THE INDIAN LAW REPORTS

(CUTTACK SERIES)

Containing Judgments of the High Court of Orissa.

Mode of Citation

2025 (I) I L R - CUT.

MARCH-2025

Pages : 737 to 1046

Published by : High Court of Orissa.
At/PO-Chandini Chowk, Cuttack-753002

Printed at - Odisha Government Press, Madhupatna, Cuttack-10

Annual Subscription : ₹ 300/-

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CIVIL PROCEDURE CODE, 1908 – Order 26, Rule 9 – Measurement of the suit properties by the Amin on being deputed by the learned Trial Court – The Amin (P.W.4) himself has admitted in his deposition that he did not find the fixed point for measurement – Taking into account the evidence of the Amin (P.W.4) and his report vide Ext. 4, the Learned Trial Court passed the decree – Whether the measurement of the suit properties by the Amin without the fixed point is acceptable under law.

Held: No – The measurement report without fixed point cannot be acceptable under law.

Ratnakar Sahoo (dead) & Ors. V. Siba Prasad Raju (Dead) & Ors.
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CONSTITUTION OF INDIA, 1950 – Article 21, 22(5) r/w Section 6 of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 – The petitioner was detained in custody due to involvement in illicit trafficking of narcotic drugs and psychotropic substances – The Detaining Authority took into account the involvement of the Petitioner in three cases only, which were communicated to the Petitioner – The Detaining Authority has recorded its subjective satisfaction not only on the grounds communicated to the petitioner, but there were some other facts and relevant materials before the Authority to arrive at its satisfaction – The involvement of Petitioner in eight cases were before the Detaining Authority which are likely to have influenced it in arriving at its subjective satisfaction, but the same were not mentioned in the grounds of detention – Whether partial withdrawal of grounds of detention by not supplying all the basic facts and materials relied upon by the Detaining Authority to the Petitioner shall entail the very detention a nullity for being violative of Article 22(5) of the Constitution.

Held: Yes – The petitioner is deprived of making an effective representation against the order of detention in compliance to the provisions of Article 22(5) of the Constitution of India read with section 6 of the 1988 Act – The partial withdrawal of grounds of detention by not supplying all the basic facts and materials relied upon by the Detaining Authority to the petitioner shall entail the very detention a nullity for being violative of Article 22(5) of the Constitution of India.

Nilakantha Pradhan V. Government of India & Ors.
2025 (I) ILR-Cut…… 760

CONSTITUTION OF INDIA, 1950 – Articles 226, 227 r/w Articles 21, 22(5) r/w Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 – The Opposite Party No. 1 passed the order of detention on 23.07.2024 thereby detaining the Petitioner in order to prevent him from engaging in illicit trafficking of narcotic drugs and psychotropic substances in future and he was directed to be detained and kept in circle jail – In the detention order it was reflected that Petitioner was indulged in three NDPS cases from the year 2017 to 2024 – The Detaining Authority while passing the order of detention, became satisfied to pass the order after taking into consideration the involvement of petitioner in crimes (in five cases) since the year 2005 to 2024 – The documents basing on which the Detaining Authority became satisfied to pass the order of detention have not been supplied to the Petitioner – Whether the Detaining Authority is justified in taking into account the involvement of the Petitioner in other five cases when the details of such cases have not been mentioned in the ground of detention.

Held: No – The Detaining Authority is not justified in taking into account of involvement of the petitioner in other five stale cases as spelt out in the counter affidavit when the details of such cases have not been mentioned in the grounds of detention.

Nilakantha Pradhan V. Government of India & Ors.
2025 (I) ILR-Cut…… 760

CONSTITUTION OF INDIA, 1950 – Arts 226 & 227 – Tender matter – Scope of interference – The petitioner challenges the pre-qualification of bidders as mentioned in Clauses 5.2.6.1 and 5.2.6.2 – Whether the pre-condition/requirement fixed by the Tender Inviting Authority can be said as arbitrary or *mala fide* in absence of any material in support of the same.

Held: No – There is also no material on record to come to a conclusion that imposition of condition is *mala fide* and unreasonable – The Tender Inviting Authority, applying its mind and taking into consideration the requirements, fixed certain conditions in the tender, which cannot be said to be illegal, arbitrary or *mala fide* in absence of any material.

Further, the conditions so imposed cannot be said to be against the public interest – No such allegation or averment is also made in the writ petition.

M/s. Meher Agencies, Nuapada V. State of Odisha, Commissioner-Cum-Secy, (Fisheries & Animal Resources Development Dept.) & Anr.
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CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Writ Petition – Maintainability – Petitioners are employee of XIMB (a society registered under the Societies Registration Act & imparting education) – They challenge the order of termination passed against them – Whether the order of termination can be challenged in the Writ Petition.

Held: No – The Writ applications relate to termination of service of the petitioners who were employed in different projects of XIMB with additional

prayer for reinstatement in service, even if is assumed that XIMB is imparting education which is a public duty, as the termination of services of the petitioners does not have any direct nexus with the discharge of public duty and the termination orders are not stigmatic, the petitioners cannot invoke extraordinary writ jurisdiction under Article 226 of the Constitution of India.

Prasanta Kumar Mohapatra (Dead) & Ors. V. State of Odisha & Ors.
2025 (I) ILR-Cut…… 853

CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Writ Petition – Maintainability – Whether the question of maintainability can be raised once the writ petition is admitted and pending since long.

Held: Yes – The fact that the writ petition is pending before this Court for a long time is therefore not a bar for considering the question of maintainability.

Prasanta Kumar Mohapatra (Dead) & Ors. V. State of Odisha & Ors.
2025 (I) ILR-Cut…… 853

CONSTITUTION OF INDIA, 1950 – Article 300-A r/w Memorandum No. 7493 dated 26.03.2015 issued by Finance Department, Government of Odisha – The Petitioner while working as Inspector of Motor Vehicles in OTES cadre has retired from service on attaining the age of superannuation – The Petitioner made an application to Opposite Parties for payment of cash equivalent to unutilized leave salary for a period of 300 days – The authority rejected the claim of Petitioner on the ground of resolution dated 26.03.2015 – Whether the executive body by virtue of an instruction can take away the service benefits which the petitioner is otherwise entitled to as per law.

Held: No – It is not open to the State Government to take away a part of the pension or gratuity or even leave encashment without any statutory provision to that effect – Therefore, the Opposite Parties have committed an error in withholding the leave encashment of the Petitioner by referring to the executive instruction dated 26.03.2025 under Annexure- A/2 to the counter affidavit – The impugned order dated 06.08.2024 is unsustainable in the eye of law.

Sri Chittaranjan Senapati V. State of Odisha & Anr.
2025 (I) ILR-Cut…… 919

CRIMINAL PROCEDURE CODE, 1973 – Section 436-A r/w Art. 21 of the Constitution of India – Petitioner has been entangled under Sections 420,468,471, 506, 294 of IPC r/w Section 06 of the OPID Act, 2011 – Petitioner was taken into custody on 13.11.2017 – Resultantly, he is behind the bar for a period of more than 7 years – Petitioner filed bail application – Bail granted but the petitioner could not furnish/fulfill the bail bond/condition i.e. cash security despite repeated reduction in cash security – The petitioner instead of filing the application for modification of the bail condition, filed bail application before the Presiding Officer but the same was rejected – Challenging the rejection of the bail, present Miscellaneous application U/s. 482 of Cr.P.C. has been filed – The plea of right to personal liberty under Art.21 of the Constitution as well right to bail as provided under section 436-A of the Cr.P.C. raised.

Held: This Court is of the considered view that Section 436A of the Code of Criminal Procedure, 1973 being a statutory provision akin to the provisions of default bail provided under Section 167 of Cr.P.C., aims to safeguard the interests of under-trial accused in custody from the prolonged incarceration – In the present case, it is evident that the accused has been in custody for a prolonged period exceeding seven years and has not been released on bail due to the inability to fulfill the bail conditions – It is apparent from the face of records that the accused-petitioner has been in custody for a duration that surpasses half of the maximum sentence prescribed under the charged sections of the Indian Penal Code, 1860, and Section 6 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 – Continuing to detain the accused as an under trial for such an extended period not only contravenes the statutory rights under Section 436A but also infringes the constitutional principles embodied in Article 21 of the Constitution of India, which along with personal liberty also includes the right to a speedy trial as an integral part of the right to life – This Court is also alive to the fact that procedurally the petitioner ought to have moved for modification of the bail condition that has been imposed by this Court while admitting him to bail – Inability to comply such bail condition despite repeated reduction of cash security amount by this Court on the application of the petitioner, itself speaks of the onerous nature of the bail condition – Condition of bail being a procedural facet of the matter, should not be allowed to prevail upon fundamental right to life and liberty of an accused – Therefore, while reaffirming the constitutional and statutory rights of the petitioner and by giving a go bye to the procedural entanglement, I prefer to allow these petitions.

Basudev Behera V. State Of Odisha

2025 (I) ILR-Cut…… 999

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Inherent Power – Offences under Sections 120-B, 420 of the Penal Code as well as under Section 13(2) & 13(1) (d) of the Prevention of Corruption Act – Non-payment of bank loan – Initiation of criminal proceeding – It was alleged that disbursal of the loan was not as per the sanctioned plan and in terms of loan agreement – The Opp.Party/investigating agency pleaded that it was a condition of the One Time Settlement (OTS) and as per agreed condition, criminal case was agreed to be proceeded with, so petitioner is forbidden to take recourse to the present case seeking quashing of the criminal case and the offence being economic offence inherent jurisdiction is not warrantable – Admittedly, no forged document has been used to get the loan sanctioned – The factum of repayment of Rs. 40 crores towards full and final settlement of the loan amount under OTS is also undisputed – Consent decree from the DRT has been obtained – Whether in criminal cases having overtones of civil dispute with criminal facets, the High Court can exercise its inherent powers and jurisdiction to quash the criminal proceedings in view of the settlement between the parties.

Held: The contention of the prosecution that the OTS agreement contains stipulation to the effect that the criminal proceedings to be continued even after

the settlement of the loan amount would prohibit this Court from exercising its inherent power cannot be sustained for a simple reason that a private agreement cannot take away the inherent jurisdiction of this Court U/s.482 Cr.P.C. Moreover, in the light of aforesaid discussion, this Court is of the considered opinion that no fruitful purpose would be served in keeping the criminal proceeding pending and subjecting the petitioner to the rigors of protracted trial.

M/s. ARSS Damoh-Hirapur Tolls Pvt. Ltd. & Ors. V. Republic of India (CBI) & Ors.

2025 (I) ILR-Cut…… 1010

CRIMINAL TRIAL – Sterling Witness – The Appellant was convicted for commission of the offences under Sections 302/379 of the Indian Penal Code, 1860 – The learned Trial Court has relied upon the evidence of P.W.5 as an eyewitness – P.W.5 claims to have witnessed the Appellant assaulting the deceased with an axe and even heard the victim cry out "Mitu Hani Dela" – Despite allegedly seeing such a brutal act, she failed to inform anyone about it until six days after the incident – P.W.5 had a close relationship with the deceased's family which introduces a strong possibility of bias – Whether the testimony of P.W.5 meets the standard of "sterling witness".

Held: No – An eyewitness must be of the highest quality and credibility, and their version should be so unimpeachable that it can be accepted at its face value without hesitation – A sterling witness must provide a natural and consistent account that withstands rigorous cross-examination and aligns with the overall case of the prosecution.

Madan Kanhar @ Mitu V. State of Odisha

2025 (I) ILR-Cut…… 779

CRIMINAL TRIAL – The appellant held guilty for the offence U/s. 304-B, 498-A of IPC – The deceased died under unnatural circumstances in her matrimonial home within 7 years of marriage – The doctor who conducted the post mortem came to a clear finding that the deceased committed suicide and the injuries available in her body are self-inflicted – Whether merely because the deceased died under unnatural circumstances in her matrimonial home within seven years of marriage is sufficient to convict the appellant for the offence U/s. 304-B and Section 498-A of the IPC.

Held: No – Even though the deceased died within 7 years of her marriage with the Appellant, but in view of the evidence laid by the Doctor-P.W.12 and in view of the fact that no independent witness has been examined by the prosecution to prove the allegation against the Appellant regarding demand of dowry and consequential death of the deceased under unnatural circumstances, it is the view of this Court that conviction and sentence of the Appellant for the offence under Sec. 304-B/498-A of the I.P.C. is not sustainable in the eye of law.

Mukesh Behera V. State of Odisha

2025 (I) ILR-Cut…… 942

CRIMINAL TRIAL – The appellant was convicted for commission of offence under Section 320/34 of the Indian Penal Code, 1860 – There are no eyewitness – The conviction is based on circumstantial evidence – The first circumstance relied upon by the learned Trial Court is the last seen of the deceased in the company of the appellant which is deposed by two witnesses i.e. P.W.1 and P.W.2 – P.W.2 in his cross-examination stated that he was about 400 feet away from the deceased and he could not say as to who was holding what weapon and why they were quarrelling – There are discrepancies between the evidence of P.W.1 and P.W.2 – The evidence of P.W.1 and P.W.2 is completely silent that the appellant and deceased were found together in the land of Baman Patra – Whether the circumstance of last seen together by itself could lead to an irrevocable conclusion that it is the accused who had committed the crime.

Held: No – The circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with hypothesis of the guilt of the accused – The prosecution must come out with something more to establish this connectivity with the accused and the crime committed.

Bishnu Patra V. State of Odisha

2025 (I) ILR-Cut…… 749

CRIMINAL TRIAL – The learned trial Court acquitted all 16 accused persons of offences U/ss. 302/120-B/109/34 of the Indian Penal Code, 1860 and Sections 25/27 of the Arms Act, 1959 – The Petitioner/the State of Odisha has filed this application seeking leave to appeal challenging the judgment and order of acquittal – The case against the respondents is based on circumstantial evidence, unreliable witness testimonial and inadmissible confessional statement – The most damaging aspect of the prosecution's case was the key witnesses turning hostile, including close family members of the deceased who were expected to establish motive and prior enmity – The Test Identification Parade was compromised as one of the identification witnesses admitted during cross-examination that he had been shown the photographs of the accused by the police before – This procedural lapse renders the TIP unreliable and inconsequential as it violates the fundamental requirement that the witnesses must not have prior opportunity to see the accused before identification – The ballistic report did not conclusively link the bullets recovered from the deceased to the firearms allegedly seized from the respondent which poses significant doubts about the prosecution's claim – Whether the Court should interfere with the well-reasoned acquittal when the circumstances relied upon by the prosecution are neither fully established nor conclusively linked to the guilt of the accused.

Held: No – The chain of the evidence is not so complete as to exclude every possible hypothesis except the guilt of the Accused-Respondents – The circumstantial evidence does not form an unbroken sequence leading to only one conclusion that the Accused-Respondents committed the crime – Instead, multiple inconsistencies and evidentiary gaps leave ample room for reasonable doubt, and as per the panchsheel principles of circumstantial evidence, such doubt must benefit the accused – Given these discrepancies, the trial Court

rightly acquitted the Accused-Respondents, and this Court finds no reason to interfere with the well-reasoned decision of acquittal.

State of Odisha V. Anil Chhotray & Ors.

2025 (I) ILR-Cut…… 806

FACELESS ASSESSMENT SCHEME, 2019 – Sub-paragraph (1) in paragraph 5 r/w Section 144B of Income Tax Act, 1961 – Whether non supply of draft assessment order as mandated U/s. 144B of Income Tax Act amounts to violation of principle of natural justice.

Held: No – The Assessing authority issued notice U/ss. 143(2) and 142(1) to the Petitioner – The Petitioner complied with both notices – The allegation of not having had full opportunity, particularly in view of statements made in the counter are without basis.

M/s. Hexa Steel & Power Pvt. Ltd., Delhi V. National Faceless Assessment Centre, Delhi & Anr.

2025 (I) ILR-Cut…… 737

HINDU MARRIAGE ACT, 1955 – Section 24 – *Pendente lite* maintenance – Petitioner-husband filed writ application challenging the maintenance award passed by the learned Family Court – The petitioner took a plea that during pendency of the case he resigned from service due to the trauma inflicted by wife and thereby he became incomeless & unable to pay the *pendente lite* maintenance – Whether remaining unemployed despite being a qualified person would be a ground for non-payment of *pendente lite* maintenance to wife and children.

Held: No – The husband, however, has not disputed his qualification, but has taken a plea of "joblessness" – At the cost of repetition, this Court with annoyance needs it to emphasize that spouses having high qualification taking plea of unemployment with no income without any sincere efforts needs to be condemned – In the backdrop of standard of living and the social standing of the husband together with his qualification and past employment in reputed organization and balancing the same with his own requirement vis-à-vis the requirement of OP-wife and the daughter of the party on the admitted income of the OP-wife, this Court considers that the learned Trial Court has not committed any illegality in awarding .15,000/- per month to be paid by the petitioner-husband to OP-wife for the maintenance of OP-wife and the daughter which by any standard cannot be considered to be unreasonable.

Bhupendra Singh Notey V. Gagandeep Kaur

2025 (I) ILR-Cut…… 993

HINDU MARRIAGE ACT, 1955 – Section 25(2) r/w Sections 125 & 127 of the Criminal Procedure Code,1973 – Maintenance – Whether the Court can enhance the maintenance beyond the relief (amount) sought or claimed by the parties.

Held: Yes – The judicial discretion must be exercised to provide a fair and just maintenance amount, considering the dependent's actual needs and the payer's

financial capability, even if the claim was initially understated – The enhancement, in the instant case, is warranted based on necessity rather than technicalities of the original plea.

Nirmal Karnakar V. Parbati @ Parbati Karnakar
2025 (I) ILR-Cut…… 819

INCOME TAX ACT, 1961 – Sections 142(1), 143(2), 144B – The return filed by the Petitioner was picked up for scrutiny/assessment and notice U/s. 143(2) was issued – The Petitioner complied the notice – Subsequent thereto another notice was issued U/s. 142(1) purporting to make inquiry – Whether the notice U/s. 142(1) can be issued after issuance of notice under Section 143(2) by the assessing authority.

Held: Yes – The sequence does not matter inasmuch as power to issue notice provided for in Section 143(2) and Section 142(1) is for purpose of making the assessment – There is no dispute that Petitioner's return was picked up for scrutiny assessment – The assessment had to be done – Commencement of the exercise of assessment was by issuance of Section 143(2) and then further enquiry felt necessary for purpose of the assessment and therefore second notice under Section 142(1) – Petitioner also complied with both notices.

M/s. Hexa Steel & Power Pvt. Ltd., Delhi V. National Faceless Assessment Centre, Delhi & Anr.
2025 (I) ILR-Cut…… 737

INDIAN EVIDENCE ACT, 1872 – Sections 8, 27 and 106 – The appellant has been convicted U/s. 302 of Indian Penal Code, 1860 – P.Ws.1 and 2 are the witnesses to the assault on the deceased by the Appellant and the incident of dragging the deceased to his residence – P.W.5 is the Medical Officer who conducted the autopsy of the dead body and opined that the injuries were ante mortem in nature and may be possible by means of iron wire and Sal Medha (Mos. I and III) – The Appellant was last seen dragging the deceased to his house – The Appellant has miserably failed to prove as to how the incident occurred in his residence – The Mos. I to III have not been sent for chemical examination – Whether non-seizure of weapon of offence and non-forward of material objects for chemical examination vitiate the prosecution case.

Held: No – In the face of the evidence of P.Ws.1 and 3 and that of the Medical Officer-P.W.5 coupled with the conduct of the Appellant and his defence of bald denial thereby failed, to discharge the burden under Section 106 of the Evidence Act, the MOs- I to III not being sent for chemical examination and their non-seizure in terms of Section 27 of the Evidence Act on which the defence rested its submissions in the factual backdrop of the case at hand, falls into insignificance.

Bishnu Charan Ganda V. State of Odisha
2025 (I) ILR-Cut…… 801

INDIAN EVIDENCE ACT, 1872 – Section 27 – The I.O. has stated that the place of recovery of axe is an open field and accessible to all – The evidence of

I.O. so also the relevant seizure list indicates that the appellant brought out the axe from the bush which was the place of concealment – The I.O. stated that after seizure of axe, it was wrapped with a paper, but the same is not mentioned in the case diary or in the seizure list and it was kept in police station Malkhana till it was sent to S.F.S.L., Rasulgarh – No Malkhana register has been proved in the case – Where there is lack of clinching evidence regarding safe custody of weapon of offence, can the appellant be held as author of the crime?

Held: No – In absence of any other circumstances being proved, these circumstances are not sufficient to hold the appellant as the murderer.

Bishnu Patra V. State of Odisha

2025 (I) ILR-Cut…… 749

INDIAN EVIDENCE ACT, 1872 – Section 27 – When the recovery can be admissible under Section 27 – P.W.9 confirmed that Ext.9/1, the statement recorded U/s. 27 of the Evidence Act was not prepared in his presence or in the presence of other witnesses – Rather he arrived at the Police Station after the preparation of the document – The forensic analysis was also inconclusive in determining whether the blood detected on the clothes was human blood or of the deceased – Whether inconclusive forensic evidence can establish any direct connection between the Appellant and the crime.

Held: No – For a recovery to be admissible under Section 27, the information given by the accused must lead to a new fact directly connected to the crime – However, in the present case, there is no independent evidence proving that the clothes belonged to the Appellant at the time of the crime, nor does the forensic report conclusively support the prosecution's case – In the absence of a reliable disclosure statement and conclusive scientific results, the prosecution's attempt to use this recovery as incriminating evidence against the Appellant is untenable.

Madan Kanhar @ Mitu V. State of Odisha

2025 (I) ILR-Cut…… 779

INDIAN LIMITATION ACT, 1963 – Section 5 – Condonation of delay – When the application for condonation of delay has remained uncontroverted by any of the Opposite Parties including the contesting PLRs of the deceased/respondent, whether the delay should be condoned by the Court.

Held: Yes – It is felt proper to condone the delay in filing the I.As by the petitioner for substitution of the LRs of the deceased respondent No.1 in S.A. No.251 of 1993 subject to payment of cost only to the contesting PLRs of the deceased respondent No.1 in S.A. No.251 of 1993 for no other reason, but, only in order to avoid the multiplicity of litigations between the parties for the self-same matter – Because, if the LRs of the deceased respondent No.1 shall not be allowed to be substituted after condoning the delay, then, the adjudication of civil rights of the petitioner (appellant in S.A. No.251 of 1993) shall be curtailed forever – For which, by adopting, liberal pragmatic, non-pedantic and justice oriented approach and for removal of injustice taking the substantial justice as

paramount consideration, it is felt proper to allow the I.As filed by the petitioner with condition.

Snehalata Beura v. Maheswar Thatoi (dead) & Ors.
2025 (I) ILR-Cut…… 1041

INDIAN SUCCESSION ACT, 1925 – Section 63 r/w Section 68 of Evidence Act – Whether exclusion of Class-I legal heir from the testament renders the Will invalid.

Held: No – The exclusion of a Class I heir from a testamentary disposition, in itself, does not render the Will invalid or raise a presumption of illegality – A Will, by its very nature, allows the testator to deviate from the ordinary rules of succession and makes specific bequests in accordance with their personal wishes – Such deviations, even if they result in disinheritance or reduced shares for certain heirs, do not inherently cast doubt on the validity of the testamentary document unless accompanied by substantive suspicious circumstances.

Lingaraj Nayak (Dead) & Anr. V. Udhava Charan Nayak
2025 (I) ILR-Cut…… 823

INDIAN SUCCESSION ACT, 1925 – Section 264 r/w Section 137 of Limitation Act – The Appellant submitted that the probate proceedings were initiated 25 years after the death of testator and as such the proceedings are barred by the law of limitation – Whether Article 137 of the Limitation Act is applicable to an application for probate of a Will.

Held : No – It is crucial to note that under Article 137 of the Limitation Act, 1963, the limitation period of three years is to be computed from the date on which the 'right to apply accrues' – In the context of probate of Will, the right to apply for probate is a continuous right that may be exercised at any time after the death of the testator – It accrues when a dispute arises over the Will or when acknowledgment by the Court becomes necessary.

It is therefore evident that the right to apply for probate arises when it becomes necessary, and this need not necessarily arise within three years from the date of the deceased's death – While delay may raise suspicion, it cannot, by itself, constitute an absolute bar to an application for probate; as rightfully held by the lower Court.

Lingaraj Nayak (Dead) & Anr. V. Udhava Charan Nayak
2025 (I) ILR-Cut…… 823

INDUSTRIAL DISPUTES ACT, 1947 – Section 33-C(2) – The Petitioner initially appointed as work-charged employee and subsequently promoted as work-charged Concrete Mixture Driver – Though the petitioner discharged the duties in promotional post till his superannuation but he was not paid his arrear salary as per the revised scale of pay – The Petitioner filed application U/s. 33-C(2) of the Act before the Labour Court with a prayer to compute the entitlement and direct the management to release the same – Whether the Industrial

Adjudicator has the jurisdiction to adjudicate a disputed question of fact in exercise of power U/s. 33-C(2) of the Industrial Dispute Act.

Held: No – A proceeding U/s. 33-C(2) of the ID Act is in the nature of an execution proceeding – Thus, it should follow that an investigation of the nature of determinations, i.e., (i) the workman's right to relief; (ii) the corresponding liability of the Management, including, whether it is, at all, liable or not is, normally, outside the scope of Section 33-C (2) of ID Act.

This Court is of the considered opinion that the learned Labour Court, in exercise of power under Section 33-C(2) of the ID Act, had no jurisdiction and competence to compute the disputed claim of the Petitioner and issue direction to pay the same, as the same was disputed and denied by the Management.

Nilamadhab Sahu v. Chief Engineer, Minor Irrigation, Odisha Bhubaneswar & Ors.

2025 (I) ILR-Cut…… 795

INSOLVENCY AND BANKRUPTCY CODE, 2016 – Section 31(1) – The demand has been raised by the revenue upon the petitioner regarding adjustment of arrear tax dues – The petitioner is a successful resolution applicant – The old income tax dues were considered in the resolution process – The petitioner assailed the adjustment made by the Revenue Department regarding old income tax dues and claims to refund the amount – Whether the petitioner's claim is sustainable.

Held: No – We reject petitioner's claim to have the refund because petitioner can only claim to step into and manage affairs of the corporate debtor from date of approval of the resolution plan – Petitioner cannot claim to have paid tax on assessment made for assessment year 2010-11 – Refund in respect of that assessment year cannot be due to petitioners, who stepped into shoes of management of the corporate debtors on and from 7th November, 2017 and proceeded to revive it as per the approved resolution plan – Petitioners having assailed the adjustment made by filing the writ petition, cannot still rely on alleged omission to notice them on the adjustment.

Sree Metaliks Ltd., Keonjhar & Anr. V. Director General of Income Tax, Bengaluru & Ors.

2025 (I) ILR-Cut…… 740

ORISSA CASTE CERTIFICATE (FOR SCHEDULED CASTES AND SCHEDULED TRIBES) RULS, 1980 r/w ORISSA SCHEDULED CASTES, SCHEDULED TRIBES AND BACKWARD CLASSES (REGULARIZATION OF ISSUANCE AND VERIFICATION OF CASTE CERTIFICATES) RULES, 2023 – Petitioner challenges the order of cancellation of the caste certificate issued in terms of the provisions provided under 1980 Rule – The authority initiated the proceeding in terms of the decision in the case of Madhuri Patil – Whether the caste certificate issued as per the provision of 1980 Rules can be cancelled in terms of the decision rendered by the Apex Court in the case of Kumari Madhuri Patil.

Held: No – This Court is of the view that the proceeding in terms of the decision in the case of *Kumari Madhuri Patil* could not have been initiated in *FCC No.57 of 2012*.

Therefore, this Court is inclined to quash order dt.29.03.2016 so passed by Opp. Party No.1 in FCC No.57 of 2012 under Annexure-7 – While quashing the same, this Court remits the matter to Opp. Party No.1 to take up the issue in terms of the provisions contained under the aforesaid 2023 Rules.

Janak Kumar Pradhan @ Nayak V. Chairman, State Level Scrutiny Committee, Ganjam & Ors.

2025 (I) ILR-Cut…… 949

ODISHA CIVIL SERIVCES (PENSION) RULES, 1992 – Rule 7 – The allegations levelled against the petitioner trace their origin to an event of the year 2010 – The departmental proceeding was initiated against him after his retirement through memorandum dated 21.02.2024 – Whether the initiation of departmental proceeding against a retired employee is permissible for the event which had happened more than twelve years before.

Held: No – The initiation of disciplinary proceedings against the Petitioner, after a lapse of twelve years and post-retirement, is manifestly unsustainable in law – Rule 7 of the Orissa Civil Services (Pension) Rules, 1992, acts as an unequivocal bar, rendering such proceedings void ab initio.

Dhaneswar Nayak v. State of Odisha & Ors.

2025 (I) ILR-Cut…… 846

ORISSA CO-OPERATIVE SOCIETIES ACT, 1962 – Section 28-B – Writ Petition has been filed challenging the action of the Administrator/ Opp.No.3 admitting Class "C" members as Class "A" members & giving voting right to such members of the Gandhamardan Loading Agency & Transporting Co-operative Society Ltd. – The state Opposite party authorities pleaded that the date of election has already been notified – There is a bar in law to interfere with the election process – Issue raised as to whether the Writ Petition is maintainable in view of the bar provided U/s. 28-B of the Act.

Held: This Court is of the view that there exists an embargo with regard to exercise of the jurisdiction of this Court which would eventually result in tinkering with the election process.

Daluram Dehury & Ors. V. State of Odisha & Ors.

2025 (I) ILR-Cut…… 910

ORISSA CO-OPERATIVE SOCIETIES ACT, 1962 – Section 28-B, 67-B r/w Rule 57 of the Orissa Co-operative Societies (Election to the Committees) Rules, 1992 – Dispute with regard to election of the members of the Co-operative Societies – Maintainability of the Writ Petition – Bar provided U/s. 28-B of the Act – Whether the petitioner would be rendered remediless in the event the Writ Court refuses to exercise the Writ jurisdiction under Art. 226 of the Constitution of India.

Held: This Court is also of the considered view that an alternative remedy in shape of election dispute has been provided in the Act as well as in the Rule i.e. by filing an election dispute before the Cooperative Tribunal U/s. 67-B of the O.C.S Act, 1962.

Daluram Dehury & Ors. V. State of Odisha & Ors.
2025 (I) ILR-Cut…… 910

ODISHA FINANCIAL STATE CORPORATION (STAFF) REGULATIONS, 1985 – Regulations 18, 19 – The Managing Director, Odisha State Warehousing Corporation seeks to recover an amount of ₹ 10,91,452/- along with interest at the rate of 12% per annum from petitioner without initiating any Disciplinary Proceeding against him – Petitioner had already retired from service by the time the order of recovery was passed – Whether major penalty of recovery can be imposed on a retired employee without initiation of any Departmental Proceeding.

Held: No – In view of the finding that no Disciplinary Proceeding was initiated against the Petitioner either while he was in service or after his retirement, this Court has no hesitation to hold that no such proceeding could have been initiated against the Petitioner as the Regulation, 1985 does not permit initiation of any such proceeding against an employee after his retirement – Thus, this Court holds that no proceeding whatsoever has been initiated against the Petitioner before imposing a major penalty in shape of Regulation 18(1)(iv) – Moreover, no penalty under Regulation-18 can be imposed without initiating a proceeding for imposition of a major penalty – Therefore, the impugned order dated 21.08.2023 under Annexure-6 is completely without jurisdiction and the same is liable to be quashed. Accordingly, the same is hereby quashed.

The Opposite Party-Corporation is hereby directed to refund the money, along with the interest at the rate of 12% per annum within a period of three months to the present Petitioner chargeable from the date of recovery till such payment is made.

Shyama Sundar Sahoo V. Odisha State Warehousing Corpn. & Anr.
2025 (I) ILR-Cut…… 924

ODISHA RESERVATION OF VACANCIES IN POSTS AND SERVICES (FOR SCHEDULED CASTES AND SCHEDULED TRIBES) ACT, 1975 (IN SHORT ORV ACT) – Section 3(d) read with Section 19 – Reservation for the appointment of Gram Rozgar Sevaks (GRS) – Whether application of the provisions of the ORV Act regarding engagement of GRS is permissible in law.

Held: No – GRS not being a ‘post’ or ‘service’ under the State, the provisions of the ORV Act would ordinarily not be applicable – As per Clause-(d) of Section 3, the applicability of the provisions of the Act stands excluded to those to be filled up on the basis of any contract.

IS GRS A CIVIL POST OR A SERVICE?

Held: GRS is not a civil post under the State nor is it a service within the meaning of the OCS (CCA) Rules (Odisha Civil Services (Classification, Control and Appeal) – It is an engagement coterminous with the MGNREG Scheme with the engagees being given consolidated remuneration and on executing agreement with undertaking that they shall not claim regular employment under the State – So, even if the State makes a fiction of creating a district cadre, the same will not confer a status akin to a civil post or service in the State to the said district cadre – In fact, it would be a namesake cadre without the trappings of a civil post or service under the State – Secondly, reference to the 2008 Rules is also fallacious for the reason that only because the State has provided an avenue of appointment to the said service from amongst the GRSs would not change their status as contractual appointees – Of course, once they are appointed under the said Rules, their status would change but prior to that their status as contractual appointees would remain intact.

HAS THE STATE ANY POWER TO APPLY THE PROVISIONS OF THE ORV ACT IN THE MATTER OF SELECTION AND ENGAGEMENT OF GRS ON ITS OWN?

Held: No – Had there been any enabling provision in the ORV Act conferring power on the State to act in a manner contrary to Section 3 or had the Act provided any exception, the matter would have been different – But in the absence of any such provision and on the face of the provision under Section 19, the State is denuded of its power to do so – In other words, the State has no power to *suo motu* apply the provisions of the ORV Act in the matter of selection and engagement of GRS on its own.

WHETHER THE OPERATIONAL GUIDELINES ISSUED UNDER THE MGNREG ACT AND COMPREHENSIVE GUIDELINES DATED 06.04.2018 HAVE SANCTION OF LAW IN SO FAR AS APPLYING THE PRINCIPLES OF RESERVATION TO THE ENGAGEMENT OF GRS.

Held: No.

WHETHER RESERVATION IS A CLAIM OR AN AUTOMATIC CONFERMENT OF RIGHT.

Held: Reservation is a claim and not an automatic conferment of right on a person.

Biswaranjan Panigrahi V. Govt. in Panchayati Raj & Drinking Water Dept. & Anr.

2025 (I) ILR-Cut…… 870

ODISHA SUBORDIANTE STATISTICAL SURVEYORS (METHOD OF RECRUITMENT & CONDITIONS OF SERVICE) RULES, 2015 &1994 – Appointment of the petitioner as Statistical Filed Surveyor (SFS) pursuant to order dated 29.11.2016 issued by the Deputy Director (P&S), District Planning and Monitoring Unit (DPMU), Ganjam, Chhatrapur – Disengagement of the petitioner *vide* Letter No. 10640 dated 20.09.2019 issued by the Deputy Secretary

to Government in Planning & Convergence Department, Odisha – Whether such order of disengagement is sustainable.

Held: No – It is manifestly clear that the Director *vide* Letter dated 20.09.2019 instructed to disengage the petitioner treating his appointment as illegal inasmuch as the recommendation for appointment of the petitioner was not made by the Selection Committee, which is not constituted under Rule 10 of the Rules, 2015, as if the consideration for appointment of the petitioner was made under the said Rules – This fact is very much apparent from the stand taken by the counter affidavit, which this Court has already repelled hitherto.

In the wake of above, the Letter No.10640/P, Bhubaneswar, dated 20.09.2019 issued by the Deputy Director to Government in Planning and Convergence Department, Odisha-Opposite Party No.2 (Annexure-8) cannot be held to be sustained – Hence, the same is liable to be set aside and this Court does so.

Sri Ranjan Kumar Swain V. State of Odisha (Planning & Convergence Dept.) & Ors.

2025 (I) ILR-Cut…… 955

ORISSA MERGED TERRITORIES (VILLAGE OFFICE ABOLITION) ACT, 1962 – Section 3(g) – The suit land was Gounti-Rayati land and Nishakara Pradhan was the Gountia in respect of the said suit land – Nishakara Pradhan sold the said land to the plaintiff and on the strength of such purchase plaintiff has claimed his right, title and interest over the suit land – The Full Bench of this Hon'ble Court in S.A. 192/1977 held that Gounti-Rayati land in the ex-state of Bamparda was not the personal land of Gountia, but he was in charge of said land by virtue of his office and as per Section 3(g) of the 1962 Act the said land vested in the State – Whether the vendor has the right to execute the sale deed in favour of plaintiff in respect of Gounti-Rayati land as per the Orissa Merged Territories (Village Office Abolition) Act, 1962.

Held: No – When, Nishakara Pradhan was the Gountia of the suit land, but, he (Nishakara Pradhan) had no title in the suit land, then at this juncture, it can safely be concluded that the plaintiff as a purchaser of the suit land through sale deed dated 02.11.1955 cannot get any better right or title in the suit land than his vendor Nishakara Pradhan – For which, no interest was created in respect of the suit land in favour of the plaintiff, through sale deed dated 02.11.1955 executed by Nishakara Pradhan – Therefore, the recording of the suit land in the Hal RoR in the name of its owner i.e. State of Orissa (defendant) cannot be held as erroneous.

State of Orissa (District Collector, Sambalpur) V. Prafulla Kumar Pradhan (Dead) & Ors.

2025 (I) ILR-Cut…… 1032

PAY AND ALLOWANCES – Whether the claim of the petitioners of being discriminated in the matter of grant of appropriate pay scale and allowances is valid.

Held: Yes – This Court is left with no doubt that the claim of the petitioners of being discriminated in the matter of grant of appropriate pay scales and allowances is valid.

Saudamini Swain & Anr. V. State of Orissa & Ors.
2025 (I) ILR-Cut…… 884

PRINCIPLE OF NON-TRAVERSE – In the present case three interlocutory applications have been filed by the petitioner/ Appellant – These three IAs are supported with separate affidavits – Neither any of the opposite parties nor any of the PLRs of the Respondents filed any written objection against the IAs of the petitioner – Whether any argument advanced by the learned Counsel appearing for the opposite parties would be sustainable in absence of any written objection/ pleadings thereof.

Held: No – When, the averments made in the I.As filed by the petitioner about the cause and reason for non-filing the petition for substitution in due time as indicated above remained uncontroverted/unchallenged, then at this juncture, by applying the principles of law enunciated in the ratio of the decisions referred to (supra), the arguments advanced by the learned counsel for the LRs of the deceased respondent No.1 relying upon the decisions of the Apex Court indicated above in Para No.3 of this order in absence of any written objection from the side of the said PLRs of deceased respondent No.1 cannot be acceptable under law.

Snehalata Beura v. Maheswar Thatoi (dead) & Ors.
2025 (I) ILR-Cut…… 1041

PROPERTY LAW – Irregularity in Amin report – Duty of Court – 1st Appellate Court has set aside the entire judgment and decree of the Trial Court on the sole ground of rejection of the report of Amin vide Ext. 4 – Amin himself in his deposition stated that he did not find the fixed point for measurement – Whether the dismissal of the suit due to irregularity in Amin's report is sustainable under law.

Held: No – When the report of the Amin is discarded/ rejected, it is the proper course for the court either to issue a fresh Amin or to remand the matter for re-consideration or to pass an order for re-appointment of another Amin for same purpose – Proposition of law to the context – Explained in reference to case law.

Ratnakar Sahoo (dead) & Ors. V. Siba Prasad Raju (Dead) & Ors.
2025 (I) ILR-Cut…… 1022

PROPERTY LAW – The Court below passed the order of eviction against the Petitioner on the basis of Record of Right which was in favour of the Opposite Party – Whether title can be established on the basis of Record of Right (RoR).

Held: No – It is also a settled law that a record of right does not create or extinguish title but possesses a presumptive value – A record of right has a presumptive value of title and possession but rebuttal in nature.

SERVICE JURISPRUDENCE – Regularization of Service – Petitioner was working as daily wage mulia under the Health & Family Welfare Department – Petitioner seeks regularization of his service from the date of similarly placed employee and pensionary/ financial benefits – Plea of right to equal opportunity raised – The State Opposite Party Authorities pleaded that petitioner *ex facie* is not similarly circumstanced because the persons who have been regularized were granted "temporary status" – Whether denial of regularization on the ground of non-conferment of "temporary status" is tenable.

Held: No – The petitioner cannot be made to suffer because it was within the domain and discretion of the authorities to grant temporary status and such discretion was evidently exercised arbitrarily – As such the authority cannot now take shelter behind the cloak of non-conferment of temporary status to deny regularization of petitioner's service.

Krushna Chandra Behera V. State of Odisha & Ors.
2025 (I) ILR-Cut…… 936

TALCHER THERMAL POWER STATION (ACQUISITION AND TRANSFER) ACT, 1994 – Sections 10, 11 & 13 – Unequal treatment of the petitioners in the matter of wages, allowances and other service conditions – Office order dated 03.12.2004 issued regarding proposed rules and regulations of the teaching staff absorbed as employees of NTPC pursuant to the 1994 Act – Letter dated 25/23.05.2005 issued regarding redeployment of the teachers as stenographer subject to acquiring typing and shorthand speed as applicable to Stenographers of NTPC as there is no cadre of teachers in NTPC – Whether both the above orders are sustainable.

Held: In this context it would be apposite to state that NTPC, being a Public Sector Undertaking (PSU) under the Government of India, can also be treated as a functionary of the State – As such, the obligation cast upon the State to act as a model employer can also be extended to a PSU like NTPC – In other words, as a model employer, NTPC has a social obligation to treat its employees in such manner that no employee feels left out from the benefits extended to other employees.

The impugned orders i.e. office order dated 03.12.2004 (Annexure-4 of W.P.(C) No. 3217 of 2006 and Annexure-5 of W.P.(C) No.11200 of 2005) and order dated 25/23.05.2005 (Annexure-8 of W.P.(C) No. 3217 of 2006) are hereby quashed.

Saudamini Swain & Anr. V. State of Orissa & Ors.
2025 (I) ILR-Cut…… 884

TALCHER THERMAL POWER STATION (ACQUISITION AND TRANSFER) ACT, 1994 – Section 11 – Whether the mandate of Section 11 of the 1994 Act was followed in letter and spirit by the NTPC management.

Held: The employees of TTPS, without distinction as to categories and grades were taken over by NTPC and as per Section 11 were entitled to be granted

same benefits as they were receiving prior to such taking over – This Court has already held that the petitioners, though teachers were treated at par with workmen by the former employer – So, if NTPC decided to give the benefit of the enhanced age of superannuation to the workmen, there was no reason as to why the same should not have been granted to the teachers – Not doing so amounts to discrimination, hit by the principle of equality under Article 14 of the Constitution of India.

Saudamini Swain & Anr. V. State of Orissa & Ors.
2025 (I) ILR-Cut…… 884

WORDS & PHRASES – Distinction between the words "Substitution" and "Supersession" – Explained.

Sri Ranjan Kumar Swain V. State of Odisha (Planning & Convergence Dept.) & Ors.
2025 (I) ILR-Cut…… 955

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2025 (I) ILR-CUT-737

M/s. HEXA STEEL & POWER PVT. LTD., DELHI
V.
NATIONAL FACELESS ASSESSMENT CENTRE, DELHI & ANR.

[W.P.(C) NO. 2632 OF 2023]

30 JANUARY 2025

[ARINDAM SINHA, A.C.J., & M.S. SAHOO, J.]

Issues for Consideration

1. Whether the notice U/s. 142(1) of Income Tax Act, 1961 can be issued after issuance of notice under Section 143(2) by the Assessing authority.
2. Whether non supply of draft assessment order as mandated U/s. 144B of Income Tax Act amounts to violation of principle of natural justice.

Headnotes

(A) INCOME TAX ACT, 1961 – Sections 142(1), 143(2), 144B – The return filed by the Petitioner was picked up for scrutiny/assessment and notice U/s. 143(2) was issued – The Petitioner complied the notice – Subsequent thereto another notice was issued U/s. 142(1) purporting to make inquiry – Whether the notice U/s. 142(1) can be issued after issuance of notice under Section 143(2) by the assessing authority.

Held: Yes – The sequence does not matter inasmuch as power to issue notice provided for in Section 143(2) and Section 142(1) is for purpose of making the assessment – There is no dispute that Petitioner's return was picked up for scrutiny assessment – The assessment had to be done – Commencement of the exercise of assessment was by issuance of Section 143(2) and then further enquiry felt necessary for purpose of the assessment and therefore second notice under Section 142(1) – Petitioner also complied with both notices. (Para 4)

(B) FACELESS ASSESSMENT SCHEME, 2019 – Sub-paragraph (1) in paragraph 5 r/w Section 144B of Income Tax Act, 1961 – Whether non supply of draft assessment order as mandated U/s. 144B of Income Tax Act amounts to violation of principle of natural justice.

Held: No – The Assessing authority issued notice U/ss. 143(2) and 142(1) to the Petitioner – The Petitioner complied with both notices – The allegation of not having had full opportunity, particularly in view of statements made in the counter are without basis. (Paras 4-5)

List of Acts

Income Tax Act, 1961; Faceless Assessment Scheme, 2019.

Keywords

Violation of principles of natural justice; Sequential mandate; Notice; Assessment; Non supply of draft Assessment

Case Arising From

Assessment order dated 28.12.2022 pertaining to Assessment Year 2021-22 passed by Assessing Authority.

Appearances for Parties

For Petitioner : Mr. A. Patnaik
For Opp. Parties : Mr. A. Kedia, Junior Standing Counsel

Judgment/Order

Judgment

ARINDAM SINHA, A.C. J.

1. Mr. Patnaik, learned advocate appears on behalf of petitioner-assessee and submits, under challenge is assessment order dated 28th December, 2022 pertaining to assessment year 2021-22. He has two points of challenge. Firstly, draft assessment order, preparation of it mandated under section 144B in Income Tax Act, 1961, was not made available to his client and secondly, after issuance of notice under section 143(2) there could not have been issued notice under section 142(1).

2. His client had duly filed return under section 139. The return was allegedly picked up for scrutiny assessment. Notice under section 143(2) was issued. The provision allows for the prescribed income tax authority, in this case, the Assessing Officer (AO), if considers necessary to ensure that the assessee has not, inter alia, understated the income, to produce evidence in support of the return filed. His client complied. Subsequent thereto another notice was issued, this time under section 142(1) purporting to make inquiry. His client though again complied but inquiry could not have been resorted to following notice issued under section 143(2), on its return filed. Furthermore, in doing the assessment, section 144B was also resorted to. As such by notification dated 17th February, 2021, substituted sub- paragraph (1) in paragraph 5 of the scheme of Faceless Assessment Scheme, 2019 required furnishing copy of draft assessment before the assessment was finalized. It cannot be disputed that draft assessment was not made available to his client. Mr. Patnaik submits still further, there has been violation of principles of natural justice inasmuch as sufficient opportunity was not given to his client. He seeks interference.

3. Mr. Kedia, learned advocate, Junior Standing Counsel appears on behalf of revenue and submits, there is no mandate under provisions in section 144B nor in

the Faceless Assessment Scheme, 2019 nor amendments made thereto in substituting subparagraph (1) in paragraph 5 of the scheme requiring a draft assessment order to be sent to the assessee. In any event, the assessment was not on best judgment but based on the evidence relied upon by the AO. So far as issuing notice under section 142(1) subsequent to notice already issued under section 143(2) is concerned, revenue has filed affidavit stating that there is no sequential mandate and the provisions can be relied upon as and when occasion arises. No interference is warranted. He also refers to statements made in the counter to demonstrate, opportunities were duly provided to petitioner including video conferencing facility. Petitioner's allegation of violation of principles of natural justice is baseless. The writ petition be dismissed.

4. First and foremost, it appears from impugned assessment order that the assessment was made invoking provision in section 143(3) read with section 144B on the assessee having complied with both notices, firstly issued under section 143(2) and then under section 142(1). We accept contention of revenue that the sequence does not matter inasmuch as power to issue notice provided for in section 143(2) and section 142(1) is for purpose of making the assessment. There is no dispute that petitioner's return was picked up for scrutiny assessment. The assessment had to be done. Commencement of the exercise of assessment was by issuance of section 143(2) and then further enquiry felt necessary for purpose of the assessment and therefore second notice under section 142(1). Petitioner having complied with both notices, the allegation of not having had full opportunity, particularly in view of statements made in the counter, are without basis.

5. As aforesaid, facts in the case are that the return filed was picked up for scrutiny assessment. Procedure provided for in section 144B on faceless assessment was adopted. It not being a case of best judgment assessment there was no draft assessment order made and thus no question of furnishing it to the National e-Assessment Centre arose.

6. We have not been able to find any merit in the contentions raised on behalf of petitioner. As such the writ petition is dismissed on the interim order vacated. Mr. Patnaik submits, his client would want to prefer statutory appeal. In doing so it may seek exclusion of time taken for adjudication of the writ petition.

Headnotes prepared by:
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Writ Petition dismissed.

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2025 (I) ILR-CUT-740

SREE METALIKS LTD., KEONJHAR & ANR.
V.
DIRECTOR GENERAL OF INCOME TAX, BENGALURU & ORS.

[W.P.(C) NO. 16985 OF 2024]

06 FEBRUARY 2025

[ARINADAM SINHA, A.C.J., & M.S. SAHOO, J.]

Issue for Consideration

Whether the Revenue Authority is empowered to adjust the old income tax dues once it was approved as per Section 31(1) of the Insolvency & Bankruptcy Code, 2016.

Headnotes

INSOLVENCY AND BANKRUPTCY CODE, 2016 – Section 31(1) – The demand has been raised by the revenue upon the petitioner regarding adjustment of arrear tax dues – The petitioner is a successful resolution applicant – The old income tax dues were considered in the resolution process – The petitioner assailed the adjustment made by the Revenue Department regarding old income tax dues and claims to refund the amount – Whether the petitioner's claim is sustainable.

Held: No – We reject petitioner's claim to have the refund because petitioner can only claim to step into and manage affairs of the corporate debtor from date of approval of the resolution plan – Petitioner cannot claim to have paid tax on assessment made for assessment year 2010-11 – Refund in respect of that assessment year cannot be due to petitioners, who stepped into shoes of management of the corporate debtors on and from 7th November, 2017 and proceeded to revive it as per the approved resolution plan – Petitioners having assailed the adjustment made by filing the writ petition, cannot still rely on alleged omission to notice them on the adjustment.

(Para 8)

Citation Reference

Ghanashyam Mishra and Sons (P) Ltd. v. Edelweiss Asset Reconstruction Company Limited, **(2021) 9 SCC 657 – referred to.**

List of Acts

Insolvency and Bankruptcy Code, 2016.

Keywords

Old income tax dues; Approval of resolution plan; Adjustment of arrear tax.

Case Arising From

Letter dated 19th June 2024 issued by Revenue Authority.

Appearances for Parties

For Petitioners : Mr. Sidharth Ray, Sr. Adv.
For Opp. Parties : Mr. Avinash Kedia, Junior Standing Counsel

Judgment/Order

Judgment

ARINDAM SINHA, A.C.J.

1. The writ petition was moved on 16th July, 2024, when revenue obtained direction for filing counter. Submissions made by Mr. Ray, learned senior advocate appearing on behalf of petitioners, as recorded in paragraph-1 of order made that day are reproduced below.

> *"1. Mr. Ray, learned senior advocate appears on behalf of petitioners and submits, demand has been raised by revenue upon his client, who is successful Resolution Applicant (RA), regarding arrear tax dues as mentioned in letter dated 19th June, 2024. On query made Mr. Ray points out, in paragraph 3.9 of the writ petition his client has clearly stated that the claim was not placed before the Resolution Professional (RF).*

2. Today, with reference to his submissions recorded in aforesaid order dated 16th July, 2024, he draws attention to, inter alia, paragraph-7 in the counter. A passage from the paragraph is reproduced below.

> *"7. That in response to the averment made in paragraph 3, Sub-paragraph 3.7 of the writ petitions containing of the Petition is concerned, the opposite parties humbly submitted that the contention made by the petitioner is not sustainable.* ***That the publication was applicable only for corporate and individual agencies and not for Govt. and since IT Dept. was not aware of the same. It skipped the attention of the authority****……"* *(emphasis supplied)*

3. He relies on judgment of the Supreme Court in **Ghanashyam Mishra and Sons (P) Ltd. v. Edelweiss Asset Reconstruction Company Limited**, reported in **(2021) 9 SCC 657**, paragraph102.1. The paragraph is reproduced below.

> *"102.1. That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan."*

He submits, the declaration of law is reiteration of provision in section 31(1) in Insolvency and Bankruptcy Code, 2016.

4. Mr. Kedia, learned advocate, Junior Standing Counsel appears on behalf of revenue and draws attention to paragraph-3.2, page-110 in the writ petition. In the stated table of statutory/other legal liabilities there is provision for 'income tax old' at ₹14,26,69,327.27/-. Subsequent disclosure in the writ petition also provides for manner, in which said amount, approved in the resolution process, was to be paid by petitioner. It remains unpaid. In the circumstances, adjustment of the refund against old income tax dues was duly made.

5. In reply Mr. Ray refers to appeal effect order dated 23rd April, 2024. He reiterates, the refund was due to his client and there was no tax dues placed for approval in the resolution process. Clear admission is there in the counter. Furthermore, no notice of the adjustment to be made was given to his client. In the circumstances, there be direction for disbursement of the refund on holding the adjustment made to be bad.

6. We have ascertained that 'old income tax dues' were considered in the resolution process. The process received approval on 7th November, 2017 by the National Company Law Tribunal (NCLT). The Supreme Court in **Ghanashyam Mishra** (supra) reiterated operation of section 31(1).

7. It appears from the appeal effect order, relevant assessment year was 2010-11, in respect of which there was refund of ₹6,00,71,354/-. This amount, revenue has adjusted. Old income tax dues, taken into consideration in the resolution process, thereby stands reduced by the refund amount. It is not necessary for us to go into working of manner of liquidation of the old dues approved in the resolution process. As aforesaid, adjustment of the refund pertaining to assessment year 2010-11, an assessment within the period giving rise to old tax dues in balance sheet of the corporate debtor, considered in the resolution process and approved, thus has effect of reducing said dues by the adjustment made.

8. Even otherwise we reject petitioner's claim to have the refund because petitioner can only claim to step into and manage affairs of the corporate debtor from date of approval of the resolution plan. Petitioner cannot claim to have paid tax on assessment made for assessment year 2010-11. Refund in respect of that assessment year cannot be due to petitioners, who stepped into shoes of management of the corporate debtors on and from 7th November, 2017 and proceeded to revive it as per the approved resolution plan. Petitioners having assailed the adjustment made by filing the writ petition cannot still rely on alleged omission to notice them on the adjustment.

9. The writ petition does not bear merit. It is dismissed.

Headnotes prepared by:
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Writ Petition dismissed.

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2025 (I) ILR-CUT-743

RAKSHYAPAL KALO
V.
STATE OF ODISHA & ORS.

[W.A. NO. 3094 OF 2024]

17 FEBRUARY 2025

[ARINDAM SINHA, A.C.J., & M.S. SAHOO, J.]

Issue for Consideration

Whether the person who had done 1(one) year B.Ed (Special Education) course should be deemed as better qualified than the person who did the same course on a longer duration.

Headnotes

SERVICE JURISPRUDENCE – Appointment – The Government of Odisha, School and Mass Education Department issued notice for filling up 20,000 Junior Teacher (Schematic) Posts in Primary and Upper Primary Schools – One of the eligibility criteria required for the post was graduation with 50% marks and 1(one) year B.Ed (Special Education) as per the notification issued by NCTE in the year 2010 – Prior to publication of notice, the 1(one) year B.Ed course terminated in year 2014, from the year 2015-16 it became two years B.Ed course – The candidature of the appellant stood rejected as having two years B.Ed Special Education – Whether the person who had done the 1(one) year B.Ed course should be deemed as better qualified than the person who did the same course on a longer duration.

Held: We do not want the situation to lead to elimination of meritorious candidates, who have been required to do B.Ed. Special Education on a course of longer duration – There is no rationale, as to why persons who had done the course upto year 2014 should be deemed to be better qualified than persons who did the same course later on a longer duration, to stand disqualified. (Para 11)

Appellant's name is restored to the provisional merit list for onward action on appointment to be taken pursuant to the recruitment notice dated 10th September, 2023. (Para 13)

Citations Reference

Zahoor Ahmad Rather v. Sheikh Imtiyaz Ahamad, **(2019) 2 SCC 404;** Chief Manager, Punjab National Bank v. Anit Kumar Das, **(2012) 12 SCC 80;** Yogesh Kumar v. Government of NCT, Delhi, **(2003) 3 SCC 548 – referred to.**

Keywords

Qualification; Requirement; Eligibility criteria; Appointment; Schematic Post.

Case Arising From

Judgment dated 4th October 2024 passed in W.P.(C) No. 18995/2024 (with batch of cases).

Appearances for Parties

For Appellant : Mr. S. Sourav
For Respondents : Mr. Bimbisar Dash, Addl. Govt. Advocate

Judgment/Order

Judgment

ARINDAM SINHA, A.C.J.

1. Mr. Sourav, learned advocate appears on behalf of appellant, who was writ petitioner. He submits, by impugned judgment dated 4th October, 2024, the writ petition stood dismissed by the learned single Judge on finding that his client having two years' B.Ed (Special Education) experience was disqualified since the requirement was of the one year course.

2. On query made, he refers to corrigendum dated 29th July, 2024 to submit, thereby his client, candidate for the applied post, stood rejected as having two years' B.Ed (Special Education). Drawing attention to the requirement on eligibility in respect of category-2 (for classes VI to VIII) he submits, the requirement was graduation with at least 50% marks and 1 year B.Ed (Special Education). Relied upon criterion is reproduced below.

> *"Graduation with at least 50% marks and 1-year B.Ed (Special Education)."*

3. Mr. Sourav submits, National Council for Teacher Education (NCTE) had earlier issued notification dated 23rd August, 2010. At that time the B.Ed (Special Education) course was of duration, one year. Government of Odisha, School and Mass Education Department adopted resolution dated 22nd August, 2023 to have recruitment. On query made he submits, the resolution also carried age criteria by clause 6. Clause 6.1 without the proviso is reproduced below.

> *" 6.1 Candidates shall not be below 18 years of age and above 38 years of age as on the date of publication of advertisement."*

Following the resolution there was notice dated 10th September, 2023 for filling up 20,000 Junior Teacher (Schematic) posts in primary and upper primary schools. Long prior to publication of said notice the 1year B.Ed course stood terminated in year 2014 and from year 2015-16 it became two years' B.Ed course. Corresponding notifications were issued by NCTE but for purpose of said notice dated 10th September, 2023, the 2010 notification was relied upon.\

4. He lays emphasis that by said notification dated 23rd August, 2010, minimum qualification was prescribed and that too with several alternatives. His client disclosed mail dated 28th September, 2023 to demonstrate that a candidate had asked regarding absence of option showing two years' Special B.Ed qualification and whether she could, having the qualification of the two years course, could apply. Answer was given in the affirmative. Hence, his client and others, though had two years' Special B.Ed qualification, applied under the notice. Contents of the mails are reproduced below.

> *"1- I passed 2 year B.Ed Special Education. In application form there is no option for 2 year Special B.Ed Only show 1 year Spl. B.ed.*
>
> *2- For choosing Qualification only shows B.ed/BA B.ed/B.Sc B.ed/D.el.ed/ B.el.ed/B.A. But not Any option for Spl. B.ed. What will I choose Diploma/B.ed?*
>
> *3- I applied in 1 year Spl. B.Ed and Qualification Diploma then B.ed. do I need reapply?"*
>
> *xxx xxx xxx*
>
> *"Need not apply again. You apply correct path. Thank You."*

5. Mr. Sourav seeks to demonstrate that there was confusion in the department. He draws attention to letter dated 14th May, 2024 issued by NCTE to the Commissioner-cum-Secretary of the department. Text from the letter is reproduced below.

> *"I am directed to refer to your D.O. letter No. No. SME-EL2-EL2-0038-2024 dated 15.03.2024 on the subject cited above and to say that the NCTE laid down the notifications regarding minimum qualification for a person to be eligible for consideration of appointment as a teacher for classes I to XII published on dated 23.08.2010* ***as amended on 23.08.2010, 29.07.2011, 12.11.2014, 13.11.2019 and 13.10.2021.***
>
> *2.* ***A set of aforesaid NCTE notifications is forwarded for ready reference and to make the appointments accordingly."*** *(emphasis supplied)*

Purportedly pursuant thereto circular dated 24th June, 2024 was issued by the department creating the confusion. Text of the circular is reproduced below.

> *"In inviting reference to the subject cited above, I am directed to say that a line of clarification was sought for from the Chairperson, NCTE regarding the eligibility of the candidates having 2-year B.Ed (Special Education) for their selection in the Upper Primary (Class VI-VII) Schools. In response to which NCTE has forwarded Notifications regarding minimum qualification for a person to be eligible for appointment as a teacher.* ***It reveals from the Notifications that only candidates having 'B.A/B.Sc. with at least 50% marks and 1-year B.Ed (Special Edication)' are eligible to be teacher in the Upper Primary Schools."*** *(emphasis supplied)*

6. He then draws attention to letter dated 5th August, 2024 of the Commissioner-cum-Secretary. Two paragraphs from the letter are reproduced below.

"It is relevant to mention here that during 2023-24 this Department had invited applications for filling up of 20,000 Junior Teacher (Schematic). Many candidates having two years B.Ed. (Special Education) have applied in the said recruitment but we are unable to consider their candidature. Being aggrieved, several representations are being filed on the ground that in letter dated 18.03.2015, the Rehabilitation Council of India (RCI) has informed all concerned Institutions and Universities that B.Ed. Special Education will be of two year duration starting from academic session 2015-16 onwards (copy enclosed).

I would therefore request you to kindly reconsider the matter and in view of the changed circumstances, two years B.Ed. special education may kindly be allowed as a qualification for Upper Primary teachers. In this regard, it is humbly submitted that it may not justifiable that while one year B.Ed. (Special Education) is allowed for posting as a teacher, degree with a longer course duration is not allowed."

(emphasis supplied)

He submits, the learned single Judge failed to appreciate the facts and erroneously applied the law. Impugned judgment be reversed in appeal for his client being considered for appointment.

7. Mr. Das, learned advocate, Additional Government Advocate appears on behalf of State and opposes the appeal. He submits, the learned single Judge made no error in appreciating the facts and duly applied the law. Appellant and others knowing fully well the requirement of 1-year Special B.Ed. qualification, they having done two years' Special B.Ed. course, applied. They then turned around and challenged the rejection of their applications. They had not challenged the eligibility criterion. He submits, close scrutiny of the eligibility essential requirement of qualification will reveal that at least 50% in graduation marks and 1-year Special B.Ed. was required. The minimum attached to the graduation marks. The second qualification on Special B.Ed. was a specific qualification as opposed to being a minimum of 1 in a 2-year course. He submits, the appeal be dismissed.

8. We will approach controversy between candidates such as appellant and others who have connected appeals on the one hand and the department on the other upon presuming that there was requirement to fill up the 20,000 posts on a merit based selection process. The notice inviting applications is dated 10th September, 2023. It is pursuant to resolution dated 22nd August, 2023 adopted by the department. By the resolution the department decided to go by notification dated 23rd August, 2010 of NCTE. Several notifications were issued thereafter by NCTE. We have not been able to see why the department resorted to be guided by the notification issued in year 2010. Said notification gave several eligibility criteria on qualification. One of them was regarding having B.Ed. Special Education qualification, at that time available on a 1-year course. This qualification one could obtain only upto year 2014, after which the same qualification could only be had by undergoing a two years' course. Though several eligibility academic qualification requirements were given in the alternative but controversy arose on only this particular requirement. It follows that clarifications were sought and obtained. The

NCTE was consistent in all correspondence originating from it that the requirement was on minimum qualification.

9. Additional Secretary to Government issued aforesaid circular dated 24th June, 2024, in which was discussed the matter of clarification. According to the Additional Secretary, the clarification revealed that only candidates having B.A./B.Sc. with at least 50% marks and 1-year B.Ed. (Special Education) are eligible to be teacher in the upper primary schools. The clarification was originally sought for by the Commissioner-cum-Secretary. After this revelation, said Commissioner-cum-Secretary by her letter dated 5th August, 2024 again said that it may not be justifiable that while one year B.Ed. (Special Education) is allowed for posting as a teacher, degree with a longer course duration is not allowed. This was not considered. On the contrary, the department sought to stick with its stand that it was an essential eligibility qualification for a candidate, who had done the B.Ed. (Special Education) 1-year course. This therefore became an eligibility criterion, by which many candidates stood eliminated simply because the course ceased to be available from year 2015-16 onwards.

10. Referring to the age criteria, we must consider it in context of this asserted elimination eligibility qualification. The age for general candidates is 18 years till 38 years. On taking estimates, further elimination is also possible because candidates, who hold B.Ed. 1-year course qualification must have been of the appropriate age at the end of year 2014, to apply for recruitment under the notice dated 10th September, 2023. This assertion therefore does not lead to a logical conclusion for furthering recruitment by due process of selection on merit. Also to be considered is the fact that the eligibility criteria were in several alternatives. That militates on any one of them being construed as elimination eligibility criterion. Still further, the department itself was not sure of the position, having embarked on a recruitment process based on an obsolete NCTE notification. It sought clarification. It got the clarification, misinterpreted it and thereafter disregarded the submission made by the Commissioner-cum-Secretary, who had sought the clarification in the first place.

11. The judgments that have been considered by the learned single Judge are in context of essential eligibility criterion, changing of rules and other questions but not on what the facts were, giving rise to the controversy between the parties. We do not want the situation to lead to elimination of meritorious candidates, who have been required to do B.Ed. Special Education on a course of longer duration. There is no rationale, as to why persons who had done the course upto year 2014 should be deemed to be better qualified than persons who did the same course later on a longer duration, to stand disqualified.

12. The learned single Judge considered the following judgments of the Supreme Court.

> i. **Zahoor Ahmad Rather v. Sheikh Imtiyaz Ahamad** reported in **(2019) 2 SCC 404**, paragraphs 26 and 27. The Supreme Court said it would not be permissible to

draw an inference that a higher qualification necessarily presupposes the acquisition of another, albeit lower, qualification. This was not the proposition involved simply because the required qualification was same, being B.Ed. (Special Education). Relied upon NCTE notification dated 23rd August, 2010 mentioned 1-year course duration. Subsequently, from year 2015-16 course duration became 2-years. It was the same qualification but on different course periods. The judgment thus is inapplicable to facts of the case.

ii. **Chief Manager, Punjab National Bank v. Anit Kumar Das** reported in **(2012) 12 SCC 80** for proposition that in absence of challenge to prescribed eligibility criteria, participation of the candidate in the recruitment would bar him from mounting the challenge. In this case we have referred to facts of a candidate seeking clarification at the time of submitting her application and receiving answer in the affirmative. Furthermore, the department itself sought clarifications. The relied upon case is also not applicable because appellant is challenging his disqualification as opposed to challenging the eligibility criterion.

iii. **Yogesh Kumar v. Government of NCT, Delhi** reported in **(2003) 3 SCC 548**. The learned single Judge appreciated declaration of the law made by the Supreme Court to be that recruitment to public services should be held strictly in accordance with terms of the advertisement and the recruitment rules. It is open to the recruiting authorities to evolve a policy of recruitment and to decide the source, from which the recruitment is to be made. The department while embarking on the recruitment process did not evolve its own policy but relied upon an obsolete notification issued by NCTE. At the time of resolving to recruit and thereafter publishing the recruitment notice, B.Ed. (Special Education) course was to be had over a period of 2-years. There is no material on record to show a policy decision was taken to eliminate those candidates, who took the course on 2-year period commencing year 2015-16.

13. Prayer of appellant made in his writ petition is, inter alia, for quashing corrigendum notice dated 29th July, 2024, by which his candidature in the provisional merit list published by notice dated 24th July, 2024 stood listed in the reject list as having two years' B.Ed. (Special Education) for post of Junior Teacher (Schematic)-2023. The corrigendum notice is set aside and quashed. Appellant's name is restored to the provisional merit list for onward action on appointment to be taken pursuant to the recruitment notice dated 10th September, 2023.

14. Impugned judgment is reversed. The appeal is allowed and disposed of

Headnotes prepared by:
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Appeal allowed & disposed of.

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2025 (I) ILR-CUT-749

BISHNU PATRA
V.
STATE OF ODISHA

[JCRLA NO. 21 OF 2008]

12 FEBRUARY 2025

[S.K. SAHOO, J. & MISS SAVITRI RATHO, J.]

Issues for Consideration

1. Whether the circumstance of last seen together by itself could lead to an irrevocable conclusion that it is the accused who had committed the crime, when the chain of circumstances had not been completed.
2. Where there is lack of clinching evidence regarding safe custody of weapon of offence, can the appellant be held as author of the crime?

Headnotes

(A) CRIMINAL TRIAL – The appellant was convicted for commission of offence under Section 320/34 of the Indian Penal Code, 1860 – There are no eyewitness – The conviction is based on circumstantial evidence – The first circumstance relied upon by the learned Trial Court is the last seen of the deceased in the company of the appellant which is deposed by two witnesses i.e. P.W.1 and P.W.2 – P.W.2 in his cross-examination stated that he was about 400 feet away from the deceased and he could not say as to who was holding what weapon and why they were quarrelling – There are discrepancies between the evidence of P.W.1 and P.W.2 – The evidence of P.W.1 and P.W.2 is completely silent that the appellant and deceased were found together in the land of Baman Patra – Whether the circumstance of last seen together by itself could lead to an irrevocable conclusion that it is the accused who had committed the crime.

Held: No – The circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with hypothesis of the guilt of the accused – The prosecution must come out with something more to establish this connectivity with the accused and the crime committed. (Para 10)

(B) INDIAN EVIDENCE ACT, 1872 – Section 27 – The I.O. has stated that the place of recovery of axe is an open field and accessible to all – The evidence of I.O. so also the relevant seizure list indicates that the appellant brought out the axe from the bush which was the place of concealment – The I.O. stated that after seizure of axe, it was wrapped

with a paper, but the same is not mentioned in the case diary or in the seizure list and it was kept in police station Malkhana till it was sent to S.F.S.L., Rasulgarh – No Malkhana register has been proved in the case – Where there is lack of clinching evidence regarding safe custody of weapon of offence, can the appellant be held as author of the crime?

Held: No – In absence of any other circumstances being proved, these circumstances are not sufficient to hold the appellant as the murderer.

(Para 12)

Citations Reference

Sharad Birdhichand Sarda -Vrs.- State of Maharashtra, **(1984) 4 Supreme Court Cases 116;** Satpal -Vrs.- State of Haryana, **(2018) 6 Supreme Court Cases 610;** Jaswant Gir -Vrs.- State of Punjab, **(2005) 12 Supreme Court Cases 438;** Arjun Marik and Ors. -Vrs.- State of Bihar, **1994 Supp (2) Supreme Court Cases 372;** Dinesh Kumar -Vrs.- The State of Haryana, **A.I.R. 2023 S.C. 2795;** State of Himachal Pradesh -Vrs.- Jeet Singh, **(1999) 4 Supreme Court Cases 370 ─ referred to.**

List of Acts

Indian Evidence Act, 1872; Indian Penal Code, 1860.

Keywords

Circumstantial evidence; Last seen together; Absence of motive; Discovery of weapon of offence.

Case Arising From

Judgment and order dated 09.01.2008 passed by the Sessions Judge, Phulbani in Sessions Trial No.69 of 2006.

Appearances for Parties

For Appellant : Ms. Tapaswini Sinha
For Respondent : Mr. Jateswar Nayak, Addl. Govt. Advocate

Judgment/Order

Judgment

BY THE BENCH,

The appellant Bishnu Patra faced trial in the Court of learned Sessions Judge, Phulbani in Sessions Trial No.69 of 2006 for commission of offence punishable under section 302/34 of the Indian Penal Code (hereinafter the 'I.P.C.') on the accusation that he along with his son Sahadev, in furtherance of their common intention, committed murder of Dhiren Mandal (hereinafter 'the deceased') on 5th August, 2005 at about 8.00 p.m. at Chachingia Nala of village Muniguda under Tumudibandh police station in the district of Kandhamal.

The learned trial Court vide judgment and order dated 09.01.2008 found the appellant guilty of the offence under section 302 of the I.P.C. and sentenced him to undergo rigorous imprisonment for life.

Prosecution Case:

2. The prosecution case, as per the first information report (Ext.1) (hereinafter 'F.I.R.') lodged by Banasingh Mandal (P.W.4) before the Officer in-charge of Tumudibandh police station on 06.08.2005, in short, is that on 05.08.2005 at about 8.00 p.m., the appellant along with his son Sahadev Patra and their other family members had committed murder of the deceased near Chachingia Nala by assaulting him with tangia. It is further stated in the F.I.R. that he had received information from Grama Rakhi, Tika Pradhan (P.W.3) about the incident, who told him that it was the wife of the appellant who gave him information regarding commission of murder of the deceased by the appellant.

On the basis of such F.I.R., P.W.10 Harihar Swain, Officer in-charge of Tumudibandh police station registered the same as Tumudibandh P.S. Case No.49 dated 06.08.2005 under sections 302/34 of the I.P.C. against the appellant, his son Sahadev Patra and other family members.

Upon registration of the F.I.R., P.W.10 took up investigation of the case. During the course of investigation, he examined the informant, deputed his staff to guard the dead body and he himself reached at the spot on 06.08.2005 at about 9.50 a.m., prepared the spot map (Ext.12), held inquest over the dead body of the deceased in presence of the witnesses, prepared the inquest report (Ext.13) and then sent the dead body for post mortem examination to the Sub-Divisional Hospital. P.W.10 also seized the sample and blood stained earth from the spot as per seizure list (Ext.4), examined other witnesses and apprehended the appellant at 5.00 p.m. on 06.08.2005. On 07.08.2005 at about 7.30 p.m., the I.O. (P.W.10) seized the wearing apparels of the deceased on being produced by the escort party members, who had accompanied the dead body for post mortem examination and at about 8.00 p.m., the appellant was arrested and while in police custody, he volunteered to give recovery of the weapon of offence i.e. axe and accordingly, his statement was recorded vide Ext.2/2 and he led the police party and the witnesses to Chachingia Nala and gave recovery of the axe and produced the same before the I.O. (P.W.10), which was seized as per seizure list Ext.3. The wearing apparels of the appellant were also seized at the police station as per seizure list vide Ext.7. P.W.10 sent the appellant to S.D. Hospital for collection of his nail clippings and accordingly, the same was collected and produced before the I.O., which were also seized. The I.O. (P.W.10) received the post mortem examination report and sent requisition to the S.D.M.O., Balliguda making a query relating to the possibility of the injury sustained by the deceased with the weapon seized and received the answer in affirmative. On 17.09.2005, the I.O. (P.W.10) prayed before the S.D.J.M., Balliguda to forward the exhibits to S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination. On completion of investigation, he submitted charge sheet on 01.12.2005 under section 302/34 of the I.P.C. against the appellant and son of the appellant, showing the latter as an absconder.

Framing of charge:

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

Prosecution Witnesses & Exhibits:

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

P.W.1 Tengera Majhi is an independent witness who stated that while he was tending cattle on a piece of land situated in his village, he saw the appellant and the deceased were indulged in 'pati tunda' and the appellant was holding an axe. He further stated that he heard that the deceased was lying dead near the spot where they were making 'pati tunda' and he had not gone to the spot to see the dead body and P.W.2 was in his land at the time of the incident.

P.W.2 Bhaktaram Patra is also an independent witness who stated that while he was working in field, he saw the appellant and the deceased were together and from their gesture, it appeared that they were talking. He further stated that he had no knowledge whether the appellant was armed with any weapon and he heard on the next day that the deceased had died near the spot where he had seen the appellant and the deceased together.

P.W.3 Tika Pradhan is the Grama Rakhi who stated that on 05.08.2005 at about 8.00 p.m., the appellant"s wife came to his house and told that her husband had cut the deceased. He further stated that on being asked, whether the deceased was dead or alive, she told that the deceased might have died in the meanwhile. He further stated that the wife the appellant disclosed that her husband had told her that he cut the deceased near Chachingia Nala and on the next day, he went to P.W.3 and told about the incident and thereafter, they went to the spot and saw that the dead body of the deceased was lying with a head injury.

P.W.4 Banasing Mandal is the informant in the case. He supported the prosecution case and stated to have heard about the occurrence from P.W.3, visited the spot and then accompanied P.W.3 to lodged the F.I.R. He proved the F.I.R. as Ext.1.

P.W.5 Sagaram Paraseth and P.W.6 Amarsingh Mandal have expressed their ignorance about the appellant making any statement while he was in police custody. They further stated that nothing has been seized in their presence and they have admitted to have put their signatures on some pieces of paper. They were declared hostile by the prosecution.

P.W.7 Prakash Chandra Dehury was the constable attached to Tumudibandh police station. He stated that on 08.08.2005, the I.O. (P.W.10) seized the wearing apparels of the appellant i.e. one check full shirt (orange colour), check towel and one

blue check lungi at the police station on being produced by the appellant as per seizure list vide Ext.7.

P.W.8 Pankaja Pradhan was the constable attached to Tumudibandh police station. He stated that on 09.08.2005, the I.O. (P.W.10) seized one sealed vial on being produced by one constable G.R. Sahani and prepared the seizure list vide Ext.8.

P.W.9 Dr. Smrutirekha Behera was the Assistant Surgeon attached to S.D. Hospital, Balliguda, who conducted the post mortem examination on the dead body of the deceased on 06.08.2005 on police requisition and proved his report vide Ext.9. She further opined that the cause of the death of the deceased was due to shock and haemorrhage due to injury to brain and death might have occurred within 12 to 36 hours and it is a case of suspected homicidal death.

P.W.10 Harihar Swain was the Officer in-charge of Tumudibandh police station, who is the Investigating Officer of the case.

The prosecution exhibited sixteen documents. Ext.1 is F.I.R., Exts.2/2 is the statement of the appellant under section 27 of the Evidence Act, Exts.3 and 4 are seizure lists, Ext.5 is the 161 Cr.P.C. statement of P.W.5, Ext.6 is the 161 Cr.P.C. statement of P.W.6, Ext.7 is the seizure list in respect of check towel and blue lungi, Ext.8 is the seizure list in respect of one sealed vial being produced by one constable, Ext.9 is the carbon copy of original post mortem report, Ext.10 is the reply to the query by P.W.9, Ext.11 is the formal F.I.R., Ext.12 is the spot map, Ext.13 is the inquest report, Ext.14 is the forwarding report in respect of the exhibits forwarded to S.F.S.L., Rasulgarh, Ext.15 is the chemical examination report and Ext.16 is the serological report.

The prosecution also proved six material objects. M.O.I is the shirt, M.O.II is the lungi, M.O.III is the towel, M.O.IV is the axe, M.O.V is the lungi and M.O.VI is the ganji.

Defence Plea:

5. The defence plea of the appellant is one of complete denial and it is stated that on suspicion, he has been falsely implicated in this case. The defence neither examined any witness nor exhibited any document.

Findings of the Trial Court:

6. The learned trial Court after assessing the oral as well as documentary evidence on record came to hold that there is no direct evidence in the case and the case entirely depends upon circumstantial evidence. Taking into account the last seen of the deceased in the company of the appellant as deposed to by P.Ws.1 and 2, the information given by the wife of the appellant to the Grama Rakhi that the appellant had killed the deceased near Chachingia Nala as deposed to by P.W.3, the dead body of the deceased was found lying near Chachingia Nala with head injury, leading to discovery of the weapon of offence (axe) at the instance of the appellant from inside a bush as deposed to by the I.O. (P.W.10), the medical opinion about the possibility of injury sustained by the deceased with such weapon so also possible time of death of deceased with the time of incident as deposed to by P.W.9, the learned trial Court has been pleased to hold that the witnesses

who have deposed to in support of the prosecution case are all reliable and even though there is no direct evidence, the circumstantial evidence available are sufficient to hold the appellant guilty under section 302 of the I.P.C.

Contentions of the Parties:

7. Ms. Tapaswini Sinha, learned counsel appearing for the appellant contended that the learned trial Court has not kept in mind the well settled principle of appreciation of a case based on circumstantial evidence. She argued that the last seen evidence which has been adduced by P.Ws.1 and 2 are discrepant in nature and therefore, the learned trial Court should not have placed reliance on these testimonies. She further argued that though it is the prosecution case that the wife of the appellant came to P.W.3 and told him that the appellant committed murder of the deceased but in absence of the examination of the appellant's wife during trial, the evidence of P.W.3, who stated to have heard about the incident from her becomes hearsay evidence and it is inadmissible. Learned counsel further argued that the information given by the appellant's wife to P.W.3 which in turn was disclosed before the informant (P.W.4) is also highly suspicious inasmuch in the F.I.R., it is not mentioned that only appellant is the author of the crime rather it is mentioned in the F.I.R. that the appellant, his son and his family members have committed murder of the deceased by assaulting him with tangia. Learned counsel further argued that though at the instance of the appellant, the weapon of offence i.e. axe is stated to have been seized as deposed by the I.O. (P.W.10), but the independent witnesses to such seizure i.e. P.Ws.5 and 6 have not supported the prosecution case and moreover, the weapon of offence has not been shown to P.W.1 to be identified in Court. Learned counsel further argued that the evidence is lacking that the dead body of the deceased was found at the place where the appellant and the deceased were last seen and therefore, on the basis of the available materials on record, it cannot be said that the chain of circumstances is so complete as to unerringly point towards the guilt of the appellant and therefore, it is a fit case where the benefit of doubt should be extended in favour of the appellant.

Mr. Jateswar Nayak, learned Additional Government Advocate, on the other hand, supported the impugned judgment and argued that the learned trial Court has rightly placed reliance on the evidence of P.Ws.1 and 2 who have seen the appellant and the deceased indulged in quarrel and the appellant was armed with an axe and the axe was seized at the instance of the appellant as deposed by the I.O. (P.W.10) and it was sent for chemical examination. The chemical examination report indicates that human blood was detected on it. Learned counsel further argued that the circumstantial evidence which are appearing on record against the appellant is trustworthy and it has been rightly relied upon by the learned trial Court and the doctor (P.W.9), who has conducted the post mortem examination has noticed the injury on the left side of parietal region and opined that the cause of death to be homicidal in nature and she has also answered to the query made by the I.O. (P.W.10) that the injury found on the head of the deceased was possible by axe (M.O.IV) which was produced before her after its seizure and therefore, the chain is complete and the appellant has been rightly found guilty under section 302 of the I.P.C.

Whether the deceased met with a homicidal death?:

8. Adverting to the contentions raised by the learned counsel for the respective parties, let us first examine the evidence available on record as to how far the prosecution has succeeded in establishing that the deceased met with a homicidal death.

Apart from the inquest report (Ext.13), the evidence of the doctor (P.W.9) is very much relevant on this score. P.W.9, who conducted the post mortem examination on 06.08.2005 has noticed the following external injuries:

> "(i) Laceration of 6 x 3 x 8 cm size over left side of parietal region;
>
> (ii) Fracture of skull over left side. Parietal bone with a chip of bone of size 5 x 3 cm separated from the skull just underneath injury no.(i);
>
> (iii) Brain matter had emerged through the wound no.(ii)."

P.W.9 further stated that the cause of death was due to hemorrhage and shock and injury to brain and the death might have occurred within 12 to 36 hours and it is a case of suspected homicidal death. The post mortem report was marked as Ext.9 with objection since the original was not produced. It further appears from the evidence of P.W.9 that on 15.09.2005, the I.O.(P.W.10) made a query regarding possibility of the injury found on the head of the deceased by the weapon i.e. axe (tangia), which was produced before her and on examination of the axe, P.W.9 opined in affirmative and the query report has been proved as Ext.10. Nothing has been brought out in the cross-examination to disbelieve the evidence of the doctor (P.W.9). Ms. Sinha, learned counsel for the appellant has also not challenged the evidence of P.W.9 and her opinion regarding homicidal death of the deceased.

After going through the evidence on record, more particularly, the inquest report (Ext.13), the post mortem report findings, the evidence of the doctor (P.W.9), we are of the humble view that the learned trial Court has rightly come to the conclusion that the deceased met with homicidal death.

Principles relating to appreciation of the case based on circumstantial evidence:

9. Admittedly, the case is based on circumstantial evidence. In the case of **Sharad Birdhichand Sarda -Vrs.- State of Maharashtra reported in (1984) 4 Supreme Court Cases 116**, the principles relating to appreciation of the case based on circumstantial evidence has been discussed and the five golden principles or panchsheel has been laid down which are as follows:

> "1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;
>
> 2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> 3. The circumstances should be of a conclusive nature and tendency;
>
> 4. They should exclude every possible hypothesis except the one to be proved;

5. There must be a chain of circumstances so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

Last seen theory:

10. Keeping in view the principles laid down in the case of **Sharad Birdhichand Sarda** (supra), let us analyze the available circumstances on record.

In the case in hand, the first circumstance relied upon by the learned trial Court is the last seen of the deceased in the company of the appellant, which is deposed to by two witnesses i.e. P.W.1 and P.W.2.

P.W.1 has stated that on the date of occurrence, he was tending cattle on a piece of land in his village and it was evening hours and he saw the appellant and the deceased were indulged in quarreling, however, the son of the appellant was not present there, but the appellant was holding an axe. He further stated that the appellant had got his land where the aforesaid incident occurred and on the next day, he heard that the deceased was lying dead near the spot where they were quarreling. However, he has stated that he had not gone to the spot to see the dead body. He further stated that P.W.2 was in his land at the time of incident. In his cross-examination, he has stated that he was about 400 feet away from the deceased and he could not say as to who was holding what weapon and why they were quarreling.

P.W.2, on the other hand though stated that the appellant and the deceased were together but he has not stated that there was any quarrel between them rather he stated that from their gesture, it appeared that they were talking. He has also not stated that the appellant was armed with any weapon. He further stated that on the next day, he heard about the death of the deceased near the spot but he had not gone there to see the dead body.

The dead body of the deceased was found in the land of one Baman Patra as per the spot visit report prepared by the I.O. (P.W.10) where the inquest was also held. However, the evidence of P.Ws.1 and 2 is completely silent that the appellant and the deceased were found together in the land of Baman Patra. Since there are discrepancies between the evidence of P.Ws.1 and 2 inasmuch as the evidence of P.W.1 that both the appellant and the deceased were indulged in quarreling and that the appellant was armed with an axe is not getting corroboration from the evidence of P.W.2 and they had not shown the spot of quarrel to the I.O. (P.W.10), therefore, it is very difficult to accept the evidence of P.W.1 and P.W.2 and to utilize the same as last seen of the deceased in the company of the appellant particularly when the dead body was discovered lying on the land of Baman Patra on the next day morning.

The last seen theory is a legal principle that is based on the idea that if someone is the last person seen with the deceased before a crime being committed, he is likely to be responsible for the crime unless he provides a satisfactory explanation in view of section 106 of the Evidence Act (section 109 of Bharatiya Sakshya Adhiniyam, 2023). Doctrine of last seen, if proved, shifts the burden of proof onto the accused, placing on him the onus to explain how the incident occurred and what happened to the deceased

who was last seen with him. If there is a failure on the part of the accused to furnish any explanation in this regard, or furnishing false explanation, it would give rise to a strong presumption against him and in favour of his guilt and would provide an additional link in the chain of circumstances. Last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen alive together and the discovery of the dead body is quite small and the possibility of any person other than the accused being the author of the crime becomes impossible. In the case of **Satpal -Vrs.- State of Haryana reported in (2018) 6 Supreme Court Cases 610,** it has been held that evidence of last seen theory is a weak kind of evidence by itself to convict upon the same singularly. In the case of **Jaswant Gir -Vrs.- State of Punjab reported in (2005) 12 Supreme Court Cases 438**, the Hon"ble Supreme Court held that in absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of "last seen together", even if version of the prosecution witness in this regard is believed. In the case of **Arjun Marik and Ors.-Vrs.- State of Bihar reported in 1994 Supp (2) Supreme Court Cases 372**, it is observed that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused, and therefore, no conviction on that basis alone can be founded. In the case of **Dinesh Kumar -Vrs.- The State of Haryana A.I.R. 2023 S.C. 2795**, it is held that the circumstance of last seen together does not by itself lead to an irrevocable conclusion that it is the accused who had committed the crime. The prosecution must come out with something more to establish this connectivity with the accused and the crime committed.

In absence of such evidence, we are of the humble that the learned trial erred in utilizing the evidence of P.Ws.1 and 2 as the last seen of the appellant with the deceased.

Evidence of P.W.3 and P.W.4 regarding statement of wife of the appellant :

11. The evidence of P.W.3 is that on 05.08.2005 at about 8.00 p.m. while he was in his house, the wife of the appellant came to his house and told him that her husband had cut the deceased and when he asked the wife of the appellant as to whether the deceased was dead or alive, she told that the deceased might have died in the meantime. P.W.3 in turn intimated the same to P.W.4. Thereafter P.W.4 along with P.W.3 went to lodge the F.I.R. Most peculiarly, in the F.I.R., there is nothing that the wife of the appellant had given information relating to the complicity of the appellant alone in the murder of the deceased rather it is mentioned that the appellant with his son Sahadev and his family members have killed the deceased with Tangia.

In view of such recital in the F.I.R., which has lodged by P.W.4, the so-called information stated to have been given by the wife of the appellant becomes a doubtful feature. Moreover, the wife of the appellant has not been examined. The I.O. has stated that he had not interrogated the wife of the appellant and not cited her as a witness in the charge sheet. Therefore, the evidence of P.W.3 becomes hearsay and it is not admissible in view of section 60 of the Evidence Act.

Leading to discovery of weapon of offence:

12. The weapon of offence was seized as per the disclosure statement made by the appellant, which is deposed to by the I.O. (P.W.10). He has stated that after arresting the appellant, while he was in custody, he stated that the weapon of offence i.e. axe had been kept concealed at a place and he could show the place if he would be taken to the place of concealment. Accordingly, the appellant led the I.O. (P.W.10) and the witnesses to Chachingia Nala and then to a bush where from he brought one axe. P.W.10 proved the statement of the appellant recorded under section 27 of the Evidence Act, which has been marked as Ext.2/2 and after recovery of the axe, the seizure list was prepared vide Ext.3.

The I.O. has stated that the place of recovery of axe is an open field and accessible to all. The evidence of I.O. so also the relevant seizure list indicates that the appellant brought out the axe from the bush which was the place of concealment. In the case of **State of Himachal Pradesh -Vrs.- Jeet Singh reported in (1999) 4 Supreme Court Cases 370**, it is held that there is nothing in section 27 of the Evidence Act, which renders the statement of the accused inadmissible if recovery of the articles was made from any place, which is "open or accessible to others". Any object can be concealed in places which are open or accessible to others. The crucial question is not whether the place was accessible to others or not, but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

P.Ws.5 and 6 are the witnesses to such seizure but they have not supported the prosecution case. P.W.5 has stated that the police insisted him to sign on papers even without knowing why he would sign the same and accordingly, he signed. P.W.6 has also stated that police took his signatures on white and blank papers.

The I.O. has seized the axe on 08.08.2005 as per seizure list Ext.3, it was produced before the doctor (P.W.9) on 15.09.2005 and forwarded to the S.F.S.L., Rasulgarh for chemical examination on 17.09.2005. The I.O. stated that after seizure of axe, it was wrapped with a paper, but the same is not mentioned in the case diary or in the seizure list and it was kept in police station Malkhana till it was sent to S.F.S.L., Rasulgarh. No Malkhana register has been proved in the case. There is not only delay in sending the seized axe to S.F.S.L., but also clinching evidence is lacking regarding its safe custody.

Even if the weapon of offence i.e. axe was examined by the doctor (P.W.9), who has given his opinion that the injury sustained by the deceased was possible by such weapon and human blood was also found in the axe as per the chemical examination report and even if it is held that such weapon, which could have been used for the commission of a crime, was discovered on the information given by the appellant, in absence of any other circumstance bring proved, these circumstances are not sufficient to hold the appellant as the murderer.

Absence of Motive:

13. The prosecution has failed to prove any motive on the part of the appellant to commit the crime. In a case of direct evidence, motive would not be relevant, however, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances. Absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. However, it is to be kept in mind that the motive is a thing which is primarily known to the accused himself and it is not possible for the prosecution to explain what actually promoted or excited the accused to commit the particular crime.

Conclusion:

14. In view of the foregoing discussions, we are of the view that there is no clinching evidence against the appellant relating to his involvement in the crime in question. The circumstances which are appearing on record do not form a complete chain so as to come to a conclusion with certainty that the appellant is the author of the crime. The findings of the learned trial Court against the appellant are not justified. Though the case is one of very grave suspicion, but suspicion, however, strong cannot be allowed to take place of proof and therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. There is no sufficient legal evidence on which this Court can come to the conclusion that the appellant must have been the murderer.

Accordingly, the impugned judgment and order of conviction of the appellant under section 302 of the I.P.C. is not sustainable in the eye of law and the same is hereby set aside. The appellant is acquitted of the charge.

The appellant, who is on bail by this Court vide order dated 18.09.2014 passed in Misc. Case No.3 of 2009, is hereby discharged from liability of the bail bonds and the surety bonds also stand cancelled.

In the result, the JCRLA is allowed. Trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information.

Before parting with the judgment, we put on record our appreciation to Ms. Tapaswini Sinha, learned counsel for the appellant for rendering her valuable assistance in arriving at the above decision. We also appreciate Mr. Jateswar Nayak, learned Additional Government Advocate for ably and meticulously presenting the case on behalf of the State.

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter JCRLA is allowed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I) ILR-CUT-760

NILAKANTHA PRADHAN
V.
GOVERNMENT OF INDIA & ORS.

[WPCRL NO. 129 OF 2024]

19 FEBRUARY 2025

[S.K. SAHOO, J. & S.S. MISHRA, J.]

Issues for Consideration

1. Whether the Detaining Authority is justified in taking into account the involvement in other five cases when the details of such cases have not been mentioned in the ground of detention.
2. Whether partial withdrawal of grounds of detention by not supplying all the basic facts and materials relied upon by the Detaining Authority to the Petitioner shall entail the very detention a nullity for being violative of Article 22(5) of the Constitution.

Headnotes

(A) CONSTITUTION OF INDIA, 1950 – Articles 226, 227 r/w Articles 21, 22(5) r/w Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 – The Opposite Party No. 1 passed the order of detention on 23.07.2024 thereby detaining the Petitioner in order to prevent him from engaging in illicit trafficking of narcotic drugs and psychotropic substances in future and he was directed to be detained and kept in circle jail – In the detention order it was reflected that Petitioner was indulged in three NDPS cases from the year 2017 to 2024 – The Detaining Authority while passing the order of detention, became satisfied to pass the order after taking into consideration the involvement of petitioner in crimes (in five cases) since the year 2005 to 2024 – The documents basing on which the Detaining Authority became satisfied to pass the order of detention have not been supplied to the Petitioner – Whether the Detaining Authority is justified in taking into account the involvement of the Petitioner in other five cases when the details of such cases have not been mentioned in the ground of detention.

Held: No – The Detaining Authority is not justified in taking into account of involvement of the petitioner in other five stale cases as spelt out in the counter affidavit when the details of such cases have not been mentioned in the grounds of detention. (Para 18)

(B) CONSTITUTION OF INDIA, 1950 – Article 21, 22(5) r/w Section 6 of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 – The petitioner was detained in custody due to involvement in illicit trafficking of narcotic drugs and psychotropic substances – The Detaining Authority took into account the involvement of the Petitioner in three cases only, which were communicated to the Petitioner – The Detaining Authority has recorded its subjective satisfaction not only on the grounds communicated to the petitioner, but there were some other facts and relevant materials before the Authority to arrive at its satisfaction – The involvement of Petitioner in eight cases were before the Detaining Authority which are likely to have influenced it in arriving at its subjective satisfaction, but the same were not mentioned in the grounds of detention – Whether partial withdrawal of grounds of detention by not supplying all the basic facts and materials relied upon by the Detaining Authority to the Petitioner shall entail the very detention a nullity for being violative of Article 22(5) of the Constitution.

Held: Yes – The petitioner is deprived of making an effective representation against the order of detention in compliance to the provisions of Article 22(5) of the Constitution of India read with section 6 of the 1988 Act – The partial withdrawal of grounds of detention by not supplying all the basic facts and materials relied upon by the Detaining Authority to the petitioner shall entail the very detention a nullity for being violative of Article 22(5) of the Constitution of India. (Para 18)

Citations Reference

Maneka Gandhi -Vrs.- Union of India, **A.I.R. 1978 S.C. 597;** Commissioner of Police, Bombay -Vrs.- Gordhandas Bhanji, **1951 Supreme Court Cases 1088;** Sasthi Keot -Vrs.- The State of West Bengal, **(1974) 4 Supreme Court Cases 131;** Khudiram Das -Vrs.- State of West Bengal, **(1975) 2 Supreme Court Cases 81;** Ameena Begum -Vrs.- State of Telengana, **(2023) 9 Supreme Court Cases 587;** Jaseela Shaji -Vrs.- Union of India, **(2024) 9 Supreme Court Cases 53;** Ganga Ramchand Bharvani -Vrs.- Under Secretary to The Government of Maharashtra and Ors., **A.I.R. 1980 Supreme Court 1744;** Mehrunissa -Vrs.- State of Maharashtra, **(1981) 2 Supreme Court Cases 709;** Mohd. Zakir -Vrs.- Delhi Administration, **(1982) 3 Supreme Court Cases 216;** Daktar Mudi -Vrs.- State of West Bengal, **(1975) 3 Supreme Court Cases 301;** Golam -Vrs.- State of West Bengal, **A.I.R. 1976 Supreme Court 754;** Bhut Nath Mete -Vrs.- The State of West Bengal, **(1974) 1 Supreme Court Cases 645;** Vijay Narain Singh -Vrs.- State of Bihar, **(1984) 3 Supreme Court Cases 14;** Sama Aruna -Vrs.- State of Telangana and another, **(2018) 12 Supreme Court Cases 150 – referred to.**

List of Acts

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988; Constitution of India, 1950.

Keywords

Violation of Natural Justice; Personal liberty; Detention; Subjective Satisfaction of the Authority.

Case Arising From

Detention order dated 23.07.2024 and consequential confirmation on 18.10.2024.

Appearances for Parties

For Petitioners : Mr. Janmejaya Katikia
For Opp. Parties : Mr. P.K. Parhi, DSGI (O.Ps. 1 & 2), Mr. S.S. Kashyap, Sr. Panel Counsel Govt. of India (O.P. 3), Mr. P.S. Nayak (O.Ps. 4 and 5)

Judgment/Order

Judgment

S.K. SAHOO, J.

Hon'ble Justice V.R. Krishna Iyer (as he then was) said in his inimitable style in **Maneka Gandhi -Vrs.- Union of India reported in A.I.R. 1978 S.C. 597** that the spirit of man is at the root of Article 21 of the Constitution of India. Liberty makes the worth of a human being. Absent liberty, other freedoms are frozen. To frustrate Article 21 of the Constitution of India by relying on any formal adjectival statute, however, flimsy or fantastic its provisions be, is to rob what the constitution treasures. Procedure which deals with modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Procedure must rule out anything arbitrary, freakish and bizarre. In the words of Mahatma Gandhi, Father of the Nation, "To deprive a man of his natural liberty and to deny to him the ordinary amenities of life is worse than starving the body; it is starvation of the soul, the dweller in the body."

Challenging the detention order dated 23.07.2024 under Annexure-1 as well as the consequential confirmation order dated 18.10.2024 under Annexure-4, being illegal and arbitrary in the eyes of law, the petitioner Nilakantha Pradhan has filed this writ petition in the nature of habeas corpus under Articles 226 of the Constitution of India read with Articles 21 and 22(5) of the Constitution of India, with a further prayer for a direction to the opposite parties to set him at liberty.

2. The opposite party no.1 in exercise of the power conferred under section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter to be called as '1988 Act', for short) passed the order of detention on dated 23.07.2024 under Annexure-1 detaining the petitioner with a view to prevent him from engaging in illicit trafficking of narcotic drugs and psychotropic substances in future and he was directed to be detained and kept in Circle Jail, Choudwar, Cuttack.

In the grounds of detention under Annexure-2, it appears that the sponsoring authority submitted proposal before the opposite party no.2 on 23.07.2024 that the petitioner was involved in three cases, i.e., (i) NCB Bhubaneswar Crime No.02/2024 dated 25.01.2024 in a case under N.D.P.S. Act in which charge sheet has not been submitted; (ii) Odisha Excise Case PR No. 1022/2022-23 under section 20(b)(ii)(C) of N.D.P.S. Act dated 12.03.2024 and (iii) F.I.R. No. 108/2017 dated 18.09.2017 in which charge sheet was submitted under sections 20(b)(ii)(C) and 29 of N.D.P.S. Act. It is further stated that the petitioner was actively involved in trafficking of narcotics drugs and psychotropic substances and he was a habitual offender. His presence in the society was a threat to the innocent persons of the locality/State/ Nation and his activities was prejudicial to society. It is further stated that the petitioner was on bail, however, considering his conscious involvement in illegal trafficking of drugs and psychotropic substances in a repeated manner to the detriment of the society, he had a high propensity to be involved in the prejudicial activities in future. It is further stated that the acts of the petitioner in engaging himself in prejudicial activities of illicit traffic of narcotics and psychotropic substances, which posed serious threat to the health and welfare not only to the citizens of the country but to every citizen in the world, besides deleterious effect on the national economy. The offences committed by the petitioner were held to be so interlinked and continuous in character and were of such nature that the same affected security and health of the nation. The grievous nature and gravity of offences committed by the petitioner in a well-planned manner clearly established his continued propensity and inclination to engage in such acts of prejudicial activities. Considering the facts presented, the opposite party no.2 came to the conclusion that there was ample opportunity for the petitioner to repeat the serious prejudicial acts and therefore, the petitioner should be immobilized and there was a need to prevent him from engaging in such illicit traffic of narcotic drugs and psychotropic substances in future by detention under section 3(1) of 1988 Act. Since the petitioner was indulged in organizing the illicit trafficking of narcotic drugs and psychotropic substances as well as had a high propensity to engage in illicit activities, it was conclusively felt that if he was not detained under section 3(1) of the 1988 Act, he would continue to so engage himself in possessing, purchase, sale, transportation, storage, use of narcotics and psychotropic substances illegally and handling such activities, organizing directly in such activities and conspiring in furtherance of such activities which amounted to illicit trafficking of psychotropic substances under section 2(e) of the 1988 Act. It is further stated that considering the

magnitude of the operation, the chronicle sequence of events, the well organised manner in which such prejudicial activities were carried on, the nature and gravity of the offence, the consequential extent of investigation involved including scanning/ examination of papers, formation of grounds, the opposite party no.2 was satisfied that the nexus between the dates of incident and passing of the detention order as well as object of the detention of the petitioner is well maintained. The petitioner was informed in the grounds of detention that he had the right to represent against his detention to the Authority, to the Central Government as well as to the Advisory Board. He was also informed that he shall be heard by the Advisory Board in due course, if the Board considers it essential to do so or if the petitioner so desired. The grounds were communicated to the petitioner for the purpose of clause (5) of Article 22 of the Constitution of India and as required under section 3(3) of the 1988 Act.

3. The order of detention with grounds of detention was served on the petitioner on 31.07.2024. On receipt of the same, the petitioner submitted a representation to the Joint Secretary (PITNDPS), Government of India, Ministry of Finance, Department of Revenue on 17.09.2024 as per Annexure-3. Thereafter, the matter was placed before the PITNDPS State Advisory Board, Odisha which was also of the opinion that sufficient cause was made out for detention of the petitioner. The Central Government by virtue of sub-section (f) of section 9 of the 1988 Act, confirmed the said detention under Annexure-4 on 18.10.2024 thereby directing to detain the petitioner (detenu) for a period of one year from the date of detention i.e. 31.07.2024.

4. The petitioner has filed the writ petition with the following grounds:

(i) The Detaining Authority has referred to NCB, Bhubaneswar Crime No.02/2024 dated 25.1.2024 in which the petitioner is not the principal accused and basing on the statement of two co-accused, the petitioner has been entangled in the case and this Court has already granted bail to the petitioner in the said case;

(ii) So far as the 2nd case i.e. Odisha Excise Case PR No. 1022/2022-23 under section 20(b)(ii)(C) of the 1988 Act is concerned, the petitioner has been released on bail by this Court even more than one year prior to the issuance of the impugned order of detention and there lies no proximate link of the said case with the order of detention and no prima facie involvement of the detenu is visible;

(iii) So far as the 3rd case i.e. Kantamal P.S. F.I.R. No. 108 dated 18.9.2017 is concerned, the petitioner is on bail, charge sheet has already been filed and the case is under trial in the Court of learned Additional Sessions Judge, Kandhamal in C.T. Case No.492 of 2017 and the complicity of the petitioner is yet to be established. It is further stated that while filing charge sheet, the name of the petitioner has been incorporated without any specific material;

(iv) It is stated that reference to the Advisory Board under section 9(b) of the 1988 Act should have been made within five weeks from the date of detention, but in the instant case, the date of detention being 23.07.2024, reference to the Advisory Board was made on 29.08.2024, which was beyond the period prescribed under the statute;

(v) It is further stated that as per section 9(c) of the 1988 Act, the Advisory Board is required to submit report within eleven weeks from the date of detention of the person

concerned, but in the instant case, the Advisory Board should have filed its report by 08.10.2024, but the order of confirmation dated 18.10.2024 under Annexure-4 is silent regarding the date of filing of the final report by the PITNDPS State Advisory Board, Odisha and that apart, a copy of the report of the Advisory Board has not been supplied to the petitioner, thereby curtailing the personal liberty of the petitioner as guaranteed under Article 21 of the Constitution of India;

(vi) It is stated that there lies no prima facie and substantial materials in all the three cases, as has been cited in the grounds of detention under Annexure-2 and cumulatively all the three cases cannot be said to have proved the propensity of the detenu to carry on illicit drug trafficking, posing a serious threat to the people as well as to the society. None of these cases have even got a proximate link with the order of detention.

5. The opposite party no.3, Zonal Director, Narcotic Control Bureau, Bhubanewar Zonal Unit, Bhubaneswar has filed counter affidavit to the writ petition, stating, inter alia, that the petitioner has a long-standing history of engaging himself in drug trafficking, with multiple cases under the N.D.P.S. Act and Excise Act and therefore, the Detaining Authority has reasonably believed warranting preventive detention under the 1988 Act to safeguard public health and welfare. It is further stated that the detention order was executed on 31.07.2024 as per section 4 of the 1988 Act, following which the petitioner was detained in the Circle Jail, Choudwar, Cuttack on 01.08.2024 at 12.35 a.m. It is further stated that grounds of detention, along with the relied upon documents, were duly served upon the petitioner on 04.08.2024, at Circle Jail, Choudwar, Cuttack, in compliance with Section 3(3) of the 1988 Act and the representation dated 17.09.2024, as enclosed under Annexure-3 in the writ petition, has not been received by any of the concerned authorities, i.e. the jail authorities, the Narcotics Control Bureau, the PITNDPS Unit, New Delhi or the State Advisory Board as of date. The representation under Annexure-3 neither bears the signature of the petitioner nor any acknowledgment from any receiving authority. It is further stated that the petitioner's allegation that the Detaining Authority has flagrantly violated or abused the powers vested under the 1988 Act is wholly misconceived and baseless. The detention order issued by the Detaining Authority is not only valid but also imperative to ensure that the petitioner is restrained from engaging in further acts of illicit drug trafficking. It is further stated that the petitioner’s repeated transgressions of law manifested through his involvement in the seizure of 438 kg. of ganja in Kantamal P.S. F.I.R. No. 108 of 2017, 30 kg. of ganja under Odisha Excise PR No.1022 of 202223 and supply of 21.1 kg. of ganja under NCB Bhubaneswar Crime No. 02 of 2024 highlights his persistent engagement in criminal activity, rendering him ineligible to invoke the protection under Article 21 of the Constitution of India in shielding his unlawful actions. It is further stated that the Detaining Authority carefully evaluating the totality of circumstances, including the detenu's criminal antecedents, prior engagements in similar offences and the unrelenting nature of his conduct, in exercise of the powers conferred upon it, issued the order of preventive detention, which was both warranted and legally sound.

It is further stated in the counter affidavit that as per Section 9(b) of the 1988 Act, the mandatory period of five weeks is to be calculated from the date of detention and not from the date when the detention order was passed. In the present case, the reference to the State Advisory Board was made on 29.08.2024, which is well within the statutory period of five weeks from the date of detention i.e. 31.07.2024. It is further stated that the report containing the opinion of the State Advisory Board, Odisha, regarding the detention of the petitioner was submitted well within the statutory period of eleven weeks from the date of detention. After giving an opportunity of personal hearing on 03.10.2024 by the State Advisory Board and after thorough consideration of all the parameters, the State Advisory Board unanimously opined that there exists sufficient cause for the detention of the petitioner and accordingly, the order of detention was confirmed under section 9(f) of the 1988 Act.

It is further stated in the counter affidavit that the Detaining Authority has found sufficient reasons to believe in the propensity of the petitioner's criminal activities, which span a period of nearly two decades, i.e., from 2005 to 2024. During this period, the petitioner has been behind the bar at least eight times for his involvement in various crimes. It is further stated that apart from the three N.D.P.S. cases cited in the grounds of detention, the petitioner is also involved in three cases under the Excise Act and two additional cases under the Indian Penal Code. It is further stated that the continued engagement of the petitioner in such activities, even while being enlarged on bail, establishes a clear pattern of persistent and organized criminal conduct. It is further stated that the conscious and repeated efforts of the petitioner to traffic and supply illicit drugs pose a serious and imminent threat to the health and welfare of society at large. His activities had a deleterious effect on the younger generation, particularly in the States of India, and such actions cannot be neglected or ignored. It is further stated that the subjective satisfaction of the Detaining Authority is based on the cumulative effect of the petitioner's repeated offences, the organized nature of his activities and the significant potential harm pose to society. It is further stated that the magnitude of his crimes cannot be judged in isolation but must be seen as a clear and continuous effort to disrupt public order and welfare. The detention of the petitioner under the 1988 Act, is not only reasonable but also imperative to prevent further engagement in such illicit and dangerous activities.

6. The opposite parties nos.1 and 2 have filed counter affidavit almost in the similar line of the counter affidavit filed by opposite party no.3. It is stated, inter alia, that the detaining authority found sufficient reasons with subjective satisfaction against the petitioner with regards to propensity of his crimes since the year 2005 until 2024 wherein the detenu has been behind the bars for at least eight times as he was involved in various crimes. Apart from three N.D.P.S. Act cases against his name as mentioned in the detention order, the detenu has also three cases under Excise Acts and two more cases under the Indian Penal Code.

7. The Opposite party No.5, Superintendent, Circle Jail, Choudwar, Cuttack has also filed counter affidavit on behalf of the State of Odisha (Opposite party nos.4 and 5) reiterating the stand taken by the opposite party no.3 in its counter affidavit.

8. In reply to the counter affidavits filed by the opposite parties, rejoinder affidavit has been filed on behalf of the petitioner, stating, inter alia, that the documents basing on which the Detaining Authority became satisfied to pass the order of detention have not been supplied to the petitioner and thereby the order of detention as well as the confirmation thereof is actuated with malafide. It is further stated that the representation of the petitioner under Annexure-3 has been filed before the opposite party no.5, who denied to give any acknowledgment in receipt thereof and few days after, the opposite party no.5 called the petitioner and told that since the said document has been prepared by someone else, the same is not permissible and he has to write as per his (opposite party no.5) dictation and to the utter surprise, the prisoner's petition under Annexure-B/7 to the counter affidavit has been sent to the authorities without enclosing the original representation, which the petitioner came to know after going through the affidavit filed by the opposite parties nos. 4 and 5. It is further stated that taking advantage of the same, the opposite parties nos.4 and 5 have taken the stand that no such representation of the petitioner has been received at the PITNDPS Unit, New Delhi or by the Jail Authorities or by the State Advisory Board.

9. On the last date of hearing, i.e. on 31.01.2025, an additional affidavit dated 31.01.2025 has been filed by the opposite party no.3 in Court enclosing some documents wherein it is stated that the documents were placed before the Detaining Authority as well as served on the petitioner. It is further stated that the petitioner was given sufficient opportunity to be confronted with those cases and a panchanama was drawn mentioning the above proceedings in the jail premises, which was acknowledged by the petitioner after being explained to him n Odia language by the Investigating Officer as per Annexure C/3. It is further stated that the petitioner had submitted a prisoner's petition on 17.09.2024 addressed to the Secretary to the Govt. of India, Department of Revenue, Ministry of Finance, opposite party no.1 through the opposite party no.5 and the said representation was forwarded to the Detaining Authority on the same day.

10. Mr. Janmejaya Katikia, learned counsel appearing for the petitioner strenuously urged that though from the detention order, it appears that while passing the order of detention, the Detaining Authority took into account the involvement of the petitioner in three cases only which were from the year 2017 to 2024, but in the counter affidavit filed by opposite party no.3, it appears that apart from those three cases, the Detaining Authority has also taken into account the involvement of the petitioner in three other cases under the Excise Act and two additional cases under the Indian Penal Code which are from 2005 onwards, the details of which have neither been supplied to the petitioner nor the same has been stated in the grounds of detention under Annexure-2, thereby it violates the principles of natural justice.

Learned counsel further submitted that the representation filed by the petitioner under Annexure-3 has neither been forwarded to the PITNDPS Unit, New Delhi nor to the Advisory Board, rather on being dictated by the opposite party no.5 to the petitioner, the petition has been forwarded to the Advisory Board. Learned counsel for the petitioner referring to paragraph no.7 of the counter affidavit filed by opposite party nos.1 and 2 submitted that the counter affidavit has been prepared in consultation with the Sponsoring Authority, i.e. the Zonal Director, Narcotics Control, Bureau, Bhubaneswar, Odisha.

Mr. Katikia, further argued that the Detaining Authority, opposite party no.2, without applying his mind, has been biased with the report of the Sponsoring Authority so as to pass the order of detention in the garb of subjective satisfaction, which fact is revealed from paragraph no.7 of the counter affidavit filed by opposite parties nos.1 and 2. He further argued that without applying mind, the opposite party no.1 basing on the report of the Sponsoring Authority, i.e. opposite party no.3 has passed the impugned order of detention, which is liable to be quashed. He emphatically contended that the grounds on which the impugned order of detention has been passed have not been supplied to the petitioner and thus, the impugned order of detention is liable to be quashed.

Mr. Katikia, further argued that if as per the detention order, the petitioner after being released on bail in one N.D.P.S. Act case of the year 2017, indulged himself in another case of the year 2023 and after being released in the second case, he indulged himself in third case of the year 2024 and thereby mis-utilised his liberty, application for cancellation of bail could have been moved by the State. When ordinary criminal law provided sufficient means to address the situation, the Authority should not have taken recourse to the provisions of the 1988 Act, which is an extraordinary statute, leading to the passing of impugned detention order.

In support of his contentions, Mr. Katikia has placed reliance on the decisions of the Hon'ble Supreme Court in the cases of **Commr. of Police, Bombay -Vrs.- Gordhandas Bhanji reported in 1951 Supreme Court Cases 1088, Sasthi Keot -Vrs.- The State of West Bengal reported in (1974) 4 Supreme Court Cases 131, Khudiram Das -Vrs.- State of West Bengal reported in (1975) 2 Supreme Court Cases 81, Ameena Begum -Vrs.- State of Telengana reported in (2023) 9 Supreme Court Cases 587 and Jaseela Shaji -Vrs.- Union of India reported in (2024) 9 Supreme Court Cases 53.**

11. Mr. P.K. Parhi, learned Deputy Solicitor General for the Union of India and Mr. S.S. Kashyap, learned Senior Panel Counsel for the Government of India, on the other hand, argued that apart from involvement of the petitioner in the three cases as mentioned in the grounds of detention under Annexure-2, he is also involved in three cases under the Excise Act and two additional cases under the Indian Penal Code and the Detaining Authority taking into account all the aforesaid eight cases, has passed the impugned order of detention. Learned counsel further submitted that the detention of the detenu was required to prevent him from anti-social activities as

he was indulging in drug trafficking in various districts of the State of Odisha including the districts of Boudh, Kandhamal and Cuttack and contraband ganja of commercial quantity had been recovered from his possession and he was remanded to judicial custody on several occasions and that the activities of the detenu were detrimental to the society. It is argued that the preventive detention can be ordered by the Detaining Authority against a person in case a satisfaction is drawn with regard to his activities prejudicial to the public order as well as to protect society from anti-social activities. It is further argued that the petitioner had been provided with entire records which were based to order his detention and further the petitioner was informed about his legal right of filing representation against his detention to the Detaining Authority as well as to the Central Government. It is further argued that while passing the detention order, the constitutional and statutory requirements were fulfilled by the Detaining Authority and there is no case for breach of any of these provisions and therefore, there is no merit in the writ petition which is liable to be dismissed.

12. Mr. Partha Sarathi Nayak, learned Addl. Government Advocate for the State appearing for the opposite parties nos.4 and 5 submitted that in compliance of the detention order under Annexure-1, the petitioner was lodged in Circle Jail, Choudwar, Cuttack and as per the direction of the Detaining Authority, he was produced before the Advisory Board on the date fixed.

13. Adverting to the contentions raised by the learned counsel for the respective parties and on perusal of the material on record, the following points would emerge for our consideration:

> **(i)** Whether the Court can look into the records to satisfy it as to whether the Detaining Authority had arrived at its subjective satisfaction only on the grounds communicated to the detenu, or there were some other relevant materials before the Authority?
>
> **(ii)** What would happen where there be some materials before the Detaining Authority which could have influenced it in arriving at its subjective satisfaction, but the same were not mentioned in the grounds of detention?
>
> **(iii)** Whether the Detaining Authority has taken into account the involvement of the detenu only in three criminal cases as has been mentioned in the grounds of detention?
>
> **(iv)** Whether the Detaining Authority is justified in taking into account involvement of the petitioner in other five cases as spelt out in the counter filed by the opposite party no.3 as well as opposite parties nos.1 and 2 when the details of such cases have not been mentioned in the grounds of detention?
>
> **(v)** Whether the Detaining Authority had given sufficient opportunity to the petitioner to make effective representation against the order of detention in compliance to the provisions of Article 22(5) of the Constitution of India read with section 6 of the 1988 Act?
>
> **(vi)** Whether partial withdrawal of grounds of detention by not supplying all the basic facts and materials relied upon by the Detaining Authority to the petitioner shall entail the very detention a nullity for being violative of Article 22(5) of the Constitution?
>
> **(vii)** Whether the petitioner is deprived of sufficient and reasonable opportunity to make an effective representation against the detention order in violation of his fundamental

right enshrined under Article 22(5) of Constitution of India read with section 8 of 1988 Act?

14. Section 3 of 1988 Act states, inter alia, that a State Government or any officer of the State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person that, with a view to preventing him from engaging in illicit traffic in narcotic drugs and psychotropic substances, it is necessary so to do, make an order directing that such person to be detained.

There is no dispute that validity of the satisfaction of the Detaining Authority will have to be considered on the facts of each case. Since an order of prevention detention has the effect of invading one's personal liberty, it would be just and proper to see that such drastic power is invoked in appropriate cases responsibly, rationally and reasonably. The detention of a person without a trial is a very serious encroachment on his personal freedom and therefore, at every stage, all questions in relation to the said detention must be carefully and solemnly considered. Preventive detention is a precautionary measure which is taken to prevent a person from doing something which, if left free and unfettered, it is reasonably probable that he would do. In other words, the essential concept of preventive detention is that the detention of a person is not to punish him for something he has done, but to prevent him from doing it. If the subjective opinion is formed by the Detaining Authority as regards the necessity of detention for a specified purpose, the condition of exercise of power of detention would be fulfilled and it is not permissible for a Court, on a review of the grounds, substitute its own opinion for that of the Authority. Procedural safeguard provided under 1988 Act are sacrosanct and needs to be followed to the hilt, deviation of which has all potential to threaten the violation of constitutional right guaranteed to the detenu.

15. At this stage, it would be worthwhile to delve upon the citations placed by the learned counsel for the petitioner and other relevant citations which have great bearing in deciding the points raised herein.

In the case of **Khudiram Das** (supra), it is held that the Constitutional imperatives enacted in Article 22 of Constitution of India are two-fold; **(i)** the Detaining Authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detenu the grounds on which the order of detention has been made, and **(ii)** the Detaining Authority must afford the detenu the earliest opportunity of making a representation against the order of detention. These are the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person and thereby drown his right of personal liberty in the name of public good and social security. It is further held that the communication of the grounds of detention is intended to subserve the purpose of enabling the detenu to make an effective representation. The 'grounds' mean all the basic facts and materials which have been taken into account by the Detaining

Authority in making the order of detention and on which, therefore, the order of detention is based. It is the factual constituent of the 'grounds' on which the subjective satisfaction of the authority is based. Therefore, nothing less than all the basic facts and materials which influenced the Detaining Authority in making the order of detention must be communicated to the detenu. That is the plain requirement of the first safeguard in Article 22(5). It is further held that it is not only the right of the Court, but also its duty as well, to examine what are the basic facts and materials which actually and in fact weighed with the Detaining Authority in reaching the requisite satisfaction. The judicial scrutiny cannot be foreclosed by a mere statement of the Detaining Authority that it has taken into account only certain basic facts and materials and though other basic facts and materials were before it, it has not allowed them to influence its satisfaction. The Court is entitled to examine the correctness of this statement and determine for itself whether there were any other basic facts or materials, apart from those admitted by it, which could have reasonably influenced the decision of the Detaining Authority and for that purpose, the Court can certainly require the Detaining Authority to produce and make available to the Court the entire record of the case which was before it. That is the least the Court can do to ensure observance of the requirements of law by the Detaining Authority. Therefore, in a case where the material before the District Magistrate is of a character which would in all reasonable probability be likely to influence the decision of any reasonable human being, the Court would be most reluctant to accept the ipse dixit of the District Magistrate that he was not so influenced and a fortiori, if such material is not disclosed to the detenu, the order of detention would be vitiated, both on the ground that all the basic facts and materials which influenced the subjective satisfaction of the District Magistrate were not communicated to the detenu as also on the ground that the detenu was denied an opportunity of making an effective representation against the order of detention.

Relying on **Khudi Ram** (supra), it is stated in the case of **Ganga Ramchand Bharvani -Vrs.- Under Secretary to The Government of Maharashtra and Ors. reported in A.I.R. 1980 Supreme Court 1744** that the mere fact that the grounds of detention served on the detenu are elaborate, does not absolve the Detaining Authority from its constitutional responsibility to supply all the basic facts and materials relied upon the grounds to the detenu.

In the case of **Mehrunissa -Vrs.- State of Maharashtra reported in (1981) 2 Supreme Court Cases 709**, it was held that the fact that the detenu was aware of the contents of the documents not furnished is immaterial. The detenu is entitled to be supplied with the copies of all material documents instead of having to rely upon his memory in regard to the contents of documents. The failure of the Detaining Authority to supply copies of such documents was held to have vitiated the detention.

In the case of **Mohd. Zakir -Vrs.- Delhi Administration reported in (1982) 3 Supreme Court Cases 216**, it was reiterated that it being a constitutional imperative for the Detaining Authority to give the documents relied on or referred to

in the order of detention pari passu the grounds of detention in order that the detenu may make an effective representation immediately instead of waiting for the documents to be supplied with. The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violative of constitutional safeguards enshrined in Article 22(5).

The Hon'ble Supureme Court in the case of **Daktar Mudi -Vrs.- State of West Bengal reported in (1975) 3 Supreme Court Cases 301** held as follows:

> "6....This Court has further held that where there are several grounds, even if one ground is vague, then it is difficult to say whether the ground which is vague and in respect of which the detenu could not make an effective representation did not influence the mind of the Detaining Authority in arriving at his subjective satisfaction that the detenu would in future be likely to act in a manner prejudicial to the maintenance of supplies and services essential to the community. If the detention order is held invalid on this count, it would be equally so in a case where there are other materials on which the Detaining Authority could have been influenced in arriving at his subjective satisfaction but which he has not mentioned in the grounds of detention, nor communicated them to the detenu. In such circumstances, whether the other materials on record had any effect on the mind of the Detaining Authority cannot be accepted solely on his statement, because to admit that he alone has such a right would be to accept that the mere ipse dixit of the Detaining Authority would be sufficient and cannot be looked into. There is a possibility that certain materials on record would disclose that the activities of the detenu are of a serious nature having a nexus with the object of the Act, namely, the prevention of prejudicial acts affecting the maintenance of supplies and services essential to the community, and having proximity with the time when the subjective satisfaction forming the basis of the detention order had been arrived at. If these elements exist, then the Court would be justified in taking the view that these must have influenced the subjective satisfaction of the Detaining Authority and the omission to indicate those materials to the detenu would prejudice him in making an effective representation. If so, the detention order on that account would be illegal."

The view expressed in **Golam -Vrs.- State of West Bengal reported in A.I.R. 1976 Supreme Court 754**, is that the word "grounds" does not merely mean a recital or reproduction of a ground of satisfaction of the authority permitting it to detain a person, nor is its connotation restricted to a bare statement of conclusion of facts. All the basis facts and materials particulars, which influenced the Detaining Authority in making the order of detention, will be covered by "grounds" within contemplation of Article 22(5) of Constitution of India and are required to be communicated to the detenu unless its disclosure is considered by the authority to be against public interest. The question whether this requirement is complied with or not is justiciable. Indeed, it is the duty of the Court as sentinel of the fundamental freedoms guaranteed by the Constitution, to see that the liberty of none is taken away except in accordance with procedure prescribed by law.

In the case of **Mohinder Singh Gill** (supra), it has been held as follows:

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.

> Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in **Gordhandas Bhanji** (supra)
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> "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older."

In the case of **Bhut Nath Mete -Vrs.- The State of West Bengal reported in (1974) 1 Supreme Court Cases 645**, the Hon'ble Supreme Court held that Article 22(5) of the Constitution of India vests a real, not illusory right, that communication of facts is the cornerstone of the right of representation and orders based on un-communicated materials are unfair and illegal.

In the case of **Sasthi Keot** (supra), it is held as follows:

> "This has been relied upon by the State as additional ground in support of the detention, apart from the theft of cables, recited in the detention order and repeated in the counter affidavit. Counsel candidly admitted that this additional circumstance had been placed before the State Government and the Advisory board, and certainly was before the District Magistrate when he passed the detention order. It is perfectly plain that the authorities have been influenced by the report of the police that the petitioner was "a man of desperate habits and dangerous character and also prone to committing theft of underground cables." We do not regard 'desperate habits' and 'dangerous character' as anything but vague. Apart from the vice of vagueness which perhaps may not matter so far as the satisfaction of the authorities is concerned, every desperate or dangerous man cannot be run down, under Section 3 of the MISA. Moreover, this vital yet injurious dossier about the petitioner has not been communicated to him and opportunity afforded for making a proper representation contra. Therefore, there is violation both of Article 22(5) of the Constitution and of Section 3(3) of the Act. In this view, we are constrained to quash the detention order on the petitioner and direct his release."

In the case of **Ameena Begum** (supra), it is held that in the three criminal proceedings where the detenu had been released on bail, no applications for cancellation of bail had been moved by the State. In the light of the same, the provisions of the Act, which is an extraordinary statute, should not have been resorted to when ordinary criminal law provided sufficient means to address the apprehensions leading to the impugned detention order. There may have existed sufficient grounds to appeal against the bail orders, but the circumstances did not warrant the circumvention of ordinary criminal procedure to resort to an extraordinary measure of the law of preventive detention. Reliance was placed in the case of **Vijay Narain Singh -Vrs.- State of Bihar reported in (1984) 3 Supreme Court Cases 14**, wherein it was observed that the law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardised unless his case falls squarely within the four corners of the relevant law. The law of preventive detention should not be used

merely to clip the wings of an accused who is involved in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention. When a person is enlarged on bail by a competent criminal Court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal Court.

In the case of **Jaseela Shaji** (supra), it is held that the right to personal liberty and individual freedom is not to be arbitrarily taken away even temporarily without following the procedure prescribed by law. When a detention order is passed, all the material relied upon by the Detaining Authority in making such an order must be supplied to the detenu to enable him to make an effective representation. This is required in order to comply with the mandate of Article 22(5) of the Constitution, irrespective of whether the detenu had knowledge of such material or not. It is imperative that every such document which has been relied on by the Detaining Authority and which affects the right of the detenu to make an effective representation under Article 22(5) of the Constitution has to be supplied to the detenu.

Law is well settled as held in the case of **Sama Aruna -Vrs.- State of Telangana and another reported in (2018) 12 Supreme Court Cases 150** that the detention order must be based on a reasonable prognosis of the future behaviour of a person based on his past conduct in light of the surrounding circumstances. The live and proximate link that must exist between the past conduct of a person and the imperative need to detain him must be there. A detention order which is found on stale incidents, must be regarded an order of punishment for a crime, passed without a trial though purporting to be an order of preventive detention. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him doing it. It was further held that the four old cases, incidents of which are stated to have taken place nine to fourteen years earlier, ought to have been excluded from consideration on the ground that they are stale and could not have been used to detain the detenu or could not have been considered as relevant for arriving at the subjective satisfaction that the detenu must be detained. Incidents which are old and stale and in which the detenu has been granted bail, cannot be said to have any relevance for detaining a citizen and depriving him of his liberty without a trial.

16. The Opposite Party No.1 in the detention order has made pointed reference to the detenu being a habitual offender by listing only three criminal cases under N.D.P.S. Act in which the petitioner was involved during the years 2017 to 2024, one of which was instituted on 18.09.2017, the second case was instituted on 12.03.2023 and the third case was instituted on 25.01.2024. It appears from the detention order that the Sponsoring Authority has drawn the attention of these three

cases to the Opposite Party No.1 and accordingly, the Opposite Party No.1 has been pleased to hold the petitioner as a habitual offender and that his presence in the society is a threat to innocent persons of the locality/State/Nation. It was further held that the petitioner was indulged in organizing the illicit trafficking of narcotic drugs and psychotic substances as well as he has a high propensity to engage himself in illicit activities.

However, in the counter affidavit filed by Opposite Party No.3 i.e. Zonal Director, Narcotic Control Bureau, Bhubaneswar Zonal Division, Bhubaneswar, it is stated that the petitioner has a long standing criminal history, extending to excise-related cases under both the Bihar and Odisha Excise Act. It is further stated that Detaining Authority has found sufficient reasons to believe in the propensity of the petitioner's criminal activities, which span a period of nearly two decades i.e. from 2005 to 2024 and during this period, the petitioner was behind bars at least eight times for his involvement in various crimes. It is further stated that apart from the N.D.P.S. cases cited in the grounds of detention, the petitioner is also implicated in three cases under the Excise Act and two additional cases under the Indian Penal Code.

In the counter affidavit filed by the Opposite Parties Nos.1 and 2 also, it is mentioned that the Detaining Authority has found sufficient reasons with subjective satisfaction against the petitioner with regard to propensity of his crimes since the year 2005 till 2024, wherein the petitioner was behind bar at least eight times as he was involved in various crimes. Apart from three N.D.P.S. cases against his name, the petitioner has also three cases under Excise Acts and two more cases under Indian Penal Code.

Thus, not only the Sponsoring Authority has taken into account five other cases apart from the three N.D.P.S. Act cases mentioned in the detention order, but also the Detaining Authority has reached its subjective satisfaction basing on eight cases, which were from the year 2005 to 2024 in passing the detention order. The five cases which were from 2005 onwards till 2017 were not reflected in the detention order nor its details, its status and documents of those cases were supplied to the petitioner to file an effective representation against the order of detention. Thus, it can be said that the petitioner was not afforded reasonable opportunity of making effective representation against the order of detention. It is not known when those three Excise Act cases and two more cases under Indian Penal Code were instituted and what was the nature of accusation against the petitioner in those cases, the status of those cases and if the petitioner was released on bail in those cases or not and if so when. The possibility of those five old cases being called stale cases cannot be ruled out. In view of the principle laid down in the case of **Khudiram Das** (supra), it can be said that all the basic facts and materials which influenced the Detaining Authority in making the order of detention (in this case, total number of eight cases from 2005 to 2024) have not been communicated to the petitioner. It is very difficult to accept that those five cases had not influenced the subjective satisfaction of the Detaining Authority. Therefore, the omission to indicate those

five cases to the detenu has caused prejudice to him in making an effective representation. Non-communication of the details of those five cases to the detenu which appears to have influenced the Detaining Authority in arriving at its subjective satisfaction, has vitiated the order of detention. In our humble view, even though the petitioner might have been aware about those five cases, but since the same has not been reflected in the detention order and no documents in connection with those five cases were supplied to him, it has vitiated the detention order. The petitioner was kept in darkness that the Detaining Authority has arrived at its subjective satisfaction also basing on those five cases and therefore, he could not have asked for the documents of such cases to file the representation. The conduct of the Authority in debarring the petitioner to make an effective representation violates the constitutional safeguards enshrined under Article 22 (5) of the Constitution of India. In view of the ratio laid down in the case of **Daktar Mudi** (supra), the detention order can be held to be invalid as those five cases which could have influenced the Detaining Authority in arriving at its subjective satisfaction has not been mentioned in the grounds of detention nor communicated to the detenu.

17. After hearing the arguments from the learned counsel for the petitioner on the previous date, an additional affidavit dated 31.01.2025 was filed by the opposite party no.3 in Court on 31.01.2025, wherein it is stated that the other cases which were not mentioned in the order of detention but referred to in the counter affidavit filed by the opposite party were well before the Detaining Authority as well as the petitioner and the petitioner has also been given opportunity to be confronted with those cases. However, the Detaining Authority has confined its order of detention to only those cases which are the subject matter of concern by the Detaining Authority and that the other criminal cases and the background of the petitioner with respect to the criminal activities has nothing to impact so far as the criminal activity under the N.D.P.S. Act is concerned.

Such a stand taken at the belated stage by the opposite party No.3 in the additional affidavit dated 31.01.2025 is completely contrary to the affidavit filed by the opposite parties nos.1 and 2 wherein it is stated that the subjective satisfaction has been based taking into account all the eight cases. Thus affidavit dated 31.01.2025 seems to be an afterthought story and it is very difficult on our part to place any reliance on it.

If apart from the three cases under N.D.P.S. Act, the Sponsoring Authority as well as the Detaining Authority has also taken into account three cases under the Excise Act and two additional cases under the Indian Penal Code which were from the year 2005 onwards and the Detaining Authority has arrived its subjective satisfaction basing on all the eight cases while passing the detention order as stated in the counter affidavit filed by opposite parties nos.1 and 2, it should have been brought to the notice of the petitioner and he should not have been kept in darkness about the same. Withholding such information, while passing the detention order,

does not conform to Article 21 of the Constitution of India in the matter of fairness, justness and reasonableness.

The stand taken by the opposite parties that the petitioner has not taken the grounds of non-supply of documents of all the eight cases in the writ petition is illogical and ridiculous. The petitioner obviously came to know about it when counter affidavits were filed by the opposite parties. The details of only three N.D.P.S. Act cases from 2017 to 2024 have been mentioned in the grounds of detention and documents of only those three cases were supplied to the petitioner, whereas counter affidavits indicate that the subjective satisfaction of the Detaining Authority was not based only on three N.D.P.S. Act cases from 2017 to 2024, but on eight cases from 2005 to 2024 and thereby the petitioner was not afforded reasonable opportunity of making effective representation against the order of detention.

We are not entering into the disputed questions of fact whether the petitioner has submitted representation as annexed to the writ petition as Annexure-3 which is dated 17.09.2024 or the representation which is dated 17.09.2024 as annexed to the counter affidavit filed by opposite parties nos.4 and 5 as Annexure-B/7.

In the case on hand, as reflected in the detention order, the petitioner was detained as he was indulged in three N.D.P.S. Act cases. The first case was registered as Kantamal P.S. F.I.R. No.108 of 2017, in which he was on bail and the trial is pending in the Court of learned Addl. Sessions Judge, Kandhamal in C.T. Case No.492 of 2017, the second case was registered on 11.03.2023 vide Odisha Excise P.R. No.1022 of 2022-23 in which the petitioner has been enlarged on bail by this Court even more than one year prior to the order of detention and the third case was registered on 25.01.2024 vide NCB Bhubaneswar Crime No.02 of 2024 in which the petitioner has been enlarged on bail by this Court. The other five cases are stale cases which were from 2005 onwards. If those stale cases are taken out of consideration and if after being released in 2017 N.D.P.S. Act case, the petitioner involved himself in 2023 N.D.P.S. Act case and again after being released in bail, he involved himself in 2024 N.D.P.S. Act case, since in the N.D.P.S. Act cases, stringent punishment is prescribed and there is also bar under section 37 of the N.D.P.S. Act in the matter of grant of bail, for misutilising the liberty by the petitioner, application for cancellation of bail could have been moved by the State and in that event, ordinary criminal law has provided sufficient means to address the situation. The Authority having not taken recourse to such remedy, has taken recourse to the provisions of the 1988 Act, which is an extraordinary statute, leading to the passing of the impugned detention order.

18. Law is well settled that a Court cannot go into correctness or otherwise of the facts stated or allegations leveled in the grounds in support of detention. A Court of Law is the last appropriate forum to investigate into circumstances of suspicion on which such anticipatory action must be largely based. That, however, does not mean that the subjective satisfaction of Detaining Authority is wholly immune from judicial reviewability. By judicial decisions, Courts have carved out areas, though limited, within which the validity of subjective satisfaction can be tested judicially. The Court must apply its mind as to whether the Detaining Authority has scrupulously followed the procedures and any infraction or procedural lapses which

ultimately result in violation of the fundamental right guaranteed under Article 21 of the Constitution of India, will lead to setting aside the said order.

Subjective satisfaction being a condition precedent for the exercise of the power of preventive detention conferred on the executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority; if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad.

In view of the foregoing discussions, we are of the humble view that the Detaining Authority has recorded its subjective satisfaction not only on the grounds communicated to the petitioner, but there were some other facts and relevant materials before the Authority to arrive at its satisfaction. The involvement of the petitioner in eight cases were before the Detaining Authority which are likely to have influenced it in arriving at its subjective satisfaction, but the same were not mentioned in the grounds of detention. Though the Detaining Authority mentioned in the grounds of detention to have taken into account the involvement of the petitioner only in three criminal cases from 2017 to 2024, but we find that the subjective satisfaction is reached on the basis of eight criminal cases against the petitioner instituted from 2005 to 2024. The Detaining Authority is not justified in taking into account involvement of the petitioner in other five stale cases as spelt out in the counter affidavit when the details of such cases have not been mentioned in the grounds of detention. Therefore, the Detaining Authority cannot be said to have given sufficient opportunity to the petitioner to make an effective representation, in other words, the petitioner is deprived of making an effective representation against the order of detention in compliance to the provisions of Article 22(5) of the Constitution of India read with section 6 of the 1988 Act. The partial withdrawal of grounds of detention by not supplying all the basic facts and materials relied upon by the Detaining Authority to the petitioner shall entail the very detention a nullity for being violative of Article 22(5) of the Constitution of India.

19. Accordingly, the detention order dated 23.07.2024 under Annexure-1 and the consequential confirmation order dated 18.10.2024 under Annexure-4 are liable to be set aside.

Resultantly, the WPCRL is allowed. The impugned detention order dated 23.07.2024 under Annexure-1 and the consequential confirmation order dated 18.10.2024 under Annexure-4 are hereby set aside. The opposite parties are hereby directed to set the petitioner at liberty forthwith, if he is not required to be detained in any other case.

There shall be no order as to cost.

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter WPCRL allowed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I) ILR-CUT-779

MADAN KANHAR @ MITU
V.
STATE OF ODISHA

[JCRLA NO. 08 OF 2008]

07 MARCH 2025

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

Issues for Consideration

1. What are the necessary criteria to meet the standard of a "sterling witness"?
2. When is the recovery made under Section 27 of the Indian Evidence Act, 1872 admissible?

Headnotes

(A) CRIMINAL TRIAL – Sterling Witness – The Appellant was convicted for commission of the offences under Sections 302/379 of the Indian Penal Code, 1860 – The learned Trial Court has relied upon the evidence of P.W.5 as an eyewitness – P.W.5 claims to have witnessed the Appellant assaulting the deceased with an axe and even heard the victim cry out "Mitu Hani Dela" – Despite allegedly seeing such a brutal act, she failed to inform anyone about it until six days after the incident – P.W.5 had a close relationship with the deceased's family which introduces a strong possibility of bias – Whether the testimony of P.W.5 meets the standard of "sterling witness".

Held: No – An eyewitness must be of the highest quality and credibility, and their version should be so unimpeachable that it can be accepted at its face value without hesitation – A sterling witness must provide a natural and consistent account that withstands rigorous cross-examination and aligns with the overall case of the prosecution. (Para 13)

(B) INDIAN EVIDENCE ACT, 1872 – Section 27 – When the recovery can be admissible under Section 27 – P.W.9 confirmed that Ext.9/1, the statement recorded U/s. 27 of the Evidence Act was not prepared in his presence or in the presence of other witnesses – Rather he arrived at the Police Station after the preparation of the document – The forensic analysis was also inconclusive in determining whether the blood detected on the clothes was human blood or of the deceased – Whether inconclusive forensic evidence can establish any direct connection between the Appellant and the crime.

Held: No – For a recovery to be admissible under Section 27, the information given by the accused must lead to a new fact directly connected

to the crime – However, in the present case, there is no independent evidence proving that the clothes belonged to the Appellant at the time of the crime, nor does the forensic report conclusively support the prosecution's case – In the absence of a reliable disclosure statement and conclusive scientific results, the prosecution's attempt to use this recovery as incriminating evidence against the Appellant is untenable. (Para 15)

Citations Reference

Sharad Birdhi Chand Sarda v. State of Maharashtra, (1984) 4 SCC 116; Naresh @ Nehru vs. State of Haryana, 2023 INSC 889; Rai Sandeep @ Deepu alias Deepu Vs. State (NCT of Delhi), **(2012) 8 SCC 21**; Manjunath & Ors. vs. State of Karnataka, **2023 LiveLaw (SC) 961**; Navaneethakrishnan vs. State, (2018) 16 SCC 161 ─ **referred to.**

List of Acts

Indian Evidence Act, 1872; Indian Penal Code, 1860.

Keywords

Sterling witness; Recovery; Admissibility; Chemical examination report.

Case Arising From

Judgment of conviction dated 2nd of January, 2008 passed by Sessions Judge, Phulbani in Sessions Trial No.94 of 2005.

Appearances for Parties

For Appellant : Mr. Jambeswar Pati
For Respondent : Mr. Aurobinda Mohanty, Addl. Standing Counsel

Judgment/Order

Judgment

CHITTARANJAN DASH, J.

1. The Appellant, namely Madan Kanhar @ Mitu, faced the trial on the charges under Sections 302/379 of the Indian Penal Code (in short, hereinafter referred to as "IPC") before the learned Sessions Judge, Phulbani, in Sessions Trial No. 94 of 2005, wherein, the learned Court found him guilty for the offence under Section 302 IPC and sentenced him to undergo imprisonment for life. He was, however, not found guilty u/s 379 IPC and was acquitted therefrom.

2. The prosecution case, in brief, is that the deceased had gone to collect firewood in the Talemba Hill area, but did not return home. Her mother namely Kaina Jani, P.W.2, went in search of her and found her lifeless body in the jungle. The body had visible injuries on the head, scapular region and legs, and her ear lobes were found lacerated. A missing ornament ('kanafasa') further supported the

suspicion of foul play. Around 10-12 days before her death, the deceased had a quarrel with Panamati, in whose house the Appellant resided. The informant, P.W.1, reported the matter to the police, leading to the registration of Khajuripada P.S. Case No. 24/05, vide Ext.1, and the investigation commenced.

3. In course of the investigation, the I.O. visited the spot, prepared the spot map vide Ext. 13, and conducted inquest over the dead body of the deceased, collected blood-stained earth and sample earth from the spot. The I.O. detected an axe lying two feet away from the dead body, stained with blood and with strands of hair attached. The axe (M.O.VI) was seized as the suspected weapon of offense. The deceased's saree, blouse, and other clothing were also seized. The dead body was sent for post-mortem examination and the report (Ext.6) confirmed that the cause of death was due to shock and hemorrhage resulting from antemortem injuries. The Accused-Appellant was arrested on 13.04.2005, and while he was in police custody, he voluntarily disclosed that he had washed his blood-stained clothes in a tank and hidden them in Panamati's house. Upon leading the police and witnesses to the location, the Appellant gave recovery of his half-shirt and napkin, both of which were later found to have human bloodstains. The seized exhibits, including the weapon, were sent to S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination. On completion of the investigation, charge sheet was submitted against the Appellant to face trial.

4. The case of the defence is one of complete denial and false accusations.

5. To bring home the charge, the prosecution examined 13 witnesses in all. P.W.1 being the informant, P.W.2 is the mother of the deceased, P.Ws. 3, 4 and 8 are the seizure witness, P.W.5 is the alleged eyewitness, P.W.6 is the doctor who conducted post-mortem examination, P.W.7 is a police constable, P.W.9 is witness to the leading to discovery, P.Ws. 10 and 11 are the co-villagers of the deceased and the Appellant, P.W.12 is the agnatic cousin of the deceased and a co-villager, and finally P.W.13 is the I.O.

6. The learned trial Court leaning to the side of prosecution, believing the evidence of P.W.5 in particular, found the prosecution to have proved its case beyond all reasonable doubt and held the Appellant guilty and convicted him awarding sentence as described above.

7. Mr. Jambeswar Pati, learned counsel appearing on behalf of the Appellant, argues that the case of the prosecution suffers from significant inconsistencies and lacks the certainty required to establish the guilt beyond all reasonable doubt. He submits that, firstly, the testimony of P.W.5, the alleged eyewitness, fails to meet the standard of a "sterling witness" as laid down by the Hon'ble Supreme Court. Her prolonged silence, the failure to examine the other persons she mentioned, and her close ties with the deceased's family, make her testimony unreliable. Secondly, the evidence related to the so-called discovery under Section 27 of the Indian Evidence Act is riddled with contradictions. P.W.9, the witness to the discovery, categorically

stated that the Appellant never made any disclosure before him and that the police merely informed him of the alleged statement. Moreover, the seizure of the Appellant's clothes, despite being found with bloodstains, does not strengthen the prosecution's case, since the chemical examination report was inconclusive, failing to confirm whether the blood was human or linked to the deceased. Mr. Pati further submits that, P.W.6's medical opinion regarding the possibility of injuries being caused by M.O.VI remains inconclusive, as he could not confirm whether the same axe was sent to him due to the absence of identification marks. This coupled with the inconclusive forensic report, prevents any definitive linkage between the Appellant and the alleged weapon of offense. Lastly, there is no direct evidence or unimpeachable circumstantial evidence linking the Appellant to the crime. The chain of circumstances remains incomplete, failing the test laid down in ***Sharad Birdhi Chand Sarda v. State of Maharashtra*** reported in **(1984) 4 SCC 116,** where the Supreme Court held that, every link in the chain of circumstantial evidence must be established beyond reasonable doubt to convict an accused. Mr. Pati concludes his argument by submitting that mere suspicion or weak circumstantial evidence cannot substitute the high threshold of proof required in a criminal trial and, therefore, the Appellant deserves the benefit of doubt, and his conviction cannot be sustained in law.

8. Mr. Aurobindo Mohanty, learned Additional Standing Counsel, on the other hand, contends that the evidence on record sufficiently establishes the guilt of the Appellant beyond all reasonable doubt. P.W.5, despite her delayed disclosure, remains a crucial eyewitness, who directly implicated the Appellant, stating that she saw him attacking the deceased with an axe. Her testimony is corroborated by the medical evidence provided by P.W.6, who confirmed that the injuries sustained by the deceased were consistent with those caused by a sharp-edged weapon like an axe. Furthermore, recovery of the Appellant's blood-stained clothes pursuant to his disclosure statement under Section 27 of the Indian Evidence Act remains a significant piece of evidence. Mr. Pati argues that the presence of bloodstains on the Appellant's clothing, even though inconclusive in the chemical examination report, reinforces the possibility of his involvement. He further contends that the strained relationship between the deceased and the Appellant, arising from the Appellant's alleged marriage proposal and the prior altercations with Panamati, provides a strong motive for the crime. The post-mortem report confirms that the injuries sustained by the deceased were homicidal in nature and not the result of an accidental fall, ruling out any other plausible explanation for her death. While the Appellant attempts to discredit the chain of circumstances, it remains intact and sufficiently compelling, when viewed in its entirety. Mr. Mohanty, learned counsel for the State asserts that minor inconsistencies do not vitiate an otherwise credible prosecution case, especially when the overall evidence points towards the Appellant's guilt. He finally submits that, considering the direct eyewitness account, medical evidence, motive and circumstantial factors, the conviction of the Appellant under Section 302 IPC is justified and ought to be upheld.

9. Having regard to the arguments advanced by the learned counsel for the respective parties, it is incumbent to deal with the testimonies of the relevant witnesses for better appreciation of the case.

P.W.1, Mogul Jani, is the informant and a co-villager. In his sworn testimony he states that, about 15 days prior to the FIR, the deceased had told him that over a dispute between her and one Panamati (in whose house the Appellant was staying) in regard to the share of rice, she assaulted Panamati. On the date of occurrence, the deceased left her house at about 8:30 a.m. to fetch firewood from the jungle, but never returned. P.W.2, the mother of the deceased went to look for her daughter and found her daughter's dead body lying in the jungle. At about 03:00 p.m., P.W.2 narrated everything to P.W.1 and accordingly he reported to the police. He was present when the inquest was conducted by the I.O. in the Talamba Hill. He noticed cut injuries over the scapular region and back of the head over neck as well as earlobes lacerated. No ornament was found on her ears. In his cross-examination, he states that the Appellant is not related to Panamati and denied to have mentioned about the dispute between the deceased and Panamati before the I.O.

P.W.2, Kaina Jani, is the mother of the deceased. She stated that her daughter left home to collect firewood at about 8 a.m. and when she did not return by 12 noon, she went to look for her. As she reached the hill, she found her daughter to be lying dead. She noticed injuries on the head, scapular region, legs, etc. She also found that her daughter's 'kanafasa' (a type of ear-ring) was missing and her earlobes were lacerated. She corroborated with P.W.1's account of the dispute between the deceased and Panamati about 10-12 days prior to the occurrence.

P.W.5, Sabitri Jani, is a co-villager. She states that on the date of occurrence, she, Sukanti and Sadhabani had gone to Baradi Mundia to collect fire wood. They noticed that the deceased had gone to Tolamba Hill to collect firewood and she was about 60 cubits away from them. At about 10:00 a.m., P.W.5 heard a cry raised by the deceased shouting "Mitu hani dela." They all rushed towards the deceased and saw the Appellant giving axe blows to the deceased. When the deceased saw them, he threatened to kill them as well, if they disclosed about the incident to anyone. Out of fear, all three of them did not venture to tell anybody about what they saw. In her cross-examination, P.W.5 states that both Baradi Mundia and Tolamba Hills are situated side by side. She further states that the Appellant had gone with her, Sukanti and Sadhabani to the Hill together, but on the way he proceeded towards Tolamba and the others went on to Baradi. She explains that she saw the Appellant chasing the deceased and giving blows, and the deceased was seen to be running into the hill and not towards the road, which she saw from behind. She was interrogated about six days after the incident and before that she had not disclosed this fact before anyone.

P.W.9, Mukteswar Mallik, is the witness to the leading to discovery. In his sworn testimony, he states that he was called by the police on 13.04.2005. In the police station, the Appellant stated before the police that after killing the deceased, he washed his wearing apparels in a tank and had kept the same in the house of Panamati, where he was residing. The police then took P.W.9 and the Appellant to

Panamati's house, where the Appellant brought out the clothes, such as a towel, a lungi and a half shirt which were then seized in front of P.W.9. In his cross-examination, he said to have been to the police station for his sisters, as they were held up there in connection with this case. He further states that Ext.9/1 was not prepared in his presence or others, and it was already prepared before his arrival. However, the Appellant did make the statement in his presence at about 03:00 p.m. The police then told P.W.9 and others that since the Appellant had disclosed where he has kept his clothes, they should accompany them to witness the seizure. P.W.9 affirms that the Appellant did not make any statement to the police in his presence and whatever he has stated was told to him by the police. He further states that the Appellant did not disclose before him and others that after killing the deceased, he washed his wearing apparels in a tank and kept the same in the house of Panamati.

P.W.10, Sabita Mallik, is a co-villager, who denied to have known anything about the case at all. She further denied to the leading questions put to her by reading out her statement u/s 161 CrPC, where she had mentioned that the Appellant was in love with the deceased. In her cross-examination, she states that she was not interrogated by the police. Moreover, the police had only taken down her name and address and had asked her nothing.

P.W.12, Mrutyunjaya Jani, is a cousin of the deceased. He stated that he knew about the assault made by the deceased to Panamati from the deceased's mother. In the village, P.W.9 had often seen the deceased and the Appellant together. The deceased had also told him that the Appellant had proposed her to marry him, but she was unwilling to marry him. Because of the dispute between the deceased and Panamati and unacceptance of the marriage proposal, the relationship between Appellant and deceased was strained.

10. Before analysing the culpability of the Appellant, it is incumbent to examine if the prosecution could successfully establish the death of the deceased to be homicidal in nature. P.W.6, the medical officer who conducted the post-mortem examination report, has opined the following :

> **External injuries:**
> (i) One chopped wound (incised) at the lower base of right-side neck 3½" x 2" x 3" with margins showing abrasions and bruising and cutting of neck muscles and underlining vessels and nerves and the cervical vertebras 6th 7th fractured and spinal and exposed outside.
>
> (ii) Incised wound on skull over left parieto-occipital region of size 7" x 2" x 2" with communicated fracture of left parietal bone ½" above left pinna. Underlying (illegible) and brain matters found spilled out. One haematoma with 150 ml blood was present.
>
> (iii) An incised wound 3½" x 1½" x 1½" on the middle of the right scapula cutting the muscles and subcutaneous tissues. Maggots were present.
>
> (iv) Incised wound on the inferior boarder of left scapula of size 2" x 1½" x 1½" involving the subcutaneous tissue and muscles

(v) Incised wound 2" x 1" x 1" on the top of left shoulder with cutting of underlying muscles and fracture of left clavicle with blood cloth of 100 ml.

(vi) Bruise of 2" x 1" size on left lower quadrant of left abdomen

(vii) Bruise and abrasion of right tip point of size 3" x 1".

(viii) Bruise of 3" x 2" in between both scapula.

(ix) Multiple minute abrasions on the back of both lower legs.

On dissection :

(a) Corresponding to injury (i), involvement of deep cervical fascia, deep muscles, internal carotid artery and internal jugular vein and prevertebral fascia were cut with disruption of cervical 6^{th} & 7^{th} vertebra exposing the spinal cord was found.

(b) With reference to injury (ii), depressed communicated fracture of parieto occipital bone with intra cerebellar laceration and haematoma was found.

P.W.6 opined the cause of death is due to shock and haemorrhage. Injuries (i) and (ii) can cause immediate shock and haemorrhage and sufficient to cause death in ordinary course. The death occurred within 36 hours of the time of postmortem. No sign of sexual violence found. In his cross-examination, he ruled out the possibility of the injuries to be caused by a fall from a height on a rocky surface with sharp edges of stones coming in contact with the body. All except injury (i) are possible by such fall.

11. The post-mortem findings of P.W.6 unequivocally establish that the death of the deceased was homicidal in nature. The multiple incised wounds on the neck, skull, scapula, and shoulder, along with the fractures and lacerations in vital parts of the body such as the cervical vertebrae, brain matter, and major blood vessels, indicate a deliberate and forceful assault rather than an accidental fall. The nature, depth, and pattern of the injuries are consistent with sharp-edged weapon trauma, when P.W.6 specifically ruled out the possibility of these injuries resulting from a fall on a rocky surface, except for injury (i). Furthermore, the extent of blood loss and damage to critical anatomical structures caused immediate shock and haemorrhage, leading to death within an estimated 36 hours before the post-mortem. P.W.6 further acknowledged that some injuries cannot be caused by a single stroke with M.O.VI, the overall pattern of wounds suggests a sustained and intentional attack rather than an accidental occurrence. In light of these observations, there is no doubt that the death of the deceased was a result of homicidal violence.

12. Coming to the culpability of the Appellant, the learned trial Court has relied upon the evidence of P.W.5 as an eye-witness. While appreciating the prosecution case, in this regard, reference may be made to the decision of the Hon'ble Apex Court in the matter of ***Naresh @ Nehru vs. State of Haryana, reported in 2023 INSC 889 –***

> "9.3 As noticed hereinabove, the evidence of the eyewitness should be of very sterling quality and calibre and it should not only instil confidence in the court to accept the same but it should also be a version of such nature that can be accepted at its face value. This Court in the case of Rai Sandeep @ Deepu alias Deepu Vs. State (NCT of Delhi) (2012) 8 SCC 21 has held:

"22. In our considered opinion, the "sterling witness" should be of very high quality and calibre, whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such 13 as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

13. In the instant case, the testimony of P.W.5, the supposed eyewitness, fails to meet the standard of a "sterling witness", as laid down by the Hon'ble Supreme Court. The Court has held that, an eyewitness must be of the highest quality and credibility, and their version should be so unimpeachable that it can be accepted at its face value without hesitation. A sterling witness must provide a natural and consistent account that withstands rigorous cross-examination and aligns with the overall case of the prosecution. A major flaw in P.W.5's statement is her delayed disclosure. She claims to have witnessed the Appellant assaulting the deceased with an axe and even heard the victim cry out, "MITU HANI DELA." Despite allegedly seeing such a brutal act, she failed to inform anyone about it until six days after the incident. This delay in disclosure raises serious doubts about the credibility of her testimony. If she had genuinely witnessed a murder, her silence is highly unnatural and unexplained. The reason given that she was threatened by the Appellant appears weak, as she was in the company of two others, who were also not examined as witnesses. Their absence in the trial further weakens her statement, as the prosecution failed to bring forward independent witnesses to substantiate her claims. There is no evidence on record that the Appellant was having criminal background. The police was coming to the village from the date of occurrence in connection with the investigation of the case. Therefore, it is difficult to accept that, on account of

threats given by the Appellant, there was delayed disclosure. If, in spite of presence of the police in the village, she was in a state of fear as the Appellant had not been arrested, then how her fear dispersed when she gave her statement to police six days after the occurrence, as by that time the Appellant was in large, which creates doubt about the truthfulness of her version.

Moreover, P.W.5 had a close relationship with the deceased's family, which introduces a strong possibility of bias. This factor further diminishes the reliability of her statement, as she had a natural inclination to support the prosecution's case. If she truly saw the murder take place, it is highly improbable that she would have remained silent for such a prolonged period. Her hesitation in reporting such a grave crime contradicts normal human behaviour and casts significant doubt on her credibility. Additionally, her account lacks coherence, as she first states that the deceased was running into the hill while the Appellant was chasing her, yet she later describes witnessing the assault from behind. These inconsistencies make her testimony unreliable. The Supreme Court's decision in ***Rai Sandeep @ Deepu (Supra)*** underscores that a sterling witness's testimony must be free from any contradictions, should be wholly reliable, and should not require corroboration. P.W.5's testimony does not meet this high standard. Her delay in reporting, lack of corroboration from other potential witnesses, and the improbability of her silence make it unsafe to rely on her statement. Given these shortcomings, her evidence does not inspire confidence and should not be considered sufficient to uphold a conviction.

14. Moving on to the next circumstance for consideration, the prosecution relied on the alleged discovery of blood-stained clothes under Section 27 of the Indian Evidence Act. As in the matter of ***Manjunath & Ors. vs. State of Karnataka,*** reported in **2023 LiveLaw (SC) 961,** it is so discussed by the Apex Court that –

> 26. Further discovery made, to be one satisfying the requirements of Section 27, Indian Evidence Act it must be a fact that is discovered as a consequence of information received from a person in custody. The conditions have been discussed by the Privy Council in **Pulukuri Kotayya v. King Emperor 1946 SCC OnLine PC 47** and the position was reiterated by this Court in **Mohd. Inayatullah v. State of Maharashtra (1976) 1 SCC 828**, in the following terms:-
>
> "12…It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the

information supplied by the accused which is the direct and immediate cause of the discovery…" *(Emphasis supplied)*

15. In the instant case, P.W.9, who was presented as a witness to the Appellant's alleged disclosure, explicitly stated in his cross-examination that the Appellant never made any statement before him. Instead, he admitted that the police merely informed him about the alleged disclosure and led him to witness the subsequent seizure. This directly contradicts the requirement under Section 27 of the Indian Evidence Act, 1872, which mandates that, only such information given by the accused in police custody, leading to the discovery of a fact previously unknown, is admissible. Since P.W.9 himself did not hear the Appellant's alleged statement, the very foundation of the prosecution's reliance on this discovery is rendered inadmissible and unreliable. Furthermore, P.W.9 confirmed that Ext. 9/1, the statement recorded under Section 27 of the Evidence Act, was not prepared in his presence or in the presence of other witnesses. Rather, he arrived at the police station after the document had already been prepared. This raises serious doubts about the authenticity of the alleged disclosure. If the document was prepared in prior, it suggests that the statement attributed to the Appellant may not have been voluntary.

Moreover, the chemical examination report (Ext.15) further weakens the prosecution's case. While blood was detected on the lungi, half-shirt and napkin seized under Ext. 8, the forensic analysis was inconclusive in determining whether it was human blood or linking it to the deceased. This inconclusiveness means that the forensic evidence lacks probative value and fails to establish any direct connection between the Appellant and the crime. Even if it is assumed that the Appellant washed his clothes, thereby diluting any potential forensic evidence, this mere assumption does not establish his culpability. The principle laid down in ***Navaneethakrishnan vs. State*** reported in **(2018) 16 SCC 161,** reiterates that "there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions."

For a recovery to be admissible under Section 27, the information given by the accused must lead to a new fact directly connected to the crime. However, in the present case, there is no independent evidence proving that the clothes belonged to the Appellant at the time of the crime, nor does the forensic report conclusively support the prosecution's case. In the absence of a reliable disclosure statement and conclusive scientific results, the prosecution's attempt to use this recovery as incriminating evidence against the Appellant is untenable.

16. Moreover, P.W.6, the Medical Officer, who conducted the post-mortem examination, opined that the injuries sustained by the deceased were possible with an axe like M.O.VI. However, he explicitly stated that he could not confirm whether the same axe was sent to him for examination, as it lacked any identifying marks. This uncertainty, coupled with the fact that the chemical examination report (Ext. 15) was inconclusive regarding the presence of human blood on M.O.VI, prevents any definitive inference that this was the weapon of offense. The prosecution's burden was to establish a clear and unambiguous link between M.O.VI and the crime, yet the absence of conclusive forensic evidence and the lack of certainty from the expert witness only serve to weaken their case. Even the prosecution has failed to prove through the evidence of P.W.5, the sole eyewitness that M.O.VI was the weapon of offense. In the absence of

concrete proof, M.O.VI cannot be conclusively identified as the weapon of offense, thereby failing to substantiate the prosecution's claim beyond reasonable doubt.

17. P.W.10, who was purportedly aware of a past relationship between the Appellant and the deceased, outrightly denied any knowledge of the case. The remaining witnesses, including P.W.1 and P.W.2, primarily spoke about circumstantial aspects, such as prior disputes with the person in whose house the Appellant used to live in, but not with the Appellant directly. These contradictions and gaps in the prosecution's narrative not only diminish the reliability of the witness testimonies but also fail to establish an unbroken chain of events pointing exclusively to the guilt of the Appellant.

18. In toto, while the death of the deceased was undoubtedly proved to be homicidal in nature and deeply tragic, the fundamental principle of criminal jurisprudence mandates that the prosecution must establish the guilt of the accused beyond all reasonable doubt. As laid down in ***Sharad Birdhi Chand Sarda v. State of Maharashtra*** reported in **(1984) 4 SCC 116,** the burden lies squarely upon the prosecution to prove the case with conclusive and cogent evidence, ensuring that there is no scope for any reasonable doubt. In the instant case, the discrepancies in the eyewitness testimony, the inconsistencies in the discovery of evidence, and the inconclusive forensic findings collectively fail to establish an unbroken chain of circumstances leading solely to the Appellant's guilt. The testimony of P.W.5, the supposed eyewitness, lacks the sterling quality required for unassailable reliance, and the alleged confession under Section 27 of the Evidence Act is fraught with procedural infirmities. Moreover, while the post-mortem report confirms the homicidal nature of death, it does not conclusively link the Appellant to the crime. Therefore, in the absence of unimpeachable and irrefutable evidence, the benefit of doubt must necessarily go to the Appellant, as no conviction can be sustained on mere suspicion or weak circumstantial evidence. The administration of justice demands nothing less than proof beyond reasonable doubt, and in its absence, the Appellant's culpability remains unproven.

19. In view of the discussions as above, in our considered view, the prosecution has not been able to prove its case beyond all reasonable doubt and is not sufficient to ascribe the guilt on the Appellant.

20. Accordingly, the judgment and order of conviction dated 02.01.2008 passed by the learned Sessions Judge, Phulbani in Sessions Trial No.94 of 2005 is hereby set aside. The Appeal is allowed.

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter Appeal allowed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I) ILR-CUT-790

M/s. MEHER AGENCIES, NUAPADA
V.
STATE OF ODISHA, COMMISSIONER-CUM-SECY, (FISHERIES & ANIMAL RESOURCES DEVELOPMENT DEPT.) & ANR.

[W.P.(C) NO. 4540 OF 2025]

18 FEBRUARY 2025

[K.R. MOHAPATRA, J. & SANJAY KUMAR MISHRA, J.]

Issues for Consideration

Whether the pre-condition/requirement fixed by the tender inviting authority can be said as arbitrary or *mala fide* in absence of any material in support of the same.

Headnotes

CONSTITUTION OF INDIA, 1950 – Arts 226 & 227 – Tender matter – Scope of interference – The petitioner challenges the pre-qualification of bidders as mentioned in Clauses 5.2.6.1 and 5.2.6.2 – Whether the pre-condition/requirement fixed by the Tender Inviting Authority can be said as arbitrary or *mala fide* in absence of any material in support of the same.

Held: No – There is also no material on record to come to a conclusion that imposition of condition is *mala fide* and unreasonable – The Tender Inviting Authority, applying its mind and taking into consideration the requirements, fixed certain conditions in the tender, which cannot be said to be illegal, arbitrary or *mala fide* in absence of any material. (Para 12)

Further, the conditions so imposed cannot be said to be against the public interest – No such allegation or averment is also made in the writ petition. (Para 12.1)

Citations Reference

M/s. Winners Pharma, Cuttack Vs. State of Odisha and another, **W.P.(C) No.1110 of 2025 (dt. 16.01.2025);** Tata Cellular Vs. Union of India; **(1994) 6 SCC 651;** Jagdish Mandal Vs. State of Odisha; **(2007) 14 SCC 517 – referred to.**

List of Acts

Constitution of India, 1950.

Keywords

Tender; Conditions/requirements; Absence of material; *Mala fide;* Illegal, Arbitrary.

Case Arising From

Detailed Tender Call Notice (DTCN) vide bid reference No. 01/2024-25, DAHVS Veterinary Care Equipment /Consumables / Ancillaries dated 30th January, 2025.

Appearances for Parties

For Petitioner : Mr. Adwitiya Satapathy
For Opp.Parties : Mr. Swayambhu Mishra, ASC

Judgment/Order

Judgment

BY THE BENCH;

1. This matter is taken up through hybrid mode.

2. Petitioner in this writ petition prays for a direction to strike down Clauses 3.1, 5.2.6.1 and 5.2.6.2 of Detailed Tender Call Notice (DTCN) vide bid reference No.01/2024-25, DAHVS Veterinary Care Equipment/Consumables/Ancillaries dated 30th January, 2025 (Annexure-2).

3. Mr. Satpathy, learned counsel for the Petitioner submits that Petitioner is a registered dealer, distributor, whole-seller and supplier of Veterinary medicines, drugs, chemicals, veterinary equipments and instruments. The Director, Directorate of Animal Husbandry and Veterinary Services, Government of Odisha- Opposite Party No. 2 came up with aforesaid DTCN under Annexure-2. But the impugned Clauses of the DTCN prevent the Petitioner to participate in the tender process. He drew attention to Clause 3.1 of the Tender Schedule. Clause 3 thereof deals with Earnest Money Deposit (EMD), which reads as under.

3	*Earnest Money Deposit*	*Bidders except MSE/ OSME & START-Ups are required to deposit EMD of Rs.1,00,00,000/- (Rupees One crore) as per Rule 212(1) of OGFR 2023 and vide MSME Department Notification No.566/MSME dt.24.01.2024 as bid security.* *The OSME/local MSE & Start-Ups of Odisha are exempted to furnish the EMD. To claim exemption the bidders must have to submit the supporting documents."*

4. It is his submission that the bidders except MSE/OSME and START-Ups are required to deposit EMD of Rs.1,00,00,000/- (Rupees One crore) as per Rule 212(1) of the Odisha General Financial Rules, 2023 (for brevity, 'OGFR') and vide

MSME Department Notification No.566/MSME dated 24th January, 2024, the Petitioner is not a MSE/OSME and START-Up unit. Thus, it is not exempted from depositing the EMD and is required to make a deposit of Rs.1,00,00,000/- (Rupees One crore) as EMD along with the tender document.

5. He further submits that Clause 5.2 of DTCN deals with Pre-Qualification of Bidders. Clauses 5.2.6.1 and 5.2.6.2 thereof are relevant for consideration, which read as under.

> *"5.2.6.1. Proof of annual average turnover (Manufacturers/Importer) of Rs.5.50 Cr(Five Crore Fifty Lakh) or more in any three (3) consecutive financial years during 2018-19, 2019-20, 2020-21, 2021-22, 2022-23 certified by the Chartered Accountant mentioning the UDIN as per the format at Format T8. The turnover for Odisha SME will be relaxed by 90% that applicable to normal bidder as per MSME Deptt. Notification No 566 dt 24.01.2024.*
>
> *5.2.6.2. The Bidder (manufacturer, supplier, distributor, importer) must have 3 (three) years' experience in supplying Veterinary equipment and instruments of its own manufacturing or reputed manufacturers of National level to Central & State Government/ semi Govt. organizations, PSUs with annual average worth of Rs.4.50 Cr. or more in the any three (3) financial years during 2018-19, 2019-20, 202021, 2021-22, 2022-23. The Bidders are required to submit the proof of supply i.e. purchase order and the copy of invoice. The Odisha SME are fully exempted from past work experience criteria as per MSME Deptt. Notification No.566 dt. 24.01.2024."*

6. It is his submission that the Clause 5.2.6.1 makes it clear that bidders like Petitioner should have annual average turnover of Rs.5,50,00,000/- (Rupees Five Crore Fifty Lakh) or more in any three consecutive financial years during 2018-19, 2019-20, 2020-21, 2021-22 and 2022-23. Likewise, as per requirement of Clause No.5.2.6.2 of DTCN, the bidder must have three years' experience in supplying veterinary equipments and instruments of its own manufacturing or reputed manufacturers of National Level to Central and State Government/Semi Government Organizations, PSUs with annual average worth of Rs.4.50 crore or more in any three financial years, as above. Thus, by introducing these Clauses in DTCN, the Tender Inviting Authority did not leave level playing field for the bidders like the Petitioner. Lot of intended bidders like the Petitioner will be deprived of submitting their bids complying with the aforesaid bid conditions. He, therefore, submits that the aforesaid clauses are arbitrary and unreasonable and need to be struck down. He further submits that as per Rule 212 (1) of OGFR, the EMD should be within 2% to 5% of the estimated value of the goods to be procured. In the DTCN, no such amount has been stated. Thus, the authorities arbitrarily fixed an EMD at Rs.1,00,00,000/- (Rupees One crore) and introduced unreasonable conditions as per Clause 5.2.6.1 and 5.2.6.2, which are liable to be struck down.

7. Mr. Mishra, learned Additional Standing Counsel submits that in W.P.(C) No.1110 of 2025 ***(M/s. Winners Pharma, Cuttack Vs. State of Odisha and another),*** similar question came up for consideration. In the said writ petition, this Court vide judgment dated 16th January, 2025 taking into consideration the ratio

decided in the case of ***Tata Cellular Vs. Union of India;*** (1994) 6 SCC 651 and ***Jagdish Mandal Vs. State of Odisha;*** (2007) 14 SCC 517 along with other case laws, held that judicial review of a tender condition can be made, if the Petitioner satisfies the following pre-conditions, i.e.,

> "(i) Whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone;
>
> (ii) Whether the process adopted or decision taken is so arbitrary and irrational that the Court can say: *'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached',* or
>
> (iii) Whether public interest is affected."

None of the aforesaid conditions is satisfied in the instant case. No mala fide against the Tender Inviting Authority is alleged by the Petitioner in the instant case and it is not stated as to how the impugned conditions are affecting public interest. Hence, the writ petition merits no consideration and is liable to be dismissed.

8. Heard learned counsel for the parties and perused the materials on record, more particularly, the case of ***Jagdish Mandal*** (supra), wherein the Hon'ble Supreme Court, while dealing with the scope of interference in a tender, tender conditions or contractual matters in exercise of power of judicial review, held as under.

> *"…… Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:*
>
> *(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;*
>
> *OR*
>
> *Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";*
>
> *(ii) Whether public interest is affected.*
>
> *If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/ contractor or distribution of State largesse (allotment of sites/shops, grant of licenses, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."*

9. Thus, as per the settled position of law, this Court has a very limited scope of judicial review in tender and contractual matters. The case of the Petitioner has to be considered keeping in mind the ratio decided, as stated above.

10. Mr. Satpathy, learned counsel for the Petitioner submits that Rule 212(1) of OGFR clearly stipulates that EMD should be 2% to 5% of the estimated value of the goods to be procured. In the instant case, no estimated value of the goods to be procured has been stated in the DTCN. He, therefore, submits that the tender condition requiring a bidder to deposit EMD of Rs.1,00,00,000/- (Rupees One crore)

is illegal and arbitrary. No specific allegation is made in the writ petition stating as to how such tender condition is so arbitrary or irrational that a responsible tender authority like the Opposite Party No. 2 in the instant case could have reasonably and in accordance with law introduced it as an essential condition. It is only stated that EMD is not in consonance with Rule 212 (1) of the OGFR, 2023.

11. In a particular tender call notice, it is not always possible to state the estimated value of the goods to be procured, as in the instant case. However, keeping in mind the requirement of the goods to be procured, EMD of Rs.1,00,00,000/- (Rupees One crore) has been fixed by the Tender Inviting Authority. That itself cannot be said to be arbitrary or *mala fide* unless a specific allegation is attributed. In the instant case, no such allegation has been made or material produced to appreciate the allegation. On a conspectus of the relevant tender conditions vis-à-vis the condition regarding deposit of EMD, it does not appear to be unreasonable.

12. A feeble argument is made that bidders like the Petitioner will be deprived of participating in the tender process and there will be no fair competition or level playing field for the bidders like the Petitioner. As yet, the bids submitted by the intending bidders have not been opened. Thus, it is very difficult at this stage to accept the submission of Mr. Satpathy, learned counsel for the Petitioner, more particularly, in absence of any material in support of the same. There is also no material on record to come to a conclusion that imposition of condition is mala fide and unreasonable. The Tender Inviting Authority, applying its mind and taking into consideration the requirements, fixed certain conditions in the tender, which cannot be said to be illegal, arbitrary or mala fide in absence of any material. Only because the Petitioner is a registered dealer, distributor, wholeseller and supplier of Veterinary medicines, drugs, chemicals, veterinary equipments and instruments, that itself would not make the Petitioner entitled or eligible to participate in the tender process for procurement of materials it is dealing with, like the instant one, if it does not satisfy the tender conditions in the DTCN.

12.1 Further, the conditions so imposed cannot be said to be against the public interest. No such allegation or averment is also made in the writ petition.

13. In that view of the matter, the writ petition merits no consideration and is accordingly dismissed. In the circumstances, there shall be no order as to costs.

Urgent certified copy of the order shall be supplied as per rules, if applied for.

Headnotes prepared by:
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Writ Petition dismissed.

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2025 (I) ILR-CUT-795

NILAMADHAB SAHU
V.
CHIEF ENGINEER, MINOR IRRIGATION, ODISHA BHUBANESWAR & ORS.

[W.P.(C) NO. 3076 OF 2016]

28 FEBRUARY 2025

[K.R. MOHAPATRA, J. & SANJAY KUMAR MISHRA, J.]

Issues for Consideration

Whether the Industrial Adjudicator has the jurisdiction to adjudicate a disputed question of fact in exercise of power U/s. 33-C(2) of the Industrial Disputes Act (ID Act).

Headnotes

INDUSTRIAL DISPUTES ACT, 1947 – Section 33-C(2) – The Petitioner initially appointed as work-charged employee and subsequently promoted as work-charged Concrete Mixture Driver – Though the petitioner discharged the duties in promotional post till his superannuation but he was not paid his arrear salary as per the revised scale of pay – The Petitioner filed application U/s. 33-C(2) of the Act before the Labour Court with a prayer to compute the entitlement and direct the management to release the same – Whether the Industrial Adjudicator has the jurisdiction to adjudicate a disputed question of fact in exercise of power U/s. 33-C(2) of the Industrial Dispute Act.

Held: No – A proceeding U/s. 33-C(2) of the ID Act is in the nature of an execution proceeding – Thus, it should follow that an investigation of the nature of determinations, i.e., (i) the workman's right to relief; (ii) the corresponding liability of the Management, including, whether it is, at all, liable or not is, normally, outside the scope of Section 33-C (2) of ID Act. (Para 10)

This Court is of the considered opinion that the learned Labour Court, in exercise of power under Section 33-C(2) of the ID Act, had no jurisdiction and competence to compute the disputed claim of the Petitioner and issue direction to pay the same, as the same was disputed and denied by the Management. (Para 11)

Citations Reference

Sayal Mal Bhansali Vs. Judge, Labour Courts, Udaipur and another; **1995 (I) LLJ 914, Rajsthan (para-14);** Management of Tingal Ibam Tea Estate Vs. Presiding Officer, Labour Court and another; **2002 (I) LLJ 177 Gauhati**

(para-6 and 7); Uttar Pradesh State Road Transport Corporation, Meerut; **2012 (III) LLJ 461 (All) (para-6);** Municipal Corporation of Delhi Vs. Ganesh Razak and another; **(1995) 1 SCC 235 – referred to.**

List of Acts

Industrial Disputes Act, 1947.

Keywords

Disputed facts; Adjudication; Jurisdiction of Labour Court; Arrear Salary.

Case Arising From

Order dated 16th October, 2014 passed in ID Misc. Case No.56 of 2012 passed by learned Presiding Officer, Labour Court, Bhubaneswar.

Appearances for Parties

For Petitioner : Mr. Ramanath Acharya
For Opp.Parties : Mr. Subha Bikas Panda, AGA

Judgment/Order

Judgment

BY THE BENCH;

1. This matter is taken up through hybrid mode.

2. Petitioner in this writ petition prays to set aside the order dated 16th October, 2014 (Annexure-1) passed in ID Misc. Case No.56 of 2012, wherein, learned Presiding Officer, Labour Court, Bhubaneswar rejected an application filed by the Petitioner under Section 33-C(2) of the Industrial Disputes Act, 1947 (for brevity 'ID Act').

3. Mr. Acharya, learned counsel submits that the Petitioner was initially appointed as a work-charged employee. He was subsequently promoted as work-charged Concrete Mixture Driver in the scale of pay of Rs.625-12-709-EB-12-745-15-790EB-15-940/- vide order dated 29th December, 1991 under Annexure-7 issued by the Superintending Engineer, Southern Minor Irrigation Circle, Berhampur, Ganjam. The scale of pay of Concrete Mixture Driver was subsequently revised and fixed at Rs.3050-4590 vide order dated 12th November, 1999 (Annexure-5) issued by the Chief Engineer, Minor Irrigation, Odisha, Bhubaneswar. Hence, the Petitioner submitted representations to revise his scale of pay accordingly. However, his repeated representations were not considered. Finding no other alternative, the Petitioner filed an application under Section 33-C(2) of the ID Act before the Labour Court, Bhubaneswar, which was dismissed vide order under Annexure-1.

4. It is further submitted by Mr. Acharya, learned Counsel that the Petitioner had a pre-existing right to receive the revised scale of pay in view of his order of

promotion vide Annexure-7 with effect from 29th December, 1991 and the revision in the scale of pay vide Annexure-5 dated 12th November, 1999 (Annexure-5). Although the Petitioner joined the promotional post on 3rd January, 1992 and was discharging his duties as such till the date of his superannuation, i.e., 30th June, 2010, but he was not paid his arrear salary as per the revised scale of pay. The application being filed under Section 33-C(2) of the ID Act, learned Labour Court should have computed the same and directed the Management to pay the legitimate entitlement of the Petitioner. Instead, his application was dismissed ex-parte vide order under Annexure-1. Hence, this writ petition has been filed to set aside the said order dated 16th October, 2014 and direct the Authorities to pay the legitimate dues of the Petitioner as per the revised scale of pay.

5. Mr. Acharya, learned Counsel for the Petitioner, placing reliance on the following decisions of different High Courts, submits that since the Petitioner had a pre-existing right to receive the revised scale of pay, his application under Section 33-C (2) of ID Act was very much maintainable. The case laws relied upon by Mr. Acharya, learned Counsel are as follows;

> *i)* ***Sayal Mal Bhansali Vs. Judge, Labour Courts, Udaipur and another;*** *1995* ***(I) LLJ 914, Rajsthan (para-14)***
>
> *ii)* ***Management of Tingal Ibam Tea Estate Vs. Presiding Officer, Labour Court and another;*** *2002 (I) LLJ 177 Gauhati (para-6 and 7)*
>
> *iii)* ***Uttar Pradesh State Road Transport Corporation, Meerut;*** *2012 (III) LLJ 461 (All) (para-6) 6. Mr. Acharya, learned Counsel further submits that when there was no dispute with regard to revision of scale of pay,*

6. Mr. Acharya, learned Counsel further submits that when there was no dispute with regard to revision of scale of pay, learned Labour Court, exercising its power under Section 33C(2) of the ID Act, ought to have computed the legitimate dues of the Petitioner and granted relief sought for by issuing appropriate direction to release his arrear salary.

7. Per contra, Mr. Panda, learned AGA submits that the proceeding under Section 33-C (2) of the ID Act, is in the nature of an execution proceeding. Hence, the entitlement, if any, of the Petitioner, which needs adjudication, could not have been gone into in such a proceeding. Since there was a dispute as to entitlement of the Petitioner regarding the revised scale of pay and the same being denied by the Employer, the Labour Court has rightly dismissed the application of the Petitioner as the same being beyond its jurisdiction. In support of his submission, Mr. Panda, learned AGA places reliance on the judgment of Hon'ble Supreme Court in ***Municipal Corporation of Delhi Vs. Ganesh Razak and another;*** reported in (1995) 1 SCC 235.

8. Mr. Panda, learned AGA further submits that, the representations submitted by the Petitioner for drawal of his arrear salary in the revised scale of pay were rejected. Thus, the claim of Petitioner for arrear salary in the revised scale of pay

requires adjudication. As held by Hon'ble Supreme Court in ***Ganesh Razak and another (supra)*** the Industrial Adjudicator cannot assume jurisdiction to adjudicate a disputed question of fact in exercise of power under Section 33-C (2) of the ID Act. Further, as is detailed in the impugned order, the Petitioner, after his retirement, had also filed OA No.1492 of 2011 before the Odisha Administrative Tribunal, Bhubaneswar to fix his pension taking into consideration the period of his employment in regular establishment as per Rule 18 (3) of the OCS Pension Rules, 1992. No claim for arrear salary in the revised scale of pay was raised in the said Original Application. Thus, learned trial Court has committed no error in in dismissing the application filed by the Petitioner in ID Misc. Case No.56 of 2012 filed under Section 33-C (2) of the ID Act.

9. Upon hearing learned Counsel for the parties and on perusal of record, this Court finds that the Petitioner initially joined under the work-charged establishment on 15th January, 1972. Subsequently, his service was regularized in the post of Helper on 17th January, 1977 after five years of continuous service vide office order No.5237 dated 28th April, 1988 (Annexure-2) issued by the Superintending Engineer, S.M.I. Circle, Berhampur. The Petitioner was promoted to the post of work-charged Concrete Mixture Driver with scale of pay of Rs.625-940/- with usual DA and other allowances vide order dated 29th December, 1991 (Annexure-7) issued by the Superintending Engineer, S.M.I. Circle, Berhampur. He joined in the said post in the afternoon of 3rd January, 1992. While continuing as such, the salary of Concrete Mixture Driver was revised and was fixed at Rs.3050-4590/- with initial scale of pay at Rs.950-1500/-. The said revision in the scale of pay was pursuant to an order of the Chief Engineer, Minor Irrigation, Odisha, Bhubaneswar vide notification dated 12th November, 1999 (Annexure-5). Thus, the Petitioner claimed revised scale of pay. His grievance was allegedly not paid any heed. As such, the Petitioner filed ID Misc. Case No.56 of 2012 under Section 33-C (2) of the ID Act for computation of his arrear salary in terms of the revised scale of pay and to pay the same. Learned Labour Court, Bhubaneswar, taking into consideration the rival contentions of the parties and documents on record, came to hold that the representations of the Petitioner for revision in the scale of pay were turned down by the Authority. Thus, it appears from the admitted facts and documents on record that there is an existing dispute as to what should have been the Petitioner's scale of pay as a work-charged Concrete Mixture Driver.

10. The contention of Mr. Acharya, learned Counsel for the Petitioner cannot be accepted on the ground that the claim of the Petitioner for revision in the scale of pay was turned down by the Authority. There appears no material on record to show that said refusal and inaction with regard to release of arrear salary on revision of scale of pay was challenged before any competent Court of law by the Petitioner. Further, the case laws relied upon by Mr. Acharya, learned counsel are of no assistance to the case of the Petitioner, as the same do not deal with a disputed claim, as that of the Petitioner. However, the ratio in the case of ***Ganesh Razak and***

another (supra), relied upon by the learned State Counsel, rather makes the position of law clear to the extent that a proceeding under section 33-C (2) of the ID Act is in the nature of an execution proceeding. Thus, it should follow that an investigation of the nature of determinations, i.e., (i) the workman's right to relief; (ii) the corresponding liability of the Management, including, whether it is, at all, liable or not is, normally, outside the scope of Section 33-C (2) of ID Act. Thus, it leaves no iota of doubt that the claim of the Petitioner is not within the jurisdiction of learned Labour Court under Section 33C (2) of the ID Act. Paragraph Nos. 11 and 12 of the said judgment, being relevant, are reproduced below:-

> *"11. In* ***Central Inland Water Transport Corporation Ltd. v. The Workmen & Anr.,*** *1975 (1) SCR 153, it was held with reference to the earlier decisions that a proceeding under Section 33C (2) being in the nature of an execution proceeding, it would appear that an investigation of the alleged right of reemployment is outside its scope and the Labour Court exercising power under Section 33C (2) of the Act cannot arrogate to itself the functions of adjudication of the dispute relating to the claim of re-employment. Distinction between proceedings in a suit and execution proceedings thereafter was pointed out. It was indicated that the plaintiff's right to relief against the defendant involves an investigation which can be done only in a suit and once the defendant's liability had been adjudicated in the suit, the working out of such liability with a view to give relief is the function of an execution proceeding. This distinction is clearly brought out in that decision as under:-*
>
> *"In a suit, a claim for relief made by the plaintiff against the defendant involves an investigation directed to the determination of (i) the plaintiff's right to relief; (ii) the corresponding liability of the defendant, including, whether the defendant is, at all, liable or not; and (iii) the extent of the defendant's liability, if any. The working out of such liability with a view to give relief is generally regarded as the function of an execution proceeding. Determination No. (iii) referred to above, that is to say, the extent of the defendant's liability may sometimes be left over for determination in execution proceedings. But that is not the case with the determinations under heads (i) and (ii). They are normally regarded as the functions of a suit and not an execution proceeding. Since a proceeding under section 33(C)(2) is in the nature of an execution proceeding it should follow that an investigation of the nature of determinations (i) and (ii) above is, normally, outside its scope. It is true that in a proceeding under section 33 (C)(2), as in an execution proceeding, it may be necessary to determine the identity of the person by whom or against whom the claim is made if there is a challenge on that score. But that is merely 'incidental'. To call determinations (i) and (ii) 'incidental' to an execution proceeding would be a perversion, because execution proceedings in which the extent of liability is worked out are just consequential upon the determinations (i) and (ii) and represent the last stage in a process leading to final relief.* ***Therefore, when a claim is made before the Labour Court under section 33(C)(2) that court must clearly understand the limitations under which it is to function. It cannot arrogate to itself the functions – say of an Industrial Tribunal which alone is entitled to make adjudications in the nature of determinations (i) and (ii) referred to above, or proceed to compute the benefit by dubbing the former as 'incidental' to its main business of computation. In such cases, determinations (i) and (ii) are not 'incidental' to the computation.*** *The*

computation itself is consequential upon and subsidiary to determinations (i) and (ii) as the last stage in the process which commenced with a reference to the Industrial Tribunal. ***It was, therefore, held in State Bank of Bikaner and Jaipur vs R.L. Khandelwal, 1968 L.L.J. 589, that a workman cannot put forward a claim in an application under section 33(C)(2) in respect of a matter which is not based on an existing right and which can be appropriately the subject-matter of an industrial dispute which requires a reference under section 10 of the Act."***

12. The High Court has referred to some of these decisions but missed the true import thereof. The ratio of these decisions clearly indicates that where the very basis of the claim or the entitlement of the workmen to a certain benefit is disputed, there being no earlier adjudication or recognition thereof by the employer, the dispute relating to entitlement is not incidental to the benefit claimed and is, therefore, clearly outside the scope of a proceeding under Section 33C (2) of the Act. The Labour Court has no jurisdiction to first decide the workmen's entitlement and then proceed to compute the benefit so adjudicated on that basis in exercise of its power under Section 33C(2) of the Act. It is only when the entitlement has been earlier adjudicated or recognised by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is treated as incidental to the Labour Court's power under Section 33C (2) like that of the Executing Court's power to interpret the decree for the purpose of its execution.

(Emphasis supplied)

11. Thus, from the admitted facts on record so also settled position of law, as detailed above, this Court is of the considered opinion that the learned Labour Court, in exercise of power under Section 33-C (2) of the ID Act, had no jurisdiction and competence to compute the disputed claim of the Petitioner and issue direction to pay the same, as the same was disputed and denied by the Management. As such, learned Labour Court has committed no error in dismissing the application filed by the Petitioner under Section 33-C(2) of the ID Act.

12. Hence, the writ petition, being devoid of any merit, stands dismissed. But in the facts and circumstances of the case, there shall be no order as to cost.

Headnotes prepared by:
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Writ Petition dismissed.

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2025 (I) ILR-CUT-801

BISHNU CHARAN GANDA
V.
STATE OF ODISHA

[JCRLA NO. 59 OF 2007]

04 MARCH 2025

[K.R. MOHAPATRA, J. & V. NARASINGH, J.]

Issue for Consideration

Whether non-seizure of weapon of offence and non-forward of Material Objects for chemical examination vitiate the prosecution case.

Headnotes

INDIAN EVIDENCE ACT, 1872 – Sections 8, 27 and 106 – The appellant has been convicted U/s. 302 of Indian Penal Code, 1860 – P.Ws.1 and 2 are the witnesses to the assault on the deceased by the Appellant and the incident of dragging the deceased to his residence – P.W.5 is the Medical Officer who conducted the autopsy of the dead body and opined that the injuries were ante mortem in nature and may be possible by means of iron wire and Sal Medha (Mos. I and III) – The Appellant was last seen dragging the deceased to his house – The Appellant has miserably failed to prove as to how the incident occurred in his residence – The Mos. I to III have not been sent for chemical examination – Whether non-seizure of weapon of offence and non-forward of material objects for chemical examination vitiate the prosecution case.

Held: No – In the face of the evidence of P.Ws.1 and 3 and that of the Medical Officer-P.W.5 coupled with the conduct of the Appellant and his defence of bald denial thereby failed, to discharge the burden under Section 106 of the Evidence Act, the MOs- I to III not being sent for chemical examination and their non-seizure in terms of Section 27 of the Evidence Act on which the defence rested its submissions in the factual backdrop of the case at hand, falls into insignificance. (Para 8)

List of Acts

Indian Penal Code, 1860; Indian Evidence Act, 1872.

Keywords

Burden of proof, Non-seizure, Chemical examination of material object.

Case Arising From

Judgment dated 17th February, 2006 passed by learned Session Judge, Phulbani in S.T. No. 111 of 2003.

Appearances for Parties

For Appellant : Mr. H.K.Mallik
For Respondent : Mr. Raj Bhusan Dash, Additional Standing Counsel.

Judgment/Order

Judgment

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. This Appeal has been registered under Section 374 Cr.P.C. receiving the prisoner's petition through Welfare Officer, District Jail, Phulbani, where the Appellant was incarcerated. The Appellant has been convicted under Section 302 IPC and has been sentenced to undergo imprisonment for life by the judgment dated 17th February, 2006 passed by learned Sessions Judge, Phulbani in ST No.111 of 2003.

3. The prosecution story is that the Appellant had married the deceased- Mina Nayak nine years prior to the date of occurrence, i.e., on 4th February, 2003. They were blessed with two daughters. The Appellant was very often ill-treating and assaulting his wife, the deceased. On 4th February, 2003 at about 3:00 PM, there was some altercations between the Appellant and the deceased and the Appellant assaulted the deceased. Later at 7:00 PM, the Appellant again assaulted the deceased mercilessly for which the deceased suffered serious bodily injuries and succumbed to such injuries. On 5th February at 6:00 AM, the maternal uncle of the deceased (the Informant) got information about the death of the deceased and came to the house of the Appellant, where he found the deceased lying dead in the courtyard of the house of the Appellant. The Informant found injuries on her person. He enquired about the death of the deceased from the villagers who informed that the Appellant assaulted the deceased to death on the previous day. Thus, the Informant lodged FIR at Khajuripada Police Station. Upon receipt of the report, the Police registered Khajuripada PS Case No.12 dated 5th February, 2003. As the FIR disclosed a cognizable case, the Investigating Officer took up investigation. On the basis of the FIR, GR Case No.55 2003 was registered on the file of learned SDJM, Phulbani.

3.1 During investigation, the Investigating Officer (IO)-PW-8 made inquest over the dead body; examined the Informant-PW-6 and other witnesses; arrested the Appellant and sent the dead body for post mortem. After completion of the investigation, the IO submitted charge sheet under Section 302 IPC against the Appellant.

4. The plea of defence was one of complete denial of the involvement of the Appellant. However, the defence did not examine any witness. The prosecution examined as many as eight witnesses. PWs-1 and 2 are the witnesses to the assault on the deceased by the Appellant and dragging her to their residence holding her hair. PW-5 is the Medical Officer who conducted the autopsy of the dead body. PW-3 is a post-occurrence witness. PW-6 is the Informant, namely, the maternal uncle of the deceased. PW- 7 is the mother of the deceased and PW-8 is the IO. Seven exhibits as MOs were marked on behalf of the prosecution.

5. Mr. Mallik, learned counsel for the Appellant being engaged by Legal Services Authority on being requested by the Appellant argued with vehemence that the conviction is based on surmises and conjectures. Although PWs-2 and 3 have been cited as eyewitnesses to the occurrence, but both of them have not seen the alleged incident of murder of the deceased, which occurred at the residence of the Appellant. They had only seen the Appellant dragging the deceased to his residence by holding her hair on the alleged date of occurrence. Neither the weapon of offence was seized nor were the wearing apparels of the deceased as well as the Appellant sent for chemical examination. Informant-PW-6 did not disclose in his evidence as to who informed him about the death of his niece, the deceased. In essence, there is no direct evidence implicating the Appellant in the offence. Learned Sessions Judge on a sheer presumption convicted the Appellant under Section 302 IPC and sentenced him to undergo imprisonment for life. All the witnesses had only stated previous incident of assault on the deceased by the Appellant, which are not sufficient to complete the chain to implicate only the Appellant in the alleged crime. Thus, the Appellant is entitled for acquittal and he should be set at liberty forthwith.

6. Mr. Dash, learned ASC, on the other hand, submitted that the witnesses, more particularly, PW-1 deposed that on 4th February, 2023, they had seen that the Appellant had caught hold the hair of the deceased and dragged her to his residence. PW-1 categorically stated that although he intervened, it yielded no result. PW-2 also deposed that the incident occurred in front of the shop of his son at 3:00 PM on 4th February, 2003. At that time, he was present in the shop. He had seen the Appellant dragging the deceased by holding her hairs. Although he protested the accused did not pay any heed. PW-3 also corroborated the testimony of PWs-1 and 2. Evidence of the Medical Officer-PW-5 who conducted post mortem of the dead body also vividly stated the external and internal injuries of the deceased. He had also opined that the injuries were ante mortem in nature and may be possible by means of iron wire (M`O-III) and Sal Medha (MO-I), which were produced before him. It was further deposed that the injuries on the scalp and both forearms could be caused by Tangia (MO-II) and Sal Medha (MO-I). Although PW-6, the Informant is not the eyewitness to the occurrence he had described the behavior and ill-treatment of the Appellant on the deceased. PW-7 is the IO who had also supported the case of the prosecution. On a cumulative assessment of the evidence adduced, the learned Sessions Judge rightly convicted the Appellant under Section 302 IPC and sentenced him to undergo imprisonment for life. The same as such warrants no interference.

7. Heard learned counsel for the parties; perused the evidence, both oral and documentary available on record. The incident occurred on 4th February, 2003 in between 8:00 PM to 10:00 PM at the residence of the Appellant. It was alleged that the Appellant brutally assaulted his wife, namely, Mina Ganda @ Nayak (deceased) by means of iron wire and Sal Medha as a result of which she succumbed to the injuries at the spot. PW-6 is the maternal uncle of the deceased and Informant in the case. He categorically stated in his evidence that on 4th February, 2003, he went to the Appellant's village getting information about death of his niece. He stated in his evidence that he along with his sister (mother of the deceased) went to the house of the

Appellant and found the deceased lying dead in the courtyard of the house of the Appellant. When the Informant enquired about the matter, the villages informed that the Appellant brutally assaulted the deceased on the previous day, i.e., on 4th February, 2003. Parents of the Appellant also disclosed before PW-6 that the Appellant being drunk assaulted the deceased. Although they protested but the Appellant ignoring the same mercilessly assaulted the deceased, which caused her death. The evidence of PW-6, the Informant, was not shaken in cross-examination. PWs-1 to 3 are the eyewitnesses to the occurrence. On the date of occurrence at about 3:00 PM, PW-2 was in the shop of his son. He vividly described that the deceased was coming towards their shop. At that time, the Appellant reached there and dragged her by holding her hair. When PW-2 protested he did not pay any heed and dragged the deceased to his residence. On the next day when the Police reached at the village he came to know about the death of the deceased. PW-1 also in his evidence stated to have seen the incident described by PW-2. Their evidence was not shaken in any manner in the cross-examination. PW-5, the Medical Officer, who conducted autopsy over the dead body, has described the injuries on the person of the deceased as under:-

> *"EXTERNAL :-*
>
> *2. The body is stout, average body built, eyes were closed, rigor mortis present in lower extremities only post-mortem lividity was absent, left eye black and adjacent tissue one is superior to the eye cavity. Capering 2" inferior to above set eye ball. External and multiple bruises above 3 cm. x 0.5 cm. were present on the tip of the right shoulder three in numbers.*
>
> *(ii) On the front of neck below the thyroid cartilage one inch apart the next. Abrasion on the outer border of the right iliac fossa two in numbers 2" incise.*
>
> *(iii) Swelling and bruise 5" x 2" on palpation, there is reptation over the lower end of left fore-arm.*
>
> *(iv) Scalp hair intact and on inspection a lacerated wound 2" x 2" bone deep present on left parietal bone.*
>
> *(v) Clotted blood present over the left pina and the external auditory meatus.*
>
> *(vi) One bruise with depressed fracture of the middle of the left temporal bone with a bruise of 3" x 2" continuing inferior to the tragus of the left ear. The Spinal cord is intact.*
>
> *On dissection of the skin over the dorsal aspect of the right fore-arm it is found that about 39 ml. of clotted blood in the subcutaneous tissue on removal of the compartment i.e. second compartment of extensor muscle of fore-arm that is a chief fracture of the lower end of alna. But radious and others are intact.*
>
> *On dissection of the left fore arm there is 30 ml. of clotted blood with a fracture of lower end of radious.*
>
> *On dissection of skull, on removal of skin of skull a haemotoma of 3" present on the left temporal bone with a linear depress fracture 2" deep and above-mentioned bone is opposed with a gap of half inch. The area adjacent to the left eye ball is bruised and contused.*
>
> *A haemotoma 6" x 3" starting from inferior border of the frontal bone to the bregma but the bone is intact.*
>
> *On further dissection of the brain the durameter and piameter are intact, except a small haemotoma of size 1" x1" present over a temporal protuburnce. The gyri and sulsei are intact.*
>
> *Corpuscallosus intact.*

A haemotama above 50 ml. present on the middle cranial fossa compressive pons and medildaoblongata."

The seized weapons were also shown to the Medical Officer who opined that the external injuries as per the injury report (Ext.6) could be possible by means of iron wire, Sal Medha (wooden). The injury on the scalp and the injuries on both the fore-arms can be cause by Tangia and Sal Medha (wood). He had further opined that the injuries on the skull, one left temporal aspect and clot on the base of the skull which were fatal in nature, could be caused by Tangia and Sal Medha (wood). The injuries found on the dead body of the deceased were sufficient to cause death in ordinary course. In the cross-examination, the Medical Officer also opined that the skull injuries may be possible by fall from five meters height on a rough surface. No further cross-examination of the Medical Officer was made. It is not the case of the Appellant that the deceased succumbed to the injuries by falling from the height of five meters on rough surface. The Appellant only denied his involvement in the alleged incident in his statement under Section 313 Cr.P.C. PW-7 is the mother of the deceased who had also corroborated the stand of PW-6, the Informant. From the evidence of PW-8, the IO and other witnesses including the Medical Officer-PW-5, the prosecution story is established beyond any reasonable doubt.

7.1 The Appellant was last seen dragging the deceased to his house. In view of Section 106 of the Evidence Act, burden is on the Appellant to prove as to how the incident occurred at his residence. He has miserably failed to discharge the onus. The conduct of the Appellant absconding, which is relevant under Section 8 of the Indian Evidence Act, 1872, cannot be ignored.

8. In the face of the evidence of PWs-1 and 3 and that of the Medical Officer-PW-5 coupled with the conduct of the Appellant and his defence of bald denial thereby failed, to discharge the burden under Section 106 of the Evidence Act, the MOs- I to III not being sent for chemical examination and their non-seizure in terms of Section 27 of the Evidence Act on which the defence rested its submissions in the factual backdrop of the case at hand, falls into insignificance.

9. On a cumulative assessment of the evidence on record and the discussions made above, this Court is of the considered view that the Appellant is the author of the crime. As such, the conviction of the Appellant under Section 302 IPC and sentencing him to undergo imprisonment for life warrant no interference.

10. This Court, vide order dated 23rd September, 2010 in Misc. Case No.16 of 2010, had released the Appellant on bail. Hence, the bail bond is cancelled and the Appellant shall be taken to custody forthwith to serve out the sentence.

11. The Jail Criminal Appeal is accordingly dismissed.

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter JCRLA dismissed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I) ILR-CUT-806

STATE OF ODISHA
V.
ANIL CHHOTRAY & ORS.

[CRLLP NO. 119 OF 2015]

14 FEBRUARY 2025

[B.P. ROUTRAY, J. & CHITTARANJAN DASH, J.]

Issue for Consideration

Whether the Court should interfere with the well-reasoned acquittal when the circumstances relied upon by the prosecution are neither fully established nor conclusively linked to the guilt of the accused.

Headnotes

CRIMINAL TRIAL – The learned trial Court acquitted all 16 accused persons of offences U/ss. 302/120-B/109/34 of the Indian Penal Code, 1860 and Sections 25/27 of the Arms Act, 1959 – The Petitioner/the State of Odisha has filed this application seeking leave to appeal challenging the judgment and order of acquittal – The case against the respondents is based on circumstantial evidence, unreliable witness testimonial and inadmissible confessional statement – The most damaging aspect of the prosecution's case was the key witnesses turning hostile, including close family members of the deceased who were expected to establish motive and prior enmity – The Test Identification Parade was compromised as one of the identification witnesses admitted during cross-examination that he had been shown the photographs of the accused by the police before – This procedural lapse renders the TIP unreliable and inconsequential as it violates the fundamental requirement that the witnesses must not have prior opportunity to see the accused before identification – The ballistic report did not conclusively link the bullets recovered from the deceased to the firearms allegedly seized from the respondent which poses significant doubts about the prosecution's claim – Whether the Court should interfere with the well-reasoned acquittal when the circumstances relied upon by the prosecution are neither fully established nor conclusively linked to the guilt of the accused.

Held: No – The chain of the evidence is not so complete as to exclude every possible hypothesis except the guilt of the Accused-Respondents – The circumstantial evidence does not form an unbroken sequence leading to only one conclusion that the Accused-Respondents committed the crime – Instead, multiple inconsistencies and evidentiary gaps leave ample room for reasonable doubt, and as per the panchsheel principles of circumstantial

evidence, such doubt must benefit the accused – Given these discrepancies, the trial Court rightly acquitted the Accused-Respondents, and this Court finds no reason to interfere with the well-reasoned decision of acquittal.

(Para 19)

Citations Reference

Gireesan Nair & Ors. Etc. vs. State of Kerala, **AIR 1984 SC 1622;** Manjunath & Ors. vs. State of Karnataka, **2023 LiveLaw (SC) 961;** Pulukuri Kotayya vs. King Emperor, **1946 SCC OnLine PC 47;** Mohd. Inayatullah vs. State of Maharashtra, **(1976) 1 SCC 828;** Sharad Birdhichand Sarda vs. State of Maharashtra, **AIR 1984 SC 1622 – referred to.**

List of Acts

Indian Evidence Act, 1872; Indian Penal Code, 1860; Arms Act, 1959.

Keywords

Test identification parade; Chain of circumstances; Circumstantial evidence; Motive.

Case Arising From

Judgment and order of acquittal dated 22nd of May, 2015 passed by Addl. Sessions Judge, Bhubaneswar in Criminal Trial No. 1/42 of 2012.

Appearances for Parties

For Appellant : Mr. Gautam Tripathy, AGA
For Respondent : Mr. Samvit Mohanty

Judgment/Order

Judgment

CHITTARANJAN DASH, J.

1. The Petitioner, the State of Odisha, has filed this application seeking leave to appeal challenging the judgment and order of acquittal dated 22.05.2015, passed by the learned 2nd Additional Sessions Judge, Bhubaneswar, in Criminal Trial No. 1/42 of 2012 arising out of G.R. No. 1301/2015 and Nayapalli P.S. Case No. 115/2005, wherein, the learned trial Court acquitted all 16 accused persons (Respondents) of offences under Sections 302/120B/109/34 of the Indian Penal Code, 1860, (hereinafter, in short, called "IPC"), and Sections 25/27 of the Arms Act, 1959.

2. The CRLA filed by the present Respondents, seeking a different prayer, has been attached with this CRLLP along with the Lower Court Records and the Paperbook, for reference. The availability of the LCR and Paperbook ensured availability of all relevant documents, including the trial Court judgment, witness depositions, scientific reports, and other materials taken in evidence by the trial

Court, were before this Court for appreciation of the case and hear the matter on merit upon the admission of this petition

3. The prosecution case, in brief, is that the Informant, Prakash Chandra Das (P.W.24), the elder brother of Subash Chandra Das @ Rubu, lodged a written report before the IIC, Nayapalli Police Station, Bhubaneswar, on 18.04.2005 at about 1:15 p.m., stating that his younger brother, Subash and his associate, Dhiren Kumar Sethi, have been murdered near Jaleswar Temple Road, Bhubaneswar. Earlier that day, around 11:30 a.m., the deceased and Dhiren had gone to Ruchika Market and then proceeded to meet one Anil Kumar Mahalik, a Special Class Contractor, to collect documents for photocopying near Jaleswar Temple. Shortly thereafter, the Informant received a telephonic call informing him that his brother has been shot dead. Upon reaching the spot, he found that Dhiren's body is lying in front of Jaleswar Temple and Subash's body is near the office of the Executive Engineer, Prachi Division, both surrounded by a pool of blood. Witnesses at the scene informed him that nine unidentified assailants on three motorcycles arrived at the location, abused the victims, and opened fire at them as they attempted to escape. The deceased sustained multiple gunshot wounds, including injuries to the chest and forehead. On receipt of the FIR, the IIC registered Nayapalli P.S. Case No. 115/2005 under Sections 302/34 IPC and Section 25 of the Arms Act and commenced an investigation.

4. In course of the investigation, the I.O. seized two empty cartridges, a bullet, a mobile phone, and cash from the crime scene. He arrested three Accused-Respondents, including Guna @ Bablu Lenka and Dhadu @ Artatrana Pradhan, and based on their alleged confessional statements, firearms, ammunition, and a motorcycle were recovered. The case was subsequently transferred to the Crime Branch, which, after further investigation, filed a charge sheet against 19 accused persons, including contractors accused of conspiring to eliminate the deceased due to a tender-fixing rivalry. Out of these, two accused could not be apprehended, and one had expired, leading to the trial of 16 accused person.

5. The case of the defence is one of complete denial and false accusations.

6. To bring home the charge, the prosecution examined 86 witnesses in all. The defence, on the other hand, examined none.

7. The learned trial Court having believed the evidence of the prosecution witnesses, found the prosecution to have proved its case beyond all reasonable doubt and held the Appellant guilty and convicted him awarding sentence as described above.

8. Mr. Gautam Tripathy, learned Additional Government Advocate, submitted that the learned trial Court erred in disregarding the overwhelming evidence on record, including the testimony of official witnesses, ballistic reports, and post-mortem findings. He contends that despite witnesses turning hostile, the trial Court failed to appreciate that prosecution evidence is not to be discarded in its entirety merely because some witnesses resile from their previous statements. It is a settled

principle of law that the testimony of official witnesses, including police officers, cannot be disregarded solely due to the absence of independent corroboration, particularly in cases where independent witnesses are reluctant to depose out of fear or influence exerted by the Accused-Respondents. He further submits that the Scientific Officer's report vide Ext.24 & Ext.22 confirms that the bullets extracted from the body of deceased Dhiren Kumar Sethi were fired from a countrymade revolver seized from one of the Accused-Respondents, Guna Lenka, yet the trial Court failed to attach due weight to this conclusive evidence. Mr. Tripathy further contends that the confessional statements of Accused-Respondents Guna Lenka and Dhadu @ Artatrana Pradhan, recorded under Section 27 of the Evidence Act, 1872, led to the recovery of firearms and other incriminating materials, establishing their direct involvement in the crime. Similarly, the identification of Accused-Respondents in the Test Identification Parade (TIP) was disregarded solely on the ground that one of the witnesses later claimed coercion, despite there being no material proof of such coercion. The Court failed to recognise that identification in TIPs conducted by a Judicial Magistrate carries significant evidentiary value. He further contends the conspiracy angle, whereby certain contractors, facing losses due to the deceased's interference in tender-related matters, engaged the other accused to execute the murders. The motive of the crime was well established through the Section 164 Cr.P.C. statements of various witnesses, which indicated that the deceased had expressed apprehension regarding threats to their lives from the Accused-Respondents.

Moreover, the trial Court erroneously held that the prosecution under the Arms Act was vitiated due to an alleged defect in sanction. A sanction order cannot be invalidated merely on the ground that all seized arms were not physically placed before the authority granting sanction, particularly when other supporting documents and reports were duly considered. Mr. Tripathy finally submits that the acquittal of the Accused-Respondents has resulted in a gross miscarriage of justice, particularly in a case involving a pre-planned and cold-blooded murder in a public place, executed in furtherance of a criminal conspiracy. The failure of the trial Court to convict the accused despite the weight of evidence on record undermines public confidence in the justice system. Therefore, the State prays for leave to appeal against the impugned judgment, and upon grant of leave, seeks the setting aside of the acquittal and conviction of the Accused-Respondents in accordance with law.

9. Mr. Samvit Mohanty, learned counsel for the Respondent, on the other hand, submits that the trial Court has rightly acquitted the Respondents, as the prosecution failed to prove their guilt beyond a reasonable doubt since its very inception. The case against the respondents is based on circumstantial evidence, unreliable witness testimonies, and inadmissible confessional statements. Mr. Mohanty asserts that several key witnesses, including family members of the deceased, turned hostile, and the Test Identification Parade (TIP) was compromised, making the prosecution's version highly questionable. He further states that the ballistic report did not conclusively link the bullets recovered from the deceased to the firearms allegedly

seized from the respondents, further weakening the prosecution's case. Moreover, the alleged motive of tender related rivalry was not supported by credible evidence, as multiple witnesses denied knowledge of any prior threats or enmity between the deceased and the respondents. Mr. Mohanty finally submits that the learned trial Court has carefully all evidence and discussed it's findings in length and has found that the prosecution failed to establish a clear and unbroken chain of circumstances pointing to the guilt of the respondents. Since an acquittal strengthens the presumption of innocence, this Petition is liable to be dismissed.

10. Having regard to the arguments advanced by the learned counsel for the respective parties, it is incumbent to deal with the testimonies of the relevant witnesses for better appreciation of the case.

P.W.2, the father of deceased Dhiren Kumar Sethi, testified that his son was a small-time contractor but stated that he had no knowledge regarding the circumstances of his death. He did not provide any firsthand account of the incident, nor did he implicate any of the Accused-Respondents in his testimony. During cross-examination, he maintained that he had no idea about any threats to his son's life prior to the murder. His testimony contradicts the prosecution's theory that the deceased had expressed apprehensions about being targeted by tender mafias.

P.W.4, an eyewitness present near the scene of the crime, did not corroborate the prosecution's version of events. While he acknowledged hearing gunshots and seeing two individuals collapse near Jaleswar Temple, he could not confirm who fired the shots or how the attack unfolded. During cross-examination, he admitted that he did not actually see the assailants and that the police obtained his signature on certain documents without explaining their contents.

P.W.9, an Executive Engineer, testified that during the relevant period, the e-tender system had been implemented, which significantly reduced human interference in the tender process. His statement contradicted the prosecution's theory that the deceased were killed due to disputes over tender-fixing, as it cast doubt on whether such rivalries were still relevant or capable of leading to a conspiracy to murder. He did not provide any evidence linking the accused to the crime.

P.W.11, the uncle of deceased Subash Chandra Das, failed to support the prosecution's case. He denied having any knowledge about the murder or the involvement of the accused. When confronted with his previous statement recorded under Section 161 CrPC, he refused to acknowledge its contents.

P.W.12, an alleged eyewitness, testified that he heard gunshots but could not identify the assailants. His testimony lacked crucial details about how the attack unfolded and failed to establish the presence of any of the Accused-Respondents at the scene of the crime.

P.W.13, the brother of deceased Dhiren Kumar Sethi, was also declared hostile. While he initially stated that he rushed to the scene after hearing about the

murder, he later denied any prior knowledge of threats to his brother's life. During cross-examination, he stated that he did not witness the crime and could not identify any of the Accused-Respondents. His testimony contradicts the prosecution's claim that Dhiren was under threat from the Accused-Respondents.

P.W.15, the Secretary of Saraswati Sishu Mandir at Baramunda, stated that he heard gunshots but had no knowledge of who fired them. He further alleged that the police obtained his signature on blank papers without informing him about the contents. During cross-examination, he denied seeing any of the Accused-Respondents at the crime scene, making his testimony unreliable for proving the prosecution's case.

P.W.16, a contractor who employed deceased Subash Chandra Das, admitted that on the day of the incident, he had sent Subash to Ruchika Market for photocopying certain documents. However, he did not corroborate the claim that Subash and Dhiren were being threatened by the Accused-Respondents. His failure to confirm any previous threats or business rivalries undermined the prosecution's motive theory.

P.W.18, another alleged eyewitness, stated that he heard gunshots and saw people running, but he failed to provide any identifying details regarding the assailants. His testimony did not contribute to proving the direct involvement of the accused in the murder.

P.W.19 was a witness to the Test Identification Parade (TIP). However, during cross-examination, he admitted that the police had shown him photographs of the accused before the TIP and instructed him to identify them. This seriously undermined the credibility of the TIP process, as it suggested police influence rather than an independent identification.

P.W.23, a Member of the Legislative Assembly (MLA) and paternal uncle of deceased Subash Chandra Das, was expected to support the prosecution's case. However, he denied knowledge of any threats to the deceased and failed to identify any accused person as being involved in the murder. His testimony contradicted the prosecution's claim that Subash had openly discussed threats to his life from the Accused-Respondents.

P.W.24, Prakash Chandra Das, the informant and elder brother of deceased Subash Chandra Das, was expected to be a key witness for the prosecution. However, he completely disowned the contents of the FIR, stating that he did not know who prepared it and only signed it at the police station without reading it. He further testified that his brother's death was an accident and denied knowledge of any conspiracy or involvement of the accused. His testimony severely damaged the prosecution's case, as it effectively nullified the credibility of the FIR on which the entire investigation was based.

P.W.25, another brother of the deceased Subash, also failed to support the prosecution's case. He stated that he had no personal knowledge of any threats to his

brother's life and did not implicate any of the accused in the crime. Like P.W.24, he contradicted the prosecution's narrative of a targeted killing due to tender rivalry. His testimony further supported the defense's claim that the case against the accused was fabricated without substantial evidence.

P.W.27, Niranjan Rath, a friend of the deceased, was another crucial witness for the prosecution, as his statement under Section 164 CrPC alleged that the deceased had disclosed fears of being murdered by the accused. However, during trial, he turned hostile and denied making any such statement voluntarily. He stated that his statement before the magistrate was obtained under police pressure and that he had no knowledge of any conspiracy. This directly impacted the prosecution's attempt to establish motive, as it eliminated crucial pre-murder threats that the accused were alleged to have made.

P.W.28, another associate of the deceased, was expected to corroborate the motive of the crime and threats received by the deceased. However, like P.W.27, he failed to support the prosecution's case and denied knowledge of any threats or conspiracy involving the Accused-Respondents. His testimony was inconsistent with his previous statement, and when confronted with his prior statement under Section 161 CrPC, he refused to acknowledge it.

P.W.34, an alleged acquaintance of the deceased, was examined by the prosecution to establish that Subash Chandra Das and Dhiren Kumar Sethi had received threats from the Accused-Respondents prior to their murder. However, during his testimony, he failed to substantiate any claims of prior threats or conflicts between the deceased and the Accused-Respondents. He admitted to knowing the deceased but denied having any knowledge of their involvement in tender disputes or their interactions with the Accused-Respondents. His testimony failed to support the prosecution's motive theory that the murder was a result of rivalry over tenders.

P.W.42, another associate of the deceased, was presented by the prosecution to corroborate the theory that the deceased were being targeted by the accused. However, he did not provide any direct evidence linking the Accused-Respondents to the crime. He stated that while the deceased had spoken to him about general disputes in their business, they never specifically mentioned the Accused-Respondents as threats to their lives. This testimony significantly weakened the prosecution's attempt to establish a conspiracy and motive, as it failed to prove that the accused had any animosity towards the deceased prior to the crime.

P.W.65, the mother of deceased Subash Chandra Das, was expected to provide key testimony regarding any prior threats or conflicts her son faced before his murder. However, during her deposition, she denied having any knowledge of her son's disputes with the Accused-Respondents. She acknowledged that her son was murdered but stated that she did not know who was responsible. When confronted with her previous statement recorded under Section 161 CrPC, in which she allegedly claimed that her son had feared for his life, she denied making any

such statement. This testimony severely damaged the prosecution's case, as it eliminated a key element of premeditation and motive.

P.W.67, the father of deceased Subash Chandra Das, similarly failed to support the prosecution's claims. He stated that while his son was involved in contracting work, he had no knowledge of any enmity between his son and the Accused-Respondents. He further testified that he was not aware of any specific threats made against his son before the murder. Like P.W.65, he was confronted with his previous statement under Section 161 CrPC, in which he had implicated the accused, but he denied having ever made such statements. His testimony further weakened the prosecution's case, as it failed to establish any connection between the accused and the murder.

11. From the above, it is apparent from the very outset that the case relied heavily on circumstantial evidence and witness testimonies, yet the majority of prosecution witnesses either turned hostile or failed to provide any substantive evidence linking the accused to the crime. Independent eyewitnesses who were allegedly present at the scene of the crime failed to identify the assailants, stating that they heard gunshots but could not see who fired them or how the attack unfolded. Their statements were vague, contradictory, and lacked the specificity required to establish the identity of the perpetrators. Moreover, several witnesses, who were expected to corroborate the prosecution's theory that the deceased had received threats from the Accused-Respondents prior to the crime, denied having any such knowledge when examined during the trial.

The most damaging aspect of the prosecution's case was the key witnesses turning hostile, including close family members of the deceased persons, who were expected to establish motive and prior enmity. The informant himself (P.W.24), the elder brother of deceased Subash Chandra Das, completely disowned the contents of the FIR, stating that he had signed the report at the police station without reading it and had no knowledge of the accused's involvement. This retraction effectively nullifies the foundation of the case, as it created serious doubts about the credibility of the initial allegations. Similarly, other family members, including P.W.25 (another brother of Subash), P.W.65 (mother of the deceased), and P.W.67 (father of the deceased), failed to provide any testimony supporting the claim that the deceased had been threatened or that the accused had a motive to commit the murder. Their depositions directly contradicted the prosecution's theory of a premeditated killing due to business rivalries, significantly weakening the case. Beyond family members, independent witnesses who allegedly had knowledge of the conspiracy or threats leading up to the murder also turned hostile. P.W.27, a close associate of the deceased, had previously given a statement under Section 164 Cr.P.C stating that the deceased had feared being killed by the Accused-Respondents, but during trial, he denied making such a statement voluntarily and claimed that he was pressured by the police. Similarly, P.W.23, a Member of the Legislative Assembly (MLA) and paternal uncle of the deceased, did not support the prosecution's case, stating that he

had no knowledge of any threats or enmity involving the accused. This directly undermined the prosecution's attempt to establish prior threats as a motive for the crime. Moreover, the Test Identification Parade (TIP) failed to yield reliable results, as P.W.19, one of the identification witnesses, admitted during cross-examination that he had been shown photographs of the accused by the police before the TIP.

12. Since it is not disputed that the nature of death is homicidal due to the gun shot injuries, we do not find it relevant to discuss on this issue to make the judgment bulky.

13. Coming to the culpability of the Accused-Respondents, the prosecution has relied upon the identification of the Accused-Respondents by P.W.19 through the conduct of the Test Identification Parade (TIP). The Hon'ble Supreme Court in ***Gireesan Nair & Ors. Etc. vs. State of Kerala*** reported in ***AIR 1984 SC 1622*** has discussed the importance and sanctity of the Test Identification Parade, wherein it is held that –

> "42. This Court in *Budhsen and Anr. v. State of UP* [(1970) 2 SCC 128], had directed that sufficient precautions have to be taken to ensure that the witnesses who are to participate in the TIP do not have an opportunity to see the accused before the TIP is conducted. In *Lal Singh v. State of U.P.* [(2003) 12 SCC 554], this Court had held that a trial would be adversely affected when the witnesses have had ample opportunity to see the accused before the identification parade is held. It was held that the prosecution should take precautions and establish before the Court that right from the day of his arrest, the accused was kept "baparda" to rule out the possibility of his face being seen while in police custody. Later, in *Lalli v. State of Rajasthan* [(2003) 12 SCC 666] and *Maya Kaur Baldevsingh Sardar and Anr. v. State of Maharashtra* [(2007) 12 SCC 654], this Court has categorically held that where the accused has been shown to the witness or even his photograph has been shown by the investigating officer prior to a TIP, holding an identification parade in such facts and circumstances remains inconsequential. Another crucial decision was rendered by this Court in *Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra* [(1998) 5 SCC 103], where it was held:
>
> 8. …. But, the question arises: what value could be attached to the evidence of identity of accused by the witnesses in the Court when the accused were possibly shown to the witnesses before the identification parade in the police station. The Designated Court has already recorded a finding that there was strong possibility that the suspects were shown to the witnesses. Under such circumstances, when the accused were already shown to the witnesses, their identification in the Court by the witnesses was meaningless. The statement of witnesses in the Court identifying the accused in the Court lost all its value and could not be made the basis for recording conviction against the accused. The reliance of evidence of identification of the accused in the Court by PW 2 and PW 11 by the Designated Court, was an erroneous way of dealing with the evidence of identification of the accused in the Court by the two eyewitnesses and had caused failure of justice. Since conviction of the appellants have been recorded by the Designated Court on wholly unreliable evidence, the same deserves to be set aside."

14. In the instant case, the T.I. Parade suffers from the very defects cautioned against by the Hon'ble Supreme Court in the afore-mentioned judgments. The Apex Court has consistently held that a TIP must be conducted in a fair, impartial, and

uninfluenced manner to ensure that the witness's identification is based on independent recollection and not on suggestive cues provided by the investigating agency. P.W.19, a key identification witness, admitted during his cross-examination that the police had shown him photographs of the Accused-Respondents before the TIP was conducted. The disclosure that P.W.19 had prior exposure to images of the accused creates a strong possibility of manipulation and police influence, making the entire identification process tainted and unreliable. Furthermore, P.W.19 expressed doubts about his own ability to correctly identify the accused, admitting that he was not certain if he had actually seen them at the crime scene. Furthermore, the prosecution failed to establish that the accused were kept "baparda" (under cover) from the time of their arrest to rule out any possibility of prior exposure to the witnesses. This procedural lapse renders the TIP unreliable and inconsequential, as it violates the fundamental requirement that the witnesses must not have prior opportunity to see the accused before identification. Given these serious irregularities, the trial Court rightly disregarded the TIP, as the fundamental purpose of a TIP is to ensure an unbiased and spontaneous recognition of the accused by the witness, free from external influence and this Court finds no reason to rely on the flawed identification process as credible evidence against the Accused-Respondents.

15. With regard to the confessional statements made by the Accused-Respondents leading to discovery, the decision of Apex Court in ***Manjunath & Ors. vs. State of Karnataka***, reported in ***2023 LiveLaw (SC) 961***, has reaffirmed that for a discovery statement to be admissible under Section 27 of the Evidence Act, 1872, it must strictly conform to the conditions laid down in ***Pulukuri Kotayya vs. King Emperor*** reported in **1946 SCC OnLine PC 47** and ***Mohd. Inayatullah vs. State of Maharashtra*** reported in **(1976) 1 SCC 828**. Held as under –

> "26. Further discovery made, to be one satisfying the requirements of Section 27, Indian Evidence Act it must be a fact that is discovered as a consequence of information received from a person in custody. The conditions have been discussed by the Privy Council in **Pulukuri Kotayya v. King Emperor 1946 SCC OnLine PC 47** and the position was reiterated by this Court in **Mohd. Inayatullah v. State of Maharashtra (1976) 1 SCC 828**, in the following terms:-
>
> "12…It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery…" (Emphasis supplied)

16. In the instant case, the trial Court rightly disregarded the alleged confessional statements of accused Guna @ Bablu Lenka and Dhadu @ Artatrana Pradhan on the ground that they were not signed by the Accused-Respondents, and the independent witnesses to these statements were untraceable. For a statement under Section 27 of the Indian Evidence Act, 1872, to be admissible, only that portion of the statement which distinctly relates to the fact discovered is admissible. The prosecution relied on the confessional statements of the Accused-Respondents to establish the recovery of firearms. However, the record highlights that the seizure of weapons based on the confessional statements was not conducted in the presence of reliable independent witnesses, which casts serious doubt on the authenticity of the recovery, and the police failed to establish an unbroken chain of custody regarding the seized arms and ammunition. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of Section 27.

17. The next aspect for consideration is the ballistic examination that was conducted on the firearms and bullets seized from the crime scene, the deceased's body, and the Accused-Respondents' alleged possession. The State Forensic Science Laboratory, Bhubaneswar, submitted its report vide Ext.24, detailing the examination of firearms, bullets, and empty cartridges. Findings of the Ballistic Report:

1. *Weapons Examined:*
   - One country-made single-shot pistol, allegedly seized from accused Dhadu @ Artatrana Pradhan.
   - One country-made six-chambered revolver, allegedly seized from accused Guna Lenka.
2. *Ammunition and Fired Bullets Examined:*
   - 8 mm jacketed bullet (without lead core) recovered from the crime scene.
   - .303 bullet recovered from the crime scene.
   - One 8 mm cartridge recovered from the crime scene.
   - Two fired .38 caliber bullets, recovered from the body of deceased Dhiren Kumar Sethi during the post-mortem.
3. *Results of Examination:*
   - The country-made single-shot pistol (Item No.12) was capable of firing 8 mm cartridges, and the six-chambered country-made revolver was capable of firing .38 cartridges.
   - The 8 mm bullet recovered from the scene (Item No.9) was found to be an 8 mm jacketed bullet, but it could not be definitively linked to the pistol allegedly seized from Dhadu.
   - The .303 bullet (Item No.10) could have been fired from a country-made firearm with a .303 cartridge chamber, but there was no matching weapon seized from the accused.
   - The 8 mm cartridge (Item No.11) was found to be capable of being fired from a country-made pistol chambering 8 mm cartridges, such as the one allegedly seized from Dhadu.

- The two .38 caliber bullets recovered from the body of deceased Dhiren Kumar Sethi matched the characteristics of bullets fired from a country-made revolver similar to the one seized from Guna Lenka.
- However, no conclusive microscopic match could be established between the bullets recovered from the deceased and the specific revolver seized from Guna.

4. *Chemical and Residue Analysis:*

- Barrel washings of both the country-made revolver and pistol revealed the presence of smokeless powder residue, confirming that both firearms had been used for firing.
- However, the report could not determine the timeframe of the last firing, making it inconclusive whether the weapons were used in the specific crime.

The ballistic report poses significant doubts about the prosecution's claim that the accused used the seized firearms to commit the murder. While the revolver and pistol seized from the accused were found to be functional and capable of firing ammunition similar to the bullets recovered from the scene and the deceased, the forensic expert could not definitively establish that the bullets extracted from the bodies were fired from those specific weapons. The lack of a conclusive microscopic match between the seized firearms and the recovered bullets creates a substantial gap in the chain of evidence, raising reasonable doubt regarding the accused's direct involvement in the shooting. Moreover, the report highlights inconsistencies in the seizure and forwarding of firearms for forensic examination. Notably, the prosecution claimed that a .303 bore pistol was seized from accused Dhadu, but the firearm forwarded for examination was a country-made pistol chambering 8 mm cartridges, which was not listed in the initial seizure report. This discrepancy casts serious doubt on the integrity of the forensic evidence and raises concerns about possible fabrication or substitution of material evidence.

Additionally, the presence of gunshot residue (GSR) in the barrels of the seized weapons only confirms prior use but does not establish when they were last fired or whether they were used in the murder of the deceased. Without a definitive link between the bullets recovered from the deceased and the weapons seized from the accused, the prosecution's case relies on circumstantial evidence rather than conclusive forensic proof.

18. Undisputedly, the instant case is based on circumstantial evidence. The law with regard to conviction based upon circumstantial evidence is very well settled in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra*** reported in **AIR 1984 SC 1622**, held as follows –

> "3:3. Before a case against an accused vesting on circumstantial evidence can be said to be fully established the following conditions must be fulfilled as laid down in Hanumat's v. State of M.P. [1953] SCR 1091.
>
> 1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;
>
> 2. The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3. The circumstances should be of a conclusive nature and tendency;

4. They should exclude every possible hypothesis except the one to be proved; and

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These five golden principles constitute the panchsheel of the proof of a case based on circumstantial evidence and in the absence of a corpus deliciti.

Hanumant v. The State of Madhya Pradesh [1952] SCR 1091; Tufail (Alias) Simmi v. State of Uttar Pradesh [1969] 3 SCC 198; Ramgopal v. State of Maharashtra AIR 1972 SC 656; and Shivaji Sahabrao Babode & Anr. v. State of Maharashtra [1973] 2 SCC 793 referred to.

3:4. The cardinal principle of criminal jurisprudence is that a case can be said to be proved only when there is certain and explicit evidence and no pure moral conviction."

19. While the gravity of the crime is undeniable, and the tragic loss of lives is deeply saddening, this Court must decide the case based solely on the strength of the evidence presented by the prosecution. A criminal conviction requires proof beyond a reasonable doubt, and in this case, the prosecution's reliance on circumstantial evidence fails to meet the stringent criteria laid down in **Sharad Birdhi Chand Sarda vs. State of Maharashtra** (*Supra*). The circumstances relied upon by the prosecution are neither fully established nor conclusively linked to the guilt of the accused. The alleged motive of tender rivalry remains unsubstantiated, as multiple witnesses, including the family members of the deceased, denied any prior threats or conflicts with the accused persons. The ballistic report failed to conclusively link the bullets recovered from the deceased to the firearms allegedly seized from the Accused-Respondents, creating a significant gap in the chain of evidence. Furthermore, the Test Identification Parade (TIP) was tainted by procedural irregularities, as P.W.19 admitted that the police had shown him photographs of the accused before the parade, rendering the identification unreliable. Most importantly, the chain of evidence is not so complete as to exclude every possible hypothesis except the guilt of the Accused-Respondents. The circumstantial evidence does not form an unbroken sequence leading to only one conclusion that the Accused-Respondents committed the crime. Instead, multiple inconsistencies and evidentiary gaps leave ample room for reasonable doubt, and as per the panchsheel principles of circumstantial evidence, such doubt must benefit the accused. Given these discrepancies, the trial Court rightly acquitted the Accused-Respondents, and this Court finds no reason to interfere with the well-reasoned decision of acquittal.

20. Accordingly, the Criminal Leave Petition is thereby dismissed on merit upon question of admission.

Headnotes prepared by:
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Criminal Leave Petition dismissed.

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2025 (I) ILR-CUT-819

NIRMAL KARNAKAR
V.
PARBATI @ PARBATI KARNAKAR

[MATA NO. 133 OF 2024]

14 FEBRUARY 2025

[B. P. ROUTRAY, J. & CHITTARANJAN DASH, J.]

Issue for Consideration

Whether the Court can enhance/modify the maintenance beyond the relief (amount) sought or claimed by the party.

Headnotes

HINDU MARRIAGE ACT, 1955 – Section 25(2) r/w Sections 125 & 127 of the Criminal Procedure Code,1973 – Maintenance – Whether the Court can enhance the maintenance beyond the relief (amount) sought or claimed by the parties.

Held: Yes – The judicial discretion must be exercised to provide a fair and just maintenance amount, considering the dependent's actual needs and the payer's financial capability, even if the claim was initially understated – The enhancement, in the instant case, is warranted based on necessity rather than technicalities of the original plea. (Para 7)

Citations Reference

Kamaldeep Kaur and Anr. vs. Balwinder Singh, **2005 SCC OnLine P&H 417;** G. Amrutha Rao vs. The State of Andhra Pradesh, **Crl.R.C. No. 80 of 2023 ─ referred to.**

List of Acts

Hindu Marriage Act, 1955; Criminal Procedure Code, 1973.

Keywords

Maintenance; Enhancement; Modification; Power of the Court.

Case Arising From

Judgment dated 21.02.2024 passed by the learned Judge, Family Court, Rourkela in Civil Proceeding No. 132 of 2021.

Appearances for Parties

For Appellant : Mr. A.P. Bose
For Respondents : Mr. Sadananda Sahoo

Judgment/Order

Judgment

BY THE BENCH:

1. The present appeal arises out of the judgment dated 21.02.2024 passed by the learned Judge, Family Court, Rourkela, in Civil Proceeding No. 132 of 2021, whereby the maintenance payable to the respondent-wife was enhanced from ₹1,500 per month to ₹10,000 per month. The Appellant-Husband has challenged this order on the ground that the enhancement was beyond the relief sought by the Respondent and that, the Family Court failed to properly assess his financial liabilities.

2. The Respondent-Wife, aged 63 years, is an elderly woman with no independent source of income. She is entitled to limited government benefits, including ₹500 per month under a government scheme and 5 kg of free rice, which she has been admittedly receiving. However, these benefits are insufficient to meet her daily living and medical expenses. Given her advanced age, she requires regular medical care and incurs additional household expenses.

3. Section 25(2) of the Hindu Marriage Act, 1955, reads as follows –

> *"(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just."*

Under this section, the Court has the power to vary, modify, or rescind maintenance orders if there is material change in circumstances of either party. The phrase "*at the instance of either party*" mandates that a formal application must be made, and judicial discretion must be exercised within the framework of the claim and evidence provided. Similarly, Section 127 of the Criminal Procedure Code, 1973, permits alteration of maintenance based on changes in financial circumstances. Section 127 CrPC reinforces this position in the context of orders of maintenance under Section 125 CrPC, stating that "*on proof of a change in the circumstances of any person receiving maintenance, the Magistrate may make such alteration, increase or decrease in the allowance as he thinks fit.*" It is well established that Courts can modify maintenance upon proof of material change in circumstances. While Courts have the power to modify maintenance based on changed circumstances, this power is not suo motu and must be exercised only on the application of either party.

4. The Punjab and Haryana High Court, while deciding the issue of awarding maintenance exceeding the claimed amount, in the matter of ***Kamaldeep Kaur and Anr. vs. Balwinder Singh***, reported in **2005 SCC OnLine P&H 417**, has held that –

> "21. Now the question which requires determination is whether the Magistrate is competent to award the maintenance more than the amount claimed by the applicant in his maintenance application. Section 125 Cr. P.C. provides that a Magistrate of

> the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct (emphasis supplied). Under this provision, it is the duty of the Magistrate to provide just maintenance to the deserted wife or destitute child. The amount of maintenance should be such that a wife is able to maintain herself decently and with dignity. If after considering the material placed before the Magistrate, the Magistrate thinks that a particular amount is a reasonable amount, he is required to award the said amount as maintenance, and in my opinion, he cannot refuse to grant the said amount merely because the claimant has not claimed such an amount in her application. Once the legislation has cast duty on the Court to award just and reasonable amount of maintenance in the facts and circumstances of a case, the same cannot be denied on mere technicalities i.e. the claimants had not claimed the said amount in their application. Though the words "just and reasonable" have not been used in Section 125 Cr. P.C., but in my opinion, the aforesaid words can be read in the expression as the Magistrate thinks fit". Once discretion has been given to the Court to award an amount of maintenance, it will always be just and reasonable, in the facts and circumstances of a case. There is no specific restriction under Section 125 Cr. P.C. that the Magistrate cannot award more than the amount claimed in the petition. Rather, duty has been imposed on the Magistrate to award compensation which he thinks fit. In such situation, the Court is not debarred from Awarding compensation exceeding the claimed amount."

5. In the above decision, the learned High Court emphasised that the awarded maintenance should be just and proper, considering the husband's financial capacity and the needs of the dependents. The Court noted that the husband was gainfully employed and had a steady income, which justified the enhancement of the maintenance amounts.

In like manner, the decision of Andhra Pradesh High Court, in the matter of ***G. Amrutha Rao vs. The State of Andhra Pradesh***, passed in **Crl.R.C. No. 80 of 2023**, addressed a similar maintenance claim where the wife initially sought a monthly maintenance of ₹30,000 (₹20,000 for herself and ₹10,000 for her minor child). The trial Court enhanced this amount to ₹50,000 per month, significantly exceeding the wife's original request. The Court's enhancement reflected its assessment of the wife's needs and the husband's financial capacity. The decision underscored the Court's duty in ensuring adequate support for the wife and child in light of the circumstances presented during the trial.

6. In the instant case, it is evident that the Family Court exceeded its jurisdiction by granting ₹10,000 maintenance when the wife had only claimed ₹7,000. However, as per Section 25(2) of the Hindu Marriage Act, 1955, and based on precedents, the Court has the discretion to increase maintenance based on substantial change in circumstances. This part of the order of the Family Court can at best be said that the Court erred procedurally in awarding more than what was

claimed but the substance of its decision remains correct, given the financial assessment of both parties.

The Appellant-Husband, aged 72 years, is a retired railway diesel engine driver receiving a pension of ₹50,000 per month. He argues that he has substantial expenses, including ₹10,000 per month on medical treatment, as he is a heart patient and a senior citizen, and family obligations, including a wife and three children, one of whom, a 26-year-old son, may still be dependent. However, despite these claims, the Appellant has not provided any documentary evidence (such as medical bills, household expense records, or educational expenses) to substantiate these alleged liabilities. The lack of documentary proof weakens his claim of financial incapacity.

The fact that cannot be blinked away, and is apparent from the record, is that the learned Family Court, Rourkela, considered the fact that the Appellant was drawing ₹50,000 per month as pension, a detail that was not within the knowledge of the Respondent until it was disclosed through the affidavit filed by the Appellant himself. Due to this, the Respondent was unable to specifically claim an appropriate maintenance amount in her petition. Furthermore, the amount granted by the learned Family Court is less than 25% of the Appellant's pension. Hence, the maintenance awarded is just and proper, ensuring that the Respondent receives a fair and reasonable amount for her sustenance.

7. The judicial discretion must be exercised to provide a fair and just maintenance amount, considering the dependent's actual needs and the payer's financial capability, even if the claim was initially understated. The enhancement, in the instant case, is warranted based on necessity rather than technicalities of the original plea. Considering the Appellant's pension income and the Respondent's financial needs, this Court finds no ground to interfere with the learned Family Court's conclusion. Despite procedural lapses in granting an amount beyond the pleadings, the ultimate finding of the Family Court is justified and does not warrant reversal.

8. Accordingly, the Matrimonial Appeal is dismissed, and the order dated 21.02.2024 of the Judge, Family Court, Rourkela is confirmed. The Appellant is directed to continue paying the ₹10,000 maintenance to the respondent, including any arrears, as ordered.

Headnotes prepared by:
Sri. Jnanendra Ku. Swain, Judicial Indexer
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Matrimonial Appeal dismissed.

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2025 (I) ILR-CUT-823

LINGARAJ NAYAK (DEAD) & ANR.
V.
UDHAVA CHARAN NAYAK

[FAO NO. 176 OF 2019]

30 JANUARY 2025

[Dr. S.K. PANIGRAHI, J.]

Issues for Consideration

1. Whether Article 137 of the Limitation Act is applicable to an application for probate of a Will.
2. Whether exclusion of Class-I legal heir from the testament renders the will invalid.

Headnotes

(A) INDIAN SUCCESSION ACT, 1925 – Section 264 r/w Section 137 of Limitation Act – The Appellant submitted that the probate proceedings were initiated 25 years after the death of testator and as such the proceedings are barred by the law of limitation – Whether Article 137 of the Limitation Act is applicable to an application for probate of a Will.

Held : No – It is crucial to note that under Article 137 of the Limitation Act, 1963, the limitation period of three years is to be computed from the date on which the 'right to apply accrues' – In the context of probate of Will, the right to apply for probate is a continuous right that may be exercised at any time after the death of the testator – It accrues when a dispute arises over the Will or when acknowledgment by the Court becomes necessary. (Para 11)

It is therefore evident that the right to apply for probate arises when it becomes necessary, and this need not necessarily arise within three years from the date of the deceased's death – While delay may raise suspicion, it cannot, by itself, constitute an absolute bar to an application for probate; as rightfully held by the lower Court. (Para 13)

(B) INDIAN SUCCESSION ACT, 1925 – Section 63 r/w Section 68 of Evidence Act – Whether exclusion of Class-I legal heir from the testament renders the Will invalid.

Held: No – The exclusion of a Class I heir from a testamentary disposition, in itself, does not render the Will invalid or raise a presumption of illegality – A Will, by its very nature, allows the testator to deviate from the ordinary rules of succession and makes specific bequests in accordance with their personal wishes – Such deviations, even if they result in disinheritance or

reduced shares for certain heirs, do not inherently cast doubt on the validity of the testamentary document unless accompanied by substantive suspicious circumstances. (Para 19)

Citations Reference

Kunvarjeet Singh Khandpur v. Kirandeep Kaur, **(2008) 8 SCC 463;** Uma Devi Nambiar v. T.C. Sidhan, **(2004) 2 SCC 321 – referred to.**

List of Acts

Indian Succession Act, 1925; Limitation Act, 1963; Indian Evidence Act, 1872.

Keywords

Probate of Will, Limitation, Class-I heir, Right to apply, Testator, Testamentary disposition.

Case Arising From

Order dated 27.12.2018 passed by the learned 2nd Additional Senior Civil Judge, Bhubaneswar in C.S. No. 3/2016 (T) arising out of Test Case No. 14/2007.

Appearances for Parties

For Appellant(s) : Mr. Sidhartha Mishra (1)
For Respondent(s) : Mr. Trilochan Nanda

Judgment/Order

Judgment

Dr. S.K. PANIGRAHI, J.

1. In this appeal, the appellants are challenging the order dated 27.12.2018 passed by the learned 2nd Additional Senior Civil Judge, Bhubaneswar in C.S. No.3/2016(T) arising out of Test Case No.14/2007.

2. It is apparent from the record that the Appellant No.1 (Lingaraj Nayak) has died during pendency of this FAO and the legal heirs of the deceased Appellant No.1 have been substituted vide order dated 01.08.2023 passed in I.A. No.1553 of 2019 arising out of FAO No.176 of 2019.

I. FACTUAL MATRIX OF THE CASE:

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

(i) The Appellant No.1 was the adopted son of Late Krushna Chandra Nayak, whereas the Respondent is his nephew.

(ii) During his lifetime, Late Krushna Chandra Nayak, purchased the schedule land on a lease-cum-sale basis from the Government of Odisha.

(iii) The Appellant No.1 had initiated probate proceedings vide TEST Case No.14 of 2007, before the District Judge, Khurda, Bhubaneswar. However, after a lapse of five years, he filed a petition seeking to withdraw the said probate proceeding.

(iv) The District Judge, Khurda, Bhubaneswar, rejected the petition of Appellant No. 1 for withdrawal vide order dated 24.04.2012. Aggrieved by this, the Appellant No. 1 challenged the said order before this Court in W.P.(C) No. 13599 of 2012.

(v) Meanwhile, the Respondent filed a petition seeking transposition as a petitioner in the probate proceedings, contending that the Will was in favor of both parties, and therefore, probate could not be declined at the instance of one party alone.

(vi) This Court, by order dated 12.05.2014, disposed of W.P.(C) No. 13599 of 2012 with a direction to the District Judge, Khurda, Bhubaneswar, to reconsider both the application of withdrawal and the application for transposition.

(vii) Subsequently, the Respondent was transposed as the petitioner in the probate proceedings before the District Judge.

(viii) Upon the grant of probate becoming contested, the matter was transferred to the 2nd Additional Senior Civil Judge, Bhubaneswar, for adjudication on merits, where it was renumbered as C.S. No. 03 of 2016 (T), arising out of TEST Case No. 14 of 2007.

(ix) Based on the pleadings of the parties, and after recording the evidence, the 2nd Additional Senior Civil Judge, Bhubaneswar, by the order dated 27.12.2018, allowed probate of the Will in favor of the Respondent and Appellant No.1. Aggrieved by this decision, the present appellants have filed this appeal.

II. SUBMISSIONS ON BEHALF OF THE APPELLANTS:

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

(i) The Appellants submitted that the Respondent is neither a descendant of the testator nor has he rendered any significant services to him during his lifetime.

(ii) The Appellants further submitted that the execution of the alleged Will is suspicious, as the probate proceedings were initiated 25 years after the testator's death. Krushna Chandra Nayak passed away in the year 1990, while the probate petition was filed in 2007. Such an extraordinary delay casts serious doubts about the authenticity of the Will and warrants the dismissal of the probate proceedings. Furthermore, as the testator passed away in 1990, the probate proceedings are barred by the law of limitation.

(iii) The Appellants further submitted that the alleged 'Will' stipulates that the Respondent and Appellant No. 1 shall jointly own Plot No. 83, measuring 32 square feet, in equal shares. However, the 'Will' is silent on the ownership and alienation of the remaining 9600 square feet comprising a double-storied shop-cum-residential building situated on the same plot. In the absence of any provision, addressing this substantial portion, the Will becomes impossible to execute and is rendered void.

(iv) The Appellants submitted that the probate proceedings were allowed without affording them an opportunity to adduce rebuttal evidence. The 2nd Additional Senior Civil Judge, Bhubaneswar, permitted the Defendants to submit evidence on

16.05.2018, despite a Miscellaneous Petition being pending, and without securing the crucial testimony of the Sub-Registrar, as directed by the earlier court order. Subsequently, the 2nd Additional Senior Civil Judge, Bhubaneswar closed the Appellants' evidence and pronounced the impugned decision, which is bad in law and liable to be set aside.

(v) The Appellants further contended that the 2nd Additional Senior Civil Judge, Bhubaneswar, erred by failing to consider the entitlement and standing of Appellant No. 2, the legally married wife of the deceased testator and a Class-I heir. As a Class-I heir of the property, her rights should have been duly examined before granting probate. The failure to do so amounts to a material irregularity, undermining the fairness of the proceedings.

III. SUBMISSIONS OF BEHALF OF THE RESPONDENT:

5. Per contra, the learned counsel for the Opposite Party earnestly made the following submissions in support of his contentions:

(i) The Respondent submitted that Late Krushna Chandra Nayak had executed a Registered Deed of Will on 24.11.1982 in favor of Appellant No. 1 and the Respondent. The 'Will' was duly registered at the Sub Registrar's Office, Bhubaneswar, in the presence of two attesting witnesses. The recitals of the Will unequivocally demonstrate that it was the testator's last Will and testament, executed voluntarily, out of love and affection, and free from coercion or undue influence.

(ii) The original deed was under the custody of the present Appellant No.1, who initially filed a probate proceeding in TEST Case No. 14 of 2007 before the District Judge, Khurda, Bhubaneswar. However, he later sought to withdraw the proceedings, which were subsequently pursued by the Respondent after being transposed as the petitioner.

(iii) The execution and attestation of the registered Will were duly proven by the Respondent. Section 63 of the Indian Succession Act, 1925, mandates that a Will must be attested by at least two witnesses, while Section 68 of the Indian Evidence Act, 1872, requires the testimony of at least one attesting witness to prove its execution. Both attesting witnesses deposed that the testator, Krushna Chandra Nayak, signed the Will in their presence and presented it for registration at the Sub Registrar's office. In contrast, the Appellants failed to produce any oral or documentary evidence to rebut the Respondent's case. Accordingly, based on the evidence adduced, the probate of the Will was rightly granted.

(iv) The Respondent submitted that the right accruing from the Will is a continuous right, exercisable at any time after the testator's death. While the delay in initiating probate proceedings must be explained, it does not constitute an absolute bar to such proceedings. The 2nd Additional Senior Civil Judge rightly observed that once the Will's execution and attestation are proven, any delay in filing the probate petition does not affect the validity of the Will.

(v) Both the Appellant No. 1 and the Respondent are equal beneficiaries under the Will, each entitled to a half share in the property. They have constructed their respective buildings and stalls on their allotted portions. The Appellants' contention that the Will does not mention the residential building and stalls is an afterthought,

devoid of any supporting evidence. Their actions reflect a mala fide intention to appropriate the entire property, in direct contravention of the Will's terms, which clearly bequeath equal shares to both parties.

(vi) The Respondent contended that the impugned judgment does not suffer from any illegality or infirmity. The 2nd Additional Senior Civil Judge, Bhubaneswar rightly granted probate of the Will in favour of both parties, and therefore, the judgment warrants no interference by this Court.

IV. FINDINGS OF THE 2ND ADDITIONAL SENIOR CIVIL JUDGE, BHUBANESWAR:

6. The 2nd Additional Senior Civil Judge, after reviewing the pleadings, evidence, and hearing arguments from both parties, made the following findings:

(i) Under the Limitation Act, 1963, no period is prescribed within which an application for probate, letters of administration or succession certificate must be made. The assumption that under Article 137 of the Limitation Act, 1963, the right to apply necessarily accrues on the date of the death of the deceased is unwarranted. The application for probate is for the Court's permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed. The right to apply would accrue when it becomes necessary to apply which may not necessarily be within three years from the date of the deceased's death.

(ii) Delay beyond three years after the deceased death would arouse suspicion and greater the delay, greater would be the suspicion. Such delay must be explained but cannot be equated with the absolute bar of limitation and once execution and attestation are proved, suspicion of delay no longer operates.

(iii) In absence of any rebuttal evidence and with the presence of witnesses during the execution of the Will, it is presumed that Krushna Chandra Nayak was of sound mind and understood his actions act at the time of execution of the Will. The affidavit of the attesting witnesses further strengthens the presumption that Krushna Chandra Nayak was of sound mind and executed the Will of his free will, without any coercion.

V. COURT'S REASONING AND ANALYSIS:

7. Heard the Learned Counsels for the parties and perused the documents placed before this Court.

8. At the outset, this Court finds it imperative to examine the applicability of Article 137 of the Limitation Act, 1963, to applications for probate of a Will before delving into the merits of the case.

9. The provisions of Article 137 of the Limitation Act, 1963, are not confined to the Code of Civil Procedure and can be extend to petitions or applications under any Act filed in a civil court.

10. The Supreme Court in ***Kunvarjeet Singh Khandpur v. Kirandeep Kaur***[1] observed that Article 137 of the Limitation Act, 1963 is applicable to an application made to the District Judge under Section 264 of the Indian Succession Act, 1925.

11. It is crucial to note that under Article 137 of the Limitation Act, 1963, the limitation period of three years is to be computed from the date on which the 'right to apply accrues'. In the context of probate of Will, the right to apply for probate is a continuous right that may be exercised at any time after the death of the testator. It accrues when a dispute arises over the Will or when acknowledgment by the court becomes necessary.

12. In this regard, the Supreme Court in ***Kunvarjeet Singh*** (supra) observed that an application for probate merely seeks recognition from the court to perform a duty. Owing to the nature of such proceedings, it is a continuing right. It was further observed as reproduced hereinunder:

> *"15. Similarly reference was made to a decision of the Bombay High Court in Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani [AIR 1983 Bom 268]. Para 16 reads as follows: (AIR p. 270)*
>
> *"16. Rejecting Mr. Dalpatrai's contention, I summarise my conclusions thus—*
>
> *(a) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;*
>
> *(b) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;*
>
> *(c) such an application is for the court's permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;*
>
> *(d) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the deceased's death;*
>
> *(e) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;*
>
> *(f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and*
>
> *(g) once execution and attestation are proved, suspicion of delay no longer operates."*
>
> *Conclusion (b) is not correct while Conclusion (c) is the correct position of law."*

13. It is therefore evident that the right to apply for probate arises when it becomes necessary, and this need not necessarily arise within three years from the date of the deceased's death. While delay may raise suspicion, it cannot, by itself, constitute an absolute bar to an application for probate; as rightfully held by the lower court.

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[1] (2008) 8 SCC 463

14. In the instant case, the Appellant No.1 had initially filed a probate proceeding in TEST Case No. 14 of 2007 before the District Judge, Khurda, Bhubaneswar, which were later withdrawn. The Respondent had subsequently applied for transposition, and the same was allowed.

15. Furthermore, the Appellants contended that the lapse of 25 years casts doubt on the authenticity of the Will. While such delay may arouse suspicion, in the present case, the Appellants have not submitted anything to contradict the authenticity of the document. The Will was duly attested, and the attesting witnesses were examined by the 2nd Additional Senior Civil Judge, Bhubaneswar. In the absence of any proof to the contrary, the probate was granted. Once execution and attestation have been proved, mere suspicion arising from delay cannot operate as a bar. The Appellants have failed to demonstrate any grounds warranting intervention by this court.

16. This Court further finds no merit in the contention of the appellant that the 2nd Additional Senior Civil Judge, Bhubaneswar, erred by failing to provide an adequate opportunity to the appellant. The record clearly reflects that the petitioner examined witnesses, while the Appellant failed to present any evidence to challenge the validity of the Will.

17. This Court also finds no merit in the contention that Appellant No. 2, who is the legally married wife of the deceased testator and a Class-I heir, had a direct interest in the property and that her rights were not considered by the 2nd Additional Senior Civil Judge, Bhubaneswar, before granting probate.

18. In ***Uma Devi Nambiar v. T.C. Sidhan***[2] the Supreme Court has succinctly observed that a Will inherently deviates from the normal mode of succession, often reducing or excluding natural heirs. This alone does not constitute a suspicious circumstance, especially when the bequest benefits an offspring. The propounder must dispel genuine and substantive doubts, and if successful, the Will must be upheld, even if it appears unconventional or unnatural. This was replicated hereinunder:

> *"16. A Will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar [1995 Supp (2) SCC 664 : AIR 1995 SC 1852] it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the*

[2] (2004) 2 SCC 321

suspicious circumstance, the court has to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations. (See Pushpavathi v. Chandraraja Kadamba [(1973) 3 SCC 291 : AIR 1972 SC 2492] .) In Rabindra Nath Mukherjee v. Panchanan Banerjee [(1995) 4 SCC 459] it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly."

19. It is thus clear that the exclusion of a Class I heir from a testamentary disposition, in itself, does not render the Will invalid or raise a presumption of illegality. A Will, by its very nature, allows the testator to deviate from the ordinary rules of succession and makes specific bequests in accordance with their personal wishes. Such deviations, even if they result in disinheritance or reduced shares for certain heirs, do not inherently cast doubt on the validity of the testamentary document unless accompanied by substantive suspicious circumstances.

20. In the present case, the Will has been duly executed and attested by competent witnesses, adhering to the requirements prescribed under the law. There is no evidence on record to suggest any lack of authenticity or procedural irregularity in its execution. Furthermore, the mere efflux of time does not invalidate the Will or extinguish the right to apply for probate. Unlike other claims, the right to seek probate does not fall under the strict limitations of a time bar; rather, it accrues when a dispute arises regarding the Will or when judicial acknowledgment of the testamentary instrument becomes necessary. This principle ensures that the intentions of the testator are respected and preserved, even in cases where the matter surfaces after considerable time. Therefore, the validity of the Will remains intact unless challenged on genuine and legally recognized grounds.

VI. CONCLUSION:

21. In light of the foregoing, this Court finds that the appellants have failed to establish any substantive grounds necessitating this Court's intervention. Consequently, the order passed by the learned 2nd Additional Senior Civil Judge, Bhubaneswar, granting probate, does not warrant interference and is hereby affirmed.

22. The present FAO is hereby dismissed.

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

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter FAO dismissed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I) ILR-CUT-831

M/s. BHADRA PRODUCTS, MUMBAI
V.
M/s. INDIAN FARMERS FERTILIZER CO-OPERATIVE LTD., JAGATSINGHPUR

[ARBA NO. 21 OF 2023]

30 JANUARY 2025

[Dr. S.K. PANIGRAHI, J.]

Issues for Consideration

1. Whether in a proceeding U/s. 34 of the Arbitration & Conciliation Act, additional evidence can be adduced by the party.
2. Whether an Appellate Court by applying Section 37 of the Arbitration & Conciliation Act can intervene in the arbitral award.

Headnotes

(A) ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 – Appellant filed an application seeking permission of the Ld. District Judge to adduce additional evidence in the Arbitral Proceeding U/s. 34 of the Act – The Ld. District Judge rejected the petition – Whether in a proceeding U/s. 34 of the Arbitration & Conciliation Act, additional evidence can be adduced by the party.

Held: No – The legal position is thus clarified that Section 34 application will not ordinarily require anything beyond the record that was before the arbitrator and that cross-examination of persons swearing into the affidavits should not be allowed unless absolutely necessary. (Para 26)

It is apparent from the orders of Ld. Arbitrator of the arbitral proceeding, on the different dates, that the Appellant was given sufficient opportunity to file any relevant documents – However, instead of doing the same, the Appellant choose to bring the additional documents during the proceeding under Section 34 of the Act.

Since the general rule dictates that additional evidence is permissible only in exceptional circumstances, the Learned District Judge was correct in refusing the Appellant's request to adduce additional evidence, and no error can be attributed to this decision. (Para 32 & 35)

(B) ARBITRATION AND CONCILIATION ACT, 1996 – Sections 37, 34 – Whether an Appellate Court by applying Section 37 of Arbitration & Conciliation Act can intervene in the arbitral award**.**

Held: While deciding an appeal it must be kept in mind that the arbitrator tribunal is the final arbiter on facts as well as law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Section 34 or Section 37 of the Act – The Supreme Court has consistently held that an arbitration award should not be lightly interfered with. (Para 38)

Citations Reference

Sandeep Kumar v. Ashok Hans, **2004 SCC OnLine Del 106;** Sial Bioenergie v. SBEC Systems, **2004 SCC OnLine Del 863;** Fiza Developers & Inter-Trade (P) Ltd. V. AMCI (India) (P) Ltd., **(2009) 17 SCC 796;** Punjab SIDC Ltd. V. Sunil K. Kansal, **2012 SCC Online P&H 19641;** WEB Techniques & Net Solutions (P) Ltd. V. Gati Ltd., **2012 SCC OnLine Cal 4271;** Cochin Shipyard Ltd. v. Apeejay Shipping Ltd., **(2015) 15 SCC 522;** Emkay Global Financial Services Ltd. v. Girdhar Sondhi, **(2018) 9 SCC 49;** Canara Nidhi Limited v. M. Shashikala, **(2019) 9 SCC 462;** Renusagar Power Co. Ltd. v. General Electric Co., **1994 Supp (1) SCC 644;** ONGC v. Saw Pipes Ltd., **(2003) 5 SCC 705;** Hindustan Zinc Ltd. v. Friends Coal Carbonisation, **(2006) 4 SCC 445;** Associate Builders v. DDA, **(2015) 3 SCC 49;** McDermott International Inc. v. Burn Standard Co. Ltd., **(2006) 11 SCC 181;** MMTC Ltd. v. Vedanta Ltd., **(2019) 4 SCC 163;** U.P. State Handloom Corpn. Ltd. v. Asha Lata Talwar, **2009 SCC OnLine ALL 624;** Dyna Technologies (P) Ltd. v. Cromption Greaves Ltd., **(2019) 20 SCC 1;** PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors., **AIR 2021 SCC 4661;** K. Sugumar and Anr. v. Hindustan Petroleum Corporation Ltd. & Anr., **(2020) 12 SCC 539;** UHL Power Company Ltd. v. State of Himachal Pradesh, **(2022) 4 SCC 116;** Sutlej Construction Limited v. Union Territory of Chandigarh, **(2018) 1 SCC 718;** Venture Global Engineering v. Satyam Computer Services Limited and Anr., **(2010) 8 SCC 660;** Patel Engineering Limited v. North Eastern Electric Power Corporation Limited, **(2020) 7 SCC 167 – referred to.**

List of Acts

Arbitration and Conciliation Act, 1996.

Keywords

Adduce of additional evidence; Scope of Judicial scrutiny; Review of arbitral award, Scope of Appellate Court.

Case Arising From

Judgment dated 03.08.2023 passed by the learned District Judge, Jagatsinghpur in Arbitration Petition No. 4 of 2020.

Appearances for Parties

For Appellant(s) : Mr. Nilamadhab Bisoi
For Respondent(s) : Mr. Sarada Prasanna Sarangi, Mr. Sanjay Grover

Judgment/Order

Judgment

Dr. S.K. PANIGRAHI, J.

1. This Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A&C Act") has been filed seeking setting aside of the judgment dated 03.08.2023 passed by the learned District Judge, Jagatsinghpur in Arbitration Petition No. 4 of 2020.

I. FACTUAL MATRIX OF THE CASE:

2. The present dispute arises over a contract of supply of defoaming agent for manufacturing of phosphoric acid. The Appellant Company is a manufacturer and seller of POLYCOL PF-140, a Defoaming agent, amongst other chemicals. The present Respondent Company required a defoaming agent for the production of phosphoric acid in its plant. On 7.2.2006, the Respondent Company issued a tender enquiry for the supply of defoamer. A trial run of supply of Defoamer was taken up from bidders including the present Appellant. After an assessment, the Appellant Company was selected for supply of Defoamer to the Respondent Company's plant.

3. Subsequently, a Letter of Intent (LoI) dated 2.11.2006 and Purchase Order dated 24.1.2007 was issued in favour of the Appellant Company for supply of 800 MT of Defoamer for production of 3,08,880 MT of Phosphoric Acid (P2O5).

4. The Claimant Company claims that payment for the Defoamer supplied to the Respondent to the tune of Rs.6,27,08,886/- apart from interest. The said claim is denied by the Respondent who asserts that no payments are due to the Claimant as all payments as per the agreed upon terms and conditions have been duly paid to the Appellant Company.

5. Upon the dispute arising between the parties, the matter was referred to the Delhi International Arbitration Centre (DIAC). On 15.1.2015, Retd. Justice Deepak Verma sent his formal consent to act as arbitrator in the arbitral proceedings. Accordingly, proceedings commenced with the first sitting being held on 3.3.2015. After hearing the parties, the Ld. Sole Arbitrator was pleased to pass his final award on 19.5.2020 wherein, all the claims of the Claimant were rejected.

6. Aggrieved, the Appellant assailed the final award dated 19.5.2020 under Section 34 of the A&C Act in the Court of the learned District Judge, Jagatsinghpur vide Arbitration Petition No. 4 of 2020. Vide judgment dated 3.8.2023 in Arbitration Petition No. 4 of 2020 the Ld. District Judge, Jagatsinghpur was pleased to dismiss the same upon arriving at the conclusion that the award was not in violation of the public policy of India, nor did it contain any plausible fact that would shock the conscience of the court and did not have any patent illegality on the face of the record.

7. It is also pertinent to mention here that during the course of hearing, the challenge under Section 34 of the A&C Act, the Appellant filed a petition under Section 151 of CPC praying for exhibiting three new documents which was rejected by the Ld. District Judge vide order dated 8.7.2022. Thereafter, the Appellant preferred a revision before this Court wherein vide order dated 13.10.2022 in W.P.(C) No. 18536 of 2022, this Court was pleased to direct the District Judge to admit the additional evidence. Aggrieved by the same, the present Respondent had approached the Supreme Court wherein the Court vide order dated 25.11.2022 in Civil Appeal No.8886 of 2022 [arising out of SLP(C)No.20504 fof 2022] was pleased to direct the Appellant to make all its submissions before the Ld. District Judge as to under what circumstances it could not lead evidence before the Ld. Arbitrator or show how the Ld. Arbitrator did not give sufficient opportunities to lead evidence as such a plea was a question of fact which would be considered by the Ld. District Judge.

8. Pursuant to the same, the Ld. District Judge did consider the plea of the Appellant at the time of final hearing of the matter under Section 34 of the A&C Act. The Ld. District Judge was pleased to conclude and sufficient opportunity was given to the Appellant to adduce evidence but no convincing explanation has been given as to what prevented the Appellant from doing so.

9. Aggrieved by the judgment dated 3.8.2023 in Arbitration Petition No. 4 of 2020, the instant Appeal has been preferred. As the facts leading up to the instant Appeal have been laid down, this Court shall endeavour to summarise the contentions of the Parties and the broad grounds that have been raised to seek the exercise of this Court's limited jurisdiction available under S. 37 of the A&C Act.

II. APPELLANT'S SUBMISSIONS:

10. The counsel for the Appellants assails the arbitral award and the judgment of the learned District Judge, mainly on the ground that the Learned District Judge has completely failed to deal with or cogently answer the grounds raised by the present appellant in its application under Section 34 of the A & C Act, 1996, challenging the Final Award dated 19.5.2020, passed by the learned Arbitrator, and has disposed of the matter in a cursory, casual and lackadaisical manner with complete non-application of mind contrary to the well settled propositions of law and, hence, both the impugned order and the Final Award are liable to be set aside.

11. It is also contended that the Ld. District Judge being the final court on facts did not take into account the alleged errors in facts that had been committed by the Ld. Arbitrator and therefore by allegedly only copying the erroneous findings of the Ld. Arbitrator, the Ld. District Judge has committed gross illegality and such a judgment is liable to be interfered with and set aside.

12. It is further submitted that the Ld. District Judge erred in not permitting the present Appellant to adduce additional evidence despite the explanation provided

which described the extent of his mental duress during the Arbitral proceeding and consequent failure to adduce the evidence at that stage.

III. RESPONDENT'S SUBMISSIONS:

13. *Per contra*, learned counsel for the present Respondent contends that the Appellant has not been able to showcase any reasonable ground for interfering with the impugned judgment apart from making bald statements towards the same. It was vehemently submitted that the scope of interference of this Court in an application under Section 37 of the A&C Act is extremely limited and this Court cannot re-appreciate evidence at this stage, therefore it may not revisit the factual findings of the Ld. Tribunal apart from testing the same on the mantle of reasonableness and public policy. It was also submitted that the Ld. District Judge had considered all the material aspects of the contentions raised by the parties and also duly regarded their submissions thereby warranting no interference with the concurrent views of the Ld. Arbitral Tribunal as well as the Ld. District Judge.

14. It is submitted that the award is based on appreciation of the material and evidence that were placed before the arbitrator and it is not open in these proceedings to re-appraise the same. It is thus prayed that the present appeal be dismissed.

IV. ISSUES FOR CONSIDERATION:

15. Having heard the parties and perused the materials available on record, this Court here has identified the following issues to be determined:

> A. Whether the Ld. District Judge erred in rejecting the Appellant's petition seeking permission to adduce additional evidence?
>
> B. Whether this Court should interfere with the impugned order given the narrow scope of its powers under Section 37 of the A&C Act?

V. ISSUE A: WHETHER THE LD. DISTRICT JUDGE ERRED IN REJECTING THE APPELLANT'S PETITION SEEKING PERMISSION TO ADDUCE ADDITIONAL EVIDENCE?

16. What is meant by the expression ‚furnishes proof' in Section 34(2) (a)? In a judgment of Delhi High Court in ***Sandeep Kumar v. Ashok Hans,***[1] the learned Single Judge of the Delhi High Court specifically held that there is no requirement under the provisions of Section 34 for parties to lead evidence. The record of the arbitrator was held to be sufficient in order to furnish proof of whether the grounds under Section 34 had been made out or not.

17. Again, a learned Single Judge of the Delhi High Court in ***Sial Bioenergie v. SBEC Systems,***[2] stated :

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[1] 2004 SCC OnLine Del 106

[2] 2004 SCC OnLine Del 863

"5. In my view the whole purpose of the 1996 Act would be completely defeated by granting permission to the applicant JD to lead oral evidence at the stage of objections raised against an arbitral award. The 1996 Act requires expeditious disposal of the objections and the minimal interference by the court as is evident from the Statement of Objects and Reasons of the Act which reads as follows:

'4. The main objectives of the Bill are as under:

***

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

***

(v) to minimise the supervisory role of courts in the arbitral process;'

6. At the stage of the objections which are any way limited in scope due to the provisions of the Act to permit oral evidence would completely defeat the objects underlying the 1996 Act. The process of oral evidence would prolong the process of hearing objections and cannot be countenanced.

7. Furthermore, the Supreme Court in Food Corpn. of India v. Indian Council of Arbitration [Food Corpn. of India v. Indian Council of Arbitration, (2003) 6 SCC 564] had summarised the ethos underlying the Act as follows : (SCC p. 572, para 14)

'14. ...The legislative intent underlying the 1996 Act is to minimise the supervisory role of the courts in the arbitral process and nominate/appoint the arbitrator without wasting time leaving all contentious issues to be urged and agitated before the Arbitral Tribunal itself.'

8. Accordingly, I see no merit in these applications and the prayer made therein is rejected."

18. This Court now come to a judgment of the Supreme Court in ***Fiza Developers & Inter-Trade (P) Ltd. v. AMCI (India) (P) Ltd.***[3] wherein the question that was posed by the Court was whether issues as contemplated under Order 14 Rule 1 of the Code of Civil Procedure, 1908 should be framed in applications under Section 34 of the Arbitration and Conciliation Act, 1996. The Court held :

"14. In a summary proceeding, the respondent is given an opportunity to file his objections or written statement. Thereafter, the court will permit the parties to file affidavits in proof of their respective stands, and if necessary permit cross-examination by the other side, before hearing arguments. Framing of issues in such proceedings is not necessary. We hasten to add that when it is said issues are not necessary, it does not mean that evidence is not necessary.

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17. The scheme and provisions of the Act disclose two significant aspects relating to courts vis-à-vis arbitration. The first is that there should be minimal interference by courts in matters relating to arbitration. Second is the sense of urgency shown with reference to arbitration matters brought to court, requiring promptness in disposal.

18. Section 5 of the Act provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I of the Act, no judicial authority shall intervene except where so provided in the Act.

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21. We may therefore examine the question for consideration by bearing three factors in mind. The first is that the Act is a special enactment and Section 34 provides for a special remedy. The second is that an arbitration award can be set aside only upon one of the

[3] (2009) 17 SCC 796

grounds mentioned in sub-section (2) of Section 34 exists. The third is that proceedings under Section 34 require to be dealt with expeditiously.

***

24. In other words, an application under Section 34 of the Act is a single issue proceeding, where the very fact that the application has been instituted under that particular provision declares the issue involved. Any further exercise to frame issues will only delay the proceedings. It is thus clear that issues need not be framed in applications under Section 34 of the Act.

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31. Applications under Section 34 of the Act are summary proceedings with provision for objections by the respondent-defendant, followed by an opportunity to the applicant to ‚prove' the existence of any ground under Section 34(2). The applicant is permitted to file affidavits of his witnesses in proof. A corresponding opportunity is given to the respondent-defendant to place his evidence by affidavit. Where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit. Thereafter, the court hears arguments and/or receives written submissions and decides the matter. This is of course the routine procedure. The court may vary the said procedure, depending upon the facts of any particular case or the local rules. What is however clear is that framing of issues as contemplated under Rule 1 of Order 14 of the Code is not an integral part of the process of a proceedings under Section 34 of the Act."

19. In a similar case, the Punjab and Haryana High Court in ***Punjab SIDC Ltd. v. Sunil K. Kansal,***[4] after referring to the Supreme Court's judgment in ***Fiza Developers*** (supra) has succinctly held:

"30. In view of the above, we answer the question of law framed as follows:

(i) The issues, as required under Order 14 Rule 1 of the Code as in the regular suit, are not required to be mandatorily framed by the Court. However, it is open to the Court to frame questions which may arise for adjudication.

(ii) The Court while dealing with the objections under Section 34 of the Act is not bound to grant opportunities to the parties to lead evidence as in the regular civil suit. The jurisdiction of the Court being more akin to the appellate jurisdiction;

(iii) The proceedings before the Court under Section 34 of the Act are summary in nature. Even if some questions of fact or mixed questions of law and/or facts are to be decided, the court while permitting the parties to furnish affidavits in evidence, can summon the witness for cross-examination, if desired by the other party. Such procedure is keeping in view the principles of natural justice, fair play and equity."

20. Further, Calcutta High Court in ***WEB Techniques & Net Solutions (P) Ltd. v. Gati Ltd.,***[5] after referring to Fiza Developers (supra) has held that oral evidence is not required under a Section 34 application when the record before the arbitrator would show whether the petitioners had received notice relating to his appointment. In ***Cochin Shipyard Ltd. v. Apeejay Shipping Ltd.***[6] also, the Supreme Court did not follow the decision in ***Fiza Developers*** (supra).

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[4] 2012 SCC OnLine P&H 19641

[5] 2012 SCC OnLine Cal 4271

[6] (2015) 15 SCC 522

21. After the decision in ***Fiza Developers*** (supra), Section 34 was amended by Act 3 of 2016 by which sub-sections (5) and (6) of Section 34 were added to the principal Act with effect from 23.10.2015. Sub-sections (5) and (6) to Section 34 of the Act are read as under:

> *"34. Application for setting aside arbitral award.—*
>
> *(4) * * **
>
> *(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.*
>
> *(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in subsection (5) is served upon the other party."*

22. The Justice B.N. Srikrishna Committee, in its report on reviewing the institutionalization of arbitration in India, recommended ensuring consistency and expediting the process of setting aside arbitral awards. It emphasized that proceedings under Section 34(2)(a) of the A&C Act, 1996, should not be treated as regular civil suits requiring extensive evidentiary proceedings, such as the framing of issues under Rule 1 of Order 14 of the CPC. Instead, the party challenging an arbitral award should establish its case primarily based on the record of the arbitral tribunal, thereby streamlining the process and avoiding unnecessary procedural delays. The relevant recommendations are produced hereinbelow:

> *"5. Amendment to Section 34(2)(a) of the ACA : Subsection (2)(a) of Section 34 of the ACA provides for the setting aside of arbitral awards by the court in certain circumstances. The party applying for setting aside the arbitral award has to furnish proof to the court. This requirement to furnish proof has led to inconsistent practices in some High Courts, where they have insisted on Section 34 proceedings being conducted in the manner as a regular civil suit. This is despite the Supreme Court ruling in Fiza Developers & Inter-Trade (P) Ltd. v. AMCI (India) (P) Ltd. [Fiza Developers & InterTrade (P) Ltd. v. AMCI (India) (P) Ltd., (2009) 17 SCC 796 : (2011) 2 SCC (Civ) 637] that proceedings under Section 34 should not be conducted in the same manner as civil suits, with framing of issues under Rule 1 of Order 14 of the CPC.*
>
> *In light of this, the Committee is of the view that a suitable amendment may be made to Section 34(2)(a) to ensure that proceedings under Section 34 are conducted expeditiously.*
>
> *Recommendation : An amendment may be made to Section 34(2)(a) of the Arbitration and Conciliation Act, 1996, substituting the words 'furnishes proof that' with the words 'establishes on the basis of the Arbitral Tribunal's record that'."* *(emphasis is ours)*

23. Thereafter, ***Arbitration and Conciliation (Amendment) Bill, 2017***[7], being Bill No. 100 of 2018, containing an amendment to Section 34(2)(a) of the principal Act was introduced which reads as follows:

> *"7. Amendment of Section 34.—In Section 34 of the principal Act, in sub-section (2), in clause (a), for the words ,furnishes proof that', the words ,establishes on the basis of the record of the Arbitral Tribunal that' shall be substituted."*

[7] [Bill No. 100 of 2018, The Arbitration and Conciliation (Amendment) Bill, 2018, p. 3.]

24. Based on Justice B.N. Srikrishna Committee's Report, Section 34 of the principal Act has since been amended by the Arbitration and Conciliation (Amendment) Act, 2019 which is as under:

> *"7. Amendment of Section 34.—In Section 34 of the principal Act, in sub-section (2), in clause (a), for the words ,furnishes proof that', the words ,establishes on the basis of the record of the arbitral tribunal that' shall be substituted."*

25. After referring to Justice B.N. Srikrishna Committee's Report and other judgments and observing that the decision in ***Fiza Developers*** (supra) must be read in the light of the amendment made in Section 34(5) and Section 34(6) of the Act and amendment to Section 34 of the Arbitration Act, 1996, the Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi,***[8] held that Section 34 proceedings under the Arbitration and Conciliation Act, 1996, are summary in nature and must be resolved expeditiously. These proceedings should primarily rely on the arbitral tribunal's record, with additional evidence permissible only through affidavits if relevant to Section 34(2)(a). Cross-examination of the affiants is allowed only in exceptional circumstances where necessary, ensuring efficiency without compromising fairness. The relevant excerpt is produced as under:

> *"21. It will thus be seen that speedy resolution of arbitral disputes has been the reason for enacting the 1996 Act, and continues to be the reason for adding amendments to the said Act to strengthen the aforesaid object. Quite obviously, if issues are to be framed and oral evidence taken in a summary proceeding under Section 34, this object will be defeated. It is also on the cards that if Bill No. 100 of 2018 is passed, then evidence at the stage of a Section 34 application will be dispensed with altogether. Given the current state of the law, we are of the view that the two early Delhi High Court judgments in Sandeep Kumar v. Ashok Hans [Sandeep Kumar v. Ashok Hans, 2004 SCC OnLine Del 106 : (2004) 3 Arb LR 306] , Sial Bioenergie v. SBEC Systems [Sial Bioenergie v. SBEC Systems, 2004 SCC OnLine Del 863 : (2005) 79 DRJ 156] , cited by us hereinabove, correctly reflect the position in law as to furnishing proof under Section 34(2)(a). So does the Calcutta High Court judgment in WEB Techniques & Net Solutions (P) Ltd. v. Gati Ltd. [WEB Techniques & Net Solutions (P) Ltd. v. Gati Ltd., 2012 SCC OnLine Cal 4271] We may hasten to add that if the procedure followed by the Punjab and Haryana High Court judgment in Punjab SIDC Ltd. v. Sunil K. Kansal [Punjab SIDC Ltd. v. Sunil K. Kansal, 2012 SCC OnLine P&H 19641] is to be adhered to, the time-limit of one year would only be observed in most cases in the breach. We therefore overrule the said decision. We are constrained to observe that Fiza Developers [Fiza Developers & Inter-Trade (P) Ltd. v. AMCI (India) (P) Ltd., (2009) 17 SCC 796 : (2011) 2 SCC (Civ) 637] was a step in the right direction as its ultimate ratio is that issues need not be struck at the stage of hearing a Section 34 application, which is a summary procedure. However, this judgment must now be read in the light of the amendment made in Sections 34(5) and 34(6). So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties. We, therefore, set aside the judgment in Girdhar Sondhi v. Emkay Global Financial Services Ltd.*

[8] (2018) 9 SCC 49

[Girdhar Sondhi v. Emkay Global Financial Services Ltd., 2017 SCC OnLine Del 12758] of the Delhi High Court and reinstate that of the learned Additional District Judge dated 22-9-2016. The appeal is accordingly allowed with no order as to costs."

26. The legal position is thus clarified that Section 34 application will not ordinarily require anything beyond the record that was before the arbitrator and that cross-examination of persons swearing in to the affidavits should not be allowed unless absolutely necessary.

27. In the subsequent decision of the Apex Court in the case of ***Canara Nidhi Limited v. M. Shashikala***[9] which has approved the interpretation of section 34(2)(a) in ***Emkay Global*** (supra) while holding that such permission to adduce additional evidence ought to be accorded only in "exceptional circumstances" and very sparingly.

28. The question falling for consideration now is whether the present case is such an exceptional circumstance that it was necessary to grant opportunity to the Appellant to adduce additional evidence.

29. At the outset, it may be observed that it is not a matter of absolute right for a party to tender additional evidence in proceeding filed under Section 34 of the Act, as these proceedings are summary proceedings. The intention of the legislation is expeditious disposal of the arbitral disputes in the manner known to Section 34 of the Act. As evident from the legislative scheme of the A&C Act, the parties have all the opportunity to object to the tribunal on all the counts as permissible under Sections 12 and 13 and in the manner recognized by Section 16 of the Act. No doubt, if such an objection fails, the same would be subject matter of consideration on the basis of the record of the arbitral tribunal in proceedings of a Section 34 application.

30. The Appellant contends that the additional documents could not be filed at the time of the arbitration proceedings due to the fact that the Appellant was unable to locate the said additional documents at the relevant time due to the mental trauma of the ongoing arbitration. It is further submitted that the Appellant Company's partner was old and unwell apart from the Appellant's bank account being declared as a non-performing asset due to default in repayment of loan amounts which is alleged to have been caused due to non-payment of dues by the present Respondent.

31. At this juncture, this Court deems it appropriate to peruse and reproduce relevant portions of the Arbitral Award.

"E. Procedural History

i. 3.3.2015: 1st Arbitral Proceeding

"17. …During this proceeding, Ld. Counsel for the Parties submitted that the matter be first heard on the issue of limitation and for which no =oral evidence was required to be

[9] (2019) 9 SCC 462

adduced. The Parties exchanged notices of admission/denial of documents on affidavit. The Claimant admitted all documents filed by Respondent whereas, Respondent only admitted some of the documents and for the remaining documents, only receipt was admitted thereof.

18. ...The Tribunal also allowed the Respondent's application seeking filing of additional documents on record in the interest of justice with a clarification that Claimant had the liberty to file additional documents in rebuttal. It was further clarified that both Parties were at liberty to file additional documents pertaining to the Purchase Order in issue before the next date of hearing i.e. 09.04.2015.

ii. 9.4.2015: 2nd Arbitral Proceeding

19. Ld. Counsel for Parties filed Interim Applications for bringing additional evidence on record. After hearing the parties, it was observed that all documents filed should be taken on record....

ii. ...

iii. ...

iv. 23.7.2015: 4th Arbitral Proceeding

23. ...The Tribunal decided the Issue of limitation in favour of the Claimant and held that the claim of the Claimant had not become time barred. Ld. Counsel for the Claimant submitted that with respect to the other issues, no oral evidence was required.

v. ...

vi. ...

vii. 5.10.2015: 5th Arbitral Proceeding

27. The evidence for Claimant was closed on account of the fact that Claimant did not lead any oral evidence. Respondent's witnesses, RW1 and RW2, were discharged after their cross examination. The matter was thereafter fixed for final hearing on 19.11.2015."

32. It is apparent from the orders of the Ld. Arbitrator of the arbitral proceedings, on the different dates, that the Appellant was given sufficient opportunity to file any relevant documents. However, instead of doing the same, the Appellant chose to bring the additional documents during the proceeding under Section 34 of the Act. The Ld. District Judge has also correctly noted that no document whatsoever has been filed by the Appellant in support of the claim of deteriorating mental health condition or bankruptcy. The arbitral proceeding commenced on 3.3.2015 and the final Award was passed on 19.5.2020. The arbitral proceeding continued for more than 5 years but such a prayer was not made at any point in time by the Appellant.

33. The Appellant sought for mainly producing 166 nos. of tax invoices, permission for which was denied leading to the first round of litigation between the parties. In this regard, this Court is bound by the Ld. Arbitrator's findings on fact that payment was based on production of P2O5, irrespective of quantity of defoamer consumed in the process which would render the invoices irrelevant. It is not the case that the invoices being on record before the Ld. Tribunal would alter the finding of fact, neither does it seem appropriate that a document which could have been produced at the stage of the arbitral proceeding, having been withheld and produced

belatedly, should render an entire award arrived at consciously by the Ld. Arbitrator null or void.

34. Section 34 of A & C Act proceedings are not meant to be converted into mini-trials or an appellate proceedings. If the issues raised were already considered and decided by the arbitral tribunal, they cannot be reopened through additional evidence unless exceptional circumstances are demonstrated. Courts are justified in rejecting such requests to maintain the summary nature of these proceedings.

35. Furthermore, since the general rule dictates that additional evidence is permissible only in exceptional circumstances, the Learned District Judge was correct in refusing the Appellant's request to adduce additional evidence, and no error can be attributed to this decision.

VI. ISSUE B: WHETHER THIS COURT SHOULD INTERFERE WITH THE IMPUGNED ORDER GIVEN THE NARROW SCOPE OF ITS POWERS UNDER SECTION 37 OF THE A&C ACT?

36. It is no longer *res integra* in arbitration jurisprudence that the scope for interference in an appeal under Section 37(1)(c) of the Act is very narrow. In order to succeed, the Appellant must establish that the finding of the arbitrator is based on no evidence or the arbitrator has taken into account material which is irrelevant or has ignored vital evidence.

37. One may also note that, it has been repeatedly held that while entertaining appeals under Section 37 of the Act, the court is not actually sitting as a court of appeal over the award of the Arbitral Tribunal and therefore, the court would not reappreciate or reassess the evidence. The position of law stands crystallised today, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is absolutely necessary. The arbitrator Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Section 34 or Section 37 of the Act.

38. While deciding an appeal it must be kept in mind that the arbitrator tribunal is the final arbiter on facts as well as law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Section 34 or Section 37 of the Act. The Supreme Court has consistently held that an arbitration award should not be lightly interfered with. In this regard, it is apposite to place reliance on the Apex Court's judgments in ***Renusagar Power Co. Ltd. v. General Electric Co.***[10]***; ONGC v. Saw Pipes Ltd***[11]***; Hindustan Zinc Ltd. v. Friends Coal Carbonisation***[12] ***and Associate Builders case [Associate Builders v. DDA]***[13]**.**

[10] 1994 Supp (1) SCC 644
[11] (2003) 5 SCC 705

39. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted, than while deciding a petition under Section 34 of the Act. The Supreme Court in ***McDermott International Inc. v. Burn Standard Co. Ltd***.[14] has held as under:

> *"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it'."*

40. It is also settled law that the courts cannot travel beyond the scope of Section 34 in an appeal under Section 37 from an order of the court in an application preferred by a party to set aside an arbitral award under Section 34 of the A&C Act as has been laid down by the Supreme Court in ***MMTC Ltd. v. Vedanta Ltd.***[15] wherein it was held as following:

> *"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such* concurrent findings."

41. Section 34 of the Act makes provision for the supervisory role of courts for review of arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, when an award is in conflict with the public policy of India, which includes cases of fraud, breach of fundamental policy of Indian law and breach of public morality. The other ground provided under Section 34 is patent illegality. It specifically provides that an award cannot be set aside on the ground of erroneous application of law or on re-appreciation of fact. In the decision of ***McDermott International Inc. v. Burn Standard Co. Ltd.*** (supra), a reference was made to the decision of ***U.P. State Handloom Corpn. Ltd. v. Asha Lata Talwar***[16] and it was observed that under Section 34 of the Act of 1996 there is a departure from the scheme of Section 16 in the 1940 Act where perhaps the court was given wider amplitude of powers. The Apex Court interpreted the scope of interference under Section 34 and observed that the court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. The scheme

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[12] (2006) 4 SCC 445
[13] (2015) 3 SCC 49
[14] (2006) 11 SCC 181
[15] (2019) 4 SCC 163
[16] 2009 SCC OnLine All 624

of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it. Under Section 34(2) of the Act 1996 the court is empowered to set aside an arbitral award on the grounds specified therein. There is no specific power granted to the court to itself allow the claims originally made before the Arbitral Tribunal where it finds the Arbitral Tribunal erred in rejecting such claims. If such a power is recognised as falling within the ambit of Section 34(4) of the Act, then the court would be acting no different from an appellate court which would be contrary to the legislative intent of the Section 34 of the Act, 1996. The court shall decline to decide the claim that had been rejected even if wrongly so by the learned Arbitrator.

42. In the decision of ***Dyna Technologies (P) Ltd. v. Cromption Greaves Ltd.***[17], the Supreme Court noted that only when there is complete perversity in the reasoning then it can be challenged under the provisions of Section 34 of the Act. The power vested under Section 34(4) of the Act, 1996 to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid the challenge based on the aforesaid curable defects under Section 34 of the Act.

43. As far as Section 34 is concerned, the position is well settled by now that the court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the 'fundamental policy of Indian law' would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with and reasonableness.

44. It is only if one of these conditions is met then only the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts.

45. In view of the law laid down by the Supreme Court, the scope of judicial scrutiny and interference by an appellate Court under Section 37 of the Act is even more restrictive than Section 34 of the Act. In fact, while entertaining appeals under Section 37 of the Act, the court is not actually sitting as a court of appeal, this Court shall examine the judgment of the Ld. District Judge in a narrow campus.

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[17] (2019) 20 SCC 1

46. The Ld. District Judge has first and foremost taken note of the scope of its powers under Section 34 of the A&C Act and the settled position of law pertaining to the grounds where it may exercise its powers as laid down by the Supreme Court in ***PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors.***[18]***; K. Sugumar and Anr. v. Hindustan Petroleum Corporation Ltd. &Anr.***[19]***; UHL Power Company Ltd. v. State of Himachal Pradesh***[20]***; Sutlej Construction Limited v. Union Territory of Chandigarh***[21]***; Venture Global Engineering v. Satyam Computer Services Limited and Anr.***[22] ***and Patel Engineering Limited v. North Eastern Electric Power Corporation Limited***[23]***.***

47. Thereafter, the Ld. District Judge has taken note of the contentions of the Parties including the law relied upon by either side. Then the Ld. District Judge applied its mind and referring to the findings of the Ld. Arbitrator has come to the conclusion that the Ld. Arbitrator has arrived at its findings after due consideration of the documents on record, the agreement and the evidence adduced by the Parties. Such a finding having been arrived at, cannot be trifled with in the absence of a glaring error as it is trite in law that a finding arrived at by the Ld. Arbitral Tribunal if plausible, cannot be interfered with.

48. A bare perusal of the impugned judgment makes it amply clear that the Ld. Tribunal has ignored any relevant submission, or not applied its mind at any juncture. This Court, therefore, does not find that the order of the Tribunal, as confirmed by the learned District Judge, is so perverse or suffers from patent illegality which requires interference.

49. In view of the discussion above, I find no infirmity, illegality or impropriety in the award and the order of the learned District Judge, which would require interference in the present appeal. Appeal is accordingly dismissed.

VII. CONCLUSION:

50. Therefore, in light of the discussion above, keeping the settled principles of law in mind and for the reasons given above, this Court is of the considered view that the impugned order as well as the Arbitral Award warrants no interference under Section 37 of the A&C Act.

51. The ARBA is disposed of, accordingly. No order as to costs.

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter ARBA is disposed of.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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[18] AIR 2021 SC 4661
[19] (2020) 12 SCC 539
[20] (2022) 4 SCC 116
[21] (2018) 1 SCC 71
[22] (2010) 8 SCC 660
[23] (2020) 7 SCC 167

2025 (I) ILR-CUT-846

DHANESWAR NAYAK
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 4909 OF 2024]

30 JANUARY 2025

[Dr. S.K. PANIGRAHI, J.]

Issue for Consideration

Whether the initiation of departmental proceeding against a retired employee is permissible for the event which had happened more than twelve years before.

Headnotes

ODISHA CIVIL SERIVCES (PENSION) RULES, 1992 – Rule 7 – The allegations levelled against the petitioner trace their origin to an event of the year 2010 – The departmental proceeding was initiated against him after his retirement through memorandum dated 21.02.2024 – Whether the initiation of departmental proceeding against a retired employee is permissible for the event which had happened more than twelve years before.

Held: No – The initiation of disciplinary proceedings against the Petitioner, after a lapse of twelve years and post-retirement, is manifestly unsustainable in law – Rule 7 of the Orissa Civil Services (Pension) Rules, 1992, acts as an unequivocal bar, rendering such proceedings void ab initio. (Para 18)

Citations Reference

Suchismita Mishra v. High Court of Orissa and Others; Bhagirathi Jena v. Board of Directors, O.F.S.C. & Ors., **(1999) 3 JT 53 (SC);** State Bank of India & Ors. v. Navin Kumar Sinha, **2024 INSC 874;** Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Ltd. & Ors., **AIR 2005 SUPREME COURT 4217 – referred to.**

List of Acts

Odisha Civil Services (Pension) Rules, 1992; Prevention of Corruption Act, 1988; Indian Penal Code, 1860; Orissa Motor Vehicles Taxation (OMVT) Act, 1975.

Keywords

Post-retirement; Disciplinary proceeding.

Case Arising From

Memorandum No.1956 dated 21.02.2024 issued by disciplinary authority.

Appearances for Parties

For Petitioner(s) : Mr. Gyana Ranjan Sethi
For Opp. Party(s) : Mr. S.N. Patnaik, AGA

Judgment/Order

Judgment

Dr. S.K. PANIGRAHI, J.

1. The Petitioner has filed this Writ Petition challenging the legality of the departmental proceeding initiated against him after this retirement through Memorandum No.1956 dated 21.02.2024. He claims the proceeding violates Rule 7 of the Orissa Civil Services (Pension) Rules, 1992.

I. FACTUAL MATRIX OF THE CASE:

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

(i) The petitioner, while in service, was implicated in Cuttack Vigilance P.S. Case No. 25 dated 13.04.2010 under Sections 13(2)/13(1)(d) of the Prevention of Corruption Act, 1988, read with Section 420 and 120-B of the Indian Penal Code. The case pertains to allegations of illegal utilization of seized vehicles for transporting iron ore fines in violation of Section 17(2) of the Orissa Motor Vehicles Taxation (OMVT) Act, 1975.

(ii) The petitioner retired on 31.10.2022. Four days before his retirement, on 26.10.2022, the Superintendent of Police (Vigilance Cell, Cuttack) submitted a draft memorandum of charges against him. Accordingly, the transport commissioner received the said draft memorandum on 16.11.2022 and forwarded it to the Department.

(iii) The disciplinary proceeding was initiated by Memorandum No. 1956 dated 21.02.2024 with government sanction under Rule 7 of the Orissa Civil Services (Pension) Rules, 1992.

(iv) The petitioner was accused of gross misconduct, dereliction of duty, failure to maintain integrity, and violation of the OMVT Act, 1975. Allegations include misuse of his position as a public servant, which, according to the opposite parties, amounts to grave moral turpitude.

(v) The petitioner was asked to submit a written statement of defense within 30 days of receiving the memorandum. Failing to do so, an inquiry officer was appointed on 04.09.2024 to investigate the charges under Rule 15(4) of the Orissa Civil Services (Classification, Control, and Appeal) Rules, 1962.

(vi) The Department contends that the four-year limitation should be counted from 16.11.2022, the date when the allegations were brought to their attention. The disciplinary proceeding was thus initiated within the permissible time limit after retirement.

(vii) The petitioner is also facing criminal prosecution in TR No. 53/2015, pending before the Special Judge, Vigilance, Cuttack. Cognizance of the offense was taken by the trial court on 06.11.2015.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER:

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

(i) Rule 7(b)(ii) explicitly prohibits the initiation of departmental proceedings against a retired employee for events that occurred more than four years prior.Since the alleged misconduct took place in January 2010 and the proceedings were initiated in February 2024, which is statutorily embargoed for proceedings.

(ii) The alleged incident dated back 14 years ago, rendering it impractical and unjust to proceed with the inquiry as evidence and witness reliability may have significantly deteriorated and might have list its integrity.

(iii) The petitioner relies on the ruling in ***Suchismita Mishra v. High Court of Orissa and Others***, where similar proceedings were quashed for breaching Rule 7 of the OCS (Pension) Rules, 1992. The principle of law established in this case mandates adherence to the statutory limitations.

(iv) Since the petitioner has already retired and is no longer in service, the continuation of the proceedings serves no purpose other than penalizing him without basis. Continuing such time-barred proceedings would cause unnecessary harassment, violating principles of natural justice and equity.

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) The opposite parties contend that the writ petition is not maintainable in law or on facts and is misconceived, as the disciplinary proceedings were initiated in compliance with applicable rules.

(ii) The Department initiated the disciplinary proceedings within the four year limitation period stipulated under Rule 7(2)(b)(ii) of the OCS (Pension) Rules, 1992. The relevant date for counting the limitation is 16.11.2022, when the Transport Commissioner forwarded the vigilance report to the Department.

(iii) It is asserted that the disciplinary proceeding was initiated with proper government sanction as required under Rule 7 of the OCS (Pension) Rules, 1992.

(iv) The petitioner failed to submit his written statement of defense within the stipulated time, necessitating the appointment of an inquiry officer.

(v) The allegations against the petitioner involve grave moral turpitude, misuse of position, and violation of statutory provisions, which are unbecoming of a public servant. Allowing the quashing of the disciplinary proceedings would undermine public interest, hinder administrative transparency, and set a detrimental precedent.

(vi) The petitioner's alleged actions are also the subject of an ongoing criminal trial (TR No. 53/2015), further underscoring the seriousness of the charges.

IV. COURT'S REASONING AND ANALYSIS:

5. Heard Learned Counsel for parties and perused the documents placed before this Court.

6. The crux of this matter rests on the initiation of disciplinary proceedings against the petitioner, who retired from service on 31.10.2022. The proceedings were formally issued on 21.02.2024, nearly a year and a half after his retirement. While in service, the petitioner was implicated in Cuttack Vigilance P.S. Case No. 25 dated 13.04.2010 under Sections 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988, read with Sections 420 and 120-B of the Indian Penal Code. The allegations center on the unauthorized use of a seized vehicle for the illegal transportation of iron ore, allegedly in contravention of Section 17(2) of the Orissa Motor Vehicles Taxation (OMVT) Act, 1975.

7. Notably, four days prior to the petitioner's retirement, on 26.10.2022, the Superintendent of Police (Vigilance Cell, Cuttack) submitted a draft memorandum of charges, which was subsequently forwarded by the Transport Commissioner to the Department on 16.11.2022. On the strength of this draft memorandum, the Department initiated disciplinary proceedings. The pivotal question before this Court is whether such disciplinary proceedings, initiated after the petitioner's retirement, are legally tenable.

8. It is a well-established principle that the authority of an employer to exercise disciplinary control over an employee ceases once the bond of employment is severed, whether by retirement or by any other lawful termination of service. As a general rule, disciplinary proceedings cannot be initiated against an employee once he has retired, nor can such proceedings, if already pending, be lawfully continued after his departure from service. However, where the law, by express provision, carves out an exception, such proceedings may be sustained, but only within the strict confines of that authority.

9. The Supreme Court had an occasion to consider the question of disciplinary proceedings post-retirement in ***Bhagirathi Jena v. Board of Directors, O.F.S.C. & Ors***[1]., particularly in the context of the rights of an employee of the Orissa State Financial Corporation, whose service conditions were governed by the Orissa Financial State Corporation Staff Regulations, 1975. In that case, the regulations did not contain any provision for the continuance of disciplinary proceedings against an employee after superannuation. While the proceedings had been initiated during the employee's tenure through the issuance of a charge sheet, they remained inconclusive at the time of his retirement. The central question before the Court was whether such proceedings could lawfully continue after the employee had retired from service. The relevant excerpts of the judgment is produced below:

> *"In view of the absence of such a provision in the above said regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits*

[1] (1999) 3 JT 53 (SC).

of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

10. Likewise, in ***State Bank of India & Ors. v. Navin Kumar Sinha***[2], the Supreme Court, in its wisdom, struck down disciplinary proceedings initiated against a bank employee after the conclusion of his extended tenure of service. The Court reaffirmed the enduring principle that once an employee steps beyond the bounds of active service, the employer's disciplinary authority is extinguished unless expressly preserved by law. The relevant excerpt of the judgment is produced below:

"As has been held by this Court on more than one occasion, a subsisting disciplinary proceeding i.e. one initiated before superannuation of the delinquent officer may be continued post superannuation by creating a legal fiction of continuance of service of the delinquent officer for the purpose of conclusion of the disciplinary proceeding (in this case as per Rule 19(3) of the Service Rules). But no disciplinary proceeding can be initiated after the delinquent employee or officer retires from service on attaining the age of superannuation or after the extended period of service"

11. To appropriately juxtapose the principles enshrined in the aforementioned judicial precedents with the facts of the present case, it is incumbent upon this Court to undertake a meticulous examination of the governing statutory framework, particularly Rule 7 of the Orissa Civil Services (Pension) Rules, 1992. The relevant excerpts of this provision is provided below:

(1) The Government reserve to themselves the right of withholding a pension or gratuity, or both either in full or in part, or withdrawing a pension in full or in part. whether permanently or for specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence in duty during the period of his service including service rendered on reemployment after retirement: Provided that the Odisha Public Service Commission shall be consulted before any final orders are passed: Provided further that when a part of pension is withheld / withdrawn, the amount of such pension shall not be reduced below the amount of minimum limit.

(2)…(b) such departmental proceedings as referred to in sub rule (1) if not instituted while the Government servant was in service, whether before his retirement or during his reemployment-

(i) shall not be instituted save with the sanction of Government;

(ii) ***shall not be in respect of any event which took place more than four years before such institution ; and***

[2] 2024 INSC 874.

> *(iii) shall be conducted by such authority and in such place as the Government may, direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service..."* *(Emphasis Supplied)*

12. The interpretation of Rule 7 of the Orissa Civil Services (Pension) Rules, 1992, as extracted above, unequivocally establishes a dual threshold for initiating departmental proceedings post-retirement: first, that such proceedings must not pertain to events occurring more than four years prior to their institution; and second, that proceedings initiated postretirement must have the sanction of the Government. From here, this court shall seek answers to both the questions in the next paragraphs.

13. In the case at hand, the allegations levelled against the petitioner trace their origin to events that transpired in the year 2010. Yet, it was not initiated until October of 2022, mere days before the petitioner was to lay down the burdens of office that the Superintendent of Police (Vigilance Cell), Cuttack found it fit to submit the draft memorandum detailing the accusations of gross misconduct. When the language of Rule 7 is read with the discernment the law demands, the term event, as employed therein, must be construed in its plain and ordinary sense to refer to the incident itself, the occurrence in 2010 that gave rise to these proceedings.

14. By the clear dictate of the Rules, the threshold of four years has long since passed. The sands of time, unhalted by administrative inertia, have rendered the initiation of proceedings not merely tardy but altogether impermissible. Not only had a full twelve years elapsed before the machinery of discipline was belatedly set into motion, but, in a further affront to established principles of law, this course of action was embarked upon only after the petitioner had already crossed the threshold into retirement.

15. At this juncture, the Court must pause to reflect upon the fundamental character of disciplinary proceedings and the evidentiary burdens they impose. Unlike a criminal prosecution, where guilt must be established beyond a reasonable doubt, the edifice of a departmental inquiry rests upon a less exacting, though no less principled, foundation, the standard of preponderance of probability. It is a measure dictated not by certitude, but by reasoned persuasion, requiring only that the scales of evidence tip in favour of one conclusion over another. In elucidating this principle, it is instructive to turn to the pronouncement of the Supreme Court in ***Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Ltd. & Ors.***[3] The relevant portions of the judgment are produced below:

> *"The two proceedings criminal and departmental are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with*

[3] AIR 2005 SUPREME COURT 4217.

service Rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused 'beyond reasonable doubt', he cannot be convicted by a court of law. In departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of 'preponderance of probability'."

16. A careful study of this doctrine leaves no room for doubt, departmental proceedings, by their very design, lean heavily in favour of the employer. In such a scheme, where strict evidentiary safeguards are relaxed, the difficulties of defense are already manifold. But when the weight of time itself is added to the burden, when an employee is called upon to answer charges after the passage of twelve long years, the difficulty swells into near impossibility. Memory fades, records are lost, and witnesses disappear into the mist of time. To demand of a man, long after the fact, that he summons forth evidence to clear his name, is not merely to impose hardship; it is to strip him of a fair chance at justice.

17. In order to impose such a burden upon a man who has laid down his labours, who stands at the threshold of his twilight years, no longer in the service of the state but in quiet expectation of repose, is to offend the very sense of justice upon which the law is built. Retirement is not a mere cessation of duty; it is the long-awaited moment when a lifetime of toil yields its rightful peace. To summon him back into the arena, to force him to bear the weight of accusations long past, is not merely a hardship, it is a palpable wrong.

V. CONCLUSION:

18. In view of the foregoing analysis, this Court finds that the initiation of disciplinary proceedings against the Petitioner, after a lapse of twelve years and post-retirement, is manifestly unsustainable in law. Rule 7 of the Orissa Civil Services (Pension) Rules, 1992, acts as an unequivocal bar, rendering such proceedings void ab initio.

19. Accordingly, this Writ Petition is allowed, and the impugned disciplinary proceedings are hereby quashed.

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

Headnotes prepared by:
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Writ Petition allowed.

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2025 (I) ILR-CUT-853

1. PRASANTA KUMAR MOHAPATRA (DEAD),
1(a). PRITI RANI MOHAPATRA,
1(b). TAMANA MOHAPATRA & ORS.
V.
STATE OF ODISHA & ORS.

PRAVAKAR SENAPATI V. STATE OF ODISHA & ORS.
[IN W.P.(C) NO. 7095 OF 2004]
Dr. HEMANTA KUMAR SATPATHY V. STATE OF ODISHA & ORS.
[IN W.P.(C) NO. 7096 OF 2004]

[W.P.(C) NO. 7094, 7095 & 7096 OF 2004]

19 FEBRUARY 2025

[MISS SAVITRI RATHO, J.]

Issues for Consideration

1. Whether the question of maintainability can be raised once the writ petition is admitted & pending since long.
2. Whether the order of termination of an employee of a society can be challenged in the writ petition.

Headnotes

(A) CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Writ Petition – Maintainability – Whether the question of maintainability can be raised once the writ petition is admitted and pending since long.

Held: Yes – The fact that the writ petition is pending before this Court for a long time is therefore not a bar for considering the question of maintainability. (Para 11)

(B) CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Writ Petition – Maintainability – Petitioners are employee of XIMB (a society registered under the Societies Registration Act & imparting education) – They challenge the order of termination passed against them – Whether the order of termination can be challenged in the Writ Petition.

Held: No – The Writ applications relate to termination of service of the petitioners who were employed in different projects of XIMB with additional prayer for reinstatement in service, even if is assumed that XIMB is imparting education which is a public duty, as the termination of services of the petitioners does not have any direct nexus with the discharge of public duty and the termination orders are not stigmatic, the petitioners cannot invoke extraordinary writ jurisdiction under Article 226 of the Constitution of India. (Para 13)

Citations Reference

BCCI vs. Cricket Association of Bihar and others, **(2015) 3 SCC 251;** Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology and others, **(2002) 5 SCC 111;** Andi Mukta Sadguru vs. V.R. Rudani, **(1989) 2 SCC 691;** Dr. Uttam Kumar Samanta vs. KIIT University, **2014 (II) ILR CUT 1044;** WB State Electricity Board vs. Desh Bandhu Ghosh and others**, AIR 1985 SC 722;** Sanjay Kumar Kar vs. Principal cum Secretary Bhadrak Institute of Engineering and Technology and another, **2019 (1) OLR 735;** The Manager vs. D.B. Belliappa, **AIR 1979 SC 429;** Marawari Balika Vidyalaya vs. Asha Srivastava and others**, (2020) 14 SCC 449;** Basanti Mohanty vs. State of Orissa and others, **72 (1991) C.L.T. 127;** Dibakar Mohapatra vs. XIMB, **WP(C) No. 5614 of 2008 decided on 14.07.2008;** Gadadhar Barik vs. XIMB, **WP(C) No. 11487 of 2008 decided on 09.11.2009;** Binny Ltd and another vs. U Sadasivan and others: **(2005) 6 SCC 657;** Sushmita Basu and others vs. Ballygunge Sikshya Samity and others: **(2006) 7 SCC 680;** K.K.Saksena vs. International Commission on Irrigation and Drainage and others: **(2015) 4 SCC 670;** St. Mary's Education Society another vs. Rajendra Prasad Bhargava & others: **2022 SCC Online 1091;** Pradeep Kumar Dhal vs. Governing Body of Christ College & others, **W.P.(C) No. 3150 of 2030 and batch decided on 26.04.2023;** Pradeep Kumar Dhal vs. Governing Body of Christ College & others, **RVWPET No. 210 of 2023 and batch decided on 14.12.2023 – referred to.**

List of Acts

Constitution of India, 1950; Societies Registration Act, 1860; Xavier University Act, 2013.

Keywords

Writ petition, Maintainability; Termination of an employee of society; Discharge of public duty; Imparting education; Writ Jurisdiction.

Appearances for Parties

For Petitioner : Mr. Jagannath Patnaik, Sr. Adv.,
Ms. Soma Patnaik & Mr. R.K. Pati
For Opp.Parties : Mr. Budhadeba Routray, Sr. Adv.,
Mr. Jagadish Biswal & Mr. R.K.Pati (O.P.Nos. 2 & 3)
Mr. D.K. Mishra, Addl. Govt. Adv. (O.P.No.1)

Judgment/Order

Judgment

MISS SAVITRI RATHO, J.

In these three writ petitions, the petitioners have challenged the orders terminating their services on different grounds and they have further prayed for the consequential relief of reinstatement in service with all benefits.

2. The prayers in these writ applications are therefore identical. **W.P.(C) No. 7094 of 2004** had been filed by Mr. Prasanta Kumar Mohapatra with the following prayer:

> *"i) the order under Annexure-7 passed by the opp. party no. 1 terminating the services of the petitioner shall not be quashed as illegal and arbitrary.*
>
> *ii) the Opp. parties shall not be directed to reinstate the petitioner with consequential benefits.*
>
> *iii) the action of the opp. parties shall not be declared as illegal and malafide.*
>
> *And pass any other orders or directions as this Hon'ble Court may deem fit just and proper."*

W.P.(C) No. 7094 of 2004 had been filed by Mr. Prasanta Kumar Mohapatra with identical prayer. As he expired during pendency of the writ application, he has been substituted by his legal heirs i.e. his wife Priti Rani Mohapatra and his minor daughter Tamana Mohapatra.

W.P.(C) No. 7095 of 2004 has been filed by Mr. Pravakar Senapati with identical prayer and the order of termination is annexed as Annexure 7.

W.P.(C) No. 7096 of 2004 has been filed by Dr. Hemanta Kumar Satpathy with identical prayer where the order of termination is annexed as Annexure 7.

W.P.(C) No. 7062 of 2004 had been filed by **Sarat Kumar Rath** with identical prayer where the order of termination is annexed as **Annexure 8**. As the learned counsel for the petitioners submitted that Mr. Rath has passed away on 25.09.2023, in the absence of his substitution, his case has been delinked from these three cases.

MAINTAINABILITY

3. The question of maintainability had been raised by this Court at the time of issuing notice in W.P.(C) No. 7094 of 2004, on 24.08.2004. The question of maintainability has also been raised by Mr. Budhadeb Routray, learned Senior Advocate appearing on behalf of the opposite parties no. 2 to 4 at the time of argument. So with the consent of the learned counsel, the writ applications have been heard on the question of maintainability without going into the factual aspects.

SUBMISSIONS

4. Mr. Jagannath Patnaik, learned Senior Counsel has submitted that the jobs performed by the petitioners in the Xavier Institute of Management, Bhubaneswar (in short *"XIMB"/ "Institute"*) XIMB were perennial ones and they had been given regular appointment and they were working under the opposite party no.2 and in other Regional Offices of XIMB. But while the services of their juniors were retained, the services of the petitioners have been illegally terminated while the petitioners were working as Project Managers / Programme Managers in the NORC, Centre for Development Research and Training (in short of Xavier Institute of Management, "CENDERET") of

XIMB, even though the type of work performed by the petitioners was very much available.

5. On the question of maintainability, Mr. J. Patnaik, learned Senior Counsel for the petitioners has submitted that XIMB is registered under the Societies Registration Act, 1860. The Chief Secretary, Secretary Industry and Finance Secretary of the State Government are the Ex-officio members of the Society. The Institution provided the following studies namely - two years full time Post Graduate programme in Rural Management (PGPRM), two years part time Post Graduate programme in Management (PGPRM), three years part time post graduate programme in Management (EXPGP) and short duration training programme are provided by Centre for Development Research and Training (CENDERET). The institution being engaged in imparting technical education under the norms of AICTE, a statutory body, is performing public duty. Therefore, it comes within the ambit of Article-12 of the Constitution of India. In support of his submissions, he has relied on the decisions of this Court and the Supreme Court in the following cases:

i) BCCI vs. Cricket Association of Bihar and others: (2015) 3 SCC 251.

ii) Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology and others : (2002) 5 SCC 111.

iii) Andi Mukta Sadguru vs. V.R. Rudani : (1989) 2 SCC 691.

iv) Dr. Uttam Kumar Samanta vs. KIIT University : 2014 (II) ILKR CUT 1044.

v) WB State Electricity Board vs. Desh Bandhu Ghosh and others : AIR 1985 SC 722.

vi) Sanjay Kumar Kar vs. Principal cum Secretary Bhadrak Instute of Engineering and Technology and another : 2019 (1) OLR 735.

vii) The Manager vs. D.B. Belliappa: AIR 1979 SC 429.

viii) Marawari Balika Vidyalaya vs. Asha Srivastava and others : (2020) 14 SCC 449.

ix) Basanti Mohanty vs. State of Orissa and others : 72 (1991)C.L.T. 127.

The alternate submissions of Mr. Jagannath Patnaik, learned Senior Counsel for the petitioners is that even if it is held that the writ applications being related to service matters of the petitioners are not maintainable, the writ applications should be heard on merit for the following reasons:

i) in view of the fact that the writ applications are pending since the last nineteen and half years, the question of maintainability should not be allowed to be raised or gone into now; and

ii) during pendency of the writ applications, the State Legislature had passed the Xavier University Act of 2013 for which the writ applications were amended and the Xavier University through its Registrar was impleaded as opposite party No. 4 in this writ petition. XIMB being part of the University, as employees of the University, the petitioners are entitled to get all benefits at par with other employees of the University and the writ applications would therefore be maintainable.

6. Mr. Budhadeb Routray, learned Senior Counsel for the opposite parties has submitted that submitting that from a perusal of the orders of termination as under Annexure-7, it is apparent that the said order are not punitive or stigmatic in nature as they are termination in simplicitor on account of closure of the relevant projects in North

Odisha Resource Centre (NORC), Baripada where the petitioners were working . He has also submitted that in the meantime "Center for Development Research and Training" (in short 'CENDERET') which was the apex body for handling projects had been closed and completely wound up by the order of the competent authority with effect from 01.04.2016.

7. Challenging the maintainability of the writ petitions, he has submitted XIMB is a Society registered under the Societies Registration Act. The Chief Secretary, Industries Secretary and Finance Secretary are three out of the eighteen, members of the Society, as they have been nominated by the State Government. They are not ex-officio members. Land was initially provided by the State Government and the essential infrastructure too was put up by them. However, as soon as the New Society was registered these were handed over to the new society. The institute received financial support for its rural extension activities and field research from national and international agencies for specific projects and these came to an end upon completion of those projects. At the time when the impugned orders were passed and the writ applications were filed, the institute used to offer the following courses:

i.) 2 year full time P.G, Diploma in Business Management.

ii.) 2-year full time P.G. Diploma in Rural Management; and

iii) 3-year Part time P.G. Diploma in Business Management.

These courses are fully funded by the fees raised from students. No subsidy or grant is received from the state or central government for the courses. These courses are designed keeping in view, the requirements of the industry, the corporate world and the rural development needs of the country, while complying with the norms laid down by the All India Council of Technical Education (AICTE) for Post Graduate Management Programmes across the country. The AICTE has approved the courses conducted by the academic wing of the institute. The Board of Governors and Members of the Association are constituted as per the by-laws of the Society which is registered with the Registrar of Societies, Government of Orissa. The rural extension wing (CENDERET) conducted short term training programmes for members and staff of its partner Non-Governmental Organizations (NGOs) engaged in rural development activities in rural areas. These training programmes were conducted as part of the various projects which CENDERET implemented from time-to-time with funding from national and international donor agencies.

8. Mr. Routray, learned Senior Counsel has also submitted that as XIMB is imparting education, it may be considered to be amenable to writ jurisdiction as far as examinations and admissions of students are concerned. But as the relation between the petitioners and the XIMB was purely contractual it does not "*come under the purview of performing public duty*" with regard to service conditions or disputes of its employees for which XIMB does not come under the ambit of Article 12 and will not be amenable to the jurisdiction of this Hon'ble Court. Service matters and disputes relating to service of its employees cannot be equated to public duty for which the writ applications will not be maintainable. Mere approval of its courses by AICTE, a statutory body, does not mean that XIMB is performing a public duty so far as service matters are concerned. He has brought to the notice of this Court that while issuing notice in the writ applications,

this Court had kept the question of maintainability open - to be decided after appearance of the opposite parties and although no objection had been raised for impleading Xavier University as an opposite party, the right to argue on merit on the question of maintainability at the time of final hearing had not been given up. He has also submitted that the status of XIMB at the stage when the impugned orders were passed is to be considered for deciding the question of maintainability. In support of his submission that the writ applications are not maintainable, he has relied on the decisions of this Court and the Supreme Court and in the cases of:

i) WP(C) No. 5614 of 2008 Dibakar Mohapatra vs. XIMB decided on 14.07.2008 (para 3 to 5).

ii) WP(C) No. 11487 of 2008 Gadadhar Barik vs. XIMB decided on 09.11.2009.

iii) Binny Ltd and another vs. U Sadasivan and others: (2005) 6 SCC 657 (Para 29 to 34).

iv) Sushmita Basu and others vs. Ballygunge Sikshya Samity and others: (2006) 7 SCC 680 (Para 4).

v) K.K.Saksena vs. International Commission on Irrigation and Drainage and others: (2015) 4 SCC 670 (Para 41 to 45).

vi) St. Mary's Education Society another vs. Rajendra Prasad Bhargava & others: 2022 SCC Online 1091.

vi) Pradeep Kumar Dhal vs. Governing Body of Christ College & others in W.P.(C) No. 3150 of 2030 and batch decided on 26.04.2023 and

vii) Pradeep Kumar Dhal vs. Governing Body of Christ College & others in RVWPET No. 210 of 2023 and batch decided on 14.12.2023.

9. JUDICIAL PRONOUNCEMENTS

The learned counsel have cited and relied on a number of decisions of this Court and the Supreme Court to buttress their submissions on the point of maintainability. It is not necessary to refer to all the decisions and the decisions cited by them and some other decisions which were found to be pertinent have been referred to.

ON MAINTAINABILITY

9.1. The case of ***BCCI*** *(supra*), related to a case of match fixing, which the Supreme Court found was of public importance and hence held the writ application to be maintainable. In the case of ***Pradeep Kumar Biswas*** *(supra)* the majority view of the Supreme Court was that the dominant role played by the Government of India in the Governing Body of CSIR was evident. The Director- General who is ex-officio Secretary of the Society is appointed by the Government of India [Rule 2(iii)] and the control of the Government in the CSIR is ubiquitous. It ultimately held that a writ application against CSIR was maintainable.

In the case of **Marawari Balika Vidyalaya** (*supra*) reinstatement of the respondent with back wages had been allowed by the Division Bench of the High Court. The Supreme Court relying on its earlier decision in the case of ***Ramesh***

Ahuliwalia vs State of Punjab and others:: (2012) 12 SCC 331 , which had relied upon the decision in ***Anandi Mukta Sadguru*** *(supra)*, interalia held that the the employee has served for five years before dismissal from the service by a stigmatic order, passed without holding an enquiry, for which the submission raised by learned Senior counsel for the Appellant-School that back wages should be denied was not acceptable .It held that the writ application was maintainable and dismissed the Appeal holding that *mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the Statute and that judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment and that mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found*.

In the case of ***Dr. Uttam Kumar Samanta*** (supra) , in the facts of that case , relying on the decision of the Supreme Court in the case of ***Sri Anadi Mukta Sadguru*** (supra) , this Court held that the State Government and by reason of the provision for approval, the Central Government also, have full control of the working of the Society and the Society is merely a projection of the State and therefore held that the Society is an instrumentality or the agency of the State and the Central Governments and it is an 'authority' within the meaning of Article 12.

In the case of ***Dibakar Mohapatra*** (supra) and ***Gadadhar Barik*** (supra), this Court has held that writ applications involving service disputes of employees of XIMB are not maintainable. In the case of ***Dibakar Mohapatra*** (supra) a Division Bench of this Court found that XIMB was a private institution imparting education and had no funding from the State Government or the Central Government. It went on to hold a follows:

> *"5…In the present case the dispute is between the employer and the employee arising out of a contract of employment and while discharging this part of the function, the opposite party No.1 is not discharging any public function, and therefore, such act of opposite party No.1 which is based on a contract of employment, is not amenable to the writ jurisdiction".*

In the case of ***Gadadhar Barik*** (supra), where the petitioner had been removed from service after a disciplinary proceeding, relying on the decision in ***Dibakar Mohapatra*** (supra) as XIMB was the opposite party in both the cases, dismissed the writ application granting liberty to the petitioner to work out his remedies in accordance with law.

In the case of ***St. Mary's Educational Society*** (supra), the Supreme Court has taken note of the decisions in ***Ramesh Ahluwalia*** (supra), ***Marwari Balika Vidhyalaya*** (supra), ***Shri Anadi Mukta Sadguru*** (supra) and has held as follows:

> *"69. We may sum up our final conclusions as under:-*
>
> *(a) An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that*

the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.

(b) Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty.

It is indisputably a public law action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226. Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the statutory provisions or the employer had the status of "State" within the expansive definition under Article 12 or it was found that the action complained of has public law element.

(c) It must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a Constitutional Court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by the statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.

(d) Even if it be perceived that imparting education by private unaided the school is a public duty within the expanded expression of the term, an employee of a nonteaching staff engaged by the school for the purpose of its administration or internal management is only an agency created by it. It is immaterial whether "A" or "B" is employed by school to discharge that duty. In any case, the terms of employment of contract between a school and nonteaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education. This is particularly in respect to the disciplinary proceedings that may be initiated against a particular employee. It is only where the removal of an employee of nonteaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered by the court. But such interference will be on the ground of breach of law and not on the basis of interference in discharge of public duty.

(e) From the pleadings in the original writ petition, it is apparent that no element of any public law is agitated or otherwise made out. In other words, the action challenged has no public element and writ of mandamus cannot be issued as the action was essentially of a private character.

In the case ***Pradeep Kumar Dhal*** and batch (supra), the petitioners had prayed for different reliefs all related to their services (order of suspension, order framing charge, for regularization, challenging separation of the Department of IT and Computer Science, prayer for reinstatement and prayer for placement in a particular wing), where this Court has held as follows:

> *"24. This Court finds that the very same question as posed above came up for consideration before the Apex Court recently in the case of* ***St. Mary's Education Society and Another vs. Rajendra Prasad Bharagava and others****, reported in* ***2022 SCC OnLine SC 1091****. In the said case the following issues were framed for determination.*
>
> *(a) Whether a writ petition under Article 226 of the Constitution of India is maintainable against a private unaided minority institution?*
>
> *(b) Whether a service dispute in the private realm involving a private educational Institution and its employee can be adjudicated in a writ petition filed under Article 226 of the Constitution? In other words, even if a body performing public duty is amenable to writ jurisdiction, are all its decisions subject to judicial review or only those decisions which have public element therein can be judicially reviewed under the writ jurisdiction?*
>
> *Analyzing the law on the subject, the Apex Court held that the School discharges a public duty by imparting education, which is a fundamental right of the citizen. However, judicial review of the action challenged by a party can be had by resort to the writ jurisdiction only if there is a public law element and not to enforce a contract of personal service. It was further clarified that a contract of personnel service includes all matters relating to the service of employee confirmation, suspension, transfer and termination etc. It was therefore held that a writ of mandamus can be issued against a private body, which is not a 'State' within the meaning of Article 12 of the Constitution of India, but there must be a public law element involved and it cannot be exercised to enforce purely private contracts entered into by the parties. It was also held that in case of retirement and in case of termination, no public law element is involved. It also referred to the decision of the Apex Court in the case of* ***Trigun Chand Thakur:***
>
> *"45. In the case of* ***Trigun Chand Thakur v. State of Bihar****, reported in* ***(2019) 7 SCC 513****, this Court upheld the view of a Division Bench of the Patna High Court which held that a teacher of privately managed Page 30 of 33 school, even though financially aided by the State Government or the Board, cannot maintain a writ petition against an order of termination from service passed by the Management."*

LONG PENDENCY OF THE WRIT APPLICATION

9.2. As regards the contention of the learned counsel for the petitioners that as the writ application have remained pending for so many years in this Court , the question of maintainability should not be considered at this stage, it would be profitable to refer to the decision of the Supreme Court in the case of ***State of Uttar Pradesh and another vs. Rajya Khanij Vikas Nigam Sangharsh Samiti: 2008 (12) SCC 675***, where the Supreme Court clarified the decision in the case of ***Suresh Chandra Tewari vs. District Supply Officer, AIR 1992 All 33*** and held as follows:

> *…. "The other Single Judge of the Division Bench, however, held that the writ petition had been entertained and interim orders were also passed. Relying upon* ***Suresh Chandra Tewari****, the learned Judge held that "the petition cannot be dismissed on the ground of alternative remedy if the same has been entertained and interim order has been passed". (emphasis supplied).*
>
> *36. With respect to the learned Judge, it is neither the legal position nor such a proposition has been laid down in Suresh Chandra Tewari that once a petition is admitted, it cannot be dismissed on the ground of alternative remedy. It is no doubt correct that in the 'head note' of All India Reporter (AIR), it is stated that "petition*

cannot be rejected on the ground of availability of alternative remedy of filing appeal". But it has not been so held in the actual decision of the Court.

37. The relevant paragraph 2 of the decision reads thus:

"2. At the time of hearing of this petition a threshold question, as to its maintainability was raised on the ground that the impugned order was an appealable one and, therefore, before approaching this Court the petitioner should have approached the appellate authority. Though there is much substance in the above contention, we do not feel inclined to reject this petition on the ground of alternative remedy having regard to the fact that the petition has been entertained and an interim order passed".

38. Even otherwise, the learned Judge was not right in law. True it is that issuance of rule nisi or passing of interim orders is a relevant consideration for not dismissing a petition if it appears to the High Court that the matter could be decided by a writ-Court. It has been so held even by this Court in several cases that even if alternative remedy is available, it cannot be held that a writ- petition is not maintainable. In our judgment, however, it cannot be laid down as a proposition of law that once a petition is admitted, it could never be dismissed on the ground of alternative remedy. If such bald contention is upheld, even this Court cannot order dismissal of a writ petition which ought not to have been entertained by the High Court under Article 226 of the Constitution in view of availability of alternative and equally efficacious remedy to the aggrieved party, once the High Court has entertained a writ petition albeit wrongly and granted the relief to the petitioner."

...."52. Since we are of the view that one of the Hon'ble Judges of the Division Bench of the High Court which decided the matter at the initial stage was right in relegating the petitioners to avail of alternative remedy under the Industrial Law and as we hold that the High Court should not have entertained the petition and decided the matter on merits, we clarify that though the writ petition filed by the petitioners stands dismissed, it is open to the employees to approach an appropriate Court/ Tribunal in accordance with law and to raise all contentions available to them. It is equally open to the Corporation and the State authorities to defend and support the action taken by them. As and when such a course is adopted by the employees, the Court/Tribunal will decide it strictly in accordance with law without being influenced by the fact that the writ petition filed by the writ petitioners is dismissed by this Court."

ANALYSIS

10. At the time of hearing the writ petition at the time of admission, the writ court is required to form a prima facie satisfaction if a legal right has been infringed or the opposite party is amenable to writ jurisdiction. If the court is prima facie satisfied on these two counts, the court may in the exercise of its discretion admit the writ petition and post it for final hearing. After the pleadings have been exchanged, and the court arrives at a conclusion that a legal right has been breached, together and a writ would lie against the opposite party, some relief can be granted. The opposite party should therefore be amenable to the writ jurisdiction of the high court on the date of institution of the writ petition as well as on the date when the writ petition is finally heard and decided.

11. Therefore, in the light of the above pronouncements of the decisions of the Apex Court, it cannot be accepted that once a writ petition is admitted, merely because several years have elapsed after the admission of the writ petition, the question of maintainability cannot be raised or decided. At the admission stage the question of

maintainability is usually not considered and notice of admission is issued or a writ petition is admitted based on prima facie finding. However, in the present writ applications, this Court, while issuing notice to the opposite parties had observed that the question of maintainability will be considered after the appearance of the opposite parties. The fact that the writ petition is pending before this Court for a long time is therefore not a bar for considering the question of maintainability.

12. As held in the decisions referred to above, normally the status of the parties as on the date the cause of action arose is to be considered for the purpose of jurisdiction. In appropriate cases, the Court may mould a relief on account of change of circumstance if otherwise it has jurisdiction. But in the present case, even though during pendency of the writ applications, XIMB has become part of Xavier University, its status on the date of the cause of action arose i.e when the services of the petitioners were terminated as well as the day the writ petitions were filed, are to be taken into account for deciding the question of maintainability. The writ applications are therefore not maintainable.

13. In view of the decisions in the cases of ***St. Mary's*** (supra) and ***Dibakar Mohapatra*** (supra), as the writ applications relate to termination of service of the petitioners who were employed in different projects of XIMB with additional prayer for reinstatement in service , even if is assumed that XIMB is imparting education which is a public duty, as the termination of services of the petitioners does not have any direct nexus with the discharge of public duty and the termination orders are not stigmatic , the petitioners cannot invoke extraordinary writ jurisdiction under Article 226 of the constitution of India.

CONCLUSION

14. W.P.(C) No. 7094 of 2004, W.P.(C) No.7095 of 2004 and W.P. (C) No.7096 of 2004 are dismissed as not maintainable.

15. But the petitioners cannot be left remediless, especially when their writ applications remained pending in this Court for so many years. As observed by the Supreme Court in the case of ***UP Khanij Vikas*** (supra), it is open to the petitioners to approach the appropriate forum in accordance with law and raise all contentions available to them. It is equally open to the opposite parties to defend and support the action taken by them. As and when such a course is adopted by the employees, the Court / Tribunal will decide the same strictly in accordance with law, without being influenced by the fact that the writ petitions filed by the petitioners in this Court have been dismissed by this Court as the cases of the petitioners have not been considered on merit by this Court.

16. W.P.(C) 7062 of 2004 filed by Mr. Sarat Kumar Rath which had been heard along with WP(C) No. 7094 of 2004, WP(C) No. 7095 of 2004 and W.P.(C) No. 7096 of 2004, is delinked from these cases as learned counsel for the petitioner submitted that he has expired during pendency of WP(C) No. 7062 of 2004 and he has to be substituted.

Headnotes prepared by:
Shri Jnanendra Ku. Swain (Judicial Indexer)
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Writ Petitions dismissed.

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2025 (I) ILR-CUT-864

SARDAR SOHAN SINGH @ SOHAN SINGH
V.
SUDHIR RANJAN TOPPO & ORS.

[W.P.(C) NO. 18478 OF 2014]

06 FEBRUARY 2024

[R.K. PATTANAIK, J.]

Issue for Consideration

Whether title can be established on the basis of Record of Right (RoR).

Headnotes

PROPERTY LAW – The Court below passed the order of eviction against the Petitioner on the basis of Record of Right which was in favour of the Opposite Party – Whether title can be established on the basis of Record of Right (RoR).

Held: No – It is also a settled law that a record of right does not create or extinguish title but possesses a presumptive value – A record of right has a presumptive value of title and possession but rebuttal in nature.

(Paras 8 & 10)

Citations Reference

Syed Yakoob Vrs. K.S. Radhakrishnan & Ors., **AIR 1964 SC 477;** Ramkrishna Panda Vrs. Arjuno Padhano & Ors., **AIR 1963 Ori 29;** Swaraswati Mohanty and others Vrs. Tirthananda Badu, **1997 (II) OLR 325;** State of Orissa Vrs. Janardhan Tripathy & Ors., **(1999) 87 CLT 673;** Anadi Charan Sahu & Ors. Vrs. Madan Ojha & Ors., **(1973) 39 CLT 1013 – referred to.**

List of Acts

Orissa Land Reforms Act, 1960; Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation, 1956.

Keywords

Title; Record of Right; Presumptive value.

Case Arising From

Order dated 26th July 2014 passed by the learned Additional District Magistrate, Sundargarh in Revenue Appeal No. 44 of 2010.

Appearances for Parties

For Petitioner : Mr. N.K. Sahu

For Opp.Parties : Mr. P.K. Mohanty, ASC
Mr. K.K. Rout, (For O.P. No.1)

Judgment/Order

Judgment

R.K. PATTANAIK, J.

1. Instant writ petition is filed by the petitioner challenging the impugned order dated 26th July, 2014 passed in connection with Revenue Appeal No.44 of 2010 under Annexure-12 by learned Additional District Magistrate, Sundargarh confirming the order 4th December, 2010 (Annexure-11) in RMC No.36 of 2010 of learned OSD (LR), Panposh on the grounds inter alia that the same is illegal, perverse and suffers from non-application of judicial mind, hence, liable to be quashed.

2. Briefly stated, the disputed property is in respect of Plot Nos.191/2 and 192 which was originally belonged to one Mangal Bhumija and Mansingh Bhumija, who are Schedule Tribes and as such, recorded in their names in CS RoR (Annexure-1) under rayati status. In respect of Plot No.191/1 measuring an area of Ac.0.34 decimal, one of the recorded tenants executed a sale deed on 4th April, 1955 and alienated the same in favour of late No.192 and the petitioner refers to the said deed at Annexure-5. It is also pleaded that the late father of opposite party No.1, after having acquired interest over Ac.0.70 decimal, sold the entire land on different dates obtaining permission from the competent authority and it was between 23rd January, 1979 and 5th March, 1986 and the petitioner refers to a copy of the EC obtained from the Sub-Registrar, Panposh dated 9th September, 2010 i.e. Annexure-6 and one such transactions was in favour of the petitioner measuring an Ac.0.10 decimal by a sale deed dated 5th March, 1986 (Annexure-7) and after the aforesaid purchase, it was mutated in his favour vide Mutation Case No.437 of 1995 upon receiving the RI's report at Annexure-8 series and followed by order dated 15th December, 1995 (Annexure-9) and later to the mutation, construction of a residential building came up over Plot No.192(B) corresponding to Hal Plot No.560(P), Hal Khata No.54 lying adjacent to CS Plot No.191/3 with an area of Ac.0.07 decimal, in total, Ac.0.17 decimal. While the position was continued as such, according to the petitioner, opposite party No.1 taking advantage of a record of right wrongly prepared, filed an application before the learned OSD (LR), Panposh under Section 3-A of the Regulation claiming therein that his later father had purchased Plot No.192, Khata No.67 with an area of Ac.0.85 decimal from the recorded owner, namely, Saiman Bhumij with due permission from the competent authority, out of which, Ac.0.60 decimal was transferred leaving Ac.0.25 decimal with them under Hal Khata No.54 corresponding to Plot No.560, whereafter, his father sold Ac.0.10 decimal to the

petitioner and accordingly, Hal RoR with an area Ac.0.15 decimal was recorded. The claim of the petitioner is that the purchase is in respect of Ac.0.70 decimal and not Ac.0.85 decimal, which as per the petitioner, is not supported by any material evidence, the fact which was taken judicial notice of by learned authorities below but unfortunately, eviction was directed from the case land. The claim of the petitioner is that there has been sufficient material on record from the side of the petitioner to rebut the presumption but it was not duly taken cognizance of and hence, resulted in passing of the impugned orders under Annexures-11 and 12, which are, therefore, liable to be interfered with and set aside.

3. Referring to the counter affidavit, it is pleaded by opposite party No.1 that as per the draft khatian at Annexure-A/1 and RoR issued in the name of his later father at Annexure-B/1, it is suggestive of the fact that the purchase was in respect of Ac.0.85 decimal, possession in respect of which has all along been peaceful and without any interruption. It is pleaded that during the settlement operation, survey was conducted and a draft khatian was prepared with an area of Ac.0.85 decimal and the father of opposite party No.1 sold Ac.0.40 decimal to one Santosh Kumar Agrawal and again Ac. 0.10 decimal to him thereafter and with other two transactions besides one in favour of the petitioner, leaving the rest Ac.0.25 decimal recorded as per Annexure-C/1, considering which, it has to be held that the land in occupation of the petitioner belongs to them, hence, learned authorities below did not commit any error in directing eviction therefrom.

4. A rejoinder affidavit is on record, referring to which, the petitioner reiterated the plea that learned authorities below though reached at a conclusion that the father of opposite party No.1 had purchased Ac.0.70 decimal and sold the same to five others but committed serious wrong to direct eviction vis-à-vis the case land merely referring to the RoR concluding that an area of Ac.0.15 decimal pertaining to Hal Plot No.560 Khata No.51 stands in the name of the recorded owner and as such, the occupation by the petitioner is liable for eviction in accordance with Section 3-A of the Regulation.

5. Heard Mr. Sahu, learned counsel for the petitioner, Mr. Rout, learned counsel for opposite party No.1 and Mr. Mohanty, learned ASC for State.

6. The purchase in respect of Ac.0.10 decimal from the father of opposite party No.1 and issuance of mutation RoR vide order dated 15th December, 1995 in Mutation Case No.437 of 1995 as at Annexure-9 is on record, a fact which is not in dispute. The alienations to the purchasers are also not in questioned except the claim of opposite party No.1 that Ac.0.60 decimal was sold and out of the remainder, Ac.0.10 decimal was alienated in favour of the petitioner. The reference is made to the draft khatian at Annexure-A/1 and a copy of RoR of 1994-95 at Annexure-B/1 by opposite party No.1 to claim that rest Ac. 0.15 decimal was still left, which is alleged to be in occupation of the petitioner.

7. As far as the proceeding in 1975 is concerned, it was dropped by learned Sub-Collector, Panposh in Revenue Misc. Case No.1 of 1975 at Annexure-4 with a finding that the impugned transaction was executed prior to the Regulation coming in force. It is at the instance of opposite party No.1 that the action has been reinitiated with a claim of unauthorized possession over Ac.0.15 decimal of land. In support of the contention, Mr. Sahu, learned counsel for the petitioner relies on a decision of the Apex Court in the case of **Syed Yakoob Vrs. K.S. Radhakrishnan and others AIR 1964 SC 477** to contend that the impugned orders under Annexures-11 and 12 by learned authorities below suffer from perversity and unreasonableness and hence, deserves to be set aside. It is contended by Mr. Sahu, learned counsel that by virtue of record of right, neither title is created nor it stands extinguished and any such entry therein merely carries a presumption of correctness of it which is questionable and if it is proved by an additional evidence in rebuttal, a Court is not to attach any importance to such record of right and in the case at hand, it was shown and satisfactory proved that the father of opposite party No.1 had indeed purchased Ac.0.70 decimal only during his life time, hence, there was no basis to record Ac.0.15 decimal in the RoR and therefore, the order of eviction against the petitioner on the basis of a purported record of right, the correctness of which, has been sufficiently rebutted, could not have been directed and apart from the citations referred to hereinbefore, placed reliance on the case laws reported in **(1986) 62 CLT 322** and **(1995) 79 CLT 507**. To counter the same, Mr. Rout, learned counsel for opposite party No.1 cited the following decisions, such as, **Ramkrishna Panda Vrs. Arjuno Padhano and others AIR 1963 Ori 29; Swaraswati Mohanty and others Vrs. Tirthananda Badu 1997 (II) OLR 325; State of Orissa Vrs. Janardhan Tripathy and others (1999) 87 CLT 673 and finally, Anadi Charan Sahu and others Vrs. Madan Ojha and others (1973) 39 CLT 1013** to contend that a record of right is a prima facie proof of title and has a presumptive value as to title and possession unless the same is proved to the contrary. The further contention is that every entry in the record of rights shall be the evidence of the matter referred to therein as held in **Anadi Charan Sahu** (supra) and shall be presumed to be correct unless it is proved otherwise and considering the settled position of law, the claim of the petitioner that the father of opposite party No.1 has sold Ac.0.70 decimal is unlikely to render any assistance in view of the RoRs while opposing eviction for such unauthorized possession.

8. In **Ramkrishna Panda** (supra), the suit was for possession and injunction and the decision was rendered in connection with a transaction of sale deed and since the defendants therein and particularly, defendant No.1 did not choose to examine the scribe of the same, it was held that such evidence could not be read in their favour and as such, the onus is failed to be discharged without any rebuttal evidence in view of the presumption in favour of the correctness attached to the entries in the record of rights in favour of the plaintiff. It is settled law that the presumption lies in favour of a record of right unless it is rebutted with any evidence adduced. It is also a settled law that a record of right does not create or extinguish

title but possesses a presumptive value which is what has been reiterated in **Swaraswati Mohanty** (supra). Similarly, while dealing with a case under the Orissa Tenancy Act, this Court in **Anadi Charan Sahu** (supra) held and observed that Section 117(3) of the said Act provides that every entry in the record of right shall be evidence of the matter referred to therein and shall be presumed to be correct if not proved to be incorrect by evidence.

9. The contention of Mr. Sahu, learned counsel for the petitioner is that the decision of learned authorities below cannot be sustained since the findings are unacceptable as it was reached without considering the rebuttal evidence. Admittedly, the case of opposite party No.1 hinges on Annexures-A/1, B/1 and C/1. It is also not in dispute that there has been alienation of Ac.0.70 decimal of land by the father of opposite party No.1. The purchase claimed to be in respect of Ac.0.85 decimal. As far as the transactions are concerned, it is suggested that Ac.0.70 decimal of land was purchased by opposite party No.1 and the same is evident from Annexures-4, 5 and 6. Such alienation of Ac.0.10 decimal in favour of the petitioner in the year 1986 is also revealed from Annexure-7 followed by issuance of mutation RoR later to the order under Annexure-9 in Mutation Case No.437 of 1995. Such fact of purchase of Ac.0.70 decimal is also accepted by learned authorities below upon a bare reading of Annexures-11 and 12. Merely, considering the record of right in favour of opposite party No.1, as is suggested, learned authorities below held the possession of the case land by the petitioner to be unauthorized. As to how and wherefrom an area of Ac.0.15 decimal was left to be occupied by the father of opposite party No.1 is not clearly made to reveal. It is a fact that a draft khatian (Annexure-A/1) was prepared and published and it was followed by the RoR in 1994-94 as per Annexure-B/1 and thereafter, the RoR i.e. Annexure-C/1 but the Court is of the considered view that before any such eviction is thought of, one has to be fully convinced regarding the extent of land purchased by the father of opposite party No.1 which is made to suggest with an area of Ac.0.70 decimal. The sale deed, a copy of which at Annexure-4, rather, reveals alienation of Ac.0.70 decimal. It is not clear as to how the late father of opposite party No.1 claimed to possess extra Ac.0.15 decimal after a sale of Ac.0.10 decimal in favour of the petitioner is indeed a disputed question of fact, as according to the Court, needs enquiry and determination. For claiming so and demanding recovery of the land by an eviction, it has to be demonstrated with clear evidence.

10. The Court is alive to the legal position discussed hereinabove which is to the effect that a record of right has a presumptive value of title and possession but rebuttal in nature. In the present case, the petitioner opposed eviction and adduced evidence through Annexure-4 to deny the claim of opposite party No.1. At least, it can be said that a doubt was created with regard to the extent of land claimed to have been purchased by late father of opposite party No.1 showing that the same was in respect of Ac.0.70 decimal only disposed of entirely in favour of others including the petitioner corresponding to Ac.0.10 decimal. In an eviction proceeding, without

appreciating such a factual position, taking a decision to eject the petitioner from the case land simply relying the RoRs cannot be said to the correct approach. When the claim of opposite party No.1 is challenged and it received a dent clearly showing purchase of land Ac.0.70 decimal, a fact which has been openly recognized by learned authorities below, eviction could not have been directed straightaway barely referring to the RoRs with a conclusion that a presumption is attached to the same. Any Court or authority may act upon a record of right as it possesses a presumptive value and cannot overlook it easily but shall have to take notice of the reply and rebuttal evidence. In the case at hand, the dispute centres around the extent of land purchased by the father of opposite party No.1 and denied by the petitioner, a finding of fact and decision to rest upon Annexure-4 in rebuttal. The Court is of the humble view that learned authorities below ought to have desisted themselves from directing eviction, morefully when, both have found the transactions to be in respect of Ac.0.70 decimals. With such a conclusion, the Court is of the further view that opposite party No.1 has the liberty seeking appropriate relief according to law, if any such possession is in respect of a land measuring Ac.0.15 decimal being a part of the purchase of Ac.0.85 decimal on the field though not on paper but with such evidence received from both sides, it was not justified on the part of learned authorities below to order eviction in respect of the case land in occupation of the petitioner. With the discussions as aforesaid and keeping in view the settled position of law, the irresistible conclusion of the Court is that the impugned decisions cannot be sustained in law.

11. Hence, it is ordered.

12. In the result, the writ petition stands allowed. As a necessary corollary, the impugned orders under Annexures-11 and 12 in RMC No.36 of 2010 and Revenue Appeal Case No.44 of 2010 by the learned authorities below are hereby set aside.

13. In circumstances, however, there is no order as to costs.

Headnotes prepared by:
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Writ Petition allowed.

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2025 (I) ILR-CUT-870

BISWARANJAN PANIGRAHI
V.
GOVT. IN PANCHAYATI RAJ & DRINKING WATER DEPT. & ANR.

[W.P.(C) NO. 13017 OF 2018 & BATCH]

06 FEBRUARY 2025

[SASHIKANTA MISHRA, J.]

Issues for Consideration

1. Whether application of the provisions of the ORV Act regarding engagement of GRS is permissible in law.
2. Is GRS a civil post or a service?
3. Has the State any power to apply the provisions of the ORV Act in the matter of selection and engagement of GRS on its own?
4. Whether the operational guidelines issued under the MGNREG Act and comprehensive guidelines dated 06.04.2018 have sanction of law in so far as applying the principles of reservation to the engagement of GRS.

Headnotes

(A) ODISHA RESERVATION OF VACANCIES IN POSTS AND SERVICES (FOR SCHEDULED CASTES AND SCHEDULED TRIBES) ACT, 1975 (IN SHORT ORV ACT) – Section 3(d) read with Section 19 – Reservation for the appointment of Gram Rozgar Sevaks (GRS) – Whether application of the provisions of the ORV Act regarding engagement of GRS is permissible in law.

Held: No – GRS not being a 'post' or 'service' under the State, the provisions of the ORV Act would ordinarily not be applicable **–** As per Clause-(d) of Section 3, the applicability of the provisions of the Act stands excluded to those to be filled up on the basis of any contract. (Para 24)

(B) IS GRS A CIVIL POST OR A SERVICE?

Held: GRS is not a civil post under the State nor is it a service within the meaning of the OCS (CCA) Rules (Odisha Civil Services (Classification, Control and Appeal) – It is an engagement coterminous with the MGNREG Scheme with the engagees being given consolidated remuneration and on executing agreement with undertaking that they shall not claim regular employment under the State – So, even if the State makes a fiction of creating a district cadre, the same will not confer a status akin to a civil post or service in the State to the said district cadre – In fact, it would be a namesake cadre without the trappings of a civil post or service under the State – Secondly, reference to the 2008 Rules is also fallacious for the

reason that only because the State has provided an avenue of appointment to the said service from amongst the GRSs would not change their status as contractual appointees – Of course, once they are appointed under the said Rules, their status would change but prior to that their status as contractual appointees would remain intact. (Para 28)

(C) HAS THE STATE ANY POWER TO APPLY THE PROVISIONS OF THE ORV ACT IN THE MATTER OF SELECTION AND ENGAGEMENT OF GRS ON ITS OWN?

Held: No – Had there been any enabling provision in the ORV Act conferring power on the State to act in a manner contrary to Section 3 or had the Act provided any exception, the matter would have been different **–** But in the absence of any such provision and on the face of the provision under Section 19, the State is denuded of its power to do so **–** In other words, the State has no power to *suo motu* apply the provisions of the ORV Act in the matter of selection and engagement of GRS on its own. (Para 26)

(D) WHETHER THE OPERATIONAL GUIDELINES ISSUED UNDER THE MGNREG ACT AND COMPREHENSIVE GUIDELINES DATED 06.04.2018 HAVE SANCTION OF LAW IN SO FAR AS APPLYING THE PRINCIPLES OF RESERVATION TO THE ENGAGEMENT OF GRS.

Held: No. (Para 26)

(E) WHETHER RESERVATION IS A CLAIM OR AN AUTOMATIC CONFERMENT OF RIGHT.

Held: Reservation is a claim and not an automatic conferment of right on a person. (Para 17)

Citations Reference

Mukesh Kumar v. State of Uttarakhand, **(2020) 3 SCC 1;** Post Graduate Institute of Medical Education & Research v. Faculty Assn., **(1998) 4 SCC 1;** Susanta Kumar Sethi vs. State of Odisha, **MANU/OR/0330/2021 : (W.A. No. 86 of 2018 decided on 03.09.2021) – referred to.**

List of Acts/Rules/Scheme

Odisha Reservation of Vacancies in Posts and Services (For Scheduled Castes and Scheduled Tribes) Act, 1975; Odisha Civil Services (Classification, Control and Appeal) Rules, 1962; Mahatma Gandhi National Rural Employment Guarantee Act, 2005; Mahatma Gandhi National Rural Employment Guarantee Scheme; Orissa Village Level Workers (Recruitment and Conditions of Service) Rules, 2008; Constitution of India, 1950.

Keywords

Reservation; Contractual Posts; Reserved category; Principles of Reservation; Advertisement.

Case Arising From

Comprehensive guidelines for selection and engagement of Gram Rozgar Sevaks (GRS) under Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS) as per Notification dated 06.04.2018 formulated by the Government in the Department of Panchayati Raj and Drinking Water and advertisement published by the Collector-cum-DPC, DRDA, Subarnapur on 30.06.2018.

Appearances for Parties

For Petitioners: M/s. Biswabihari Mohanty, J.N. Panda, M. Harichandan, B. Tripathy & B. Samantaray [in W.P.(C) No.13017 of 2018]

M/s. Jyotirmay Gupta, P.P. Rao & S. Sahoo, [in W.P.(C) No.15082 of 2020 & W.P.(C) No.21256 of 2021]

M/s. S.K. Samal, S.P. Nath, S.D. Routray, S. Sekhar & J. Biswal. [in W.P.(C) No. 29309 of 2022]

For Opp.Parties: Mr. S.N. Pattnaik, Addl. Government Advocate

M/s. B.P. Tripathy, R. Achary, T. Barik, N. Barik, B. Hidyatullah, A. Pati & S.R. Ojha, [O.P. No.2 in W.P.(C) No. 13017 of 2018]

M/s. Jyotirmay Gupta, P.P. Rao & S. Sahoo, [for intervener in W.P.(C) No. 13017 of 2018]

Mr. Prasanjeet Mohapatra, [O.P. No.3 in W.P.(C) No. 15082 of 2020].

Amicus Curiae: Mr. P.K. Rath, Sr. Adv.
Ms. Pami Rath, Sr. Adv.

Judgment/Order

Judgment

SASHIKANTA MISHRA, J.

All these writ applications involve a common question of fact and law and as such, they were heard together and are being disposed of by this common judgment.

FACTS

2. An advertisement was published by the Collector-cum-DPC, DRDA Subarnapur on 30.06.2018 inviting applications from intending candidates for their appointment as Gram Rozgar Sevaks (GRS) in different Gram Panchayats of

Subarnapur District. 19 posts were notified, of which 5 were reserved for SC and 14 for ST candidates. Said advertisement, inter alia, mentioned that the 'post' of GRS under Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS) is contractual and the engagement would be initially for a period of one year, which can be extended on the basis of satisfactory performance and recommendation by the concerned Block Development Officer. It also mentioned that the provisions of Odisha Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 (in short "ORV Act") and Rules formulated thereunder shall be strictly followed.

3. Prior to publication of the advertisement, the Government in the Department of Panchayati Raj and Drinking Water formulated comprehensive guidelines for selection and engagement of GRS under MGNREGS as per Notification dated 06.04.2018. Among other things, it was provided that the provisions of ORV Act shall be strictly followed in the selection of GRS and that GRS will form a district cadre. Pursuant to the advertisement and upon submission of applications by the intending candidates, selection was made and on 03.12.2018, a final list was prepared. After verification of documents produced by the selected candidates, a revised final merit was published.

4. While the matter stood thus, one Biswaranjan Panigrahi, a person belonging to the general category, has filed W.P.(C) No.13017 of 2018 challenging the guidelines as well as advertisement mainly on the ground that the principles of reservation could not have been applied to all the 19 posts notified to be filled up. The following relief has been claimed in the said writ application:

> *"Under the above circumstances it is humbly prayed that this Hon'ble Court may graciously be pleased to issue a writ in appropriate nature to quash the Advertisement dated 30.6.2018 so far as the decision to reserve all 19 posts in favour of reserved category and direct the respondents to issue advertisement afresh maintaining the ceiling limit of 50% as per the settled position of law pertaining reservation or treating all the posts as unreserved being single posts in different gram Panchayats of Subarnapur district and consider the candidatures of all eligible candidates irrespective of category for such selection and this Hon'ble Court may further be pleased to quash the guidelines dated 06.04.2018 issued by Panchayatraj Department so far as the decision to apply the provisions of ORV Act and Rules to the selection of GRS and making the post of GRS is District Cadre concerned.*
>
> *Any other order/ orders, direction/directions as would be deemed fit and proper be issued in the interest of justice and equity."*

5. On the other hand, the petitioners in the other two writ applications i.e., W.P.(C) No.15082 of 2020 and W.P.(C) No. 21256 of 2021 having been selected pursuant to the above advertisement, filed those writ applications because of the delay in issue of engagement orders in their favour.

6. Be it noted that the petitioners in W.P.(C) No. 15082 of 2020 had earlier approached this Court in W.P.(C) No. 21777 of 2019, which was disposed of by

order dated 21.11.2019 by directing the Collector to take a decision on the representation filed by them. Pursuant to such order, the Collector vide order dated 27.12.2019 held that the engagement of GRS is not possible at present as this Court has passed an interim order in the writ application filed by Biswaranjan Panigrahi being W.P.(C) No. 13017 of 2018. As such, the petitioners have filed W.P.(C) No. 15082 of 2020 seeking the following relief:

> *"The petitioners therefore humbly (sic) pray that the Hon'ble Court may be graciously pleased to admit this case, issue notice to opposite parties for show cause and after hearing both the sides may be pleased to issue a writ in nature of mandamus/certiorari with a direction to the opposite parties particularly to O.P. No.- 2 i.e. Collector, Subarnapur to take immediate steps to issue appointment letters as per selection list published vide advertisement No.275 dated 17.01.2019 vide Annexure- 2 series for the post of Gram Rozgar Sevak (GRS) in Subarnapur district on the basis of the earlier order of this Hon'ble court vide Annexure-4 by modifying the order passed by Collector, Subarnapur vide Annexure- 5 within a stipulated period with cost.*
>
> *And to pass such other order or direction as this Hon'ble Court deems just, fit, equitable and proper in the facts and circumstances of the present case."*

7. While the matter stood thus, the Collector, Subarnapur issued another advertisement on 24.03.2021 inviting applications for engagement of GRS in different GPs of the district Subarnapur. 25 posts were notified, of which, 10 were reserved for SC, 11 for ST and 4 for unreserved candidates. Challenging the aforesaid advertisement, the petitioners in W.P.(C) No. 15082 of 2020 have again approached this Court in W.P.(C) No. 21256 of 2021 seeking the following relief:

> *"The petitioners therefore humbly(sic) pray that the Hon'ble Court may be graciously pleased to admit this case, issue notice to opposite parties for show cause and after hearing both the sides may be pleased to issue a writ in nature of mandamus/certiorari with a direction to the opposite Parties particularly to O.P. No.- 2 to take immediate steps to give appointment as per selection list published in advertisement No. 275 dated 17.01.2019 vide Annexure- 2 series for the post of Gram Rozgar Sebhak (GRS) in Subarnapur district by quashing the present advertisement i.e. Advertisement dated 24.03.2021, vide Annexure-6 within a stipulated period with cost.*
>
> *And to pass such other order or direction as this Hon'ble Court deems just, fit, equitable and proper in the facts and circumstances of the present case.*
>
> *And for which act of kindness, the petitioners as in duty bound shall ever pray."*

8. The other writ petition, being W.P.(C) No. 29309 of 2022 has been filed by the candidates selected pursuant to the advertisement dated 30.06.2018 claiming the following relief:

> *"It is therefore, most humbly prayed that this Hon'ble Court be graciously pleased to*
>
> *i) Admit the writ application.*
>
> *ii) Call for the record.*
>
> *iii) Issue a writ in the nature of Mandamus by directing the opp. parties to issue necessary engagement order for the post of GRS on the basis of their rank in the select list which was prepared pursuant to their advertisement dated 30.06.2018 and further*

direction may be issued to extend all financial and service benefits in favour of the petitioners within a reasonable time to the stipulated by this Hon'ble Court.

iv) And/or pass such other or der/orders, direction/directions as this Hon'ble Court may deems fit and proper for the ends of justice.

And for the said act of kindness, the petitioners as in duty bound shall ever pray."

9. Thus, out of the four writ applications so filed, three, being W.P.(C) No. 15082 of 2020, W.P.(C) No. 21256 of 2021 and W.P.(C) No.29309 of 2022 are filed by the candidates selected pursuant to the advertisement dated 30.06.2018, who are aggrieved by non-issuance of engagement orders in their favour. On the other hand, the petitioner in W.P.(C) No.13017 of 2018 is an outsider, who challenges the advertisement as well as comprehensive guidelines on the ground that all the posts notified could not have been reserved for SC and ST Category.

10. In view of the importance of the issue involved, this Court requested the assistance of two senior Counsel Ms. Pami Rath and Mr. P.K. Rath as Amicus Curiae.

11. Heard learned counsel, Mr. B.B. Mohanty for the petitioner in W.P.(C) No.13017 of 2018; Mr. J. Gupta for the petitioners in W.P.(C) No.15082 of 2020 and W.P.(C) No. 21256 of 2021; and Mr. S.K. Samal for the petitioners in W.P.(C) No. 29309 of 2022 and also Mr. S.N. Pattnaik, learned Addl. Government Advocate for the State in all the cases.

Submissions against the Advertisement dated 30.06.2018 and comprehensive guidelines dated 06.04.2018

12. Mr. B.B. Mohanty, learned counsel for the petitioner seeks to assail the guidelines dated 06.04.2018 in so far as the same provides for application of the provisions of the ORV Act and making the GRS a district cadre post and consequently the advertisement dated 30.06.2018 in so far as it provides for reservation of all the 19 posts notified on the following grounds:

(i) GRS is not a civil post as per OCS (CCA) Rules, 1962 nor under the Mahatma Gandhi National Rural Employment Guarantee Act, 2005.

(ii) Admittedly, GRS is a contractual engagement as per comprehensive guidelines as also the advertisement renewable from year to year.

(iii) Section 3(d) of the ORV Act specifically bars applicability of the said Act to contractual posts.

(iv) Section 19 of the ORV Act gives overriding effect to the Act as against any Rule, order, guidelines etc. Therefore, any guidelines issued by the Central Government or the State Government to the contrary has no force of law.

13. Admittedly, 109 'posts' of GRS were available in Subarnapur district, all of which being single 'posts' were filled up without adhering to the principle of reservation at the relevant time. The impugned advertisement intends to retrospectively apply the principle of reservation to the said 'posts', which is not

permissible in law. Moreover, the comprehensive guidelines dated 06.04.2018 itself provides for its prospective application only.

Submissions supporting the advertisement and comprehensive guidelines.

14. Mr. S.N. Pattnaik, learned Addl. Government Advocate, supported by Mr. J. Gupta, and Mr. S.K. Samal, learned counsel appearing for the petitioners in other three writ applications, has made the following submissions.

> (i) GRSs are engaged on contractual basis in each Gram Panchayat for execution of work, which is co-terminus with MGNREG Scheme. Finance Department concurred in the creation of 6234 posts of GRS on 22.09.2014 and after reorganization of Gram Panchayats in 2017, it again concurred in the creation of 567 new posts, taking the total number of posts to 6801.
>
> (ii) There are 96 Gram Panchayats in Subarnapur district prior to reorganization, which increased to 109 after reorganization. The circulars issued by the Government in 2006 and 2013 relating to GRS have lost their force in view of the issuance of the comprehensive guidelines dated 06.04.2018.
>
> (iii) Out of the 109 GRS posts in Subarnapur District, only 9 SC, 29 UR and 50 SEBC category persons are in position. There is thus, a deficit of 9 SC and 25 ST candidates and surplus of 10 belonging to UR and SEBC taken together. Therefore, there is no question of filing up the vacancy of UR or SEBC category as only 19 posts of GRS were available. Thus, the claim of the petitioner regarding exceeding 50% ceiling of reservation and of making 100% reservation is factually incorrect.
>
> (iii) At the relevant time, there being only one post of GRS in each Gram Panchayat, there was no application of reservation but after becoming a district cadre post it was found that there was no proper representation of the reserved category candidates, for which the impugned advertisement was issued only to make good the shortfall so as to ensure proper representation of all communities.
>
> (iv) Though initially, the GRS was a single post but now it has been clubbed up and a district cadre has been formed. Further, for appointment of the village level workers as per Orissa Village Level Workers (Recruitment and Conditions of Service) Rules, 2008, 30% of the vacancies are to be filled up by selection from amongst GRS.

Submissions by Amicus Curiae

15. Ms. Pami Rath, learned Senior Counsel submits that Article-16(4) and (4-A) of the Constitution are enabling provisions conferring power on the State to provide reservation. No one can claim reservation as a Fundamental Right by virtue of Article 16(4) of the Constitution of India. Ms. Rath, has referred to the judgment of the Supreme Court in the Case **Mukesh Kumar v. State of Uttarakhand**[1], in this regard. She further submits that exercising its legislative power, the State of Odisha enacted ORV Act making it applicable to all posts under the State excluding certain categories of posts as laid down in Section 3 thereof. Section-3(d) excludes the applicability of the Act to contractual posts. That apart, Section 19 has an overriding effect over all other Rules, resolutions etc. GRS being a contractual engagement, the

[1] **(2020) 3 SCC 1**

provisions of the ORV Act cannot be made applicable as the same would run contrary to its provisions. Ms. Rath further submits that there is no question of retrospectively applying reservation to a post which itself was not subject to reservation at the relevant time. Ms. Rath concludes her argument by submitting that reservation is always in respect of the post and not the employee and further, reservation does not mean that the reserved category candidate cannot compete for the unreserved seats.

16. Mr. P.K. Rath, learned Senior Counsel would submit that there is no provision in the Constitution or in any other law for retrospective application of the principles of reservation. Further, reservation is a benefit claimed by a candidate. The State cannot force reservation upon a candidate. Since in the instant case the concerned persons were appointed admittedly when there was no reservation, the State cannot subsequently segregate them on the basis of the social categories to which they belong and apply the principle of reservation suo motu at this distance of time. In any case, the posts being contractual in nature, they stand automatically excluded from the purview of the ORV Act and in view of the overriding provision of Section 19, the State has no power to make the Act applicable by an executive/administrative decision.

Analysis and findings

17. The concept of reservation flows from Article-16 of the Constitution, Clause-4 of which confers power on the State to make provision for reservation of appointments or posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in the services under the State. As argued by Ms. Rath, learned Amicus Curiae, it is basically an enabling provision utilizing which the State can make laws to provide for reservation to the backward classes. For instance, the State of Odisha has enacted ORV Act to provide for reservation in appointment to members of the SC and ST communities. It is thus, a positive benefit conferred by the legislature drawing power from the Constitutional provision but then, reservation is not automatic but a right to be claimed by persons belonging to the reserved categories. Unless a claim is laid it is not for the State to provide the benefit to a person only because he belongs to a particular social category. This is being said for the reason that it is open to persons of all social categories to compete on merits without claiming reservation. In the case of **Mukesh Kumar** (supra), the Supreme Court observed as follows:

> *"12. Articles 16(4) and 16(4-A) do not confer fundamental right to claim reservations in promotion [Ajit Singh (2) v. State of Punjab, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239] . By relying upon earlier judgments of this Court, it was held in Ajit Singh (2) [Ajit Singh (2) v. State of Punjab, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239] that Articles 16(4) and 16(4-A) are in the nature of enabling provisions, vesting a discretion on the State Government to consider providing reservations, if the circumstances so warrant. It is settled law that the State Government cannot be directed to provide reservations for appointment in public posts [C.A. Rajendran v. Union of India, (1968) 1 SCR 721 : AIR 1968 SC 507] . Similarly, the State is not bound to make reservation for Scheduled*

Castes and Scheduled Tribes in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing inadequacy of representation of that class in public services. If the decision of the State Government to provide reservations in promotion is challenged, the State concerned shall have to place before the Court the requisite quantifiable data and satisfy the Court that such reservations became necessary on account of inadequacy of representation of Scheduled Castes and Scheduled Tribes in a particular class or classes of posts without affecting general efficiency of administration as mandated by Article 335 of the Constitution. [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013]

13. Articles 16(4) and 16(4-A) empower the State to make reservation in matters of appointment and promotion in favour of the Scheduled Castes and Scheduled Tribes "if in the opinion of the State they are not adequately represented in the services of the State". It is for the State Government to decide whether reservations are required in the matter of appointment and promotions to public posts. The language in clauses (4) and (4-A) of Article 16 is clear, according to which, the inadequacy of representation is a matter within the subjective satisfaction of the State. The State can form its own opinion on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is that there must be some material on the basis of which the opinion is formed. The Court should show due deference to the opinion of the State which does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within the subjective satisfaction of the executive are extensively stated in Barium Chemicals Ltd. v. Company Law Board [Barium Chemicals Ltd. v. Company Law Board, AIR 1967 SC 295] , which need not be reiterated. [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1]"

To reiterate, reservation is a claim and not an automatic conferment of right on a person.

18. Before proceeding to examine the applicability of the provisions of the ORV Act in the matter of engagement of GRS, it would be apt to keep in mind the fundamental principle underlying reservation that a single post cannot be reserved, as it would amount to 100% reservation, as was held by the Supreme Court in the case of ***Post Graduate Institute of Medical Education & Research v. Faculty Assn.***[2] The following observations of the Supreme Court in the aforesaid case are noteworthy.

"34. In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such a single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permissible within the constitutional framework. The decisions of this Court to this effect over the decades have been consistent.

35. Hence, until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of

[2] (1998) 4 SCC 1

rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bounds to the members of a large segment of the community who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society."

19. To briefly advert to the facts of the case, it is admitted that there were 96 'posts' of GRS in Subarnapur district, which were Gram Panchayat-based and as such, were single 'posts'. Therefore, appointments were made to the said 'posts' without applying the principles of reservation. The number of 'posts' increased to 109 after reorganization. There were 19 vacancies at the time of issuance of the impugned advertisement. As per the comprehensive guidelines dated 06.04.2018, the Government decided to make the GRS a district cadre 'post' meaning thereby, that all 109 'posts' formed a part of single cadre. Thus, 96 'posts', which were originally single 'posts', now purportedly became part of a cadre comprising 109 'posts'.

20. In its counter affidavit filed in W.P.(C) No.29309 of 2022, the State has enclosed the operational guidelines of MGNREG Act, 2005 of which, Clause-4.6.7 (ii) provides as follows:

"(ii) In the recruitment process, the reservation policy of the State for contractual employment should be followed. The MGNREGS staff should be adequately represented by women, SCs, STs. Disabled etc."

The MGNREG Act, 2005 however, does not provide for any such provision regarding engagement of GRS. The State of Odisha has applied the provisions of the ORV Act to the engagement of GRS as per the comprehensive guidelines dated 06.04.2018. It is to be seen whether such application of the provisions of the Act is permissible in law or not.

21. The ORV Act was enacted to "provide for adequate representation of scheduled castes and scheduled tribes in posts and services under the State". The term 'posts' has not been defined in the Act. The Odisha Civil Services (Classification, Control and Appeal Rules, 1962 provides for classification of posts under Rule-8, and reads as under;

*"**8. Classification of post** – [(1) Civil Posts under the State other than those ordinarily held by persons to whom these rules do not apply or included in any State Civil Service shall by a general or special order of the Governor, issued in this behalf, be classified as follows :-*

(i) State Civil Posts, Group-A

(ii) State Civil Posts, Group-B

(iii) State Civil Posts, Group-C

(iv) State Civil Posts, Group-D

(2) Any order made by the competent authority and in force immediately before the commencement of these rules relating to classification of civil posts under the State shall continue to be in force until altered, rescinded or amended by an order of Governor under sub-rule (1).

(3) If any Civil post under the State has not been classified by an order of the Governor and a question as to its classification arises, the decision thereon of the appropriate department of Government after taking into account the class to which another Civil Post carrying a comparable scale of pay belongs, shall be final."

22. Admittedly, GRS has not been classified as Civil Post as per Rule-8 of the 1962 Rules. There is also no post of GRS provided under MGNREG Act, 2005. On the contrary, the comprehensive guideline dated 06.04.2018, without saying that it is a civil post, specifically mentions that it is a contractual post. In fact, the introduction to the comprehensive guidelines read as follows:

"Multipurpose Assistants namely Gram Rozgar Sevaks (GRSs) are engaged on contractual basis in each Gram Panchayat for execution of work which is co-terminus with MGNREG Scheme. Government in Finance Department concurred in creation of 6234 nos. of posts of Gram Rozgar Sevaks (GRSs) on 22-09-2014. Consequent upon reorganization of Gram Panchayats, Finance Department have concurred in creation of 567 new posts of GRS increasing the total no. of posts of GRS to 6801.

The selection of GRSs on contractual basis should be done in a fair and transparent manner at the District level under the overall direction, control & supervision of Collector-cum-DPCs in the capacity of CEO, Zilla Parishad abiding by the following Guidelines:"

23. The following provisions of the comprehensive guidelines are also relevant and are quoted hereinbelow:

EXECUTION OF AGREEMENT & ISSUE OF ENGAGEMENT ORDER;

UNDERTAKING:

• Prior to execution of agreement, an undertaking should be obtained from the GRS as follows: -

*• **"I am quite aware that the engagement offered is purely temporary and for a specific purpose of executing the work under MGNREGA and this is not a permanent job. Hence, I solemnly affirm that I would not claim my permanent absorption in the job under State Government/ Zilla Parishad/ Panchayat Samities/ Gram Panchayats etc.***

Further, I undertake not to approach any Court of Law for engaging me on permanent basis under the State Government or any other organization merely on the ground of my engagement as Gram Rozgar Sevak". (Ref: Letter No. 5664 dated 07-02-2008]

*• The Collector-cum-CEO, Zilia Parishad will execute an agreement with the GRS in Non-judicial stamp paper and issue engagement order **(contractual and coterminous with the Scheme)**.*

• If any fraudulent testimonial is detected in future or if he/she has been criminally prosecuted, the engagement shall be cancelled without notice and action as deemed proper will be taken against him/her as per the provision of Law.

NATURE OF ENGAGEMENT:

The GRS will be engaged on contractual basis for a period of one year. The selected candidates who join may be engaged in any Gram Panchayat of the concerned District by the Collector-cum-CEO, Zilla Parishad.

RENEWAL OF CONTRACT:

The BOG will assess the performance of GRS of each Gram Panchayat every year as per their Job Chart. On the basis of the satisfactory performance and recommendation by the EDO, the contract of GRS may be renewed for another one year by the Collector-cum-CEO, Zilla Parishad; and so on.

REMUNERATION:

The GRS may be paid a consolidated monthly remuneration of Rs.5000/- (Rupees Five Thousand) which may be revised with the approval of Government. The remuneration may be paid from the Administrative Contingency of MGNREGS parked at District level. Payment of remuneration may be made through e-FMS. [Ref: Letter No. 7240 dated 27-04-2016]

Thus, from a conjoint reading of all the aforequoted provisions there can be no manner of doubt that engagement of a GRS is not against any civil post in the State of Odisha but is a purely contractual engagement, initially for a period of one year and renewable from time to time depending on performance.

24. Having held that GRS is a purely contractual engagement, the question is, whether the provisions of ORV Act would be applicable, as has been sought to be done in the comprehensive guidelines as well as the advertisement dated 30.06.2018. Firstly, GRS not being a 'post' or 'service' under the State, the provisions of the ORV Act would ordinarily not be applicable. Secondly, Section-3 of the ORV Act reads as follows:

*"3. **Applicability**- This Act shall apply to all appointments to the Posts and Services under the State except-*

(a) Class I posts which are above the lowest rank thereof and meant for conducting or guiding or directing Scientific and Technical research;

(b) Class I posts which are above the lowest rank thereof and classified as scientific posts;]

(c) tenure posts;

(d) those filled up on the basis of any contract;

(e) ex-cadre posts;

(f) those which are filled up by transfer within the cadre or on deputation;

(g) the appointment of such staff the duration of whose appointment does not extend beyond the term of office of the person making the appointment and the work charged staff which are required for emergencies like flood relief work, accident restoration and relief etc.;

(h) temporary appointments of less than forty-five days duration;

(h-1) those which are required to be filled up by appointment of persons under the rehabilitation assistance given to the members of the family of the deceased of permanent disabled employee who suffers from the disability while in service;

(i) those in respect of which recruitment is made in accordance with any provision contained in the Constitution."

Thus, as per Clause-(d) of Section 3, the applicability of the provisions of the Act stands excluded to those to be filled up on the basis of any contract.

25. The question is, can the State acting administratively decide to apply the provisions of the Act on its own. Given the Scheme of the Act as reflected in its provisions, the answer would an emphatic 'no'. Reference in this regard may be had to Section-19 of the ORV Act, which reads as follows:

*"**19. Overriding effect of the Act**.- The provisions of this Act shall have effect notwithstanding anything to the contrary in any other law or in any rule, order or resolution made by the State Government."*

26. Thus, on the face of Section 3(d), read with Section 19 of the ORV Act, the operational guidelines issued under the MGNREG Act and the comprehensive guidelines dated 06.04.2018 can have no sanction of law in so far as applying the principles of reservation to the engagement of GRS is concerned. Of course, had there been any enabling provision in the ORV Act conferring power on the State to act in a manner contrary to Section 3 or had the Act provided any exception, the matter would have been different. But in the absence of any such provision and on the face of the provision under Section 19, the State is denuded of its power to do so. In other words, the State has no power to suo motu apply the provisions of the ORV Act in the matter of selection and engagement of GRS on its own.

27. It would be profitable at this stage to refer to a judgment passed by a Division Bench of this Court in the case of **Susanta Kumar Sethi vs. State of Odisha**[3], wherein, referring to the provision under Section 3(d) of the ORV Act, it was held as follows:

30. Section 3 makes it clear that the Act will apply to all appointments to the posts and services under the State. Section 3 of the ORV Act lists out the posts to which the ORV Act will not apply. What is relevant here is that under Section 3 (d) the ORV Act will not apply to posts "filled up on the basis of any contract." Admittedly, the post of SS is a contractual post and therefore, the ORV Act does not apply to it.

36. With the ORV Act itself making it clear that it will not apply to the recruitment for the post of SS, the question of applying Section 6 of the ORV Act and thereby insisting that the unfilled vacancies of STs should be filled up by SCs alone and nobody else, cannot be sustained in law. It was rightly rejected by the learned Single Judge.

28. The State has made a feeble attempt to justify its decision by citing two grounds, firstly that GRS has become a district cadre post and secondly, appointment to the post of village level worker as per the 2008 Rules can be made from amongst GRS to the extent of 30 %. For the reasons to be indicated below this Court finds both the arguments fallacious and absurd. As has already been held,

[3] MANU/OR/0330/2021 : (W.A. No. 86 of 2018 decided on 03.09.2021)

GRS is not a civil post under the State nor is it a service within the meaning of the OCS (CCA) Rules. It is an engagement coterminous with the MGNREG Scheme with the engagees being given consolidated remuneration and on executing agreement with undertaking that they shall not claim regular employment under the State. So, even if the State makes a fiction of creating a district cadre, the same will not confer a status akin to a civil post or service in the State to the said district cadre. In fact, it would be a namesake cadre without the trappings of a civil post or service under the State. Secondly, reference to the 2008 Rules is also fallacious for the reason that only because the State has provided an avenue of appointment to the said service from amongst the GRSs would not change their status as contractual appointees. Of course, once they are appointed under the said Rules, their status would change but prior to that their status as contractual appointees would remain intact.

29. In view of the clear finding of this Court that GRS being a contractual appointment the principles of reservation would have no application, the alternative argument advanced to the effect that the comprehensive guidelines would be effective only prospectively, is not necessary to be gone into.

Conclusion

30. Thus, from a conspectus of analysis of facts, statutory provisions and the case laws referred, this Court is of the considered view that the impugned comprehensive guidelines dated 06.04.2018 in so far as it relates to making the provisions of the ORV Act strictly applicable, cannot be sustained in the eye of law. Consequently, the advertisement dated 30.06.2018 providing for reservation in respect of all the 19 vacancies also cannot be sustained.

31. In the result, W.P.(C) No. 13017 of 2018 is allowed. The comprehensive guidelines dated 06.04.2018 in so far as it provides that the provisions of ORV Act and Rules framed thereunder would be strictly followed is hereby quashed. Further, the advertisement dated 30.06.2018 is also quashed.

32. Consequently, W.P.(C) Nos. 15082 of 2020, W.P.(C) No. 21256 of 2021 and W.P.(C) No. 29309 of 2022 are hereby dismissed.

33. In view of the above findings, the advertisement dated 24.03.2021 shall be modified/revised accordingly to invite applications from candidates without applying the principles of reservation.

Headnotes prepared by:
Shri Pravakar Ganthia, Editor-in-Chief.

Result of the case:
W.P.(C) No. 13017 of 2018 allowed.
W.P.(C) Nos.15082 of 2020, 21256 of 2021 & 29309 of 2022 dismissed.

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2025 (I) ILR-CUT-884

SAUDAMINI SWAIN & ANR.
V.
STATE OF ORISSA & ORS.

[W.P.(C) NO. 11200 OF 2005 & 3217 OF 2006]

SIBAMOHAN SENAPATY & ANR. V. G.M., NTPC LTD. & ANR.
[IN W.P.(C) NO. 3217 OF 2006]

21 FEBRUARY 2025

[SASHIKANTA MISHRA, J.]

Issues for Consideration

1. Whether orders dated 03.12.2004 and 25/23.05.2005 are sustainable.
2. Whether the mandate of Section 11 of the 1994 Act was followed in letter and spirit by the NTPC management.
3. Whether the claim of the petitioners of being discriminated in the matter of grant of appropriate pay scale and allowances is valid.

Headnotes

(A) TALCHER THERMAL POWER STATION (ACQUISITION AND TRANSFER) ACT, 1994 – Sections 10, 11 & 13 – Unequal treatment of the petitioners in the matter of wages, allowances and other service conditions – Office order dated 03.12.2004 issued regarding proposed rules and regulations of the teaching staff absorbed as employees of NTPC pursuant to the 1994 Act – Letter dated 25/23.05.2005 issued regarding redeployment of the teachers as stenographer subject to acquiring typing and shorthand speed as applicable to Stenographers of NTPC as there is no cadre of teachers in NTPC – Whether both the above orders are sustainable.

Held: In this context it would be apposite to state that NTPC, being a Public Sector Undertaking (PSU) under the Government of India, can also be treated as a functionary of the State – As such, the obligation cast upon the State to act as a model employer can also be extended to a PSU like NTPC – In other words, as a model employer, NTPC has a social obligation to treat its employees in such manner that no employee feels left out from the benefits extended to other employees. (Para 49)

The impugned orders i.e. office order dated 03.12.2004 (Annexure-4 of W.P.(C) No. 3217 of 2006 and Annexure-5 of W.P.(C) No.11200 of 2005) and order dated 25/23.05.2005 (Annexure-8 of W.P.(C) No. 3217 of 2006) are hereby quashed. (Para 62)

(B) TALCHER THERMAL POWER STATION (ACQUISITION AND TRANSFER) ACT, 1994 – Section 11 – Whether the mandate of Section 11 of the 1994 Act was followed in letter and spirit by the NTPC management.

Held: The employees of TTPS, without distinction as to categories and grades were taken over by NTPC and as per Section 11 were entitled to be granted same benefits as they were receiving prior to such taking over – This Court has already held that the petitioners, though teachers were treated at par with workmen by the former employer – So, if NTPC decided to give the benefit of the enhanced age of superannuation to the workmen, there was no reason as to why the same should not have been granted to the teachers – Not doing so amounts to discrimination, hit by the principle of equality under Article 14 of the Constitution of India. (Para 44)

(C) PAY AND ALLOWANCES – Whether the claim of the petitioners of being discriminated in the matter of grant of appropriate pay scale and allowances is valid.

Held: Yes – This Court is left with no doubt that the claim of the petitioners of being discriminated in the matter of grant of appropriate pay scales and allowances is valid. (Para 57)

Citations Reference

Osmania University v. V.S. Muthurangam**, (1997) 10 SCC 741;** K. Nagaraj v. State of A.P., **(1985) 1 SCC 523;** Union of India v. Lieut E. Iacats**, (1997) 7 SCC 334;** Central Inland Water Transport Corporation Ltd, v. Brojo Nath Ganguly & Anr., **(1986) 3 SCC 156;** Chairman and MD NTPC Ltd. v. Reshmi Construction, Builders and Contractors, **(2004) 2 SCC 663;** Bhupendra Nath Hazarika & Anr. v. State of Assam & Ors., **(2013) 2 SCC 516 – referred to.**

List of Act/Rules

Talcher Thermal Power Station (Acquisition and Transfer) Act, 1994; Industrial Disputes Act, 1947; Constitution of India, 1950; Orissa Revised Scales of Pay Rules, 1989; Orissa Revised Scales of Pay Rules, 1998.

Keywords

Odisha State Electricity Board (OSEB); Talcher Thermal Power Station (TTPS); National Thermal Power Corporation (NTPC); NTPC management; Skilled; Unskilled; Semi-Skilled; Highly skilled; Supervisory; Hobson's Choice; Public Sector Undertaking (PSU); Representation; Pay and allowances.

Case Arising From

Orders dated 03.12.2004 and 25/23.05.2005 issued by National Thermal Power corporation (NTPC).

Appearances for Parties

For Petitioners : Mr. J.K. Rath, Sr. Adv., & M/s. Basudev Mishra, B.L. Tripathy & Mr. G. Sahu

For Opp. Parties : M/s. A.N. Das, A.N. Pattnaik, E.A. Das & N. Sarkar

Judgment/Order

Judgment

SASHIKANTA MISHRA, J.

Both these writ applications involve common facts and law and were therefore, heard together and are being disposed of by this common judgment. However, for brevity, the facts pleaded in W.P.(C) No. 3217 of 2006 are considered.

INTRODUCTORY FACTS

2. The erstwhile Odisha State Electricity Board (OSEB) owned a power station in Talcher, presently in the district of Angul, called Talcher Thermal Power Station (TTPS). Since TTPS, for various reasons could not operate at the optimum level resulting in loss in generation of electricity and as neither the OSEB nor the State Government were in a position to provide additional funds necessary to achieve optimum production, the State legislature enacted the Talcher Thermal Power Station (Acquisition and Transfer) Act, 1994 (in short '1994 Act") for taking over the power station by National Thermal Power Corporation (NTPC), a wholly owned Government of India undertaking. Said Act came into force w.e.f. 18.05.1995 being published in the Odisha Gazette. As per the provisions of the 1994 Act, the right, title and interest of the OSEB in relation to TTPS was vested in the State Government. Thereafter, the State Government vested the power station with NTPC free from all encumbrances as per Section 5 of the 1994 Act w.e.f. 03.06.1995. The modalities of transfer of the employees of OSEB (TTPS) to the Corporation, security of their tenure, protection of their status etc. were governed by different provisions of the 1994 Act, particularly Sections, 10, 11 & 13 thereof. As such, about 1500 employees of the erstwhile OSEB working in TTPS were taken over by NTPC pursuant to the 1994 Act. They became the regular employees of the NTPC without any break.

3. OSEB also owned and ran three schools being Talcher Thermal High School, Talcher Thermal Model Primary School and Talcher Thermal Sector-IV Primary School. All the three Schools were also transferred to NTPC by virtue of the 1994 Act with effect from 03.06.1995. By letter dated 03.07.1995, the Chief Personnel Manager, NTPC issued a letter to the Headmasters of the three schools indicating the transfer of said schools to NTPC.

CASE OF THE PETITIONERS

4. The petitioners in W.P.(C) No.11200 of 2005 were working as Asst. Teachers in Talcher Thermal High School. The two petitioners in W.P.(C) No.3217 of 2006 were working as Trained Graduate Teacher and Matric CT Teacher respectively in Talcher Thermal High School. Though strictly not workmen yet they were treated at par with different categories of workmen by the management of OSEB such as, Highly Skilled, Supervisory and Skilled-B etc. Their services were also taken over by NTPC as per the 1994 Act.

5. By an office order dated 02.09.1998, the age of retirement of the employees of NTPC was enhanced to 60 years. The retirement age of the employees of the power station was 58 years. But in view of the aforementioned office order, they were also eligible to work till 60 years.

6. The petitioners believe that they were treated unequally as compared to the other taken over employees and the direct employees of NTPC in the matter of wages, allowances and other service conditions. They voiced such discontent before the management claiming equal treatment. However, NTPC entered into a bipartite understanding with one of the six trade unions operating in the power station on 20.08.1998, which ultimately became a tripartite settlement under the Industrial Disputes Act. Subsequent to such settlement, an office order was issued on 20/22.08.1998 calling upon the taken over employees to give their option for coming over to the NTPC Pay Scale. The petitioners being Teachers were excluded from the said order. Clause-2.8 of the said order provided that revised pay structure and allowance of GRIDCO as notified by Notification dated 21.04.1998 shall be extended to all teaching staff w.e.f. 03.06.1995.

7. Feeling aggrieved, the present petitioners and some other teachers approached this Court in OJC No.13155 of 1998. Said writ petition was disposed of on 05.03.1999 by directing NTPC to frame separate rules and regulations for the teaching staff of the Schools taken over by it as per the 1994 Act. A division Bench of this Court, inter alia, issued the following directions:

> *"In view of the aforesaid position we direct that necessary rules and regulations be framed by NTPC keeping in view of the prescription in Section-11 of the 1994 Act as accepted in the Counter Affidavit filed by it. Such action be taken within three months from today."*

8. The above direction was not complied with by NTPC for which a contempt application was filed (OCRMC No.95 of 2000), which was disposed of granting eight weeks' time to the NTPC for compliance. Again another contempt petition was filed (OCRMC No.103 of 2002). At this stage, NTPC filed an additional affidavit in the contempt proceeding on 06.12.2004 enclosing an office order dated 03.12.2004 regarding proposed rules and regulations of the teaching staff absorbed as employees of NTPC pursuant to the 1994 Act. Said office order dated 03.12.2004 is enclosed as Annexure-4 to the writ application.

9. In view of such development, the contempt proceeding was dropped inter alia, with the following observations:

> *"Orl.Crl.Misc.Case No.103 OF 2002*
>
> *Xxxx xxxxx xxxx*
> *Xxxx xxxx xxxx*
>
> *5. The petitioners, if aggrieved by the fixation of scales of pay and other conditions, are entitled to challenge or agitate the same in a separate proceeding or may move the Management for the purpose, but the same cannot be considered in the present contempt application.* ***However, we feel that the points urged on behalf of the petitioners need proper consideration by the Management.***
>
> *6. In that view of the matter, we are of the considered opinion that there is no wilful or deliberate violation of this Court's order, as alleged.* ***However, while dropping the contempt proceeding we observe that in the event the petitioners raise their grievance with regard to fixation and parity of their scale of pay by way of a representation, the Management should consider the same in its proper perspective.***
>
> *Sd/-P.K.Hohanty, J*
> *Sd/-J.P.Mishra, J.*
>
> *[Emphasis added]*

10. According to the petitioners, the office order dated 03.12.2004 is not in conformity with the direction issued by the Division Bench in the earlier writ application and is nothing but an eyewash inasmuch as, if the same is given effect to, it would amount to granting less favourable benefits than what the petitioners were receiving or were entitled to receive as on 03.06.1995. By letter dated 14/15.01.2005, the Chief Manager (HR) intimated the Headmaster of Talcher Thermal High School that the petitioners will be paid salary through DAV CMC management and will be under administrative control of DAV management. The petitioners, unable to accept such offer, submitted a joint representation to the Management on 14.02.2005 along with a tabular statement showing their conditions of service, followed by a reminder on 02.03.2005.

11. In response, the General Manager of NTPC, vide letter dated 29/30.03.2005, (copy enclosed as Annexure-7) informed that the revised conditions of service of the teaching staff framed on 03.12.2004 is being re-examined. Ultimately, by letter dated 25/23.05.2005 (copy enclosed as Annexure-8), the General Manager of NTPC, inter alia, informed that there is no cadre of teachers in NTPC and therefore, in order to give an opportunity to the teachers to be redeployed in NTPC pay and benefit structure, they were required to exercise option for being deployed in the post of Stenographer subject to acquiring typing and shorthand speed as applicable to Stenographers of NTPC and qualifying in the test to be conducted for the same. Significantly, said communication contained no reference to the representation dated 14.02.2005. The petitioners, instead of accepting the offer, submitted another representation on 08.08.2005 to the management to reconsider the representation dated 14.02.2005 and not to give effect to Annexure-8. However, no action whatsoever was taken by the management. The petitioners contend that the conduct

of NTPC is contrary to their own undertaking given before this Court in the earlier writ application as also the observations of this Court. Furthermore, they have been made inferior to even Class-IV employees of the School in the matter of pay scales. As such, the petitioners in both the cases have preferred these writ applications with the following common prayers:

> (i) To quash the office order dated 03.12.2004 (Annexure-4) and letter dated 25/23.05.2005 (Annexure-8);
>
> (ii) To direct NTPC to absorb the petitioners as employees of NTPC w.e.f. 03.06.1995 and apply the service conditions of NTPC to them; and
>
> (iii) To fit the petitioners in NTPC pay scale basing on the GRIDCO revised scale of pay as on 02.06.1995.

Thus, the case of the petitioners, in a nutshell, is that in view of the express provision under Section 11 of the 1994 Act they are entitled to be treated as full-fledged employees of the NTPC and granted all financial and service benefits applicable to its regular employees.

CASE OF NTPC

12. The stand taken by NTPC, as can be culled out from the preliminary counter affidavit and counter affidavit filed in both these cases is that NTPC does not have any system of running Schools departmentally in any of its projects across the country though as per its policy, it provides for all infrastructure like building, playground, laboratory etc. The Schools are actually run by reputed educational institutions. This policy is adopted by NTPC in all of its projects across the country including taken over projects like UNCHHAR and TANDA in U.P. where the Schools have been handed over to DAV Educational Society. As per Section 11(1) of 1994 Act and the bipartite settlement with recognized unions, the service conditions of all workmen, excluding teachers were changed over to those in NTPC as a package to their advantage. As regards the teaching staff, the same was to be taken up separately but the petitioners and others approached this Court in OJC No. 13155 of 1998 apprehending discrimination and unfair treatment. Pursuant to direction of this Court in order dated 05.03.1999, NTPC framed the terms and conditions of the service of the teachers on 09.09.1999 which was duly served upon all teachers including the petitioners.

13. In order to improve the quality of education in the Schools, the management decided to run the said Schools under the management of DAV CMC vide circular issued on 16/19.06.2000. Said circular was challenged before this Court in OJC No. 5568 of 2000, which is subjudice but the circular was acted upon and implemented. NTPC management persuaded the DAV Management to absorb the teaching staff of the taken over High Schools, which was accepted. NTPC therefore, offered in writing the option to the petitioners to accept the offer of the DAV failing which they would be treated as surplus and would have to be terminated from service. The DAV management offered to pay the total emoluments (Basic Pay + DA) to the

teachers on the condition that the same shall not be less than the emoluments received by the petitioners.

14. It is the further case of NTPC that the teachers cannot be classified as 'workmen' in terms of the Industrial Disputes Act. They were offered a package as per circular dated 03.12.2004, which they did not accept. As such, they cannot claim the benefit of superannuating at the age of 60 years. Said circular was accepted by 7 teachers and therefore, there is no question of any discrimination. The petitioners, on their own volition rejected the package offered by NTPC on 03.12.2004. As such, they are estopped to challenge the same before this Court.

ADDITIONAL FACTS

15. In view of the stand taken by NTPC in its counter affidavit the petitioners have put forth the following additional facts in their rejoinder and additional affidavit.

13.1 The tripartite settlement with recognised union cannot prevail over the 1994 Act, which does not provide for classification of employees and particularly of the teaching staff on the basis of their cadre/grade under their former employer. Section 11 of the Act clearly provides that the service conditions of the taken over employees shall not be less favourable to what was available to them prior to the taking over. As such, the offer given by the DAV management for granting only the basic pay and DA cannot, by any stretch of imagination, be treated as favourable to the petitioners who were enjoying various allowances and pension. Moreover, the petitioners were threatened with termination of their services in case of non-acceptance of such offer. The claim of the petitioners also cannot be rejected by treating them as non-workmen in view of the fact that they are members of NTPC Power Workers' Union and were participating in the elections and were also enjoying several benefits granted to other employees of OSEB/GRIDCO under various settlements entered into by the management with the Unions. NTPC itself has provided a list of employees including the names of the teaching staff to the Labour authorities for the purpose of holding secret ballot for electing the recognized union. The teaching staff have been treated at par with various categories of employees/workmen such as Semi-Skilled-A, Semi-Skilled-B, Skilled-A etc. The offer given by NTPC is highly humiliating and arbitrary. In fact, because of such gross discrimination meted out to the petitioners they are in receipt of salaries and allowances less than that received by even peons and messengers.

SUBMISSIONS

16. Heard Mr. J.K. Rath, learned Senior Counsel along with Mr. B. Mishra, learned counsel for the petitioners and Mr. A.N. Das, learned counsel appearing for the NTPC.

17. Opening his arguments, Mr. Rath, learned Senior Counsel would submit that the NTPC is guilty of violating not only the provisions of the 1994 Act but also the

specific direction of this Court in OJC No.1315 of 1998. Mr. Rath would draw attention of this Court to the provisions of the 1994 Act, particularly to Sections 10 and 11 thereof. Referring to Section 10(1) of the Act, Mr. Rath would submit that every person, who was a regular employee of the power station, shall, on and from the appointed day, be deemed to be on deputation with the State Government on the same terms and conditions as he was employed under the former employer. Sub-Section (2) provides that on the vesting of the Power Station in NTPC under Section 5, NTPC shall absorb the employees of the power station and the absorbed employees shall be governed thereafter by the rules and regulations of NTPC in force from time to time. Mr. Rath further refers to Section 11 of the Act to submit that every employee of TTPS absorbed in NTPC shall hold office or render service under the NTPC on the same terms and conditions and with the same rights and privileges as to pension, gratuity, leave and other matters as were applicable to him immediately before such vesting. It also provides that his conditions of service can be altered by the NTPC only to his advantage.

18. On such basis, Mr. Rath argues that the petitioners were teachers in schools established by TTPS. Said schools where duly established under the provisions of the Odisha Education Act being recognised by the State Government as also by the Board of Secondary Education as educational institutions. The students of the school were permitted to appear in the Board's examination and certificates were also issued to the students by the Board. The teachers were appointed by TTPS for the purpose of functioning and running the school. The pay structure of the teachers was also finalized with the approval of the educational authorities and as prescribed by the Board. Thus, as on the date of vesting of the TTPS with NTPC after coming into force of the 1994 Act i.e., on 03.06.1995, the petitioners, who were earlier employees of erstwhile OSEB working under TTPS, became the taken-over employees of NTPC. In view of Section 11, the petitioners are entitled to be given the same terms and conditions, rights and privileges as regards pension, gratuity, leave and other matters as were applicable to them on the date of their vesting.

19. What the NTPC has done in the instant case is that the petitioners were discriminated as compared to the other employees, inasmuch as they were never given the same service conditions as were applicable to them at the time of taking over. Elaborating his argument, Mr. Rath, would submit that the petitioners were entitled to the revised GRIDCO scale as on 02.06.1995 available to them as per their categorisation into different grades at par with the workmen. The TTPS being taken over with effect from 03.06.1995, the petitioners became full-fledged employees of NTPC and their salary and other entitlements ought to have been fixed on the basis of their pay scale and category as on 02.06.1995. Mr. Rath further argues that instead of offering the same service conditions, NTPC offered fitment on pre-revised GRIDCO Scale of pay and thereafter on the State Government pre-revised and revised scales, which is less than their entitlement. When the same was refused by

the petitioners, NTPC offered them DAV scale, which is also less than what they were entitled to lawfully.

20. Mr. Rath further argues that the teachers including the petitioners were ranked inferior to even peons, messengers and attendants of the said School by giving them much higher pay scales and when such fact was brought to the notice of this Court by the petitioners in the contempt proceeding (OCRMC No. 103 of 2002), NTPC, ostensibly to cover up the same, shunted out such non-teaching staff of the Schools to various offices/departments of NTPC in the administrative side as per order dated 05.11.2004 (Annexure-11). This, according to Mr. Rath shows the vindictive and step-motherly attitude of NTPC towards the teachers.

21. Ultimately, acting purportedly on their representation, NTPC came out with a humiliating offer by asking the petitioners to be redeployed as Stenographers for being given the NTPC scale of pay. Naturally, the petitioners did not accept the offer.

22. Mr. Rath, also argues that the petitioners may not be workmen in the strict sense of the term but they have been classified as different categories only for the purpose of fitment. Therefore, the stand taken by NTPC that the teachers not being workmen, the NTPC scale cannot be granted to them is untenable. Mr. Rath concludes his arguments by submitting that the petitioners are entitled to the NTPC scale of pay and all other such service conditions as are applicable to the regular employees of NTPC. This also entails that the age of superannuation of the petitioners ought to have been treated as 60 years and their initial fitment ought to have been made on the basis of the revised GRIDCO scale of pay as on 02.06.1995 corresponding to the appropriate category to which they had been classified by their former employer.

23. Per contra, Mr. A.N. Das would first submit that a memo was filed on behalf of the petitioners on 22.05.2022 abandoning the prayer as at serial No.1. Such prayer being quashment of Annexure-4 is therefore, no longer available to be granted.

24. On merits, Mr. Das would argue that as many as four offers were given by the NTPC to the petitioners but they did not accept any of the same. By letter dated 09.09.1999, the teachers were offered to be fitted from existing OSEB 1990 Pay Scales to the pre-revised scales for teaching staff under OSRP Rules, 1989 till 31.12.1995 and thereafter, to the OSRP Rules, 1998 w.e.f. 01.01.1996. But the petitioners did not respond. The situation is therefore, governed by the doctrine of *sub silentio*, for which the petitioners are estopped to question the said order. Notwithstanding the above, NTPC sought to make an arrangement with DAV Management for the benefit of the teachers as it does not have a cadre of teachers. Said offer was also not accepted by the petitioners. As directed by the Court, NTPC framed service conditions for the teachers by order dated 03.12.2004 offering fitment as per GRIDCO revised Pay Scales but same was also not accepted by the petitioners. The representations of the petitioners and other group of teachers was

duly considered and in order to arrive at an acceptable arrangement regarding fitment of the teachers in appropriate grades, the letter dated 23/25.05.2005 was issued offering to redeploy them in the post of Stenographer subject to their acquiring the required skill and proficiency. This was also not acceptable to the petitioners. As such, the petitioners are estopped to make any further claim.

25. As regards the allegation regarding violation of the provisions of the Act, Mr. Das would argue that Section 10 relates to absorption while Section 11 relates to fitment. Fitment is to be made on the same terms and conditions and rights and privileges as applicable on 02.06.1995. From the offers given by NTPC it would be amply clear that it performed its part of the obligation which the petitioners chose not to accept. As on 02.06.1995, the petitioners were getting GRIDCO (OSEB) Scale and that is what NTPC offered as the basis for their further fitment. Teachers not being workmen and there being no cadre of teachers in NTPC, there is no other way of effecting a fitment of the teachers. In fact, 7 out of the 28 teachers accepted the offer, and the others, barring the petitioners, did not raise any further claim. As regards letter dated 23/25.05.2005, Mr. Das would submit that it was an honest attempt by NTPC Management to find out a corresponding grade to fit the teachers in an appropriate scale. As regards the allegation regarding violation of the directions of this Court in the earlier writ application, Mr. Das would argue that the proposed service conditions having been framed by NTPC but not being accepted by the petitioners, no further obligation remains with it.

26. Before highlighting the issues involved in the case it would be proper to deal with the first contention raised by Mr. A.N. Das, learned counsel for the NTPC that the petitioners in W.P.(C) No. 3217 of 2006 had abandoned their prayer for quashment of Annexure-4 as per memo filed in the Court on 25.02.2020. Mr. J.K. Rath, learned Senior Counsel appearing for the petitioners on the other hand would submit that though such a memo was filed by the previous conducting counsel, yet the same was never acted upon nor any order passed by the Court accepting the same. That apart, the present counsel engaging him has informed that the petitioners did not wish to press the said memo.

27. This Court finds that a memo was filed on 25.02.2020 indicating that the petitioners do not want to press the prayer to set aside Annexure-4 series since the same was never implemented and was superseded by the revised proposal under Annexure-8. Reference to the order sheet of the case however, reflects that said memo was never taken note of by the Court nor any order passed in that regard and particularly in view of the statement of the learned Senior Counsel being instructed by the counsel for the petitioner, this Court deems it proper to ignore the said memo.

ISSUES FOR DETERMINATION

28. Having regard to the rival contentions, it is evident that the following issues primarily arise for determination in these writ applications:

(i) Whether the mandate of Section 11 of the 1994 Act was followed in letter and spirit by the NTPC management?

(ii) Whether the order dated 03.12.2024 (Annexure-4) passed and the subsequent offers given by the NTPC were in consonance with the direction of this Court in OJC No. 13155 of 1998 and OCRMC No. 103 of 2002?

(iii) Whether the claim of the petitioners of being discriminated in the matter of grant of appropriate pay scale and allowances etc. is valid.

(iv) What relief are the petitioners entitled to?

ISSUE NO.(i)

29. This Court has given its anxious consideration to the rival contentions noted above. Simply stated, according to the petitioners, they are entitled to be fully absorbed and treated as regular employees of the NTPC and to all financial and service conditions but have been discriminated by the Management of NTPC in this regard. This, according to the petitioners, violates Section 11 of the 1994 Act. On the other hand, it is the stand of the NTPC that the petitioners being teachers cannot be treated as workmen within the meaning of Industrial Disputes Act and therefore, the terms and conditions on which the workmen were absorbed cannot be extended to them. Moreover, NTPC establishment does not have a cadre of teachers and therefore, the petitioners were offered to be fitted against appropriate pay scales on the basis of what they were receiving immediately prior to the date of acquisition of TTPS by NTPC. Four such offers were given but none was acceptable to them.

30. In view of such opposing contentions it becomes imperative to first refer to certain background facts at the outset. Admittedly, the petitioners were working as teachers in Schools established by OSEB for the children of the employees of TTPS. There is no dispute that they were regular employees of OSEB/TTPS. By virtue of the 1994 Act, TTPS was taken over by NTPC. In this context, Section 10 of the said Act, being relevant is quoted below.

> ***10. Absorption of employees.*** *(1) Every person who has been, immediately before the appointed day, a regular employ employee of the Power Station, shall, on and from the appointed day, be deemed to be on deputation with the State Government on the same terms and conditions, subject to the provisions contained in sub-section (2).*
>
> *(2) On the vesting of the Power Station in the Corporation under section 5, the Corporation shall, save as otherwise provided,* ***absorb the employees of the Board working in the Power Station, in the following manner:-***
>
> *(a) Subject to the provisions of clauses (b) and (c) of this sub-section and sub-sections (3) and (4),* ***all the employees on the regular rolls of the Power Station shall be absorbed in the services of the Corporation*** *who may, with a view to achieving better productivity and efficiency, redeploy them in Talcher Super Thermal Power Project or in any other Project or Power Station belonging to them and* ***such employees absorbed in the services of the Corporation shall be governed by the Rules and Regulations of the Corporation in force from time to time.***

(b) Officers in the rank of Executive Engineer and above, whatever designation they hold, shall be retained by the Board for deployment in other activities of the Board of the State Government.]

(c) Officers in the rank of Assistant Engineer, whatever designation they hold shall be kept on deputation with the Corporation, and their absorption in the Corporation or repatriation to the Board or the State Government shall be regulated in the following manner:-

(i) twenty-five percentum of them shall be absorbed, in order of their suitability as may be determined by the Corporation, during the first year of vesting of the Power Station in the Corporation;

(ii) twenty-five percentum of them shall be repatriated to the Board during the first year of such vesting for redeployment in the Board or under the State Government Departments;

(iii) further twenty-five percentum of them shall be absorbed in order of their suitability as may be determined by the Corporation, during the second and third years of such vesting (that is 15% in second year and 10% in the third year);

(iv) the remaining twenty-five percentum of the officers shall be repatriated to the Board during the second and third years of such vesting for redeployment in the Board or under the State Government Departments.

(3) All Stipendiary Engineers in employment in the Power Station immediately before the appointed day, shall be retained by the Board.

(4) Notwithstanding anything in the preceding sub-sections, employees appointed, if any, in the Power Station after the 11th October 1994 shall be retained by the Board.

[Emphasis added]

31. Thus, on and from the appointed date, all the employees of TTPS were deemed to be on deputation with the State Government and upon vesting of TTPS with NTPC i.e., on 03.06.1995, they were absorbed in the services of NTPC to be governed by its rules and regulations. As regards the terms and conditions of service of such employees, Section 11 is relevant and is quoted below:

"11. ***Terms and conditions of service of employees of Power Station at to be carried to their disadvantage.:*** *(1) Every employee of the Power Station absorbed in the Corporation shall of hold office or render service under the Corporation* ***on the same terms and conditions and with the same rights and privileges as to pension, gratuity, leave and other matters, as would have been applicable to him immediately before such vesting, till his employment under the Corporation is duly terminated or until his remuneration and other conditions of service as a package are duly altered by the Corporation to his-advantage.***

(2) The financial liabilities of the Board in relation to the employees absorbed by the Corporation on account of the matters referred to in sub-section (1) for the services rendered under the Board shall be computed till the date immediately preceding the date of vesting of the Power Station with the Corporation and the amount shall be paid to the Corporation as soon as the employees are absorbed." [Emphasis added]

32. A plain reading of sub-section (1) of Section 11 would show that absorption of the employees of TTPS in NTPC shall be on the same terms and conditions and with same rights and privileges as to pension, gratuity, leave and other matters as

were applicable to them immediately before such vesting. The language employed in sub-Section (1) would also indicate that the conditions of service cannot be altered to disadvantage of the absorbed employees. It therefore, becomes necessary to know as to what were the service conditions of the absorbed employees immediately prior to the date of vesting i.e. on 02.06.1995. Admittedly, the petitioners were teachers in different Schools run by OSEB. It is pertinent to mention that GRID Corporation of Odisha (GRIDCO) after taking over OSEB, effected a Pay revision for the employees w.e.f. 01.04.1995.

32. The following table reflects the position in detail.

Sl. No.	**Petitioners**	**Qualification**	**Designation**	**Date of Joining**	**Pay Scale revised by GRIDCO w.e.f 01/04/1995 & in which the teachers were drawing salary**
1	Dhiramani Manthan	M.A. B.Ed	Asst. Teacher	01/08/1981	4760-9370
2	Saudamini Swain	Matric ITI	Asst. Teacher	21/01/1984	3600-6550
3	Gobardhan Naik	B.A B.Ed	Craft Teacher	25/02/1984	3600-6550
4	Sibamohan Senapathy	TGT	Asst. Teacher	10/04/1976	4760-9370
5	Lambodhar Pradhan	Matric CT	Asst. Teacher	16/11/1977	3600-6550

From a conjoint reading of Sections 10 and 11 of the 1994 Act, it follows that the petitioners (Teachers) were entitled to be fitted to the appropriate scale of NTPC on the basis of the GRIDCO revised pay scale as on 02.06.1995.

34. Now, what would be appropriate pay scale of NTPC for fitment? In this regard, there appears to have been a bipartite settlement signed by NTPC with one of the Unions, which was subsequently held to be a tripartite settlement on 21.08.1988 to decide the fitment of the absorbed employees. However, the petitioners being teachers were left out from the settlement on the ground that they are not workmen within the meaning of Industrial Disputes Act. As already stated, it has been the consistent stand of NTPC that the petitioners are not workmen and hence cannot be equated with the workmen absorbed in NTPC. It is true that being teachers, the petitioners cannot obviously be treated as workmen within the meaning of Section 2(s) of the Industrial Disputes Act but then, this Court finds from the record that apparently for want of a specific cadre in the erstwhile establishment, the teachers have been treated at par with different categories of workmen. As per the document enclosed to the rejoinder vide Annexure-18, the OSEB in its 304th meeting held on 25.02.1988, granted TBA Scales for its employees, wherein all the employees were broadly categorised as workmen with sub-categories such as Unskilled, Semi-

Skilled-B, Semi-Skilled- A, Skilled-C, Skilled-B, Skilled-A, Highly Skilled-B, Highly Skilled-A Supervisory-C and Supervisory-B. They were further classified as Administrative and Technical. Most significantly, the teachers have been included under the sub-classification of Administrative in appropriate grades. For instance, Asst. Teacher is treated as Semi-Skilled-A; Asst. Teacher Matric Trained, Matric Teacher, P.E.T., and Head Pandit (U.P. School) have been treated as Skilled-B; Asst. Teacher Trained, I.A. Asst. Teacher (Arts), Hindi Teacher and Graduate Teacher have been treated as Skilled-A; Sanskrit Teacher is Highly Skilled-B; Asst. Teacher Trained Graduate is Highly Skilled-A Supervisory 'C'; and Headmaster is Supervisory-B.

35. It would also be relevant to note that despite not being strictly workmen, the petitioners were members of trade unions and were participating in elections. In fact, on as many as three occasions NTPC itself forwarded a list of the members of the union for the purpose of voting, which includes the names of the petitioners. Having done so, it is not open to the NTPC to reject the claim of the petitioners on the ground that they were not workmen. From what has been narrated hereinabove, it is clear that even though the petitioners cannot be treated as workmen strictly yet, they have been always been treated at par with different categories of workmen obviously for the purpose of fitting them in appropriate pay scales so as to bring about uniformity. This vital aspect has never been considered by NTPC resulting in meting out differential treatment to the teachers which is amplified in the succeeding paragraphs.

36. In the representation dated 14.02.2005, the petitioners have enclosed a comparative statement, which is extracted below:

COMPARATIVE STATEMENT				
REVISED GRIDCO PAY SCALE/ALLOWANCES AS ON 02/06/1995				
Name	**S.M. SENPATY**	**L. PRADHAN**	**C. PRADHAN**	**N.K. PARIDA**
EMP. No.	94416	94471	95303	94062
Qualification	B.A. Bed.	B.A. Bed.	Matric	Under Matric
Designation	Asst. Teacher	Asst. Teacher	Clerk-B	Peon
Post Held	TGT	M. CT.	Clerk-B	Peon
DOJ	10/4/76	16/11/77	2/1/76	1/6/65
Category				
Time bound advance pay scale after 15 years	-	Skilled –A	Skilled-A	-
Retd. Age	58	58	58	60
Scale of Pay	4760-9370	4020-7380	4020-7380	2550-4551
Basic Pay	5990	5220	5760	4131
D.A.	-	-	-	-
Medical Allowance	63	54	61	44

Conveyance Allowance	100	100	100	100
Thermal Allowance	240	240	240	120
Total	6336	5614	6161	4395

As on January- 2005

OSEB/ GRIDCO			**NTPC**	
CATEGORY	**High Skilled/Sup.C**	**Skilled-B**	**W-7**	**W-2**
Time bound advance pay scale after 25 years	-	High Skill-B	-	-
Scale of Pay	4760-9370	4400-7905	6700-11750	4700-9010
Pay	7670	6785	11267	7506
DA	4679	4139	5791	3964
Medical Allowance	230	204	Reimbursable	Reimbursable
Conveyance Allowance	100	100		
Thermal Allowance	240	240	-	-
Factory Compensatory Allowance	-	-	563	386
Special Pay	-	-	-	206
Generation Incentive	-	-	1447.63	1020.58
Quarterly Incentive	-	-	1709.38	1205.10
Trans. Sub	-	-	445	245
Lunch. Sub	-	-	483	483
LIT Reimb	-	-	80	80
Wash Reimb	-	-	136	136
Total	12,919.00	11,468.00	21,922.01	15,231.68
Retd. Age	58	58	60	60

37. A bare look at the table would show that in case of a clerk and a peon, the total emoluments as on 02.06.1995 were Rs.6161/- and Rs.4395/- respectively, whereas, the total emoluments of the teachers (petitioners) were Rs.6,336/- and Rs.5,614/- respectively. The same as on January, 2005 went up to Rs.21,922/- and Rs.15,231/- respectively in case of the clerk and the peon, whereas in so far as the petitioners are concerned, the same went only up to Rs.12,919/- and Rs.11,468/- respectively. There is thus a substantial difference in the emoluments of the teachers as compared to the clerks and peons. Not only that, there is disparity as regards the age of superannuation also inasmuch as while the same is 60 years for the Clerk and the Peon, it is 58 years for the teachers. Significantly, this averment and comparative statement has not been specifically denied or disputed by NTPC in its counter.

38. It would be more than evident from the above that discrimination is writ large and tell-tale on the face of the record.

39. As already stated, despite not being workmen in the strict sense of the term, the teachers have been treated at par with workmen and categorised accordingly for the purpose of payment of their salaries and allowances by the erstwhile employer. Had the same been accepted by NTPC, the petitioners would obviously have been fitted against appropriate grades like the workmen and other employees, thereby receiving much higher emoluments than what they were actually given.

40. All the petitioners having rendered more than 10 years' service could have been placed in appropriate grades under NTPC structure as was done in case of workmen as per Clause-2.3.2 of the tripartite agreement in the following manner.

Sl. No.	**OSEB Structure**	**NTPC Structure**
01.	Unskilled	W2
02.	Semi Skilled-B	W3
03.	Semi Skilled-A	W4
04.	Skilled-C	W5
05.	Skilled-B	W6
06.	Skilled-A	W7
07.	Highly Skilled-B	W8
08.	Highly Skilled-A	W10

41. Why such decision was not taken in respect of the teachers, has not been satisfactorily explained by the NTPC save and except for taking the consistent stand that they are not workmen, which needless to say, could not have been a valid reason for the gross discrimination meted out to them in the manner narrated before. This Court is therefore, of the considered view that the mandate of Section 11 of 1994 Act was not followed in its letter and spirit in case of the petitioners by the NTPC Management.

42. NTPC has basically harped upon two pleas, namely, that the petitioners being teachers are not workmen and secondly, it does not have a cadre of teachers in its establishment. The first plea has already been discussed in detail hereinbefore and is rejected as untenable because it is not the case of the petitioners that they were workmen but the fact that they have always been treated at par with the workmen was never considered by the NTPC. As to the plea that NTPC does not have a cadre of teachers, the same is also not worthy of consideration because it is not as if its management was not aware of the existence of the three schools run by the OSEB and the teachers employed therein before agreeing to take over TTPS. That apart, the 1994 Act, which is obviously binding on all concerned, speaks of 'every employee' of TTPS, who as per Section 10 of 1994 Act were absorbed. Having acted as per the provisions of Section 10 of the Act in absorbing all the employees of TTPS, it is not open to the NTPC to turn around to complain that it does not have a cadre of teachers. Even accepting the argument for a moment that it does not have a cadre of teachers, the same is immaterial if the fundamental fact that the teachers being regular employees of TTPS were always treated at par with workmen is taken into account. Therefore, irrespective of whether the services of the teachers are placed

under DAV Management or directly under the NTPC administration, the mandate of Section 11 of the 1994 Act as discussed in detail earlier can never be ignored.

43. It would be worthwhile to refer to some judgments relied upon by Mr. Das to justify the stand of the NTPC that there is no legal bar in providing different age of superannuation for different employees of the establishment. Mr. Das has cited the judgments of the Supreme Court in **Osmania University v. V.S. Muthurangam**[1], **K. Nagaraj v. State of A.P.**[2]**,** and **Union of India v. Lieut E. Iacats**[3].

44. A reading of the cited decisions reveals that it is legally permissible to maintain different age of superannuation for different categories of employees in one establishment. The question involved in the present case is however, entirely different for the reasons indicated below. The employees of TTPS, without distinction as to categories and grades were taken over by NTPC and as per Section 11 were entitled to be granted same benefits as they were receiving prior to such taking over. This Court has already held that the petitioners, though teachers were treated at par with workmen by the former employer. So, if NTPC decided to give the benefit of the enhanced age of superannuation to the workmen, there was no reason as to why the same should not have been granted to the teachers. Not doing so amounts to discrimination, hit by the principle of equality under Article 14 of the Constitution of India. Thus, on peculiar facts of the case, this Court is of the considered view that cited judgments are not applicable.

ISSUE NO.-(ii)

45. Coming to the contention that NTPC was also guilty of not complying with the specific direction of this Court in the earlier writ application, as already stated, this Court taking note of the specific stand taken by the NTPC in its counter affidavit directed it to frame necessary rules and regulations keeping in view the prescription under Section 11 of the 1994 Act. In purported compliance of such direction, NTPC came up with the impugned office order dated 03.12.2004 (Annexure-4) proposing certain rules and regulations for the teaching staff. As regards pay scale, fixation of pay, annual increments and DA, the said office order proposed different scales for different categories of teachers by considering the OSEB pay scale, pay scales under OSRP Rules, 1989 and pay scales under OSRP Rules, 1998. The revised pay scales of GRIDCO which came into effect from 01.04.1995 was also taken into account, but despite doing so, NTPC proposed to extend the pay scales under OSRP Rules, 1989 and OSRP Rules, 1998. It is not understood as to why the OSRP Rules was sought to be applied to the teaching staff when the other employees of TTPS including the non-teaching staff of the three Schools had been extended the NTPC

[1] (1997) 10 SCC 741
[2] (1985) 1 SCC 523
[3] (1997) 7 SCC 334

pay scales. From the comparative statement given below, it would be apparent that giving effect to the proposed service conditions would have resulted in reduction of emoluments received by the petitioners.

COMPARATIVE STATEMENT AS PER OFFICE ORDER
REF. NO. 045-8-ER/13614 3RD NOV. 2004.
PARA TABLE 5.2.2. AND 5.3.2. AS ON 03.06.1995

Name	**Sibamohan Senapaty**		**Lambodar Pradhan**	
Employee No.	94416		94471	
Qualification	B.A. B.Fd.		B.A. B.Fd.	
Post Held	T.G.T.		M.C.T	
Scale of Pay	OESB/GRIDCO	PROPOSED OSRP-1989	OESB/GRIDCO	PROPOSED OSRP-1989
	4760-150(5)-5510-160(5)-6310-170(18)-9370	1600-50-2300-EB-60-2660	4020-115(5)-4595-125(5)-5220-135(16)-7380	1400-40-1800-EB-50-2300
Basic Pay	5990	2150	5220	1850
DA	Nil	2688	Nil	2313
Total	5990	4838	5220	4163

46. As already stated, this Court, while dropping the contempt proceeding (ORMC No. 103 of 2002) was of the view that the points urged by the petitioners need proper consideration by the Management. That apart, it was also observed that in the event the petitioners raise their grievance with regard to fixation and parity of their scale of pay by way of a representation, the Management should consider the same in its proper perspective. From what is narrated hereinbefore, this Court is also of the considered view that the proposed service conditions as per office order dated 03.12.2004 cannot be treated as a full compliance of the direction of this Court being in apparent violation of the mandate of Section 11 of the Act. It is stated at the cost of repetition that this Court directed the NTPC management to frame rules in view of the prescription of Seciton-11 of the 1994 Act. So, essentially compliance of the mandate of Section 11 was the paramount consideration for this Court while issuing the direction. This Court in OCRMC No. 103 of 2002, granted liberty to the petitioners to raise their grievance with regard to fixation and parity of their scale of pay by way of representation with direction to the Management to consider the same in its proper perspective. Pursuant to such direction, the representation dated 14.02.2005 was submitted by the petitioners. NTPC in its letter dated 29/30.03.2005 informed the petitioners that the revised conditions of service of the teaching staff is being re-examined. There was no further response in so far as the representation dated 14.02.2005 is concerned. But surprisingly, acting on a representation submitted by another group of teachers on 09.02.2005, the General Manager of NTPC, in letter dated 23/25.05.2005 intimated that their request had been examined keeping in view the judgment passed by the High Court and the order passed in the contempt proceeding and gave an offer to the teachers to be redeployed in NTPC

pay scale and benefit structure in the post of stenographer at any unit of NTPC other than TTPS wherever vacancy exists with a condition that such redeployment will be subject to their acquiring typing and shorthand speed as applicable to Stenographer post in NTPC and qualifying in the test for the same. The pay scale was fixed at Rs.6700-11750/- in W7 grade. This Court is of the view that having assured the petitioners in its letter dated 29/30.03.2005 to re-examine the revised conditions of service of the teaching staff framed on 03.12.2004, it was obviously not open to the Management to come up with such an offer that had no bearing whatsoever with the service conditions framed on 03.12.2004. By letter dated 06.08.2005, the petitioners rightly refused to accept such offer.

47. Before going further into the above aspect it would be apposite at this stage to mention that according to learned counsel appearing for NTPC, as many as four offers were given to the petitioners regarding their fitment and placement in appropriate grades purportedly in consonance with the mandate of Section 11. By letter dated 09.09.1999, the petitioners were informed that as on 03.06.1995 they shall be fitted from the existing OSEB 1990 pay scale to the pre revised scales of pay for teaching staff under OSRP Rules, 1989 till 31.12.1995 and thereafter, the revised scales of pay for teaching staff of Odisha Government w.e.f. 01.01.1996 with full revision benefits shall be granted. The teachers did not accept the offer though no communication in this regard was made by them. By office order dated 19.06.2000, the Management informed that the taken-over Schools were decided to be run under the Management of DAV, CMC. Accordingly, offer letters were issued by the DAV Management in June, 2002 indicating that their total emoluments (Basic Pay +DA) shall not be less than their present emoluments (Basic Pay + DA). There was no response from the petitioners. The third offer is the order dated 03.12.2004 (Annexure-4) proposing the service conditions, which has already been discussed hereinbefore. The fourth and final offer of the NTPC is letter dated 23/25.05.2005 (Annexure-8), which has also been discussed hereinbefore.

As already stated, this Court has found that none of the offers extended to the petitioners was in conformity with the mandate of Section 11 of the 1994 Act rather, were disadvantageous to them. Therefore, this Court is of further view that non-acceptance of such offers cannot act as estoppel.

48. The final offer vide letter dated 23/25.05.2005 needs special mention. Teachers were asked to become Stenographers! Persons, who had rendered decades of service as teachers, were asked to get themselves trained to acquire proficiency, pass the qualifying test and be redeployed as Stenographers in other units of NTPC. For one, the offer is, on the face of it, humiliating as rightly contended by learned counsel for the petitioners. Secondly, this Court has not found anything to suggest that there was any legal impediment in treating the petitioners at par with other employees, including the non-teaching staff of the School, who were taken on NTPC Pay Scale and benefit structure. Thirdly, it was given out that in case the petitioners did not opt for fitment in NTPC pay scale and benefit structure as offered, they shall

continue in the existing pay scale and benefit structure. The choice thus, given to the petitioners was nothing but a 'Hobson's Choice', meaning, no choice. Viewed plainly, the petitioners/teachers, being already treated at par with different categories of workmen, could have been fitted in appropriate pay scales of NTPC like the workmen and other taken over employees of TTPS. The fact that NTPC does not have a cadre of teachers in its establishment is immaterial inasmuch as on its own admission, the Management of the Schools owned by NTPC is entrusted to DAV, CMC. In such event, the teachers working under Management of DAV could also have been granted NTPC scale of pay.

49. It is well settled that an unfair or unreasonable contract cannot be endorsed by the Court. Moreover on the face of unequal bargaining power of the parties the above principle becomes all the more relevant. This proposition was highlighted by the Supreme Court in the case of the **Central Inland Water Transport Corporation Ltd, v. Brojo Nath Ganguly and Anr**[4], in the following words.

> *"**88.** As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognised, at least in certain areas of the law of contracts, that there can be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, Section 138(2) of the German Civil Code provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages ... which are obviously disproportionate to the performance given in return". The position according to the French law is very much the same.*
>
> *89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give*

[4] (1986) 3 SCC 156

some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

It is not unreasonable to suppose that the 7 teachers, who are said to have accepted the above offer, may have succumbed to pressure having perhaps realised their inability to put up a fight against the mighty management, which the present petitioners have attempted. In the case of **Chairman and MD NTPC Ltd. v. Reshmi Construction, Builders and Contractors**[5], Supreme Court referring to maxim '**Necessitas Non Habet Legem**' observed as follows-

"Further, necessitas non habet legem is an old age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of other party to the bargain who is on a stronger position."

In this context it would be apposite to state that NTPC, being a Public Sector Undertaking (PSU) under the Government of India, can also be treated as a functionary of the State. As such, the obligation cast upon the State to act as a model employer can also be extended to a PSU like NTPC. In other words, as a model employer, NTPC has a social obligation to treat its employees in such manner that no employee feels left out from the benefits extended to other employees.

50. The Supreme Court expressed the above sentiment in its judgment in the case of **Bhupendra Nath Hazarika and another v. State of Assam and others**[6] in the following words-

61. Before parting with the case, we are compelled to reiterate the oft stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept.

[5] (2004) 2 SCC 663
[6] (2013) 2 SCC 516

62. Almost a quarter century back, this Court in Balram Gupta v. Union of India [1987 Supp SCC 228 : 1988 SCC (L&S) 126 : (1987) 5 ATC 246] had observed thus : (SCC p. 236, para 13)

"13. ... As a model employer the Government must conduct itself with high probity and candour with its employees.

xx xx xx"

51. Therefore the argument that seven of the teachers accepted the offer dated 23/25.05.2005 does not necessarily make it a valid or acceptable offer for all.

ISSUE NO.(iii)

In the preceding paragraphs it was mentioned that the petitioners were treated at par with different categories of workmen by the erstwhile employer being sub-classified as Administrative Grade. An office order was issued by NTPC on 21/22.08.1998 providing pay scales, allowances, benefits and other terms and conditions of service of workmen on the regular rules of TTPS absorbed in NTPC. This was evidently on the basis of the so called tripartite settlement entered into by the Management with the concerned trade union. Clause- 2.2 provides the equivalence of grades in workmen category between OSEB pay scales and NTPC pay scales as on the date of absorption in the following tabular form.

Sl. No.	OSEB Structure (Revised w.e.f. 01.04.90 Grade)	Pay Scale	NTPC Structure (revised w.e.f. 01.01.92) Pay Scale	Grade
01.	Unskilled	860-22-1058-26-1240-30-1540	2100-40-2380-45-2965	W2
02.	Semi-Skilled-B	930-26-1086-30-1296-35-1611	2175-45-2490-50-3140	W3
03.	Semi-Skilled-A	1050-30-1200-35-1375-40-1735	2230-50-2580-55-3295	W4
04.	Skilled-C	1150-40-1350-45-1665-50-2115	2285-60-2705-70-3615	W5
05.	Skilled-B	1250-45-1520-50-1920-55-2250	2350-70-2240-80-3880	W6
06.	Skilled-A	1345-50-1595-55-1980-60-2530	2485-80-3045-85-4150	W7
07.	Highly Skilled-B	1390-60-1810-65-2265-70-2685	2575-85-3425-95-4375	W8
08.	Highly Skilled-A	1355-65-2040-70-2600-75-3200	2755-105-3805-115-4955	W9

52. Clause- 2.3.1 provides for the placement in the equivalent grade of workmen who had not completed ten years of service as on the date of absorption, while clause 2.3.2 provided for the same for the workmen who had completed ten years of service. Same being relevant for the present case, is quoted hereinbelow:

***2.3.1** All workmen who have not completed 10 years of service in their existing grade as on 03.06.95 (4 years in case of ITI qualified workmen in their respective trade) will be placed in equivalent grade as per the table at 2.2. above w.e.f. 03.06.1995. On*

placement they will be redesignated as per corresponding designation existing in NTPC structure.

2.3.2 *The workmen who have completed 10 years of service or more in existing grade and payscale as on 03.06.95 (4 years or more in respect of ITI qualified workmen in their respective trade) will be placed in the next higher grade in NTPC w.e.f. 03.06.1995 as under. The corresponding pay scales will be as stated in para 2.2. above."*

53. The petitioners have attempted to show that the persons placed in the same grade under the erstwhile employer were given higher pay scales as compared to them. In particular, a comparison is sought to be made between one Rabinarayan Barik, who was working as Junior Grade Typist and Lambodar Pradhan (petitioner No.2 in W.P.(C) No. 3217 of 2006). Both were on the pay scale Rs.4020-115-4595-125-5220-135-7380. The pay of both as on 01.04.1995 was fixed at Rs.5220/-by the GRIDCO in view of the pay revision effected on 23.07.1998. It would be useful at this stage to refer once again to the classification made by the erstwhile OSEB vide order dated 14.04.1988 regarding time bound advancement pay scales of its employees i.e., Annexure-18. What is relevant to note is that both the Junior Grade Typist as well as Asst. Teacher (Matric Trained) were categorised as Skilled-B with the sub-classification-Administrative. Petitioners have relied upon the pay slip of said Rabinarayan Barik as well as Lambodar Pradhan for the month of January, 2011. Rabinarayan Barik has been described as W-9 with his total emoluments being Rs.68,852.20. Lambodar Pradhan, on the other hand, has been described as Highly Skilled-B with his total emoluments being Rs.30,210/-. Thus, while both the employees were in receipt of same emoluments under the erstwhile employer, the same was materially altered upon their absorption in NTPC so much so that the emoluments of Rabinarayan Barik became more than double of that of Lambodar Pradhan. The above fact being brought on record by the petitioners in the additional affidavit filed in the case, the NTPC in its reply affidavit has stated as follows:

"7.0. In reply to paragraph 6 the deponent most humbly says and submits and adopts the submissions in the paragraphs herein above. R.N. Barik, Junior Steno Typist was changed to NTPC pay & benefit structure, etc., in terms of the tripartite settlement dated 20.08.1998 under the Industrial Disputes Act, 1947. Accordingly, he has been drawing salary under the NTPC pay & benefit structure w.e.f. 03.06.1995. The petitioner and other teachers being not covered under the tripartite settlement dated 20.08.1998 and having on their own volition and choice not opted and accepted the NTPC pay & benefit, etc are estopped in law from raising any grievance. The petitioner continuing under the revised GRIDCO structure cannot therefore compare with the salary drawn by R.N.Barik under the NTPC structure. The OPs adopt the submissions in the above paragraphs and the same are not reiterated for the sake of brevity and convenience."

54. In essence, according to NTPC, the petitioners not being workmen were not covered under the tripartite settlement dated 20.08.1998 and not having accepted the offers given by NTPC cannot compare themselves with the salary drawn by Rabinarayan Barik under the NTPC structure. The above plea can be considered only to be rejected for the following reasons:

Firstly, Section 11 of the 1994 Act does not make any distinction between workmen and non-workmen but speaks of 'every employee' of the Power Station absorbed in the Corporation.

Secondly, the provision mandates that such employee shall hold office or render service under the Corporation on the same terms and conditions as would have been applicable to him immediately before such vesting. So, the action of NTPC in picking up only a section of employees of TTPS, even if they are in majority, and fitting them to its pay structure under the so called tripartite agreement but offering the remaining employees unacceptable offers of fitment to their disadvantage is certainly not what is intended by Section 11.

Thirdly, there is no provision in the 1994 Act permitting NTPC to segregate the employees of TTPS into different categories.

Finally, this Court is unable to accept that the so-called offers given by NTPC were worthy of acceptance in the first place so that refusal of the petitioners to accept them would estopp them from laying a valid claim.

55. Thus, the mandate of Section 11 was to maintain the status as existing immediately prior to the date of vesting. This is where NTPC appears to have gone beyond the provisions of the 1994 Act by entering into separate agreement for the workmen category of employees. Be that as it may, it was still imperative for NTPC to have accepted the status of the other employees as existing immediately prior to the date of vesting. Viewed thus, the status of teachers of being at par with different categories of workmen with corresponding pay scales ought to have been accepted as the foundation for their further fitment in NTPC pay scale but by treating them otherwise, the terms and conditions on which the teachers were employed under the previous employer was never maintained.

56. Much has been argued with regard to the effect of the non-acceptance by the teachers of the four offers given by the NTPC from time to time. The law of estoppel has been invoked in this respect. Law is well settled that there can be no estoppel in case of a contract between two unequals. In the instant case, teachers were pitted against the mighty NTPC and therefore, had practically no bargaining power unlike the workmen who were represented by the trade unions resulting in a much favour fitment for them as per the terms of the tripartite settlement. The teachers however, despite being members of the trade union, were not made parties to the settlement.

57. From what has been narrated hereinbefore, this Court is left with no doubt that the claim of the petitioners of being discriminated in the matter of grant of appropriate pay scales and allowances is valid.

ISSUE NO.(iv)

58. Having held thus, this Court would now proceed to examine as to what relief can be granted to the petitioners. Since the petitioners were treated at par with different categories of workmen prior to vesting, there is no other option open to

NTPC than to treat them as such in view of the provision under Section 11 of the 1994 Act. This would entail firstly, ascertaining the appropriate grade in which they were fitted in the former establishment and the equivalent grade under NTPC structure to be extended to them. To illustrate, petitioner No.1 in W.P.(C) No. 3217 of 2006, Sibamohan Senapati being a Trained Graduate Teacher was treated at par with Highly Skilled-A/Supervisory-C category. As per the equivalence of grades effected for workmen (having more than 10 years of service) the equivalent grade under NTPC structure is W-10 in the pay scale of Rs.2865-115-4015-125-5265. Similarly, petitioner No.2 in W.P.(C) No.3217 of 2006, Lambodar Pradhan, being Matric CT Asst. Teacher, was treated at par with Skilled-B category. So, the equivalent grade under NTPC structure is W-5 in the Pay Scale of Rs.2350-70-2840-80-3880. On such basis the Basic Pay, DA, VDA and other allowance need to be worked out right from the date of absorption i.e. 03.06.1995.

59. As regards the date of superannuation, it is to be noted that once the petitioners are absorbed in NTPC then as per Section 11 of the 1994 Act, they are entitled to be governed by the Rules and Regulations of NTPC. As already indicated, by Memo dated 02.09.1998, the Manager (Pers.) clarified that 'For the purpose of any rule of NTPC where age of retirement is required, to be considered, the age shall be reckoned as 60 years'. Therefore, the petitioners, having been absorbed in NTPC are eligible to be superannuated on attaining the age of 60 years. It is borne out from the pleadings and materials on record that the 7 teachers, who had accepted the offer dated 25/23.05.2005, were allowed to superannuate at 60 years. Most surprisingly however, the petitioners were superannuated at the age of 58 years evidently because they had not accepted the above mentioned offer. So, even though they became full-fledged employees of NTPC not only that they were never given NTPC pay scales but also were made to retire from service at a different age. It resulted in having two different ages of superannuation for the employees of one organization, which is hardly conscionable in law. Be it noted that challenging the letters issued by the Management regarding their dates of superannuation, the petitioners filed interlocutory application being Misc. Case No. 7621 of 2011 in the present writ application and this Court, passed the following order on 23.07.2007:

Misc. Case No.7621/2007
W.P.(C) No 3217 of 2006

5. 23.07.2007

Heard.

This misc. case has been filed by the petitioners for stay of order of superannuation dated 23.04.2007 (Annexure-1).

According to learned counsel for the petitioners, that they have been working as teachers in school of Talcher Thermal Power Station since Orissa State Electricity Board was in operation, which was subsequently taken over by NTPC as per 10(2)(a) and 11(1) of the TTPS (Acquisition and Transfers) Act, 1994, which contains the provisions for protection of service conditions of the petitioners that was prevailing while the petitioners, were serving under TTPS Now the learned counsel for the petitioners submits that as undisputedly the petitioners are the employees of NTPC they

may be given salary as per the scale meant for the NTPC employee and they should also be superannuated at the age of 60. Mr.Das, learned counsel for the OPs pointed out that the petitioners are yet to accept the proposal of the NTPC for which they have remained in the scale of pay and other service conditions as it was applicable to TTPS employees. However, learned counsel for the petitioners contested the contention by. stating that there cannot be two different age of superannuation, one for the direct employees of the NTPC and another for teachers of school run by the NTPC being taken over from TTPS. But all these aspects can be taken care of during final hearing of the writ petition.

From what is narrated before, this Court is of the considered view that the petitioners could not have been discriminated with regard to their age of superannuation.

Therefore, we are not inclined to grant stay as prayed for. ***However, we make it clear that the petitioners shall be entitled to all the benefits including financial benefits that would accrue in that would accrue in the event they succeed in the writ petition.***

The misc. is disposed of accordingly.

List W.P.(C) No. 3217 of 2006 in the list of fresh admission on 21st August, 2007.

Issue urgent certified copy of this order as per rules.

[Emphasis added]

60. The date of superannuation being 60 years for the employees of NTPC, the same also ought to be extended in favour of the petitioners. As such, the petitioners shall be entitled to differential pay scales from 03.06.1995 till the date of superannuation calculated as 60 years.

61. Further, NTPC not having been able to demonstrate a plausible and justified reason for not extending the due benefits to the petitioners including pension and pensionary benefits, if any, resulting in the petitioners being involved in protracted litigation extending for more than two decades, shall also be liable to pay interest calculated at the rate of 7.5% per annum on the arrears till the date of actual payment.

CONCLUSION

62. In the result, the writ applications are allowed. The impugned orders i.e., office order dated 03.12.2004 (Annexure-4 of W.P.(C) No. 3217 of 2006 and Annexure-5 of W.P.(C) No.11200 of 2005) and order dated 25/23.05.2005 (Annexure-8 of W.P.(C) No. 3217 of 2006) are hereby quashed. NTPC management is directed to re-calculate the dues of the petitioners in terms of the observations made and illustration given in the preceding paragraph and to disburse the same in their favour along with interest so also pensionary benefits at par with their counterparts in the administrative side as early as possible, preferably within a period of three months from the date of this judgment.

Headnotes prepared by: *Result of the case:*
Shri Pravakar Ganthia, Editor-in-Chief. Writ Petitions allowed.

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2025 (I) ILR-CUT-910

DALURAM DEHURY & ORS.
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 3906 OF 2025]

18 FEBRUARY 2025

[ADITYA KUMAR MOHAPATRA, J.]

Issues for Consideration

1. Whether the Writ Petition is maintainable in view of the bar provided U/s. 28-B of the Orissa Co-operative Societies Act, 1962.
2. Whether the Petitioner would be rendered remediless in the event the Writ Court refuses to exercise the Writ Jurisdiction under Article 226 of the Constitution of India.

Headnotes

(A) ORISSA CO-OPERATIVE SOCIETIES ACT, 1962 – Section 28-B – Writ Petition has been filed challenging the action of the Administrator/ Opp.No.3 admitting Class "C" members as Class "A" members & giving voting right to such members of the Gandhamardan Loading Agency & Transporting Co-operative Society Ltd. – The state Opposite party authorities pleaded that the date of election has already been notified – There is a bar in law to interfere with the election process – Issue raised as to whether the Writ Petition is maintainable in view of the bar provided U/s. 28-B of the Act.

Held: This Court is of the view that there exists an embargo with regard to exercise of the jurisdiction of this Court which would eventually result in tinkering with the election process. (Para 20)

(B) ORISSA CO-OPERATIVE SOCIETIES ACT, 1962 – Section 28-B, 67-B r/w Rule 57 of the Orissa Co-operative Societies (Election to the Committees) Rules, 1992 – Dispute with regard to election of the members of the Co-operative Societies – Maintainability of the Writ Petition – Bar provided U/s. 28-B of the Act – Whether the petitioner would be rendered remediless in the event the Writ Court refuses to exercise the Writ jurisdiction under Art. 226 of the Constitution of India.

Held: This Court is also of the considered view that an alternative remedy in shape of election dispute has been provided in the Act as well as in the Rule i.e. by filing an election dispute before the Cooperative Tribunal U/s. 67-B of the O.C.S Act, 1962. (Para 22)

Citations Reference

N.P. Ponnuswami v. Returning Officer, **(1952) 1 SCC 94;** Mohinder Singh Gill and Another v. Chief Election Commissioner, New Delhi and Ors., **(1978) 1 SCC 405;** Sri Sulabh Charan Samal and Ors. V. State of Orissa and Ors., **(2008) 106 CLT 153;** Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and Another v. State of Maharashtra and Others, **(2001) 8 SCC 509 – referred to.**

List of Acts

Orissa Co-operative Societies Act, 1962; Orissa Co-operative Societies (Elections to the Committees) Rules, 1992; Orissa Co-operative Societies Rules, 1965.

Keywords

Election of Co-operative societies; Bar; Maintainability of Writ Petition; Writ Jurisdiction; Alternative remedy; Election Dispute.

Appearances for Parties

For Petitioners : M/s. Debakanta Mohanty, T.K. Nayak, A.K. Das.

For Opp. Parties : Mr. Pitambar Acharya, Advocate General
(For O.P. Nos.1 & 2)

Judgment/Order

Judgment

ADITYA KUMAR MOHAPTRA, J.

The Petitioners, who are the members of Gandhamardhan Loading Agency and Transporting Cooperative Society Ltd. (registered as a Cooperative Society under the Cooperative Societies Act), have approached this Court by filing the present writ petition with a prayer to quash the final electoral roll of the aforesaid Society on the ground that the same has been prepared in violation of the provisions contained in the Cooperative Societies Act as well as the Rules framed thereunder. The Petitioners have also prayed for a direction to the Opposite Parties to prepare a revised final electoral roll considering the points/grievances raised by the Petitioners in the writ petition and till such time the election of the managing committee members of the aforesaid Cooperative Society be not conducted.

2. The factual background of the Petitioners' case, in a narrow compass, is that Gandhamardhan Loading Agency and Transporting Cooperative Society Ltd. (hereinafter referred to as 'the Society') is a registered Cooperative Society bearing Registration No.89/BJR/28.12.2006. The Society is governed by its own bye-law and the Petitioners are the members of the Society. A copy of the bye-law of the Society has been annexed to the writ petition as Annexure-2. Clause-5 of the Bye-Law specifically deals with admission of members. There are three categories of

members who can be admitted in the Society. Class-A members of the Society are those who hold more than 50 shares with voting right. Class-B membership shall be allotted to the State Government/Central Government employees working in the area. Class-C members shall consist of the share holders, who are nominal members and shall not have any voting right.

3. The pleadings in the writ petition further reveals that the Society is managed by an elected managing committee. The dispute arose when the Deputy Registrar, Cooperative Societies, Keonjhar Division vide his letter dated 23.07.2024 dissolved the elected committee of management and appointed the official Administrator, namely, Sri Susil Chandra Naik (SARCS). Accordingly, the management of the Society has been taken over by the above named Administrator till constitution of a newly elected managing committee. For constitution of the newly elected managing committee, the above named Administrator was required to prepare the list of eligible members which would constitute the electoral roll for conducting the election of the new committee members.

4. Mr. D.K. Mohanty, learned counsel appearing for the Petitioners, at the outset, contended that the main grievance of the Petitioners in the present writ petition is with regard to the preparation of the electoral roll consisting of valid members having voting right. He further contended that it was the duty of the Administrator to prepare the list of eligible members who can cast their votes once the election process is notified. By the time the Administrator took over the charge of the Society, there were altogether 105 nos. of Class-A members and 2453 nos. of Class-C members. He further alleged that the Administrator, after taking over the charge, convened an Annual General Body meeting and, accordingly, new members were admitted to the Society. As a result of which, the number of Class-C members, which was 2453, increased to 3317. He further alleged that the Administrator, Opposite Party No.3, inducted 211 numbers of Class-A members from out of 864 numbers of Class-C members inducted by the Administrator. As a result, the number of Class-A members with voting rights increased to 316.

5. Mr. Mohanty further alleged that although applications were made by some of the old C class members before the Administrator, Opposite Party No.3 and the ARCS, Keonjhar requesting them to admit such Class-C members as Class-A members and to confer them with voting rights, however, such request was not considered by the Opposite Party No.3. On the contrary, some new Class-C members who were inducted by the Administrator were later on converted to Class-A members by virtue of the decision taken in AGB meeting after the Opposite Party No.3 took over charge as Administrator. Therefore, a total of 208 nos. of such new Class-C members were converted to Class-A member. Being aggrieved by such conduct of the Administrator, Opposite Party No.3, in inducting new Class-C members after he took over charge and thereafter converting their membership to Class-A and conferring such members with the voting right and at the same time ignoring the claims of the old Class-C members for conversion of their membership to Class-A and conferment of their voting right, the Petitioners, most of whom are such old Class-C members of the Society, have

approached this Court by invoking the writ jurisdiction of this Court under Article 226 ad 227 of the Constitution of India.

6. Learned counsel for the Petitioners further contended that the Administrator, Opposite Party No.3, without considering the request of the present Petitioners under Annexure-4 Series, published a provisional electoral roll was on 18.01.2025 indicating therein a list of 316 nos. of Class-A members. He further strenuously argued that induction of 208 nos. of new Class-A members over and above the 105 old Class-A members by the Administrator is absolutely illegal and arbitrarily. He further contended that while inducting Class-C members and later on converting them to Class-A members with voting right, the provisions of Cooperative Societies Act as well as the Rules framed thereunder have been infringed.

7. Learned counsel for the Petitioners, further drawing attention of this Court to the Odisha Cooperative Societies (Elections to the Committee) Rules, 1992, contended that the said rule has been framed in exercise of the power conferred under Section 134 read with Section 28-A of the Cooperative Societies Act. Further, referring to Rule-6, learned counsel for the Petitioner submitted that the said rule lays down the detailed procedure with regard to the preparation of electoral roll. He further contended that after publication of the provisional electoral roll an objection is required to be invited under Section 6(5) of the aforesaid rules and such objection shall be filed before the Election Officer. Moreover, Rule-6(5) provides that after the objections are filed before the Election Officer, the same shall be heard and decided by the Election Officer after such inquiry as he may consider necessary. The relevant provision of Rule-6 which is the main plank of argument of the learned counsel for the Petitioner is quoted herein below:-

> *"6(5) Objections to the provisional electoral rolls published under Sub-rule (4) shall be filled before the Election Officer in writing showing therein the details of the objections, and full particulars of the objectors within four days from the date of publication of the said electoral rolls, and the same shall be heard and decided by the Election Officer after such enquiry as he may deem necessary. The Election Officer shall correct the electoral roll after deciding all claims and objections and finalise the same within three days from the last date of receipt of objections."*

8. Thus, on a careful analysis of the submission made by the learned counsel for the Petitioners, this Court observed that the challenge to the final electoral roll by the Petitioners is based on two planks. (i) induction of new Class-C members by the Administrator, Opposite Party No.3, and thereafter conversion of such new Class-C members to Class-A members with the conferment of voting right on such members, which according to the learned counsel for the Petitioners, is beyond the competence and authority of the Administrator; (ii) Although objections under Rule-6(5) were filed before the Election Officer under Annexure-4 to the writ petition, however, without deciding the same in terms of sub-rule(5) of Rule-6, the final electoral roll was published abruptly. Therefore, the final electoral roll published by the Opposite Party No.3 is illegal and the same is in violation of the provisions of 1992 Rules as well as the Act.

On the aforesaid two major planks, learned counsel appearing for the Petitioners urged before this Court that the entire election process is vitiated as the same is based on an illegal and void electoral roll. On such ground, learned counsel for the Petitioners submitted that the final electoral roll under Annexure-7 is liable to be quashed with a further direction to the Opposite Parties to conduct the election afresh after preparation of a valid final electoral roll in terms of the 1992 Rules.

9. Per contra, Mr. Pitambar Acharya, learned Advocate General, representing the State-Opposite Parties contended that the Opposite Party No.3-Administrator has not committed any illegality in notifying the election and going ahead with it. He further submitted that after dissolution of the committee of management vide letter dated 23.07.2024, the Opposite Party No.3 was appointed as an Administrator. Furthermore, after taking over the charge as an Administrator, the Opposite Party No.3 took immediate steps to conduct the election and to ensure that the new committee members are elected and that the Society runs in a democratic manner with the election of new committee members as well as officer bearers. With regard to the induction of new members by convening an Annual General Body meeting by the Opposite Party No.3-Administrator, Mr. Acharya contended that while inducting such members, the Opposite Party No.3 has not committed any illegality, rather he has acted in conformity with the settled legal position and the applicable Rules. Therefore, the allegation made by the Petitioners with regard to infringement of the provisions of the rule as well as act is absolutely baseless and vague and such allegations remain unsubstantiated.

10. In course of the argument, Mr. Acharya, learned Advocate General, strenuously canvassed an issue with regard to the maintainability of the present writ petition. It was emphatically and strenuously argued by Mr. Acharya that in view of the bar contained in the Odisha Cooperative Societies Act, 1962, the present writ petition is not maintainable. To substantiate his objection with regard to the maintainability of the writ petition, Mr. Acharya referred to the final election schedule notification dated 18.01.2025 and contended that since the election has been notified, there is a bar in law to interfere with the election process. In the said context, he also referred to the provisions contained in Section 28-B of the O.C.S. Act. For better understanding, the provision contained in Section 28-B of the O.C.S. Act has been extracted herein below:-

> *"**28-B. Election process not to be held up** – Notwithstanding anything contained in this Act and Rules, election process of a Society, once started, shall not be held up, and no matter relating to election of the President or members of the Committee shall be called in question before any authority under this Act until the declaration of the result of such election."*

11. The aforesaid Section 28-B was inserted in the statute book by virtue of Orissa Act No.28 of 1991 w.e.f. 11.09.1992. Further, referring to the aforesaid provision, Mr. Acharya contended that once the election process is notified, the same shall not be held up under any circumstances and that the dispute with regard to the election of the President or the members of the committee shall not be called in question before any

authority under this Act until declaration of the result of such election. In the light of the aforesaid provision, it was argued by Mr. Acharya that this Court should not interfere in the present writ application in view of the provision contained in Section 28-B of the O.C.S. Act, 1962.

12. In support of his contention with regard to the bar on the interference of this Court with any election dispute while the election process is on, Mr. Acharya referred to the judgment of the constitution Bench of the Hon'ble Supreme Court in ***N.P. Ponnuswami v. Returning Officer***, reported in ***(1952) 1 SCC 94***; as well as in the case of ***Mohinder Singh Gill and Another v. Chief Election Commissioner, New Delhi and Ors.***, reported in ***(1978) 1 SCC 405***. By referring to the aforesaid two judgments of the constitution Bench of the Hon'ble Supreme Court, Mr. Acharya contended that the law with regard to election and the scope of interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India has been crystallized by the Hon'ble Supreme Court in a catena of judgments including the above noted two constitution Bench judgments. The said constitution Bench judgments have clearly put an embargo on the exercise of the jurisdiction by this Court under Article 226 of the Constitution of India while the election process is on.

13. Mr. Acharya further contended that a mechanism has been provided to decide the disputes involving or arising out of the election. So far the Odisha Co-operative Societies Act is concerned, he submitted that a specific provision in the shape of Section 67-B has been enacted in the statute book. Section 67-B of the O.C.S. Act 1962 specifically provides that any dispute arising in connection with the election of any office bearer of a Society shall be referred to the Tribunal. Therefore, the Cooperative Tribunal constituted under Section 67-A of the O.C.S. Act 1962 is the competent forum to decide any election dispute of the Cooperative Society. In such view of the matter, it was contended that the present writ petition is not maintainable in view of the bar contained in the statute and on the face of an alternative mechanism provided in the statute for adjudication of the dispute relating to the election involving Cooperative Societies. Hence, it was urged that the writ petition is not maintainable and, accordingly, the same should be dismissed.

14. Heard Mr. D.K. Mohanty, learned counsel for the Petitioner and Mr. PitambarAcharya, learned Advocate General appearing for the State-Opposite Parties. Perused the writ petition as well as the documents filed along with the writ petition and place before this Court in course of hearing.

15. On a careful analysis of the submissions made by the learned counsels appearing for the respective parties, further taking note of the preliminary objection raised by the learned Advocate General with regard to maintainability of the present writ petition, this Court is of the considered view that the issue with regard to the maintainability of the present writ petition requires adjudication before entering into the merits of the dispute involved in the preset writ application. While objecting to the maintainability of the writ petition, Mr. Acharya referred to the provisions contained in Section 28-B of the O.C.S. Act, 1962 as well as the provisions contained in Section 67-B

of the said Act. On a careful analysis of both the provisions, this Court observed that Section 28-B imposes a bar in an unambiguous manner with regard to the interference of this Court in the election process once such process has commenced and until the declaration of the result of such election. On an examination of the provision contained in Section 28-B, it is observed that the said provision provides that the election shall not be held up and no matter relating to the election shall be called in question before any authority under this Act. Therefore, the question that arises for determination is as to whether this Court can be construed to be an authority as has been mentioned in Section 28-B of the O.C.S. Act, 1962?

16. While answering the aforesaid question, this Court would like to refer to the judgment of Division Bench of this Court in ***Sri Sulabh Charan Samal and Ors. V. State of Orissa and Ors.***, reported in ***(2008) 106 CLT 153***. In the said reported judgment, a Division Bench of this Court was required to decide an identical question similar to the one involved in the present writ petition, i.e. the validity of the voter list for election to the Committee of Management of Cuttack Central Co-operative Bank under the O.C.S. Act, 1962. In the said writ petition, a preliminary objection was raised with regard to the maintainability of the writ petition. Before the Division Bench, the admitted facts were that the election to the committee of management of the Bank had already been held as scheduled, however, the result of such election had not been declared because of the interim order passed by the Court. The Hon'ble Division Bench by referring to Section 28-B of the Act had come to a conclusion that the said provision goes to show the intention of the legislature to prevent interference in the election process of a society once scheduled, until the declaration of the result of such election.

17. In the aforesaid judgment, it has also been held by the Division Bench that a combined reading of the provisions of Section 28-B as well as 67-B of the O.C.S. Act implies that the Tribunal exercising jurisdiction with regard to any dispute cannot interfere with the election process until declaration of the result of such election. Eventually, the writ petition was dismissed by the Division Bench by holding that infringement of any statutory right conferred under the statute can only be assailed only in the designated forum and not by way of a writ petition before this Court and, as such, it was categorically held that the writ petition under Article 226 and 227 of the Constitution of India would not lie and, accordingly, the writ petition was not entertained although liberty was granted to the Petitioners to approach the Cooperative Tribunal under Section 67-B of the Act.

18. It would also be noteworthy to refer to a judgment of the Hon'ble Supreme Court in ***Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and Another v. State of Maharashtra and Others***, reported in ***(2001) 8 SCC 509***. The question that fell for consideration before the Hon'ble Supreme Court in the aforesaid case is somewhat similar to the question that this Court is attempting to answer in the present writ petition. The specific question that was being considered by the Hon'ble Supreme Court in the aforesaid case is whether the High Court should interfere with the preparation of an electoral roll in a petition under Article 226 of the Constitution of India or to decline to interfere in the matter leaving the parties to get the

matter adjudicated by the Tribunal by filing an election petition after declaration of result of the election.

19. While answering the aforesaid question, the Hon'ble Supreme Court referred to the relevant provisions of the Maharashtra Cooperative Societies Act, 1960 and it has been categorically held that preparation of voters list is a part of the election process and that the preparation of list inviting objection and preparation of the voter list are all part of the rules meant for conducting the election. Finally, it was held that the preparation of the electoral roll being an intermediary stage in the process of election of the Managing Committee of a specified society and the election process having been set in motion, it is well settled that the High Court should not stay the continuation of the election process even though there may be some alleged illegality or breach of rules while preparing the electoral roll. Further, it has been held that once the election result has been declared, it would be open to the aggrieved parties to challenge the election of the return candidates by means of an election petition before the Election Tribunal. In such view of the matter, there is absolutely no doubt that any infringement of procedure or the rules can very well be challenged by raising an election dispute under Section 67-B of O.C.S. Act that too after publication of final result.

20. Reverting back to the facts of the present case, it is not disputed by either side that the election was notified vide Notification dated 18.01.2025. Moreover, Rule-5 of the 1992 Rules provides for notice for various stages of the election. The said rule clearly indicates that preparation of provisional electoral roll, objection, final electoral roll etc. are all part of the electoral process. It is also an admitted fact that the Petitioner being aggrieved by the preparation of the final electoral roll has approached this Court by filing the present writ petition. Taking into consideration the prayer of the Petitioners as well as the Notification, this Court has no hesitation to hold that the election process has been set in motion. Therefore, the provision contained in Section 28-B would apply to the facts of the present case. Further, taking into consideration the judgment of this Court as well as the Hon'ble Supreme Court discussed hereinabove, this Court is of the view that there exists an embargo with regard to exercise of the jurisdiction of this Court which would eventually result in tinkering with the election process.

21. The next question that falls for consideration is as to whether the Petitioner would be rendered remediless in the event this Court refuses to exercise the writ jurisdiction under Article 226 of the Constitution of India? In reply to the said question, this Court would first like to refer to the relevant provision in the 1992 Rules, particularly Rule-57 which provides the manner in which the election disputes can be raised and decided. For the sake of convenience, the said provision has been quoted herein below:-

> *"**57. Election disputes** – Subject to the provision of Section 28-B, disputes regarding any matter relating to election of the President of Members of the Committee of a society may be raised before any authority competent in that regard under the Act and in that case the provisions of the rules under Chapter VII of the Orissa Co-operative Societies Rules, 1965 shall mutatis mutandis apply in respect of such disputes."*

22. Thus, Rule-57 of the O.C.S. Rule, 1962 clearly provides that the same is subject to Section 28-B of the O.C.S. Act and that the election dispute with regard to the election of President or the members of the committee may be raised before any authority competent in that regard. In the present case, the competent authority as has been provided under Section 67-B of the O.C.S. Act, 1962 is the Tribunal constituted under Section 67-A. Therefore, this Court is also of the considered view that an alternative remedy in the shape of election dispute has been provided in the Act as well as in the Rule, i.e. by filing an election dispute before the Cooperative Tribunal under Section 67-B of the O.C.S. Act, 1962. Therefore, on the face of such alternative remedy being available to the Petitioners, this Court should refrain from exercising its discretionary power under Article 226 and 227 of the Constitution of India leaving the entire issue to be adjudicated by the competent forum, i.e. the Cooperative Tribunal to determine the entire election dispute in terms of the O.C.S. Act, 1962 as well the Rules framed thereunder.

23. This Court would also like to mention here that an identical writ application was filed before this Court involving the very same dispute in W.P.(C) No.4632 of 2025 and vide order dated 17.02.2025, this Court while taking note of the provisions contained in the O.C.S. Act, 1962 declined to entertain the writ application.

24. In the ultimate analysis of the factual as well as the legal position, this Court is of the considered view that the right to participate in the election being a statutory right, the same is to be governed by the provisions contained in the very statute and the rules framed thereunder which has conferred such right on the individuals. Such statute, having created an embargo with regard to interference with the election process by keeping in view larger public interest and further an alternative mechanism having been provided to decide the election disputes after conclusion of the election and declaration of the final result, it would not be fair, proper and legal to interfere with the election process at this intermediate stage in exercise of the writ jurisdiction under Article 226 and 227 of the Constitution of India. Thus, while holding that the present writ petition is not maintainable, this Court deems it proper to dispose of the writ petition by granting liberty to the Petitioners to approach the Tribunal, in the manner as has been provided in the O.C.S. Act, 1962 and the rules framed thereunder, after declaration of the final result. This Court believes that once such a dispute is raised, the Tribunal shall do well to adjudicate such disputes in accordance with law without being influenced by any of the observations made hereinabove.

25. Accordingly, the writ petition is dismissed with the observations made hereinabove.

Headnotes prepared by:
Sri. Jnanendra Ku. Swain, Judicial Indexer
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Writ Petition dismissed.

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2025 (I) ILR-CUT-919

SRI CHITTARANJAN SENAPATI
V.
STATE OF ODISHA & ANR.

[W.P.(C) NO. 20808 OF 2024]

06 MARCH 2025

[ADITYA KUMAR MOHAPATRA, J.]

Issue for Consideration

Whether the executive body by virtue of an instruction can take away the service benefits which the petitioner is otherwise entitled to as per law.

Headnotes

CONSTITUTION OF INDIA, 1950 – Article 300-A r/w Memorandum No. 7493 dated 26.03.2015 issued by Finance Department, Government of Odisha – The Petitioner while working as Inspector of Motor Vehicles in OTES cadre has retired from service on attaining the age of superannuation – The Petitioner made an application to Opposite Parties for payment of cash equivalent to unutilized leave salary for a period of 300 days – The authority rejected the claim of Petitioner on the ground of resolution dated 26.03.2015 – Whether the executive body by virtue of an instruction can take away the service benefits which the petitioner is otherwise entitled to as per law.

Held: No – It is not open to the State Government to take away a part of the pension or gratuity or even leave encashment without any statutory provision to that effect – Therefore, the Opposite Parties have committed an error in withholding the leave encashment of the Petitioner by referring to the executive instruction dated 26.03.2025 under Annexure- A/2 to the counter affidavit – The impugned order dated 06.08.2024 is unsustainable in the eye of law. (Paras 12 & 13)

Citations Reference

State of Jharkhand & others Vs. Jitendra Kumar Srivastava & another**, AIR 2013 SC 3383;** State of Odisha and Others v. Nirmal Chandra Satapathy and another, **Order dated 28.02.2017 passed in W.P.(C) No.3442 of 2016; – referred to.**

List of Acts

Odisha Civil Services (Pension) Rules, 1992; Orissa Leave Rules, 1966.

Keywords

Unutilized leave salary; Encashment; Executive instruction; Service benefits.

Case Arising From

Order/letter No.8170/T dated 06.08.2024 issued by Finance Department.

Appearances for Parties

For Petitioner : Mr. Prasanta Kumar Mishra
For Opp. Parties : Mr. Akshaya Pati, ASC

Judgment/Order

Judgment

ADITYA KUMAR MOHAPATRA, J.

1. Heard the learned counsel for the Petitioner as well as learned counsel for the State-Opposite Parties. Perused the respective pleadings of the parties as well as the documents annexed thereto.

2. The present writ petition has been filed by the Petitioner with a prayer to quash the order/letter No.8170/T dated 06.08.2024 under Annexure-2 to the writ petition, so far as it relates to sanction of unutilized leave salary with a further prayer to direct the Opposite Party No.1 to sanction and disburse the unutilized leave salary in his favour within a stipulated period of time.

3. Learned counsel for the Petitioner, at the outset, contended that the Petitioner, while working as Inspector Motor Vehicles in OTES Cadre under the Opposite Parties, has retired from service on attainting the age of superannuation w.e.f. 30.04.2024. In the present writ petition, the Petitioner seeks to challenge the order dated 06.08.2024 passed by the Commerce and Transport Department, Government of Odisha, thereby rejecting his claim for payment of unutilized leave salary which the Petitioner is entitled to as per law.

4. Learned counsel for the Petitioner further contended that while the Petitioner was serving as Motor Vehicles Inspector, he was entangled in a vigilance case as well as in a disciplinary proceeding. However, both the proceedings were not concluded by the time the Petitioner retired from service. He further contended that after retirement from service, the Petitioner approached the Opposite Parties for payment of the financial dues in lieu of unutilized leave salary. The same having been rejected by the Opposite Parties by virtue of the impugned order dated 06.08.2024 under Annexure-2, the Petitioner seeks to challenge the same in the present writ petition. Learned counsel for the Petitioner further contended that the claim of the Petitioner has been rejected on the ground that such unutilized leave salary has not been sanctioned in favour of the Petitioner due to pendency of the vigilance case and disciplinary proceeding against him. Accordingly, the pension papers and the original Service Book of the Petitioner has been returned by the competent authority with a request to take appropriate action under Rule-66 of O.C.S. (Pension) Rules, 1992.

5. In course of his argument, learned counsel for the Petitioner contended that Rule-66 of the O.C.S. (Pension) Rules, 1992 has no application to the facts of the Petitioner's case, as no such provision exists permitting the authorities to withhold the unutilized leave salary in a case where a criminal case as well as a disciplinary proceeding is pending against the employee. He further contended that there exists no statutory provision to withhold the unutilized leave salary as is due and admissible to the present Petitioner. In such view of the matter, learned counsel for the Petitioner submitted that the conduct of the Opposite Party No.1 in rejecting his claim for sanction and disbursal of the unutilized leave salary for a period of 300 days is highly illegal and arbitrary. Further, referring to the judgment of the Hon'ble Supreme Court in the case of ***State of Jharkhand & others Vs.- Jitendra Kumar Srivastava & another***, reported in ***AIR 2013 SC 3383***, learned counsel for the Petitioner submitted that the executive instructions do not have statutory character and, therefore, the same cannot be termed as law within the meaning of the Article 300A of the Constitution of India. Since the monetary value equivalent to unutilized leave salary can very well be considered as a property within the definition of Article 300A of the Constitution of India, the Petitioner cannot be deprived of such benefits in the absence of any statutory provisions. Moreover, an executive instruction does not have the force of law and no provision in any of the statutes permit the Opposite Parties to withhold such benefits being extended to the employees/officers who are otherwise entitled to such benefits as per law.

6. In the aforesaid context, learned counsel for the Petitioner also referred to the order dated 28.02.2017 passed by a Division Bench of this Court in W.P.(C) No.3442 of 2016 (in the case of ***State of Odisha and Others v. Nirmal Chandra Satapathy and another***). In the aforesaid case, the Hon'ble Division Bench dealt with a matter involving issues identical to the one involved in the present case, where the unutilized leave salary was withheld on the ground of pendency of a vigilance case as well as a disciplinary proceeding. While referring to the judgment in ***Jitendra Kumar Srivastava's*** case (supra), the Hon'ble Division Bench has come to a conclusion that in the absence of any statutory rules, the leave encashment cannot be withheld by the authorities. Moreover, it has also been held that the contention of the learned Additional Government Advocate that the provision contained in Rule-20 of the Orissa Leave Rules, 1966 is attracted to the case, was also rejected by the Hon'ble Division Bench in the aforesaid order. Accordingly, the writ petition preferred by the State-Opposite Parties was dismissed while upholding the order passed by the learned O.A.T. dated 14.08.2015 in O.A. No.2037 of 2015 directing the Petitioners to release the unutilized leave salary.

7. Learned Additional Standing Counsel appearing for the State-Opposite Parties, on the other hand, referring to the counter affidavit filed on behalf of the Opposite Party No.1 and 2, emphatically argued that a judicial proceeding in the shape of a vigilance case as well as a disciplinary proceeding was pending against the Petitioner by the time the Petitioner retired from service on attaining the age of superannuation. Therefore, learned Additional Standing Counsel contended that pendency of such cases disentitled the Petitioner from getting such financial benefits including the cash equivalent of unutilized leave salary for a period of 300 days.

8. In course of his argument, learned Additional Standing Counsel referring to paragraph-7 of the counter affidavit, contended that the Finance Department, Government of Odisha, has come out with a Memorandum No.7493 dated 26.03.2015 wherein it has been stated that a cash amount equivalent to the unutilized leave salary to the Government servants will not be sanctioned in the event of their retirement on superannuation if it is found that a departmental/judicial proceeding is pending against the Government servant as on the date of their retirement. While arguing with regard to applicability of Memorandum dated 26.03.2015, he further contended that since both a judicial proceeding as well as a disciplinary proceeding was pending against the Petitioner by the time the Petitioner retired from service, the Petitioner will be automatically covered under the Finance Department Office Memorandum dated 26.03.2015 and, as such, the Opposite Parties have not committed any illegality in denying such benefits to the Petitioner. In such view of the matter, learned counsel for the State submitted that the Petitioner is not entitled to the cash equivalent of unutilized leave salary and, as such, the writ petition is devoid of merit and, accordingly, the same should be dismissed.

9. Having heard the learned counsels appearing for both the sides, on a careful analysis of their submissions and upon a careful examination of the pleadings of the respective parties as well as the documents placed before this Court for consideration, this Court observes that the only issue that falls for determination in the present writ petition is with regard to the entitlement of the Petitioner to the cash equivalent of unutilized leave salary and the rejection thereof by the Opposite Parties vide order dated 06.08.2024 under Annexure-2. It is not disputed by both the sides that by the time the Petitioner has retired from service, a vigilance case and a disciplinary proceeding was pending against the Petitioner. Therefore, in the aforesaid factual background, the case of the Petitioner is required to be considered by this Court. With regard to withholding of the cash equivalent of unutilized leave salary, this Court found that there is no statutory rule or guidelines which specifically prohibits payment of such benefits to the employees who are involved in any judicial/disciplinary proceeding at the time of their retirement from service.

10. So far the applicability of Rule-66 of the OCS (Pension) Rules is concerned, this Court observes that the same has no application to the facts of the present case, as the same does not deal with sanction and disbursal of cash equivalent of unutilized leave salary and that the same specifically relates to payment of gratuity. Similarly, the Hon'ble Division Bench of this Court in ***Nirmal Chandra Satapathy's*** case (supra) has taken into consideration the Finance Department Circular dated 17.12.1991 which was issued under Rule-20 of Orissa Leave Rules, 1966. In the said context, the Hon'ble Division Bench, by referring to the judgment of Hon'ble Supreme Court in ***Jitendra Kumar Srivastava's*** case (supra), has categorically held that it is not open to the State Government to take away a part of the pension or gratuity or even leave encashment without any statutory provision under the umbrage of administrative instruction. Moreover, the circular that has been referred to by the learned counsel for the State in paragraph-7 of the counter affidavit dated 26.03.2015 is similar to the one that was under consideration by the Hon'ble Division Bench in the above noted case.

11. On a careful analysis of the factual background of the present case, further on close scrutiny of the legal provisions governing the field of sanction and disbursement of retiral benefits including cash equivalent of unutilized leave salary, this Court observes that there is no statutory provision either in the shape of an enactment or rules prohibiting payment of such amount to the employee who is found to be involved in a judicial proceeding or a disciplinary proceeding by the time he retires from Government Service. While saying so, this Court is aware of the provisions that prohibit payment of pensionary benefits as well as gratuity in a case where the Government employee is found to be involved in a judicial/departmental proceeding on the date of his retirement from service.

12. The question, therefore, which arises for consideration before this Court is whether the executive, by virtue of an executive instruction, can take away the service benefits which the Petitioner is otherwise entitled to as per law. In the aforesaid context, this Court would like to refer to the judgment of the Hon'ble Supreme Court in ***Jitendra Kumar Srivastava's*** case (supra). In the said judgment, the Hon'ble Supreme Court has very categorically observed that it is not open to the State Government to take away a part of the pension or gratuity or even leave encashment without any statutory provision to that effect. Therefore, the Opposite Parties have committed an error in withholding the leave encashment of the Petitioner by referring to the executive instruction dated 26.03.2015 under Annexure-A/2 to the counter affidavit. Moreover, this Court observes that in the rejection order dated 06.08.2024, it has not been mentioned that the claim of the Petitioner was rejected in view of the executive instruction vide Memorandum dated 26.03.2015 of the Finance Department, Government of Odisha, under Annexure-A/2 to the counter affidavit.

13. In view of the aforesaid analysis of the legal as well as factual position, further relying upon the order passed by the Hon'ble Division Bench of this Court in ***Nirmal Chandra Satapathy's*** case (supra), this Court is of the view that the impugned order dated 06.08.2024 under Annexure-2 to the writ petition is unsustainable in the eye of law. Accordingly, the same is hereby quashed. Further, the Opposite Parties are directed to calculate the cash equivalent of the unutilized leave salary for a period of 300 days as is due and admissible to the Petitioner and the same be sanctioned and disbursed in favour of the Petitioner within a period of two months from the date of communication of a copy of this judgment.

14. Accordingly, the writ petition stands allowed. However, there shall be no order as to costs.

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter Writ Petition allowed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I) ILR-CUT-924

SHYAMA SUNDAR SAHOO
V.
ODISHA STATE WAREHOUSING CORPN. & ANR.

[W.P.(C) NO. 21066 OF 2024]

06 MARCH 2025

[ADITYA KUMAR MOHAPATRA, J.]

Issue for Consideration

Whether major penalty of recovery can be imposed on a retired employee without initiation of any Departmental Proceeding.

Headnotes

ODISHA FINANCIAL STATE CORPORATION (STAFF) REGULATIONS, 1985 – Regulations 18, 19 – The Managing Director, Odisha State Warehousing Corporation seeks to recover an amount of ₹ 10,91,452/- along with interest at the rate of 12% per annum from petitioner without initiating any Disciplinary Proceeding against him – Petitioner had already retired from service by the time the order of recovery was passed – Whether major penalty of recovery can be imposed on a retired employee without initiation of any Departmental Proceeding.

Held: No – In view of the finding that no Disciplinary Proceeding was initiated against the Petitioner either while he was in service or after his retirement, this Court has no hesitation to hold that no such proceeding could have been initiated against the Petitioner as the Regulation, 1985 does not permit initiation of any such proceeding against an employee after his retirement **–** Thus, this Court holds that no proceeding whatsoever has been initiated against the Petitioner before imposing a major penalty in shape of Regulation 18(1)(iv) **–** Moreover, no penalty under Regulation-18 can be imposed without initiating a proceeding for imposition of a major penalty **–** Therefore, the impugned order dated 21.08.2023 under Annexure-6 is completely without jurisdiction and the same is liable to be quashed. Accordingly, the same is hereby quashed. (Para 21)

The Opposite Party-Corporation is hereby directed to refund the money, along with the interest at the rate of 12% per annum within a period of three months to the present Petitioner chargeable from the date of recovery till such payment is made. (Para 22)

Citations Reference

Bhagirathi Jena v. Board of Directors, O.S.F.C., **(1999) 3 SCC 666;** Dev Prakash Tewari v. U.P. Coop. Institutional Service Board, (**2014) 7 SCC 260;**

State Bank of India & Ors vs. Navin Kumar Sinha**, Civil Appeal No.1279 of 2024 (decided on 19.11.2024) ─ referred to.**

List of Acts/Regulation

Warehousing Corporations Act, 1962; Odisha Financial State Corporation (Staff) Regulations, 1985

Keywords

Recovery; Disciplinary Proceeding against retired employee; Imposition of Major Penalty.

Case Arising From

Order dated 21.08.2023 passed by the Managing Director, Odisha State Warehousing Corporation.

Appearances for Parties

For Petitioner : Mr. D.K. Pani
For Opp.Parties : Mr. Braja Kishore Sahoo

Judgment/Order

Judgment

A. K. MOHAPATRA, J.

1. By filing the present Writ Petition, the present Petitioner seeks to invoke the jurisdiction of this Court under Article 226 of the Constitution of India to quash the Office order dated 21.08.2023 under Annexure-6 to the Writ Petition passed by the Managing Director, Odisha State Warehousing Corporation, Opposite Party No.2. By virtue of the impugned order dated 21.08.2023 the Opposite Party no.2 seeks to recover an amount of Rs.10,91,452/- along with interest at the rate of 12% per annum from the Petitioner without initiating any Disciplinary Proceeding against the Petitioner, who had already retired from service by the time the aforesaid order dated 21.08.2023 was passed directing recovery of the aforesaid amount.

2. The factual background leading to filing of the present Writ Petition, in short, is that the Petitioner was initially appointed as Work Sarkar on 18.01.1985 by the Opposite Party No.1-Corporation. During his service career, the Petitioner was given promotion to the post of Assistant Superintendent, Deputy Superintendent and Superintendent. After serving for about 38 years in different capacities in the Corporation, the Petitioner finally retired from service on attaining the age of superannuation with effect from 31.03.2023.

3. The pleadings further reveal that while the Petitioner was working as Zonal Manager (I/C) of the Corporation he received a show cause notice dated 05.12.2022 to explain as to why a sum of Rs.27,28,630/- shall not be recovered from him. The aforesaid show cause was received on the basis of a verification conducted by the Food Corporation of India (FCI) at Jagatpur Warehoue of the Corporation during

January, 2022 and February, 2022. During such verification, it was found that the physical stock did not tally with the stock recorded in the Register. As such, there was a shortfall in the physical stock that was verified in the godown.

4. In reply to the aforesaid show cause notice, the Petitioner submitted his explanation on 17.12.2022. In his explanation the Petitioner has mentioned that during the aforesaid period, the Warehouse at Jagatpur received an abnormally high number of rakes and due to shortage of staff, the Petitioner was required to handle the whole thing alone. Despite repeated requests, no man power was provided to the Petitioner. Further, it has been categorically stated by the Petitioner in his reply that there is no shortage of stock inasmuch as the total quantity of all the stacks has been tallied with the register. It has been specifically mentioned that the FCI team verified only a selected stock wherein there was some shortage. However, at the same time other stocks were not taken into consideration where the stock was not recorded. As such it has been stated by the Petitioner that there is no shortage of stock and that the show cause notice to recover the amount is totally misconceived and bad in law.

5. After the Petitioner submitted his reply, no action was taken therein till his retirement. The Petitioner retired from service on attaining the age of superannuation with effect from 31.03.2023. Four months after his retirement, the Petitioner received a notice dated 20.07.2023 to show cause as to why a sum of Rs.10,91,452/- shall not be recovered from his retiral dues as F.C.I. has recovered an amount of Rs.27,28,630/- from the bill of Opposite Party No1-Corporation. Since the Petitioner was in-charge of the Warehouse, he is liable to bear 40% of the loss, which was quantified at Rs.10,91,452/-. In compliance to the notice dated 20.07.2023, the Petitioner again submitted his reply on 24.07.2023 referring to his earlier reply dated 17.12.2022. The Petitioner remained under the impression that the Opposite Party-Corporation would consider his case and by taking into consideration the fact that there was no shortage, they would have sanctioned and disbursed all his retiral dues. However, to the surprise of the present Petitioner, he received Office order dated 21.08.2023, issued by the Managing Director, Odisha State Warehousing Corporation, under which a sum of Rs.10,91,452/- was sought to be recovered from the retiral dues of the Petitioner and eventually the same has been recovered by the Corporation from the retiral dues of the Petitioner. Being aggrieved by such conduct of the Opposite Parties, the Petitioner has approached this Court by filing the present Writ Petition.

6. Learned counsel representing the Opposite Parties-Corporation on the other hand referred to the Counter Affidavit filed on behalf of the Opposite Parties and submitted that on verification of stock by the FCI and on detection of the fact that there was a shortage of physical stock, the FCI has raised a demand to the tune of Rs.27,28,630/- against the Opposite Party No.1-Corporation. Although the Opposite Parties-Corporation found that there are discrepancies in the bill raised by the FCI and sought to resolve the same, however on the basis of physical verification report

of the FCI, the FCI authority did not agree to settle the matter, as a result of which the Corporation was saddled with liability to the tune of Rs.27,28,630/-.

7. Learned counsel for the Opposite Parties further contended that since the aforesaid dispute could not be resolved, the Corporation has been saddled with the financial liability. Furthermore, since the Petitioner was the Warehouse In-charge at the relevant point of time, therefore, the responsibility has been fixed on the Petitioner and accordingly, after serving notice to show cause, the aforesaid amount has been recovered from the retiral dues of the Petitioner. Learned counsel for the Opposite Parties further contended that in view of the agreement executed between the Corporation and the Service Provider namely, M/S Origo Commodities Pvt. Ltd. on 02.06.2022 the responsibility for storage loss is to be shared on a 60/40 basis. Since the recovery has already been made by the FCI for the storage loss, the Petitioner has been saddled with the liability of the Corporation to the tune of 40% of the total loss and accordingly, such amount has been recovered from the retiral dues of the Petitioner.

8. The Opposite Parties in their Counter Affidavit have also specifically admitted in Paragraph-7 with regard to the discrepancies in the physical stock verification. They have also stated that some stacks showed shortages in the number of bags and weight, other stacks had excess bags and the same has not been taken into consideration by F.C.I. during verification. Accordingly, FCI has come to a conclusion that there was actually a physical shortage of stock and a sum of Rs.27,28,630/- has been recovered from the bill of the Corporation. Although such fact was raised at the bilateral meeting with the FCI and the same was protested by the Corporation, but the FCI justified the fact of recovery by citing their Circular dated 13.01.2023. In such view of the matter, learned counsel for the Opposite Parties contended that since the Corporation was saddled with the liability to make good the aforesaid loss amount and such liability has arisen on an allegation with regard to shortage of stock of the Warehouse during the period of time when the Petitioner was in charge of the Warehouse. Therefore, it has been contended that the Opposite Parties were justified in their conduct to recover their share of liability from the person, who is responsible for such shortage as has been found by the FCI.

9. Heard learned counsels for the Petitioner as well as the learned counsel for the Opposite Parties-Corporation. Perused the pleadings of the respective parties on record.

10. Learned counsel for the Petitioner at the outset contended that the order dated 21.08.2023 passed by the Managing Director, Opposite Party No.2 is absolutely illegal and arbitrary. Further, he contended that no proceeding whatsoever has been initiated against the Petitioner, although a major financial penalty is being sought to be imposed on the Petitioner for recovery of an amount due to a loss of stock kept in the Warehouse. In the aforesaid context, learned counsel for the Petitioner, referring to the Corporation's Regulation vide Notification dated 10.07.1985 under Annexure-7 to the Writ Petition contended that Sub-Rule (iv) of

Regulation 18 provides for recovery from the pay of the employee whole or part of the pecuniary loss caused to the Corporation. He further referred to the explanation-II appended to Regulation18 which categorically provides that the imposition of a penalty in the shape of recovery is a major penalty. As per the said Regulations, to inflict a major penalty in the shape of recovery from the pay, as has been done in the present case, the Opposite Parties should have proceeded by following the procedure laid down in Regulation-19 of the aforesaid Regulation, 1985.

11. Learned counsel for the Petitioner, further referring to Regulation-1985, contended that the same lays down the procedure for conducting enquiry and for imposition of major punishment. Therefore, the Opposite Parties-Corporation can only take resort to Regulation-1985 against the employees who are under their employment. So far the present Petitioner is concerned, learned counsel for the Petitioner further contended that by the time the second show cause notice was issued to the Petitioner, he had already retired from service. Further, no such proceeding, as has been prescribed in Rule19, has been initiated against the Petitioner while he was in service. He further emphatically argued that Rule-19 does not permit for either initiation or continuation of any proceeding which was initiated during the service tenure to be continued after retirement of the employee. On such ground, learned counsel for the Petitioner further submitted that the imposition of a major punishment vide order dated 21.08.2023, under Annexure-6, is without any authority of law. As such the same is unsustainable in law and is liable to be quashed.

12. He further contended that even though there is no actual loss of physical stock, however, due to a faulty procedure adopted by FCI while conducting the physical verification, a wrong report has been submitted and on the basis of such wrong report, FCI has raised an illegal demand against the Corporation. In any case, learned counsel for the Petitioner further contended that it is between the FCI and the Corporation to resolve the issue and the Petitioner is in no way responsible for the loss incurred by the Opp.Party-Corporation. Moreover, no fault can be found with the Petitioner for the alleged shortage of stock as shown by the F.C.I. based on a faulty report.

13. Learned counsel for the Opposite Parties on the other hand contended that since the liability has been saddled on the Corporation by the FCI and demand has been made as indicated herein above, the Corporation had no other alternative but to saddle the liability on the person who was in charge of the Warehouse. He further contended that although attempts were made to amicably settle the issue in their bilateral meeting, however, the same was not adhered to by the FCI. Since the liability has been saddled on the Corporation, the Corporation has no other alternative but to recover the money from the Petitioner as per their share of the loss according to the agreement entered into between the Corporation and the Outsourcing Agency with regard to the procedure to be followed in case of loss.

14. Learned counsel for the Opposite Parties contended that the Petitioner was given adequate opportunity to file his reply to the show cause. In fact, the Petitioner has submitted his reply to the show cause notice issued by the Corporation. The Corporation, after a due consideration of the reply of the Petitioner, has taken a decision to saddle the liability on the petitioner as he was in charge of the Warehouse during the relevant time. On such ground, learned counsel for the Opposite Parties contended that the Opposite Party- Corporation has not committed any illegality and that the order dated 21.08.2023 under Annexure-6 passed by the Opposite Party no.2 does not call for any interference of this Court. Accordingly, it was prayed that the present Writ Petition, being devoid of merit, be dismissed.

15. Having heard learned counsels appearing for the respective parties, on careful examination of the background facts as well as the respective pleadings of the parties, this Court observes that the pivotal issue involved in the present Writ Petition is with regard to the validity of the conduct of Opposite Party No.2 in issuing the show cause notice under Annexure-6 ?. Further, it is to be examined as to whether such conduct of Opposite Party no.2 is supported by any statutory authority or not ?

16. To get an answer to the aforesaid question this Court is required to verify the Regulation of the Corporation that was notified on 10.07.1985. The said Regulation has been prepared in exercise of power conferred by Section 42 of the Warehousing Corporation Act, 1962 with the previous sanction of the State Government. Thus, the Regulation under Annexure-7 has a statutory flavour as the same has been framed and notified in exercise of power conferred by section 42 of the Warehousing Corporation Act, 1962. In such view of the matter, there is no dispute that the aforesaid Regulation is required to be mandatorily followed by the Corporation.

17. On careful examination of the aforesaid Regulation under Annexure-7, this Court observes that recovery from the pay of an employee for any pecuniary loss caused to the Corporation is a punishment prescribed under Regulation-18. Further, the explanation appended to Regulation 18 reveals that such punishment is in the nature of a major penalty and to impose a major penalty, the Opposite Party Corporation is required to follow the procedure as laid down in Regulation 19 of the aforesaid Regulation, 1985.

18. With regard to the submissions of the learned counsel for the Petitioner that he does not come within the purview of Regulation 1985 since by the time the show cause notice was issued and the subsequent order of recovery was issued by the Managing Director of the Corporation under Annexure-6, the Petitioner was no more an employee of the Corporation and as such, the Petitioner was completely out of the purview of the Regulation, 1985. This Court is of the considered view that, in absence of a specific provision with regard to the applicability of the aforesaid Regulation to a retired employee or to initiate any Disciplinary Proceeding against a retired employee, no such proceeding could have either been initiated against the Petitioner or continued after his retirement. Thus, the order imposing the major punishment in the shape of a recovery of the amount vide letter dated 21.08.2023, under Annexure-6, is completely without jurisdiction.

19. In this context, this court would like to refer to a few decisions of the Hon'ble Supreme Court wherein the aforesaid position of law has been discussed. In ***Bhagirathi Jena v. Board of Directors, O.S.F.C.***, reported in ***(1999) 3 SCC 666***, the Hon'ble Supreme Court, while dealing with a matter where disciplinary proceeding was initiated against the appellant under the Orissa Financial State Corporation Staff Regulations, 1975, but enquiry against such employee could not be completed before his retirement, the Hon'ble supreme Court held observed that no specific provision exists under the Orissa Financial State Corporation Staff Regulations, 1975 for continuance of departmental enquiry after superannuation or for conducting a disciplinary enquiry after the appellant's retirement. In the absence of any such provisions, the Hon'ble Supreme Court held that the respondent-Corporation had no legal authority to make any reduction in the appellant's retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing departmental enquiry and in the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits. Similarly in, ***Dev Prakash Tewari v. U.P. Coop. Institutional Service Board***, reported in ***(2014) 7 SCC 260***, the appellant has earlier challenged the continuance of disciplinary proceeding after his retirement by filing a Writ on the file of the High Court of Judicature of Allahabad, Lucknow Bench. The High Court held that there is no ground to interfere with the disciplinary proceeding and directed to complete it within four months by the impugned order dated 18-12-20092. Thereafter, the appellant filed Review Petition No. 139 of 2010 and the High Court the dismissed the same by order dated 29-3-2010. Challenging both the orders the appellant has preferred the present appeals. The Hon'ble Supreme Court dealt with a matter involving regulations of the Uttar Pradesh Cooperative Societies Employees' Service Regulations, 1975, reaffirmed the law laid down in ***Bhagirathi Jena***'s case and held that once the appellant had retired from service on 31-3-2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits. The aforesaid legal position has again found support by the decision of the Hon'ble Supreme Court in ***State Bank of India & Ors vs. Navin Kumar Sinha*** bearing Civil Appeal No.1279 OF 2024 (decided on 19.11.2024), wherein it was observed in the concluding paragraphs that, a subsisting disciplinary proceeding initiated before superannuation of the delinquent officer may be continued post superannuation by creating a legal fiction of continuance of service of the delinquent officer for the purpose of conclusion of the disciplinary proceeding. However, no disciplinary proceeding can be initiated after the delinquent employee or officer retires from service on attaining the age of superannuation or after the extended period of service.

20. On a careful scrutiny of the provisions of Regulation 19 of the aforesaid Regulation, 1985, it is revealed that there is no such provision to permit the Corporation to initiate any proceeding against the employee after his retirement to continue the proceeding after retirement of the employee from service or to initiate such proceeding after retirement. Therefore, it is not open to the Opposite Parties-Corporation to initiate a proceeding or to continue any Disciplinary Proceeding after the employee retires from

service. In the present case, no proceeding was initiated against the Petitioner, while he was in service. Although a show cause notice was issued prior to the retirement subsequently after his retirement, another show cause notice was issued to which the Petitioner has filed his reply. Further, without resorting to Regulation 19 and without conducting any enquiry or initiating any proceeding as required by the Regulations the impugned order under Annexure-6 was passed directing recovery of money from the retiral dues of the Petitioner. Moreover, learned counsel for the Opposite Parties could not cite any Regulation or authority by which the Opposite Party-Corporation would have proceeded against a retired employee for recovery from his retirement benefits under any of the Regulation of the Corporation. This Court, therefore, has no hesitation in coming to a conclusion that no Disciplinary Proceeding whatsoever was initiated against the Petitioner either while he was in service or even after his retirement.

21. In view of the aforesaid finding that no Disciplinary Proceeding was initiated against the Petitioner either while he was in service or after his retirement, this Court has no hesitation to hold that no such proceeding could have been initiated against the Petitioner as the Regulation, 1985 does not permit initiation of any such proceeding against an employee after his retirement. Thus, this Court holds that no proceeding whatsoever has been initiated against the Petitioner before imposing a major penalty in shape of Regulation 18(1)(iv). Moreover, no penalty under Regulation 18 can be imposed without initiating a proceeding for imposition of a major penalty. Therefore, the impugned order dated 21.08.2023 under Annexure-6 is completely without jurisdiction and the same is liable to be quashed. Accordingly, the same is hereby quashed.

22. The Opposite Party-Corporation is hereby directed to refund the money, along with the interest at the rate of 12% per annum within a period of three months to the present Petitioner chargeable from the date of recovery till such payment is made.

23. Before parting, this Court would like to observe that a stand has been taken by the Corporation in the Counter Affidavit, which is almost similar to the one taken by the Petitioner, with regard to actual shortfall of the stock. It is further observed that the Corporation has taken a specific stand that actually there was no physical shortage of stock. Although the matter was discussed in the bilateral meeting by the FCI, however the said authority did not accept the claim of the Opposite Parties-Corporation.

24. Since the issue raised by the Opposite parties that imposition of penalty by the FCI is beyond the scope of the Corporation, this Court has no hesitation in granting liberty to the Opposite Party-Corporation to resort to any appropriate proceeding, if so advised, for recovery of Rs.27,28.630/- from the F.C.I.

25. Accordingly, the Writ Petition stands allowed, however, there shall be no order as to cost.

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter Writ Petition allowed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I) ILR-CUT-932

RATNAKAR SWAIN
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 34529 OF 2022]

13 FEBRUARY 2025

[V. NARASINGH, J.]

Issue for Consideration

Petitioner has rendered four decades of continuous service – His juniors have got the pensionary benefit – Whether the Petitioner/NMR employee is entitled to regularization and pensionary benefits.

Headnotes

SERVICE JURISPRUDENCE – Regularization and pensionary benefits – The petitioner was engaged as fitter mechanic on NMR basis with effect from 16.12.1980 – The petitioner was relived from service on 28.02.2022 on attaining the age of superannuation – Thus it is clear from the uncontroverted materials on record that the petitioner was in service since 16.12.1980 till he retired on 28.02.2022 after rendering service for more than four decades – Whether the Petitioner/NMR employee is entitled to regularization and pensionary benefits when he has rendered four decades of continuous service and his junior have got the benefits.

Held: Yes – It is directed that the services of the Petitioner shall be regularized with effect from the date the services of his junior, Mr. Puhan (adverted to herein above) has been regularized and he shall be paid retiral dues in accordance with law within a period of three months hence, failing which, the same shall entail interest at the rate of 10% per annum from the date of entitlement till payment – And, the recovery of such interest shall be effected from the concerned official who is responsible. (Para 13)

Citations Reference

Chandra Nandi vrs. State of Odisha, **2014 (1) OLR 734;** Jagoo vrs. Union of India, **2024 INSC 1034;** Shripal & another vrs. Nagar Nigam, Ghaziabad, **2025 SCC OnLine SC 221;** Secretary, State of Karnataka vrs. Uma Devi, **(2006) 4 SCC 1 – referred to.**

Keywords

Regularization; Pensionary benefit; Selective application.

Case Arising From

Order dated 21.11.2022 passed by the Authority.

Appearances for Parties

For Petitioner : Mr. S. Mallik
For Opp. Parties : Mr. S.N. Das. ASC

Judgment/Order

Judgment

V. NARASINGH, J.

1. Heard learned counsel for the Petitioner and learned counsel for the State.

2. At the outset it is apt to note that the Petitioner, who worked as Fitter-Mechanic, is seeking regularization and pensionary benefits in the case at hand and taking note of the grievance of the Petitioner, this Court by orders dated 2.1.2023 and 10.05.2023 granted time to the State to file counter. Since the counter was not filed, by order dated 16.08.2023, as a last chance, two weeks time was allowed to file counter. Even in the face of such order as the counter was not filed "last and final opportunity" of two weeks was granted as per order dated 12.09.2023. Such time to file counter was further extended by four weeks by order dated 1.3.2024.

While passing such order, this Court observed thus:

> "Let the counter be filed within four weeks, failing which, the matter shall be taken into adjudication on its own merit without further opportunity to file counter affidavit."

Taking a liberal view, further time was allowed by order dated 29.07.2024 and the matter was adjourned at the instance of learned counsel for the State on 31.08.2024. The matter was adjourned to 31.08.2024 at the instance of the learned counsel for the Petitioner and the matter was posted to 23.09.2024. While adjourning the matter on 4.11.2024 further prayer was made to file counter and the matter was adjourned to 21.1.2025 to file counter. In spite of repeated opportunities as detailed above, the State has chosen not to file any counter affidavit. Hence, this Court proceeds to hear the matter on merits.

3. The Petitioner was engaged as Fitter Mechanic on NMR basis with effect from 16.12.1980 in Salipur Division under the administrative control of the Opposite Party No.5. Name of the Petitioner appears at serial No.54 (page 11) of the gradation list of the staff maintained by the then Executive Engineer, Cuttack P.H. Division No.III, Cuttack.

Considering the nature of grievance, it is apt to note here that the name of one Debendranath Puhan Fitter Mechanic appears in the said gradation list at serial No.57 and his date of appointment, in the very division of the Petitioner is 5.3.1981.

Since it came to light that said Debendranath Puhan has been regularized and his services have been treated as pensionable, the Petitioner sought information through RTI to test the veracity of the same.

The information obtained through RTI which is on record at Annexure-2 indicates that said Debendranath Puhan has been regularized and is getting pension.

4. Referring to the said case of Debendranath Puhan, learned counsel for the Petitioner submits that though he is at all fours with the said Debendranath Puhan but he is being discriminated in the matter of regularization and consequentially he is not getting any pension.

5. The order of retirement of the Petitioner is at Annexure-4 by which it is stated that he is relieved from service on 28.2.2022 on attaining the age of superannuation. Thus it is clear from the uncontroverted materials on record that the Petitioner was in service since 16.12.1980 till he retired on 28.02.2022 after rendering service of more than four decades.

6. Ventilating his grievance the Petitioner along with other similarly circumstanced moved the then Orissa Administrative Tribunal and after abolition of the same, the lis was transferred to the docket of this Court and renumbered as WPC (OAC) No.1067 of 2018 and by order dated 7.4.2022 directing for consideration of the claim of the Petitioner. The same having been turned down by the impugned order dated 21.11.2022 at Annexure-5, the present writ petition has been filed.

7. During the course of submission, learned counsel for the Petitioner submits that in the case of one Bidhyadhara Mishra, a Coordinate Bench of this Court vide order dated 7.9.2022 in WP(C) No.21769 of 2022 directed grant of pensionary benefits referring to the earlier decisions of this Court in the case of **Chandra Nandi vrs. State of Odisha**, 2014(1) OLR 734 and in the case of one **Nansu Pradhan** in O.A No.1189(C) of 2006.

8. It is stated at the Bar that said Nansu Pradhan filed O.A. No.1189(C) of 2006 praying for retiral benefits. Learned Tribunal allowed the retiral benefits in his favour vide order dated 11.6.2009. Assailing the said order, State filed WP(C) No.5377 of 2010 before this Court and by order dated 19.06.2009 the writ petition was dismissed and the order passed by the learned Tribunal was confirmed. Being aggrieved the matter was carried to the Apex Court in Civil Appeal No.22498 of 2012 and the order passed by the learned Tribunal and this Court were affirmed and the said appeal was dismissed by order dated 7.1.2013.

9. It is submitted by the learned counsel for the Petitioner that since admittedly the Petitioner has rendered service from 16.12.1980 till the date of his retirement and the services of his junior, namely, Debendranath Puhan has been regularized and he has been granted pensionary benefits, there is no distinguishing feature to deny the similar benefits to the Petitioner.

10. Per contra, learned counsel for the State on the materials on record opposes such views and reiterates the stand taken in the impugned order at Annexure-5 and submits that the appointment of the Petitioner was not against any sanctioned vacancy. Hence, the Petitioner is not entitled to the benefits only on the ground of parity and it is his further submission that each case has to be dealt with on its own taking into account the factual matrix of such case.

11. There is no cavil about such proposition. But this Court is of the considered view that there is no distinguishing feature so as to deprive the Petitioner from getting pensionary benefits after rendering service of more than four decades. In this context this Court respectfully refers to the latest decision of the Apex Court in the case of **Jagoo vrs. Union of India** 2024 INSC 1034, which has been reiterated in the case of **Shripal & another vrs. Nagar Nigam, Ghaziabad**, 2025 SCC OnLine SC 221.

It is manifestly clear that the manner in which the judgment of the apex Court in the case of **Secretary, State of Karnataka vrs. Uma Devi, (2006) 4 SCC 1** is being applied in the facts of the present case amounts to "selective application" which "distorts the judgment's spirit and purpose, effectively weaponizing it against the employees who have rendered indispensable services over decades".

There cannot be a more glaring case than the case at hand when after serving for more than four decades, on flimsy grounds notwithstanding the regularization of junior to him, Petitioner is still in the portals of the Court to get his legitimate dues and the matter has suffered number of adjournments for non filing of the counter.

12. This Court with the fervent hope that the authority will mend their ways, resists from imposing any cost.

13. Accordingly, impugned order at Annexure-5 is quashed. It is directed that the services of the Petitioner shall be regularized with effect from the date the services of his junior, Mr. Puhan (adverted to herein above) has been regularized and he shall be paid retiral dues in accordance with law within a period of three months hence, failing which, the same shall entail interest at the rate of 10% per annum from the date of entitlement till payment. And, the recovery of such interest shall be effected from the concerned official who is responsible.

14. The writ petition is allowed. No costs.

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter Writ Petition allowed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I) ILR-CUT-936

KRUSHNA CHANDRA BEHERA
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 10888 OF 2023]

24 FEBRUARY 2025

[V. NARASINGH, J.]

Issue for Consideration

Whether denial of regularization on the ground of non-conferment of temporary status is tenable.

Headnotes

SERVICE JURISPRUDENCE – Regularization of Service – Petitioner was working as daily wage mulia under the Health & Family Welfare Department – Petitioner seeks regularization of his service from the date of similarly placed employee and pensionary/ financial benefits – Plea of right to equal opportunity raised – The State Opposite Party Authorities pleaded that petitioner *ex facie* is not similarly circumstanced because the persons who have been regularized were granted "temporary status" – Whether denial of regularization on the ground of non-conferment of "temporary status" is tenable.

Held: No – The petitioner cannot be made to suffer because it was within the domain and discretion of the authorities to grant temporary status and such discretion was evidently exercised arbitrarily – As such the authority cannot now take shelter behind the cloak of non-conferment of temporary status to deny regularization of petitioner's service. (Para 13)

Citations Reference

Secretary, State of Karnataka & Ors v. Umadevi & Ors., **(2006) 4 SCC 1;** Jaggo Versus Union of India and Others, **2024 SCC OnLine 3826;** Shripal and Another Versus Nagar Nigam, Ghaziabad, **2025 SCC OnLine SC 211 – referred to.**

Keywords

Regularization of service; Non-regularization; Temporary status.

Appearances for Parties

For Petitioner : Mr. S. Mohanty
For Opp.parties : Mr. S.N. Das, ASC

Judgment/Order

Judgment

V. NARASINGH, J.

Heard learned counsel for the Petitioner, Mr. S. Mohanty and learned counsel for the State, Mr. S.N. Das, ASC.

2. This is the second journey of this Petitioner, a daily wage mulia invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. The Petitioner had earlier moved this Court in WPC(OAC) No.989 of 2020 ventilating his grievance for non-regularization. During the course of hearing of the said writ petition, the impugned order under Annexure-19 was brought on record.

The Petitioner withdrew the same and is assailing the order under Annexure-19 in the present writ petition.

For convenience of reference, the prayer of the writ petition is culled out hereunder:-

> "Therefore, it is prayed that this Hon'ble Court may kindly be pleased to admit the case and issue notice to the opposite parties to file their show cause as to why the case of the petitioner shall not be allowed and after hearing the parties, the case of the petitioner be allowed and pass necessary order to set aside the Annexure-19 dt.17.03.2023 and pass necessary order for regularization of services of the petitioner w.e.f. the date persons similarly placed employees and juniors were regularized. The petitioner be given pension and pensionary benefit without any further delay and the petitioner be given all the other financial and consequential benefits from the date similarly placed and his junior regularised.
>
> xxx xxx xxx

3. It is submitted by the learned counsel that the Petitioner, who was working as a Daily Wage Mulia, was engaged in the National Faileria Control Programme (hereinafter referred to as 'the NFCP') since 01.10.1982 under the administrative control of Opposite Party No.5. And, seeking regularization of services, he along with similarly placed moved the learned Tribunal by filing O.A. No.2243(C)/1994. The Petitioner was applicant No.6 before the learned Tribunal.

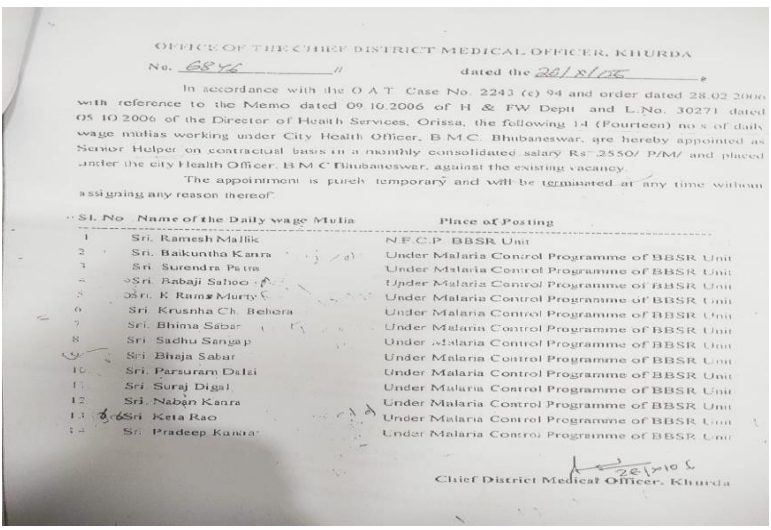
4. Learned Tribunal by order dated 28.02.2006 directed for consideration of the grievance of the Petitioner and others to be absorbed in the grade of Senior Helper in the NFCP, Bhubaneswar if vacancy still exists.

5. Learned counsel for the Petitioner invites the attention of this Court to the communication of the Government dated 23.09.2006 in the Health & Family Welfare Department addressed to the CDMO, Khurda referring to the very order of

the learned Tribunal, directing for implementation of the same, in order to avoid contempt.

In view of the same, the CDMO, Khurda (Opposite Party No.4) by order dated 26.10.2006 regularized the services of the Petitioners and others similarly circumstanced.

For convenience of reference, the said order is culled out hereunder:-



OFFICE OF THE CHIEF DISTRICT MEDICAL OFFICER, KHURDA

No. 6846 dated the 26/10/06

In accordance with the O.A.T. Case No. 2243 (c) 94 and order dated 28.02.2006 with reference to the Memo dated 09.10.2006 of H & FW Deptt and L.No. 30271 dated 05.10.2006 of the Director of Health Services, Orissa, the following 14 (Fourteen) nos of daily wage mulias working under City Health Officer, B.M.C. Bhubaneswar, are hereby appointed as Senior Helper on contractual basis in a monthly consolidated salary Rs. 2550/ P/M/ and placed under the city Health Officer, B.M.C Bhubaneswar, against the existing vacancy.

The appointment is purely temporary and will be terminated at any time without assigning any reason thereof.

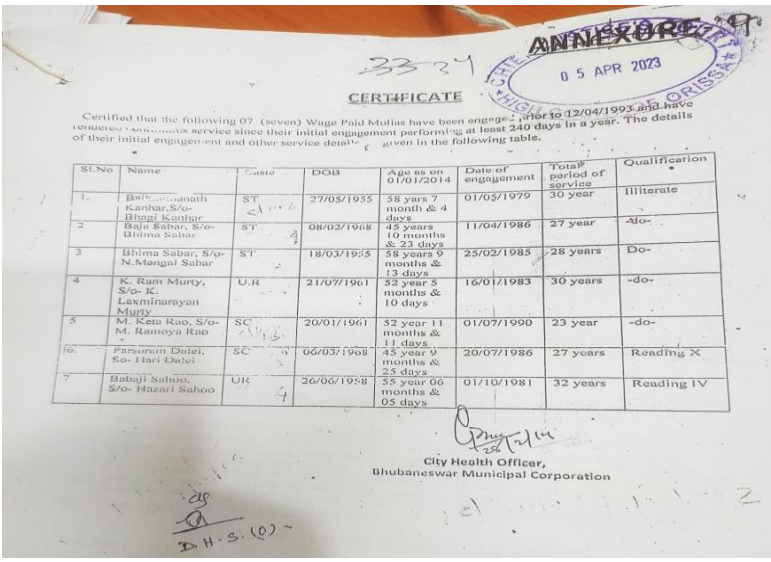
Sl. No.	Name of the Daily wage Mulia	Place of Posting
1	Sri. Ramesh Mallik	N.F.C.P. BBSR Unit
2	Sri. Baikuntha Kanra	Under Malaria Control Programme of BBSR Unit
3	Sri. Surendra Patra	Under Malaria Control Programme of BBSR Unit
4	Sri. Babaji Sahoo	Under Malaria Control Programme of BBSR Unit
5	Sri. K. Rama Murty	Under Malaria Control Programme of BBSR Unit
6	Sri. Krusnha Ch. Behera	Under Malaria Control Programme of BBSR Unit
7	Sri. Bhima Sabar	Under Malaria Control Programme of BBSR Unit
8	Sri. Sadhu Sangap	Under Malaria Control Programme of BBSR Unit
9	Sri. Bhaja Sabar	Under Malaria Control Programme of BBSR Unit
10	Sri. Parsuram Dalai	Under Malaria Control Programme of BBSR Unit
11	Sri. Suraj Digal	Under Malaria Control Programme of BBSR Unit
12	Sri. Nabin Kanra	Under Malaria Control Programme of BBSR Unit
13	Sri. Keta Rao	Under Malaria Control Programme of BBSR Unit
14	Sri. Pradeep Kumar	Under Malaria Control Programme of BBSR Unit

26/10/06

Chief District Medical Officer, Khurda

The name of the Petitioner appears at Sl. No.6.

6. When the matter stood thus, services of the persons at Sl. No.2, 9,7,15,13,10 and 4 were regularized and it is the submission of the learned counsel for the Petitioner that except persons at Sl. No.2 & 4 all others have put in less number of years than the Petitioner which is evident on a bare perusal of Annexure-9 the certificate in the said regard. The said certificate is extracted hereunder:-



ANNEXURE-9

0 5 APR 2023

CERTIFICATE

Certified that the following 07 (seven) Wage Paid Mulias have been engaged prior to 12/04/1993 and have rendered continuous service since their initial engagement performing at least 240 days in a year. The details of their initial engagement and other service details are given in the following table.

Sl.No	Name	Caste	DOB	Age as on 01/01/2014	Date of engagement	Total period of service	Qualification
1.	Bail[illegible]anath Kanhar, S/o- Bhagi Kanhar	ST	27/05/1955	58 yars 7 month & 4 days	01/05/1979	30 year	Illiterate
2	Baja Sabar, S/o- Bhima Sabar	ST	08/02/1968	45 years 10 months & 23 days	11/04/1986	27 year	-do-
3	Bhima Sabar, S/o- N.Mangal Sabar	ST	18/03/1955	58 years 9 months & 13 days	25/02/1985	28 years	Do-
4	K. Rami Murty, S/o- K. Laxminarayan Murty	UR	21/07/1961	52 year 5 months & 10 days	16/01/1983	30 years	-do-
5	M. Ketu Rao, S/o- M. Ramoya Rao	SC	20/01/1961	52 year 11 months & 11 days	01/07/1990	23 year	-do-
6.	Parsuram Dalei, So- Hari Dalei	SC	06/03/1968	45 year 9 months & 25 days	20/07/1986	27 years	Reading X
7	Babaji Sahoo, S/o- Hazari Sahoo	UR	26/06/1958	55 year 06 months & 05 days	01/10/1981	32 years	Reading IV

City Health Officer,
Bhubaneswar Municipal Corporation

D. H. S. (O)

7. Ventilating his grievance that though he is similarly circumstanced yet his services have not been regularized while services of Juniors have been regularized, the Petitioner approached this Court as noted hereinabove.

8. It is the submission of the learned counsel for the Petitioner that there is no distinguishable feature between the persons, who have been regularized and the Petitioner and in fact Petitioner is better placed than 10 of others who have been regularized as adverted to hereinabove. As such there has been patent discrimination. In this context, he relied on the following judgments.

(i) Raman Kumar & Ors. v. Union of India & Ors., 2023 LiveLaw (SC) 520

(ii) Niranjan Nayak v. State of Odisha & Ors., 2023 (I) OLR – 407.

9. Learned counsel for the State, per contra, submits that the Petitioner ex facie is not similarly circumstanced, since the persons who have been regularized were granted temporary status. Hence, merely because, the name of the persons who have been regularized also appears in the same list along with the Petitioner that does not ipso facto confer any right on the Petitioner to claim regularization.

10. In this context, learned counsel for the Petitioner draws the attention of this Court to the lis before this Court in the earlier writ petition at the behest of the Petitioner, i.e., W.P.(OAC) No.989 of 2018 wherein pursuant to the direction of this Court dated 25.01.2023 a further affidavit was filed by the CDMO, who was arrayed as Opposite Party No.4 therein.

For convenience of reference a direction of this Court dated 25.01.2023 and the relevant extract of the further affidavit (paragraph-4) is quoted hereunder:-

"xxx xxx xxx xxx

3. Considering the nature of dispute involved in this matter, this Court directs learned ASC to obtain instruction from the O.P. No. 4 as to why on the face of the order passed by the Tribunal and the order of regularisation extended in favour of similarly situated employees who were Parties before the Tribunal in O.A. No. 2243(C) of 1994 the Petitioner has not yet been conferred either with the temporary status or absorbed as against the post of Senior Helper. Such an instruction shall be provided to this Court on the next date."

Paragraph-4 of the further counter affidavit:-

"That pursuant to said direction, it is humbly submitted that all other seven persons similarly situated like that of the petitioner has already been regularized as indicated at Annexure-11 of the writ petition." (Emphasized)

11. On a plain reading of the said paragraph, it can be seen that it was the unambiguous stand taken by the State functionaries that "all other seven persons similarly situated like that of the Petitioners had already been regularized as indicated at Annexure-11 of the writ petition".

Laying emphasis on the same, it is submitted by the learned counsel for the Petitioner that the stand taken by the State in the counter and the submission of the learned counsel for the State referring to "temporary Status" is untenable.

It is apt to note that a rejoinder affidavit has been filed by the Petitioner controverting the recitals in the counter affidavit.

12. On a perusal of the counter affidavit, it is seen that the State Authorities apart from the stand that the Petitioner has not been conferred with the temporary status have also relied on the judgment of the Apex Court in case of ***Secretary, State of Karnataka & Ors v. Umadevi & Ors., (2006) 4 SCC 1.***

13. There is nothing on record to indicate the reasons as to why the temporary status was not conferred on the Petitioner and whether given such opportunity, the Petitioner failed to attain such 'temporary status'. In the absence of pleadings mere stand that the benefit of regularization cannot be granted to the Petitioner because he did not have temporary status amounts to justifying the unjustifiable. The Petitioner cannot be made to suffer because it was within the domain and discretion of the Authorities to grant temporary status and such discretion was evidently exercised arbitrarily. As such the Authority cannot now take shelter behind the cloak of non-conferment of temporary status to deny regularization of Petitioner's service. Rather this Court finds force in the submission of the learned counsel for the Petitioner that the Petitioner was deprived from getting temporary status and as such there has been discrimination and the same is telltale.

14. So far as the judgment of the Apex Court in the case of Umadevi (*supra*) referred to in the counter as relied upon by the learned counsel for the State, this Court takes note of the latest dictum of the Apex Court both in the case of ***Jaggo***

Verus Union of India and Others 2024 SCC OnLine 3826 and reiterated in ***Shripal and Another Versus Nagar Nigam, Ghaziabad 2025 SCC OnLine SC 211.***

In Jaggo (*supra*) the Apex Court has referred to the principles as laid down in Umadevi (*supra*) inasmuch as it has clarified that the judgment Umadevi (*supra*) "does not intent to penalize employees who have rendered long years of service fulfilling ongoing and necessary functions of the State for its instrumentalities". The Apex Court has also taken note of the distinction between the irregular and illegal appointees.

In the case at hand, it is agreed at the Bar that the services of the Petitioners were regularized in terms of order passed by the Tribunal against existing vacancies and the persons whose names also figured along with the Petitioner have been regularized and as such denial of regularization on the bogey of "temporary status", as already been noted, cannot be sustained.

15. Learned counsel for the State also further submitted that since the order of retirement was passed by the Bhubaneswar Municipal Corporation (BMC) and they have not been made party, the writ petition is liable to be rejected on the said ground.

16. On a perusal of the cause title, it is seen that the City Health Officer, Bhubaneswar Municipal Corporation has been cited as Opposite Party No.5 and it is not disputed at the Bar that the grievance of the Petitioner is against the State and hence, such contention does not find favour with this Court and on the said ground the Petitioner who has already retired cannot be relegated to fight another litigation since the grievance of the Petitioner is against the State and the State being adequately represented and the stand of the State being ably canvassed by the learned State Counsel on the basis of the counter affidavit.

17. On a conspectus of materials on record and taking the cue from the judgments of the Apex Court in the case of Jaggo (*supra*) and Shripal (*supra*), this Court is persuaded to hold that the impugned order at Annexure-19 rejecting the prayer of the Petitioner for regularization at par with his juniors is not sustainable and the same is quashed.

The Petitioner shall be entitled to consequential service and financial benefits at par with the incumbents at Anneuxre-9. And, the exercise is this regard in terms of the judgment be completed within a period of four months from the date of production/receipt of the copy of this judgment, whichever is earlier.

18. Accordingly, the Writ Petition is allowed. No costs.

Headnotes prepared by: *Result of the case:*
Sri. Jnanendra Ku. Swain, Judicial Indexer Writ Petition allowed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I) ILR-CUT-942

MUKESH BEHERA
V.
STATE OF ODISHA

[CRLA NO. 558 OF 2012]

27 JANUARY 2025

[BIRAJA PRASANNA SATAPATHY, J.]

Issue for Consideration

Whether merely because the deceased died under unnatural circumstances in her matrimonial home within seven years of marriage is sufficient to convict the appellant for the offence U/s. 304-B and Section 498-A of the Indian Penal Code, 1860.

Headnotes

CRIMINAL TRIAL – The appellant held guilty for the offence U/s. 304-B, 498-A of IPC – The deceased died under unnatural circumstances in her matrimonial home within 7 years of marriage – The doctor who conducted the post mortem came to a clear finding that the deceased committed suicide and the injuries available in her body are self-inflicted – Whether merely because the deceased died under unnatural circumstances in her matrimonial home within seven years of marriage is sufficient to convict the appellant for the offence U/s. 304-B and Section 498-A of the IPC.

Held: No – Even though the deceased died within 7 years of her marriage with the Appellant, but in view of the evidence laid by the Doctor-P.W.12 and in view of the fact that no independent witness has been examined by the prosecution to prove the allegation against the Appellant regarding demand of dowry and consequential death of the deceased under unnatural circumstances, it is the view of this Court that conviction and sentence of the Appellant for the offence under Sec. 304-B/498-A of the I.P.C. is not sustainable in the eye of law. (Para 4.2)

Citation References

Charan Singh @ Charanjit Singh Vs. State of Uttarakhand, **2003 LiveLaw SC 341 – referred to.**

List of Acts

Indian Penal Code, 1860; Dowry Prohibition Act, 1961.

Keywords

Unnatural death; Dowry death; Death within seven years of marriage; Dowry torture.

Case Arising From

Conviction and sentence passed by learned Addl. Sessions Judge, FTC, Rourkela S.T. Case No. 106/5 of 2010-11.

Appearances for Parties

For Appellant : Mr. H.S. Mishra

For Respondent : Mr. A. Tripathy, Addl. Govt. Advocate

Judgment/Order

Judgment

BIRAJA PRASANNA SATAPATHY, J.

The present appeal has been filed challenging order of conviction and sentence passed against the Appellant in S.T. Case No. 106/5 of 2010-11 by the learned Addl. Sessions Judge, FTC, Rourkela. Vide the said Judgment while convicting the Appellant guilty of the offences under Sec. 498-A, 304-B of the I.P.C., the Appellant was sentenced to undergo R.I. for a period of 7 years under Sec. 304-B I.P.C. and R.I. for a period of 2 years and to pay fine of Rs.2,000/- under Sec. 498-A of the I.P.C. and in default to undergo further R.I. for a period of two months and R.I. for a period of six months and to pay a fine of Rs.1,000/- and in default to undergo further R.I. for one month under Sec. 4 of the Dowry Prohibition Act. It is also contended that all the sentences are to run concurrently.

2. Learned counsel appearing for the Appellant contended that the prosecution case was set into motion basing on the F.I.R. lodged by one Ranjit Suna-P.W. 6 in Sector-7 P.S. Case No. 34/2010 corresponding to G.R. Case No. 615/2010 in the file of learned SDJM, Panposh. After commitment of the matter, the present Appellant along with three (3) other accused persons stood charged under Sec. 498-A, 304-B, 306/34 of the I.P.C. and Sec. 4 of the D.P. Act.

2.1. It is contended the prosecution in order to establish its case examined as many as 13 nos. of witnesses, which includes P.W. 6 the informant, P.W. 10 father of the victim, P.W. 13 the I.O. and P.W. 12, the Doctor who conducted the post mortem. It is contended that the prosecution in order to establish the case never examined any independent witnesses with regard to the allegation made regarding demand of dowry resulting the death of the deceased, who happens to the wife of the present Appellant.

2.2. It is contended that the marriage in between the Appellant and the deceased took place in the year 2005. Though initially basing on the F.I.R. lodged in the year

2006, a case was initiated against the present Appellant for the offence under Sec. 498-A, 326, 34 of the I.P.C. read with Sec. 4 of the D.P. Act, but the same was quashed by this Court vide order dtd.11.04.2007 in Criminal Misc. Case No. 406/2007.

2.3. It is contended that thereafter alleging commission of offence under Sec. 498-A, 304-B, 302/34 of I.P.C. read with Sec. 4 of the D.P. Act, the F.I.R. was lodged resulting initiation of Sector-7 P.S. Case No. 34/2010. But after completion of investigation charge-sheet was submitted for the offences under Sec. 498-A, 304-B, 306/34 of the I.P.C. and Sec. 4 of the D.P. Act. The present Appellant along with three (3) others after being charged for the offence under Sec. 498-A, 304-B, 306/34 I.P.C. and Sec. 4 of the D.P. Act faced the trial.

2.4. It is contended that the trial court when did not find any incriminating material against three of the accused persons, all of them were acquitted vide the impugned judgment dtd.22.08.2012. But the present Appellant was convicted for the offences under Sec. 498-A & 304-B of the I.P.C.. The present Appellant however was acquitted of the offence under Sec. 306 of the I.P.C..

2.5. Learned counsel for the Appellant vehemently contended that since in order to prove the offence under Sec. 304-B and 498-A of the I.P.C. the prosecution never examined any independent witnesses and the statement of P.W. 6, 8 & 10 being contrary to each other, basing on the statement of such P.Ws. Appellant could not have been held guilty for the offence under Sec. 304-B/498-A of the I.P.C..

2.6. It is also contended that in view of the testimony of P.W. 12 who happens to be the doctor and conducted the post mortem, the Appellant could not have been held guilty of the offence under Sec. 304-B. It is contended that P.W. 12 in his cross examination clearly admitted that the deceased committed suicide and the injuries found on the body of the deceased may also be self-inflicted. Statement of P.W. 12 in his cross-examination reads as follows:-

> *"I cannot say without the report of viscera by forensic body as to whether there is poisonous articles in the stomach.*
>
> *The material with which the dead body of the deceased was hanging was strong enough to keep the body stable on hanging position. Features of asphyxia is marked by me on the body of the deceased when the material with which the body was hanging is strong enough, it would construed 'suicide' of the deceased.*
>
> *The injuries found on the body of the deceased may also be self-inflicted."*

2.7. It is also contended that since the doctor who conducted the post mortem held the case as a case of suicide and the injuries being self-inflicted, the Appellant on the face of such evidence could not have been held guilty of the offence under Sec. 304-B of the I.P.C..

2.8. Even though in such nature of allegation, commission of offence under Sec. 306 of I.P.C. would have been attracted, but no evidence since was found against the

Appellant causing abatement of suicide of the deceased, the Appellant was acquitted of the offence under Sec. 306 of the I.P.C..

2.9. It is also contended that the I.O.-P.W. 13 in his cross-examination also clearly admitted that he has not examined any neighbourer of the Appellant though there were no. of quarters adjoining to the house of the Appellant. The I.O. in his cross-examination also clearly admitted that the room in which the deceased committed suicide was closed from inside and on the request of the present Appellant some of the local boys opened the door forcibly at about 1.15 P.M. on the date of incident. Relevant extract of the evidence of P.W. 13 so laid in his cross-examination reads as follows:-

> *"It revealed from the investigation that the main door was closed from inside, and at the request of accused Mukesh some of the local boys opened the same forcibly. About 1.15 PM on the date of incident the door was forcibly opened.*
>
> *xxx xxx xxx*
>
> *On 19.4.2010 I came to know that accused Mukesh was working in RSP, RKl from the informant. I have not gone to the department of RSP where the accused Mukesh was working in order to verify his conduct. It is not a fact that accused Mukesh came from his office on 19.4.2010 at 12.2 P.M. having obtained the gate pass receiving the information of death of his wife.*
>
> *xxx xxx xxx*
>
> *I have not examined any neighbor of the informant. There were number of quarters adjacent to the house of informant."*

2.10. It is also contended that though the concerned doctor advised to send the viscera report for chemical examination, but the same was never dispatched to the forensic laboratory for chemical examination. Evidence of P.W. 13 in that regard reads as follows:-

> *As per the advise of the Doctor visera was sent for chemical examination. There is no record to show that the viesera has been dispatched for chemical examination."*

2.11. It is also contended that P.W. 13 in his cross-examination disproved the stand taken by P.W. 6 regarding demand of dowry and allegation of torture to the victim. Evidence of P.W. 13 so laid in his cross-examination reads as follows:-

> *"PW-6 did not state before me that the deceased had made a complaint that her treatment was not taken up by the accused persons, and that he did not state before that accused persons at the throat of the deceased and that the deceased was admitted into the hospital, and that his sister was not staying with accused Mukesh at Jharsuguda. P.W. 6 did not state before me that his mother had given cash of Rs.50,000/- to Rs.60,000/- to accused Mukesh through his deceased sister and that all the accused persons were assaulting his sister. P.W-6 did not state before that accused Mukesh had forcibly taken away the deceased from the computer class, but stated that he had taken her (BHAGEI KI NEI GALA). P.W-6 did not state to me that parents of accused Mukesh by joining hand took away his sister by quarreling and were abusing her, for which accused Mukesh lost his job. He did not speak before me that 4 to 6 days prior to the incident the accused persons were assaulting to his sister."*

2.12. It is also contended that since the doctor who conducted the post mortem came to a clear finding that the deceased committed suicide and the injuries available in her body are self-inflicted, there was no occasion to held the Appellant guilty for the offence under Sec. 304-B and Sec. 498-A of the I.P.C. It is also contended that presumption of demand of dowry as provided under Sec.13-B of the Evidence Act cannot be stated to have been proved in the present case.

2.13. It is also contended that merely because the deceased died under unnatural circumstances in her matrimonial home within 7 years of marriage, it is not sufficient to convict the Appellant/husband for such dowry death. View of the Hon'ble Apex Court in Para 23 of the decision in the case of ***Charan Singh @ Charanjit Singh Vs. State of Uttarakhand,*** 2003 LiveLaw SC 341 reads as follows:-

> *"23. On a collective appreciation of the evidence led by the prosecution, we are of the considered view that the prerequisites to raise presumption under Section 304B IPC and Section 113B of the Indian Evidence Act having not been fulfilled, the conviction of the appellant cannot be justified. Mere death of the deceased being unnatural in the matrimonial home within seven years of marriage will not be sufficient to convict the accused under Section 3048 and 498A IPC. The cause of death as such is not known."*

2.14. It is also contended that D.Ws.1 & 2 who happens to be the neighbourers of the Appellant clearly testified that the Appellant was living a happy marital life with the deceased and they have never heard of demand of dowry made by the Appellant from the deceased or her family.

2.15. Making all these submissions learned counsel for the Appellant contended that the impugned order of conviction and sentence passed against the Appellant is not sustainable in the eye of law. It is also contended that by virtue of the order passed by this Court on 17.05.2013 though the Appellant is continuing on bail, but at no point of time he has violated any of the terms and condition. It is also contended that the Appellant was inside custody for more than 2 years during trial and after the order of conviction and sentence passed on 22.08.2012.

3. Mr. A. Tripathy, learned Addl. Govt. Advocate on the other hand while supporting the impugned order of conviction and sentence, contended that in view of the statement of P.W. 6 who happens to be the informant/brother of the deceased and evidence of P.W. 8, 9 & 10, the Appellant has been rightly held guilty for the offence under Sec. 304-B, 498-A of the I.P.C..

3.1. It is contended that P.W. 6 in his evidence clearly proved the demand of dowry made by the accused-Appellant after the marriage in the year 2005. Evidence of P.W. 6 with regard to demand of dowry reads as follows:-

> *"When my sister went to attend her class in computer Institute she was forcibly taken away by Mukesh and the accused persons asked her to get Rs. 2 lakhs from our house so that accused Mukesh would get a job in the Sponge Iron at Jharsuguda. My mother thereafter was compelled to pay Rs. 1 lakh to accused Mukesh in obedience to the demand done by him. My sister also telling me that the accused Mukesh not an*

employment at Jharsuguda Sponge Iron Company and both of them were staying together at Jharsuguda. Having stayed there for about one year both of them again came to Rourkela and constructed a house at Sector-6 and stayed there. My sister was also asked by accused Mukesh to get some money for construction of a house at Rourkela and in response to that my mother had paid probably fifty to sixty thousand rupees to accused Mukesh for constructing a house."

3.2. It is also contended that P.W. 9 who happens to be the sister-in-law of the deceased also proved the allegation regarding demand of dowry by the present Appellant. Statement of P.W. 9 supporting the demand of dowry reads as follows:-

"*As there was demand of money by accused Mukesh, myself and my mother in law had gone to Jharsuguda and paid Rs.1,00,000/- to accused Mukesh through our sister in law. Then they stayed in Qrs. No. 10, Golghar, Sector-5 without parents in law of deceased. After staying in there house, the deceased had also came to our house and disclosed that she was being harassed by the accused Mukesh."*

3.3. Similarly, relying on the statement of P.W. 10 who happens to be the father of the deceased, it is contended that the said P.W. also proved the demand of dowry against the Appellant. Statement of P.W. 10 reads as follows:-

"Few days there my daughter came to our house and disclosed accused threatening and assaulting her and demanding Rs. 1,50,000/- for arranging a service. But being compelled I paid Rs.1,00,000/- to her for the accused Mukesh. Again my daughter came after one month after payment of Rs.1 lakh, and further demanded some money for construction of house for which we again paid Rs.60,000/- to her. She made over the said money to accused Mukesh."

3.4. Similarly, reliance was placed on the evidence of P.W. 11 who happens to be the sister of the deceased. Evidence of P.W. 11 with regard to demand of dowry reads as follows:-

"At the time of marriage the parents and brother accused Mukesh demanded dowry and as per the capacity dowry articles were given to accused Mukesh. Sometimes thereafter accused used to send the deceased to our house for money, and when the same was not complied she was being assaulted by accused Mukesh."

3.5. Placing reliance on the evidence of P.W. 6, 8, 9, 10 & 11, learned Addl. Govt. Advocate contended that since the deceased died under unnatural circumstances within 7 years of her marriage and demand of dowry prior to such death of the deceased having been proved by the prosecution, the Appellant has been rightly convicted and sentenced under Sec. 498-A/304-B of the I.P.C.. It is accordingly contended that no interference is called for.

4. Having heard learned counsel appearing for the Parties and considering the submission made, this Court finds that the prosecution case was set in motion with lodging of the F.I.R. for the offences under Sec. 498-A, 304-B, 302/34 of the I.P.C. and Sec. 4 of the D.P. Act. But after completion of the investigation charge sheet was filed against the present Appellant and three other accused persons for the offences under Sec. 498-A, 304-B, 306/34 of the I.P.C. and Sec. 4 of the D.P. Act. Accordingly, the present Appellant and three other accused persons after being

charged for the offences under Sec. 498-A, 304-B, 306/34 of the I.P.C. and Sec. 4 of the D.P. Act faced the trial in S.T. Case No. 106/5 of 2010-11 in the file of learned Addl. Sessions Judge, FTC, Rourkela. As found the prosecution in order to prove the case examined as many as 13 nos. of witnesses and the defence examined 3 nos. of witnesses.

4.1. Learned trial court after going through the evidence so laid acquitted the other three accused persons of the offences under Sec. 498-A, 304-B and Sec. 4 of the D.P. Act. All the three other accused persons including the present Appellant were also acquitted from the offence under Sec. 306 of the I.P.C.. But the present Appellant basing on the available materials was convicted and sentenced for the offences under Sec. 304-B and Sec. 498-A of the I.P.C.

4.2. This Court after going through the materials placed, finds that even though the deceased died within 7 years of her marriage with the Appellant, but in view of the evidence laid by the Doctor-P.W. 12 and in view of the fact that no independent witness has been examined by the prosecution to prove the allegation against the Appellant regarding demand of dowry and consequential death of the deceased under unnatural circumstances, it is the view of this Court that conviction and sentence of the Appellant for the offence under Sec. 304-B/498-A of the I.P.C. is not sustainable in the eye of law.

4.3. Since the prosecution could not prove the offence under Sec. 306 of the I.P.C. and such acquittal of the Appellant under Sec. 306 of the I.P.C. being not under challenge, this Court placing reliance on the decision in the case of ***Charan Singh*** as cited (supra) is of the view that Appellant has been wrongly convicted and sentenced to undergo the imprisonment of the offence under Sec. 304-B and 498-A of the I.P.C. vide the impugned judgment dtd.22.08.2012. Therefore, this Court is inclined to quash the order of conviction and sentence so passed against the Appellant. While quashing the same, this Court directs the Appellant to be discharged from the bail bond.

5. The appeal accordingly stands allowed.

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter CRLA allowed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I) ILR-CUT-949

JANAK KUMAR PRADHAN @ NAYAK
V.
CHAIRMAN, STATE LEVEL SCRUTINY COMMITTEE, GANJAM & ORS.

[W.P.(C) NO. 13075 OF 2016]

27 JANUARY 2025

[BIRAJA PRASANNA SATAPATHY, J.]

Issue for Consideration

Whether the caste certificate issued as per the provision of Orissa Caste Certificate (for Scheduled Castes and Scheduled Tribes) Rules, 1980 can be cancelled in terms of the decision rendered by the Apex Court in the case of Kumari Madhuri Patil.

Headnotes

ORISSA CASTE CERTIFICATE (FOR SCHEDULED CASTES AND SCHEDULED TRIBES) RULS, 1980 r/w ORISSA SCHEDULED CASTES, SCHEDULED TRIBES AND BACKWARD CLASSES (REGULARIZATION OF ISSUANCE AND VERIFICATION OF CASTE CERTIFICATES) RULES, 2023 – Petitioner challenges the order of cancellation of the caste certificate issued in terms of the provisions provided under 1980 Rule – The authority initiated the proceeding in terms of the decision in the case of Madhuri Patil – Whether the caste certificate issued as per the provision of 1980 Rules can be cancelled in terms of the decision rendered by the Apex Court in the case of Kumari Madhuri Patil.

Held: No – This Court is of the view that the proceeding in terms of the decision in the case of *Kumari Madhuri Patil* could not have been initiated in *FCC No.57 of 2012*. (Para 4.2)

Therefore, this Court is inclined to quash order dt.29.03.2016 so passed by Opp. Party No.1 in FCC No.57 of 2012 under Annexure-7 – While quashing the same, this Court remits the matter to Opp. Party No.1 to take up the issue in terms of the provisions contained under the aforesaid 2023 Rules. (Para 4.3)

Citations Reference

Kumari Madhuri Patil & Others Vs. Additional Commissioner, Tribunal Development, **AIR 1995 SC 94;** Dayaram Vs. Sudhir Batham and Others, **(2012) 1 SCC 333;** Sridhar Ku. Dalai Vs. State of Odisha and Others**, 2023 (I) OLR 614 – referred to.**

List of Acts

Orissa Caste Certificate (for Scheduled Castes and Scheduled Tribes) Rules, 1980; Orissa Scheduled Castes, Scheduled Tribes and Backward Classes (Regularization of Issuance and Verification of Caste Certificates) Rules, 2023.

Keywords

Issuance of caste certificate; Cancellation of certificate.

Case Arising From

Order passed by the State Level Scrutiny Committee on 29.03.2016 in F.C.C. No. 57 of 2012.

Appearances for Parties

For Petitioners : Mr. P.C. Chhinchani
For Opp. Parties : Mr. A. Tripathy, AGA

Judgment/Order

Judgment

BIRAJA PRASANNA SATAPATHY, J.

1. The Present Writ Petition has been filed inter alia challenging the final order passed by the State Level Scrutiny Committee on 29.03.2016 in F.C.C.No.57 of 2012 under Annexure-7. Vide the said order, State Level Scrutiny Committee (Southern Divn.) Opp. Party No.1 while directing for cancellation of the Caste Certificate issued in favour of the Petitioner by holding the Petitioner having not belong to S.T, directed for cancellation of the Caste Certificate so issued in favour of the Petitioner along with other directions to initiate criminal proceeding and to remove the Petitioner from his services.

2. Learned counsel appearing for the Petitioner contended that Petitioner was issued with the Certificate in question by the Tahasildar, G. Udayagiri vide RMC No.27/86. In the said certificate, Petitioner was declared having belong to Scheduled Tribe category i.e. Kandha (Christian). Learned counsel appearing for the Petitioner contended that such a certificate was issued in favour of the Petitioner in RMC No.27/86, basing on the inquiry report submitted by the Revenue Supervisor under Annexure-1 series. It is contended that the concerned Revenue Supervisor basing on the direction issued by the Tahasildar, G. Udayagii not only caused a detailed inquiry but also submitted the report on 18.08.1979 under Annexure-1 series. In the said report, it was clearly indicated that the Petitioner belongs to Scheduled Tribe Community having belong to Kandha (Christian). A clear finding was also given that the Petitioner does not belong to Pano (Christian). It is also contended that such a finding was arrived at by the Revenue Inspector basing on the statement of various witnesses recorded by him.

2.1. It is contended that basing on the report available under Annexur-1, not only Petitioner was issued with the Caste Certificate showing him having belong to S.T in RMC No.27/86, but also by utilizing the same, Petitioner was appointed as a Constable in C.R.P.F. A further submission was made that such an inquiry was conducted basing on the allegation made before the Tahasildar, G. Udayagiri under Annexure-1 series.

2.2. It is contended that not only Petitioner was declared as having belong to S.T, his caste being Kandha (Christian), but also in the R.O.R issued in the name of his father under Khata No.33 under Annexure-4, Petitioner's caste was shown as Kandha (Christian) i.e S.T.

2.3. It is contended that while the matter stood thus, basing on the report submitted by the I.O that Petitioner does not belong S.T Community, the proceeding in FCC No.57/2012 was initiated in the file of Opp. Party No.1. After initiation of the said Proceeding in FCC No.57/2012, Petitioner was issued with the show-cause by Opp. Party No.1 vide letter No.1217 dt.22.05.2014.

2.4. It is contended that on receipt of the show-cause vide letter dt.22.05.2014, Petitioner submitted his reply on 25.09.2014 under Annexure-6. It is contended that a stand was taken in the reply to the show-cause that Petitioner has been rightly issued with the Caste Certificate, having belong to ST, his sub-caste being Kandha (Christian) and the said certificate was issued basing on the inquiry report submitted by the Revenue Supervisor under Annexure-1. But Opp. Party No.1 without proper appreciation of the reply to the show cause so submitted under Annexure-6, passed the impugned order on 29.03.2016 under Annexure-7. While directing for cancellation of the certificate so issued in favour of the Petitioner in RMC No.27 of 1986, other directions were also issued for initiation of criminal proceeding and for recovery of the benefit received by the Petitioner from his service.

2.5. Learned counsel for the Petitioner contended that since without proper appreciation of the stand taken by the Petitioner in his reply under Annexure-6, the impugned order was passed directing for cancellation of the Certificate, the same is not sustainable in the eye of law.

2.6. It is also contended that because of the impugned order, Petitioner was removed from his services and Criminal Proceeding has also been initiated against him. However, because of the interim order passed by this Court, no further progress has been made in the criminal proceeding.

2.7. Learned counsel for the Petitioner also contended that even though the proceeding in question in FCC No.57 of 2012 was initiated against the Petitioner basing on the decision rendered by the Apex Court in the case of ***Kumari Madhuri Patil & Others Vs. Additional Commissioner, Tribunal Development, AIR 1995 SC 94***, but in view of the subsequent decision rendered in the case of ***Dayaram Vs.***

Sudhir Batham and Others (2012) 1 SCC 333, the proceeding in terms of the decision in the case of ***Kumari Madhuri Patil*** was not maintainable.

2.8. It is contended that since the certificate in question in RMC No.27/86 was issued in terms of the provisions committed under the ***Orissa Caste Certificate (for Scheduled Castes & Scheduled Tribes) Rules, 1980***, the direction contained in the case of Kumari Madhuri Patil is not applicable in the State of Orissa. View of the Apex Court in Para 22 of the decision rendered in the case of ***Dayaram*** reads as follows:

> *22. Therefore, we are of the view, that Directions 1 to 15 issued in exercise of power under Articles 142 and 32 of the Constitution, are valid and laudable, as they were made to fill the vacuum in the absence of any legislation, to ensure that only genuine Scheduled Caste and Scheduled Tribe candidates secured the benefits of reservation and the bogus candidates were kept out. By issuing such directions, this Court was not taking over the functions of the legislature but merely filling up the vacuum till the legislature chose to make an appropriate law.*

2.9. It is also contended that following the decision in the case of ***Dayaram***, this Court in the case of ***Sridhar Ku. Dalai Vs. State of Odisha and Others 2023 (I) OLR 614***, clearly held that no proceeding in terms of the decision in the case of Kumar Madhuri Patil can be initiated in the State of Orissa as with regard to grant of such certificate, the Orissa Caste Certificate (for SC & ST)Rules, 1980 (in short Rules) prevails. View expressed by this Court in para 7 of the judgment in the case of Sridhar Ku. Dalai reads as follows:

> *"7. Recently this Bench had dealt with this question by judgment dated 4th January, 2023 in W.P.(C) NO.15048 of 2022 (Kunalata Nayak V. State of Odisha and others). There is no room for doubt, pursuant to clarification by the Supreme Court in Dayaram (supra) that Kumari Madhuri Patil (supra) was judgment delivered in exercise of power under article 142 in the Constitution. It was for purpose of filling the vacuum in absence of legislation in those States, where the directions were made to operate. Here, in Odisha, the rules prevail, as was found by this Bench in Kunalata Nayak (supra).*

2.10. Placing reliance on the decision in the case of Dayarm so followed by this Court in the case of Sridhar Ku.Dalai, learned counsel appearing for the Petitioner contended that since the Certificate in question was issued in favour of the Petitioner in RMC No.27/86 in terms of the 1980 Rules, the proceeding in terms of the decision in the case of Madhuri Patil is not at all entertainable and accordingly the direction issued vide the impugned order under Annexure-7 is not sustainable in the eye of law. It is also contended that because of the interim order passed by this Court, no coercive action has been taken against the Petitioner save and except termination of the petitioner from his services. It is accordingly contended that the impugned order dtd. 29.03.2016 so passed by Opp. Party No.1 under Annexure-7 is not sustainable in the eye of law.

3. Mr. Arabinda Tripathy, learned Additional Government Advocate though on the other hand made his submission basing on the stand taken in the counter

affidavit and contended that after receipt of the show-cause in FCC No.57 of 2012, since the Petitioner without raising any objection participated in the proceeding by filing his reply under Annexure-6, the stand taken that initiation of the proceeding in terms of the decision in the case of Kumari Madhuri Patil is not maintainable, is not acceptable.

3.1. It is contended that since without any objection, Petitioner participated in the proceeding with filing of the reply, the stand taken by the Petitioner that such a proceeding is not maintainable cannot be raised after passing of the impugned order under Annexure-7.

3.2. It is also contended that even though basing on the report of the I.O, Petitioner was issued with the show-cause vide letter dt.22.05.2014 and he submitted the reply under Annexure-6, but no documents were filed by the Petitioner in support of his claim that he belongs to Scheduled Tribe Community and the certificate has been issued in his favour rightly in RMC No. 27/86.

3.3. However, while countering the submission of the learned counsel for the Petitioner regarding the decision rendered in the case of Dayaram so followed by this Court in the case of Sridhar Ku. Dalai, learned counsel for the State contended that in the meantime while superseding the Orissa Caste Certificate (for Scheduled Castes and Scheduled Tribes) Rules, 1980 , a new rule has come into force vide notification dt.06.01.2024 i.e. Orissa Scheduled Castes, Scheduled Tribes and backward Classes (Regulation of Issuance of Verification of Caste Certificate) Rules, 2023. It is contended that a detailed procedure has been provided in the aforesaid 2023 Rules to deal with the issue, with regard to grant and cancellation of the Certificates issued in favour of Scheduled Castes, Scheduled Tribes and Backward classes.

3.4. It is contended that in view of the provisions contained under the aforesaid 2023 Rules, the State Level Scrutiny Committee is also competent to deal with the allegation made against the present Petitioner. It is accordingly contended that since after giving due opportunity of hearing, the Caste Certificate issued in favour of the Petitioner in RMC No.27/1986 has been cancelled vide the impugned order, the same has been rightly passed and it requires no interference of this Court.

4. Having heard learned counsel for the parties, considering the submission made and the materials placed, this Court finds that Petitioner was issued with the Caste Certificate in RMC No.27 of 1986. Vide the said certificate; Petitioner was declared as having belong to S.T community and his sub caste being Kandha (Christian). As found basing on the report submitted by the Inquiry Officer, the proceeding in question was initiated in FCC No.57 of 2012. After initiation of the proceeding in FCC No.57 of 2012, Opp. Party No.1 issued the show-cause to the Petitioner vide letter dt.22.05.2014.

4.1. As found the proceeding in question was initiated in terms of the decision rendered by the Apex Court in the case of Kumari Madhuri Patil as cited (supra). It is found that even though Petitioner was submitted a reply to the show cause under Annexure-6 and the proceeding was disposed of vide the impugned order dt.29.03.2016 under Annexure-7, but this Court in view of the subsequent decision of the Apex Court in the case of Dayaram so followed by this Court in the case of Sridhar Kumar Dalai, as cited (supra) is of the view that the proceeding in FCC No.57 of 2012 could not have been initiated as the Certificate in question was issued under the 1980 Rules.

4.2. Therefore, in view of the decision rendered in the case of Dayaram so followed in the case of Sridhar Kumar Dalai, this Court is of the view that the proceeding in terms of the decision in the case of Kumari Madhuri Patil could not have been initiated in FCC No.57 of 2012.

4.3. However, taking into account the notification issued by the Government on 06.01.2024 and with coming into force of the Orissa Scheduled Castes, Scheduled Tribes and Backward Classes (Regulation of Issuance and Verification of Caste Certificates) Rules, 2023, the power is now vested on the State Level Scrutiny Committee to deal with the issue involved in the present Writ Petition. Therefore, this Court is inclined to quash order dt.29.03.2016 so passed by Opp. Party No.1 in FCC No.57 of 2012 under Annexure-7. While quashing the same, this Court remits the matter to Opp. Party No.1 to take up the issue in terms of the provisions contained under the aforesaid 2023 Rules.

4.4. Since this Court is remanding the matter for its disposal in accordance with the amended 2023 Rules, this Court directs the Petitioner to appear before Opp. Party No.1 along with a copy of this order on 7th February, 2025. On his appearance, Opp. Party No.1 shall take up the issue and decide the matter in accordance with the 2023 Rules within the period of 4 (four months) from the date of appearance, as directed, in which this Court expresses no opinion.

The Writ Petition accordingly stands disposed of.

Headnotes prepared by:
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Writ Petition disposed of.

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2025 (I) ILR-CUT-955

SRI RANJAN KUMAR SWAIN
V.
STATE OF ODISHA
(PLANNING & CONVERGENCE DEPT.) & ORS.

[W.P.(C) NO. 21705 OF 2019]

20 FEBRUARY 2025

[MURAHARI SRI RAMAN, J.]

Issue for Consideration

Whether the order of disengagement issued vide Letter No. 10640 dated 20.09.2019 is sustainable.

Headnotes

(A) ODISHA SUBORDIANTE STATISTICAL SURVEYORS (METHOD OF RECRUITMENT & CONDITIONS OF SERVICE) RULES, 2015 &1994 – Appointment of the petitioner as Statistical Filed Surveyor (SFS) pursuant to order dated 29.11.2016 issued by the Deputy Director (P&S), District Planning and Monitoring Unit (DPMU), Ganjam, Chhatrapur – Disengagement of the petitioner *vide* Letter No. 10640 dated 20.09.2019 issued by the Deputy Secretary to Government in Planning & Convergence Department, Odisha – Whether such order of disengagement is sustainable.

Held: No – It is manifestly clear that the Director *vide* Letter dated 20.09.2019 instructed to disengage the petitioner treating his appointment as illegal inasmuch as the recommendation for appointment of the petitioner was not made by the Selection Committee, which is not constituted under Rule 10 of the Rules, 2015, as if the consideration for appointment of the petitioner was made under the said Rules – This fact is very much apparent from the stand taken by the counter affidavit, which this Court has already repelled hitherto.

In the wake of above, the Letter No.10640/P, Bhubaneswar, dated 20.09.2019 issued by the Deputy Director to Government in Planning and Convergence Department, Odisha-Opposite Party No.2 (Annexure-8) cannot be held to be sustained – Hence, the same is liable to be set aside and this Court does so. (Paras 9-10)

(B) WORDS & PHRASES – Distinction between the words “Substitution” and “Supersession” – Explained. (Para 7.8)

Citations Reference

State of Odisha Vrs Sreepati Ranjan Dash, **2023 SCC OnLine Ori 6207 – referred to.**

List of Acts

Odisha Subordinate Statistical Surveyors (Method of Recruitment & Conditions of Service) Rules, 2015; Odisha Subordinate Statistical Surveyors (Method of Recruitment & Conditions of Service) Rules, 1994.

Keywords

Order of disengagement; Consequential Service and financial benefits; Statistical Field Surveyor (SFS).

Case Arising From

Letter No.10640/P, Bhubaneswar, dated 20.09.2019 issued by the Deputy Secretary to Government-Opposite Party No.2 disengages the petitioner and Letter No.1416, dated 27.09.2019 issued by the Deputy Director (P&S) DPMU, Ganjam, Chhatrapur-Opposite Party No.4.

Appearances for Parties

For Petitoner : M/s. Sadasiva Patra, Sandeep Rath & Pratap Keshari Sahu

For Opp. Parties : Mr. Jayant Kumar Bal, Additional Government Advocate

Judgment/Order

Judgment

MURAHARI SRI RAMAN, J.

Challenging the direction contained in Letter No.10640/P, Bhubaneswar, dated 20.09.2019 issued by the Deputy Secretary to Government-Opposite Party No.2 under Annexure-8 to disengage the petitioner, appointed as contractual Statistical Field Surveyor, to the Deputy Director (P&S), DPMU, Ganjam from service, and order of disengagement contained in Letter No.1416, dated 27.09.2019 issued by the Deputy Director (P&S) DPMU, Ganjam, Chhatrapur-Opposite Party No.4, with effect from 27.09.2019, the petitioner has knocked the doors of this Court by way of this writ petition craving to invoke extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India, with the following prayer(s):

> *Under the facts and circumstances stated above, the petitioner therefore prays that, this Hon'ble Court may graciously be pleased to issue a appropriate Writ/Writ(s) in the nature of writ of Certiorari quashing the Letters dated 20.09.2019 and 27.09.2019 under Annexures-8 & 9 respectively as illegal.*

And further be pleased to issue a Writ/Writs in the nature of a writ of Mandamus commanding the Opposite Parties to reinstate the petitioner with all service and consequential benefits.

And pass any other order/orders as would be deemed fit and proper.

And for this act of kindness, the petitioner shall ever pray."

Facts:

2. Facts, as adumbrated by the writ petitioner, reveal that the petitioner was appointed as a Statistical Field Surveyor (SFS) pursuant to order dated 29.11.2016 issued by the Deputy Director (P&S), District Planning and Monitoring Unit (for short, "DPMU"), Ganjam, Chhatrapur-Opposite Party No.4 after being duly selected in a selection process.

2.1. Pursuant to said Office Order dated 29.11.2016, the petitioner joined in his duty on 14.12.2016 and was deployed to Seragada Block under Seragada Circle vide order dated 20.12.2016. The petitioner also participated in the training programme and he was assigned duty of Surveyor, which he has been discharging.

2.2. On coming to know about letter dated 20.09.2019 issued by the Deputy Secretary to Government in Planning & Convergence Department, Odisha-Opposite Party No.2 addressing to the Director, E&S, Odisha, BhubaneswarOpposite Party No.3 (Annexure-8) indicating disengagement of the petitioner from service on preconceived notion that he was illegally appointed, the petitioner, questioning the said contemplated action of the Government, a writ petition, being W.P.(C) No.18575 of 2019, was filed with the following prayer(s):

"to issue a appropriate Writ/Writ(s) declaring the action directing to disengage the petitioner from his services by the order no.10640/P dtd.20.09.2019 as indicated in para-7 of the writ petition as illegal.

And further be pleased to issue a Writ/Writs in the nature of a writ of Mandamus commanding the Opposite Parties to release all his salaries immediately with 9% interest."

2.3. This Court vide order dated 01.10.2019 passed an interim order directing to maintain status quo with regard to the post held by the petitioner. The attempt of the petitioner to communicate the copy of the said order to the authority concerned turned out to be futile. However, it is only when the petitioner had the opportunity to attend the staff meeting on 14.10.2019, he could come to know about an order being passed by the Deputy Director (P&S), DPMU, Ganjam, Chhatrapur-Opposite Party No.4 vide Letter No.1416, dated 27.09.2019 under Annexure-9, whereby he had already been disengaged from service with effect from 27.09.2019 in obedience to what is directed in Letter No.10640, dated 20.09.2019 issued from the Planning & Convergence Department.

2.4. Questioning the propriety of disengagement of the petitioner from service with effect from 27.09.2019 (Annexure-9), the petitioner has approached this Court

by way of filing this writ petition invoking extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India.

Counter affidavit filed by the opposite parties:

3. This Court vide order dated 18.11.2019 while issuing notice to the Opposite Parties on the question of admission, passed the following interim order:

> *"As an interim measure, it is directed that there shall be status quo in respect of the position of the petitioner in terms of the order dated 01.10.2019 passed in W.P.(C) No.18575 of 2019. It is further directed that in the event the petitioner is already disengaged, the said post shall not be filled up without leave of the Court."*

3.1. Pursuant thereto, the Joint Director, Directorate of Economics & Statistics, Odisha, Bhubaneswar-Opposite Party No.3 filed counter affidavit by asserting the following:

> *"5. **** As per the rules, on the requisition of the Opposite Party No.3 the Odisha Subordinate Staff Selection Commission (OSSSC) shall make advertisement of district-wise vacancies of Statistical Field Surveyor and shall conduct the recruitment inviting applications from the eligible candidates for a particular district as per the procedure prescribed in Rule 7 of the Odisha Subordinate Statistical Surveyors (Method of Recruitment & Condition of Service) Rules, 2015 through one common State wide test. After completion of recruitment process, the commission shall prepare district wise merit list and shall forward to Opposite Party No.3 who shall send a copy of the merit list to the appointing authority of respective districts. On receipt of such district wise merit list from the Director, the Appointing Authority shall issue appointment orders in favour of the candidates whose names appear in the merit list. The merit lists prepared by the Commission shall remain valid for a period of one year from the date of its approval by the Director. Accordingly, Opposite Party No.3 had requested the OSSSC vide DES letter No.14732 dtd.31.12.2015 for filling up of the post of SFSs by direct recruitment and accordingly, the OSSSC had made advertisement on 11.11.2016.*
>
> *But in the instant case without the knowledge of the opposite party No.1, 2 & 3, a Selection Committee was constituted de hors the rules, 2015 by the Opposite Party No.4 under the Chairmanship of ADM Ganjam, Chhatrapur, Deputy Collector, Ganjam, Chatrapur, District Welfare Officer, Ganjam, Chatrapur, Regional Assistant Director of Employment, Berhampur and DD (P&S) DPMU Ganjam, Chatrapur, as Member Secretary and the Selection Committee was convened on 22.09.2015 to select a candidate for filling up of one vacant post of contractual SFS which was not only illegal but also in violation of the recruitment rules. In contravention of the rules, the District Administration prepared a draft proceeding of the meeting of the selection Committee and a draft select list Besides that the said proceeding and the select list was not approved & signed by the Chairman of the said Committee i.e. ADM, Ganjam, Chatrapur. The copy of such proceeding is annexed herewith as Annexure-D/3. All the above exercise made de hors the rules, hence any selection is invalid and inoperative. But, based on the above draft select list & proceeding the then Deputy Director (P&S), DPMU, Ganjam, Chatrapur had given appointment to the petitioner as contractual SFS vide Office Order No.1338 dtd.29.11.2016 which was illegal and was in violation of the Odisha Subordinate Statistical Surveyors (Method of Recruitment & Condition of Service) Rules, 2015. The said action was obviously to frustrate the steps taken by the DES for filling up of the vacant posts of SFS by direct recruitment as requested vide*

DES letter No.14732 dtd.31.12.2015 and the advertisement of OSSSC issued dtd 11.11.2016 for direct recruitment of the SFSs. Further, it is submitted that after receipt of details of the case with documents from Opposite Party No.3, the Opposite Party No.1 examined and found that the recruitment was made without the rigors of the Odisha Subordinate Statistical Surveyors (Method of Recruitment & Condition of Service) Rules, 2015. Hence, the Opposite Party No.1 issued a notice to disengage the applicant from the post of contractual SFS.

***

8. That with regard to the averments made in paragraphs-4 & 5 of the writ petition, it is humbly submitted that the Opposite Party No.3 had called for explanation to Opposite Party No.4 for such type of gross irregularities. But Opposite Party No.4 did not respond to the order of Opposite Party No.3, rather the petitioner was allowed to continue and posted him in different blocks and utilised his services for election duty and training programme etc. All the above works had been done by the then Deputy Director (P&S), DPMU, Ganjam violating the recruitment Rules, 2015 and disobeying the orders of higher authorities."

Hearing:

4. Pleadings, being completed and exchanged between the counsel for respective parties, on their consent, this matter is taken up for final hearing at the stage of admission.

4.1. Accordingly, heard Sri Sadasiva Patra, learned counsel appearing along with Sri Sandeep Rath and Sri Pratap Keshari Sahu, learned counsel for the petitioner and Sri Jayanta Kumar Bal, learned Additional Government Advocate appearing for the State-Opposite Parties.

4.2. On conclusion of hearing, the judgment is dictated in open Court.

Rival contentions and submissions:

5. Reiterating the facts as narrated in the writ petition, Sri Sadasiva Patra, learned counsel appearing for the petitioner submitted that the reply to the averments made in the writ petition by the Opposite Party No.3 is contrary to the provisions contained in relevant Rules and the Opposite Party No.3 being misdirected himself asserted that the disengagement of the petitioner was made treating his appointment as illegal and irregular.

5.1. Amplifying his submission, he has taken this Court to the Office Order No.1338, dated 29.11.2016 under Annexure-1 issued by the Deputy Director (P&S), DPMU, Ganjam, wherein it has been stated that the appointment of the petitioner as Statistical Field Surveyor (SFS) was made on the basis of recommendation of the Selection Committee constituted vide Office Order No.1038, dated 06.07.2015.

5.2. It is impressed upon this Court that the Opposite Parties while construing the appointment of the petitioner as illegal as if such appointment was made under the provisions of the Odisha Subordinate Statistical Surveyors (Methods of Recruitment and Conditions of Service) Rules, 2015 (for short, "The Rules, 2015")

and proceeded to disengage on the misconceived perception that the recommendation of the Selection Committee was made in consonance with said Rules, 2015. He laid valiant attempt to persuade by submitting that as the recommendation vide Office Order No.1038, dated 06.07.2015 was made, it is quite obvious that Rules, 2015 had not seen the light of the day. Therefore, Sri Sadasiva Patra, learned Advocate emphatically argued that the Board constituted under the Odisha Subordinate Statistical Surveyors (Method of Recruitment and Conditions of Service) Rules, 1994 (for short, "Rules, 1994") having recommended appointment of the petitioner and he was, in fact, appointed pursuant thereto which is apparent from Annexure-1, his appointment could not have been treated irregular of illegal.

6. Learned counsel appearing for the petitioner vehemently contended that Letter No.10640/P, Bhubaneswar, dated 20.09.2019 issued by the Planning and Convergence Department, Odisha addressed to the Director, E&S, Odisha, Bhubaneswar was clear and necessity arose to disengage the petitioner as his appointment was found to have been made illegally.

6.1. Sri Jayanta Kumar Bal, learned Additional Government Advocate appearing for the Opposite Parties refuting the stance taken by the learned counsel appearing for the petitioner laid stress on paragraph-8 of the counter affidavit and submitted that certain steps were taken against the petitioner for disengagement in consonance with the directions issued in Letter dated 20.09.2019 (Annexure-8) issued by the Planning and Convergence Department.

6.2. He has also relied heavily on constitution of Selection Committee as reflected in the Rules, 2015. He, therefore, would strenuously argue that since the appointment was not made by a Selection Committee constituted under Rules, 2015, the appointment of the petitioner being illegal, there was justification in issuing Letter dated 27.09.2019 by Deputy Director (P&S), DPMU, Ganjam, Chhatrapur indicating disengagement from service.

Analysis and discussions:

7. Reading of Office Order No.1338, dated 29.11.2016 (Annexure-1), reveals the following fact:

> *"On the recommendation of the Selection Committee constituted* ***vide this Office Order No.1038, dated 06.07.2015****, Sri Ranjan Kumar Swain, son of Prafulla Kumar Swain, At: Pattapabula, Post: Baramundali, P.S.: Badagada, Via: Sheragada, District: Ganjam-761106 is hereby appointed as Statistical Field Surveyor (S.F.S.) on contractual basis on the following terms and conditions."*

7.1. Rule 10 of the Rules, 2015 dealing with Constitution of Selection Committee stands as follows:

> *"10. Constitution of Selection Committee.—*
>
> *(1) A* ***Selection Committee*** *shall be* ***constituted*** *consisting of* ***the following members*** *to consider the cases of promotion from Statistical Field Surveyor to Statistical Field*

Inspector and from Statistical Field Inspector to Senior Statistical Field Inspector, namely:

(a) Director	...	*Chairman*
(b) Joint Director of Directorate of Economics and Statistics in charge of Agriculture Statistics Division.	...	*Member*
(c) Senior most Joint Director of the Range	...	*Member*
(d) A representative of the S.T. & S.C. Development Department.	...	*Member*
(e) Senior Establishment Officer of Directorate	...	*Member Secretary*

(2) The recommendation of the Selection Committee shall be valid and can be operated 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."

7.2. On the contrary of Rule 8 of the Rules, 1994, dealing with Constitution of Board for Direct Recruitment1[1], stood as follows:

"8. Constitution of Board for Direct Recruitment.—

The "Board" for direct recruitment to the posts in Category-III shall consist of—

(i) The Collector of the district or an officer of the rank of Additional District Magistrate as nominated by the Collector to represent him in the Board	...	*Chairman*
(ii) Deputy Director (Statistics) of concerned range	...	*Member*
(iii) An officer not below the rank of Class-III belonging to other Department of Government located in the district to be nominated by the Chairman	...	*Member*
(iv) District Statistical Officer	...	*Member-Secretary."*

7.3. Rule 1 of the Rules, 2015, lays down as follows:

"1. Short title and commencement.—

(1) These rules may be called the Odisha Subordinate Statistical Surveyors (Method of Recruitment and Conditions of Service) Rules, 2015.

(2) They shall come into force on the date of their publication in the Odisha Gazette"

7.4. Minute reading of the Rules, 2015, would reveal that said rules have been framed by the Planning and Convergence Department in exercise of powers

[1] Chairman Member Rule 2(d) of the Odisha Subordiante Statistical Surveyors (Method of Recruitment and Conditions of Service) Rules, 1994 defines the term "Committee" to mean: "*Committee means the Selection Committee constituted under sub-rule (1) of Rule 10.*"

conferred by the proviso to Article 309 of the Constitution of India and in supersession of the Odisha Subordinate Statistical Surveyors (Method of Recruitment and Conditions of Service) Rules, 1994, came into force on the date of their publication in the Odisha Gazette.

7.5. It is pointed out at the Bar that the said Rules, 2015 came into force on the date of its publication in the Odisha Gazette. Said Rules being published in the Odisha Gazette Extraordinary No.1292, dated 08.09.2015, there is no ambiguity that these Rules, 2015 came into force with effect from 08.09.2015. Such fact of publication of the Rules, 2015 in the Extraordinary issue of the Odisha Gazette on 08.09.2015 is not disputed by the learned Additional Government Advocate.

7.6. Referring back to the Office Order dated 29.11.2016 (Annexure-1), it is manifested that the Board for Direct Recruitment was constituted under the Rules, 1994, but not under Rules, 2015, as the Office Order No.1038, dated 06.07.2015, existed prior to the Rules, 2015 came into force. The constitution of the Board being made prior to coming into force of the Rules, 2015, it could not be said by the opposite parties that the appointment of the petitioner was illegal in terms of the Rules, 2015,

7.7. It is pertinent to take cognizance of the following fact as is apparent from the title of the Rules, 2015:

> *"No. 10398-PC-ES-ES-134/2014/P.—*
>
> *In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of the Odisha Subordinate Statistical Surveyors (Method of Recruitment and Conditions of Service) Rules, 1994;* ***except as respects things done or omitted to be done before such supersession****, the Governor of Odisha hereby makes the following rules regulating the method of recruitment and conditions of service of the persons appointed to the Odisha Subordinate Statistical Surveyor's Service under the Directorate of Economics and Statistics, Odisha."*

7.8. It is apposite to have reference to a Division Bench decision of this Court rendered in the case of *State of Odisha Vrs Sreepati Ranjan Dash, 2023 SCC OnLine Ori 6207*, wherein it has been observed as follows:

> *"50. In Pratap Chandra Mishra Vrs. State of Odisha, O.J.C. No. 6113 of 1992, vide Judgment dated 23.08.1993, this Court has laid down as follows:*
>
> *"3. The petitioners' case is that they had no occasion to know about the Resolution dated 23rd March, 1992 until its publication in the Official Gazette dated 10th April, 1992. The only question that needs adjudication is whether the date on which the Resolution was passed or the date on which the same was published in the Orissa Gazette would be the effective date. The difficulty arises in respect of units which made fixed capital investment between the period from 23.03.1992 to 10.04.1992. Obviously a person who has made investment after 23.03.1992, but before 10.04.1992 would be affected if the Resolution is made operative from 23.03.1992. If the same is so made operative, it would cause prejudice to the person who is unaware of the Resolution and makes fixed capital investment upto 10.04.1992. It is seen from the Resolution dated 23.03.1992 itself that the same was ordered to be published in the next issue of the*

Official Gazette. Section 3(39) of the General Clauses Act, 1897 defines "Official Gazette" or "Gazette" to mean Gazette of India or Official Gazette of a State. Section 2(16) of the Orissa General Clauses Act, 1937 defines "Gazette" as the Official Gazette of the State. The publication in the Official Gazette is made for the purpose of making it known to the public. Even if a Resolution is adopted, from a particular date it cannot be made operative without necessary publication, when it affects any person by withdrawal of any benefit or incentive already granted. We are, therefore, inclined to accept the submission on behalf of the petitioners that the Resolution cannot be operative prior to 10.4.1992. The Resolution dated 17.06.1992 published in the Orissa Gazette Supplement dated 26.06.1992 is nullified to that extent. The Finance Department Notification No. SRO 629/92 dated 28.04.1992 was published in the Official Gazette on 29.04.1992, and therefore, the same would be operative from 29.04.1992."

51. Minute scrutiny of the Odisha Transport Service (Method of Recruitment and Conditions of Services) Rules, 2021, as published in the Extraordinary issue of the Odisha Gazette, would reveal the following intent of the Government:

*In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of all rules framed, instructions or orders issued in this respect except as respect things done or omitted to be done before such supersession, the Governor of Odisha hereby makes the following rules to egulate the method of recruitment and conditions of service of persons appointed to the Odisha Transport Services ***"*

52. While the Odisha Transport Service (Method of Recruitment and Conditions of Services) Rules, 2021 came into force with effect from 05.01.2022 to have prospective in its operation, the same saved the "things done or omitted to be done before such supersession".

53. The word "supersede" in law, vide Black's Law Dictionary, 5th Edition, as referred to in Calcutta Municipal Corporation Vrs. Pawan Kumar Saraf, (1999) 2 SCC 400 = (1999) 1 SCR 74, means "obliterate, set aside, annul, replace, make void or inefficacious or useless, repeal". The purport of "supersession" has been succinctly explained in Union of India Vrs. Glaxo India Ltd., (2011) 6 SCC 668 : (2011) 4 SCR 50:

39. The impugned notification uses the expression "supersession" of the earlier notification. Therefore, the first question that requires to be considered and answered by us is, what is the meaning of the expression "supersession" and what is its effect. Webster's Third New International Dictionary defines the word "supersession" to mean "the state of being superseded", "removal" and "replacement". P. Ramanatha Aiyar's Advanced Law Lexicon defines "superseded" as "set aside" and "replaced by". The view of this Court in some of the decisions is that the expression "supersession" has to be understood to amount "to repeal" and when notification is repealed, the provisions of Section 6 of the General Clauses Act would not apply to notifications.

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42. In State of Orissa Vrs. Titaghur Paper Mills Company Ltd., 1985 Supp SCC 280 = AIR 1985 SC 1293, the specific question whether on "supersession" of a notification, the liability to tax for a period prior to the supersession was wiped out or not, directly arose and was considered. This Court came to the conclusion that the previous liability to tax for a period prior to the supersession was not wiped out In our view, the results that flow from changes in the law by way of amendment, "repeal", "substitution" or "supersession" on the earlier rights and obligations cannot be decided on any set formulae. It is essentially a matter of construction and depends on the intendment of the

law as could be gathered from the provisions in accordance with accepted cannons of construction.

45. In Syed Mustafa Mohamed Ghouse Vrs. State of Mysore, (1963) 1 Cri LJ 372 (Mys), the Sugar (Movement Control) Order, 1959 of 06.11.1959 was passed in supersession of the Sugar (Movement Control) Order, 1959, dated 27.07.1959. It was held that in law "supersession" has not the same effect as repeal and proceedings of a superseded order can be commenced. In R.S. Anand Behari Lal Vrs. United Provinces Govt., AIR 1955 NUC 2769 (All), it was held that in case of supersession of a notification, the objections and liabilities accrued and incurred under the earlier notification remain unaffected, since the supersession will be effected from the date of second notification and not retrospectively, so as to abrogate the earlier notification from the date of its commencement."

54. The distinction between the word "substitution" and the term "supersession" can well be deduced from the following dicta of the Hon'ble Supreme Court of India in the case of State of Maharashtra Vrs. Central Provinces Manganese Ore Co. Ltd., (1977) 1 SCC 643 = (1977) 39 STC 340 (SC):

The following passage was also cited from Koteswar Koteswar Vittal Kamath Vrs. K. Rangappa Balica & Co., (1969) 1 SCC 255 : AIR 1969 SC 504 (at page 509) : (1969) 3 SCR 40 (at p. 47):

'Learned counsel for the respondent, however, urged that the Prohibition Order of 1119 cannot, in any case, be held to have continued after 8 March, 1950, if the principle laid down by this Court in Firm A.T.B. Mehtab Majid & Co. Vrs. State of Madras, 1963 Supp (2) SCR 435 : AIR 1963 SC 928 is applied. In that case, Rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, was impugned. A new Rule 16 was substituted for the old Rule 16 by publication on September 7, 1955, and this new rule was to be effective from 1 April, 1955. The Court held that the new Rule 16(2) was invalid because the provisions of that rule contravened the provisions of Article 304(a) of the Constitution. Thereupon, it was urged before the Court that, if the impugned rule be held to be invalid, the old Rule 16 gets revived, so that the tax assessed on the basis of that rule will be good. The Court rejected this submission by holding that:

Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid'.

On that analogy, it was argued that, if we hold that the Prohibition Order of 1950 was invalid, the previous Prohibition Order of 1119 cannot be held to be revived. This argument ignores the distinction between supersession of a rule, and substitution of a rule. In the case of 1963 Supp (2) SCR 435 = AIR 1963 SC 928 (supra), the new Rule 16 was substituted for the old Rule 16. The process of substitution consists of two steps. First, the old rule is made to cease to exist, and, next, the new rule is brought into existence in its place. Even if the new rule be invalid, the first step of the old rule ceasing to exist comes into effect and it was for this reason that the Court held that, on declaration of the new rule as invalid, the old rule could not be held to be revived'.

In the above mentioned passage, this Court merely explained the argument which was accepted in the case of firm A.T.B. Mehtab Majid & Co. Vrs. State of Madras 1963 Supp (2) SCR 435 = AIR 1963 SC 928). After doing so, it distinguished the facts in Koteswar"s case (supra), relating to an alleged substitution of one Prohibition Order by a subsequent order which was found to be invalid. It recorded its conclusion as follows (at p. 509):

"In the case before us, there was no substitution of the Prohibition Order of 1950 for the Prohibition Order of 1119. The Prohibition Order of 1950 was promulgated independently of the Prohibition Order of 1119, and because of the provisions of law it would have had the effect of making the Prohibition Order of 1119 inoperative if it had been a valid order. If the Prohibition Order of 1950 is found-to be void ab initio, it could never make the Prohibition Order of 1119 inoperative".

The argument before us is that since the word "substituted" is used in the amending Act of 1949, it necessarily follows that the process embraces two steps. One of repeal and another of the new enactment. But, this argument is basically different from the argument which prevailed in Koteswar's case (supra) where a distinction was drawn between a "substitution" and "supersession". ***It is true that, as the term substitution was not used there, the old rule was not held to have been repealed.*** *Nevertheless, the real basis of that decision was that what was called supersession was void ab initio so that the law remained what it would have been if no such legislative process had taken place at all.* ***It was held that the void and inoperative legislative process did not affect the validity of the pre-existing rule****. And, this is precisely what is contended or by the State before us."*

55. The word "supersession", as finds place in the Odisha Transport Service (Method of Recruitment and Conditions of Services) Rules, 2021, framed in exercise of proviso to Article 309 of the Constitution, is construed to be used in the sense as the word "repeal" or the words "repeal and replacement". By using "supersession" in said notification the expression "in supersession of all Rules framed, instructions or orders issued" all that was done was to repeal and replace the previous executive instructions/circulars by this new notification, namely aforesaid Rules of 2021. Thus understood, the Odisha Transport Service (Method of Recruitment and Conditions of Services) Rules, 2021, repealed and replaced executive instructions of 17.11.1981 as amended in 1991 and 1995 with prospective effect from 05.01.2022. The succeeding words "except as respect things done or omitted to be done before such supersession" contained in said Rules, 2021 are significant, which would be construed to mean the earlier action/process undertaken on the basis of executive instructions was not wiped out.

56. In view of the settled legal position the stand of the Standing Counsel (Transport) that the earlier actions of authorities concerned for convening Departmental Promotion Committee Meeting to consider the cases of three Senior Assistants (re-designated as Assistant Section Officers) in terms of extant executive instructions gets obliterated once the Odisha Transport Service (Method of Recruitment and Conditions of Services) Rules, 2021, came into force with effect from 05.01.2022, runs counter to the interpretation of the word "supersession" as put forth by the Hon'ble Supreme Court as discussed above."

7.9. In view of such position, the decisions and actions taken in consonance with the Rules, 1994, could not be obliterated. The stand taken by the opposite parties that the appointment was not made in consonance with the provisions of the Rules, 2015 is untenable in the eye of law. There is no dispute set up in the counter affidavit by the opposite parties with regard to decision and action taken under the Rules, 1994. The counter affidavit of the opposite parties suggests that the appointment of the petitioner was illegal in terms of the Rules, 2015. Such glaring mistake in understanding the facts by the opposite parties cannot be countenanced.

7.10. Therefore, the stand taken in the counter affidavit is liable to be repelled.

8. The next contention of the learned counsel for the petitioner that the "appointing authority" as defined in Rule 2(a) of the Odisha Subordinate Statistical Surveyors (Method of Recruitment and Conditions of Service) Rules, 1994 means "the Director in respect of the posts of Senior Statistical Field Inspectors and Statistical Field Inspectors and the District Statistical Officer in respect of the posts of Statistical Field Surveyor".

8.1. As it appears from Office Order dated 29.11.2016 available at Annexure-1 it is revealed that said Office Order was issued by the Deputy Director (P&S), DPMU, Ganjam, Chhatrapur on the recommendation of the Selection Committee constituted under Rules, 1994. It could not be demonstrated by learned Additional Government Advocate that the "appointing authority" as defined under Rule 2(a) of the Rules, 1994, did not direct for appointment.

8.2. On perusal of Rule 8 read with Rule 2(d) of the Rules, 1994, it is transpired that the Deputy Director (Statistics) of concerned Range was one of the Members of the Board for direct recruitment along with the Collector and other two Officers.

8.3. Since Office Order dated 29.11.2016 is issued by the Deputy Director (P&S), DPMU, Ganjam on the recommendation of the Selection Committee/Board constituted vide this Office Order No.1038, dated 06.07.2015 [prior to the Rules, 2015 came into force with effect from 08.09.2015], this Court finds no illegality or infirmity in appointment of the petitioner as Statistical Field Surveyor (SFS).

8.4. This Court finds force in the submission of Sri Sadasiva Patra, learned counsel appearing for the petitioner that Letter No.10640/P, Bhubaneswar, dated 20.09.2019 (Annexure-8) issued by the Planning and Convergence Department, Odisha was under a preconceived notion to disengage the petitioner. The tenor of direction to the Director (E&S) contained therein to follow due procedure for disengagement would depict that "following due procedure" is an empty formality.

8.5. For better appreciation, the text of said letter dated 20.09.2019 of the Government is extracted hereunder:

> *In inviting a reference to the subject cited above. I am directed to advice you to take immediate steps to disengage Sri Ranjan Kumar Swain appointed illegally as contractual SFS by the Deputy Director (P&S), DPMU, Ganjam from services following due procedures under intimation to the Department.*
>
> *This may be treated as Most Urgent."*

8.6. In pursuance thereof, the Deputy Director (P&S), DPMU, Ganjam, Chhatrapur-Opposite Party No.4 has issued Letter No.1416, dated 27.09.2019, which reflected as follows:

> *"You are hereby disengaged from your service with effect from 27.09.2019* ***as per L.No.10640, dated 20.09.2019*** *of Planning & Convergence Department, Govt. of Odisha as your appointment in the said post is treated as irregular and illegal."*

8.7. As seen from the Letter under Annexure-8, no option was left for the Director to take decision after following "due procedure". The authority concerned was left with no alternative but to issue Letter under Annexure-9 as is manifest from aforesaid text of the Letter dated 27.09.2019.

8.8. Conjoint reading of both the letters (Annexures-8 and 9) shows that the disengagement of the petitioner was made under preconceived notion that the appointment was illegal even prior to seeking any explanation from the petitioner.

8.9. On this ground also, the order contained in Letter dated 27.09.2019 issued by the Opposite Party No.4 cannot be said to withstand judicial scrutiny.

Conclusion:

9. From the aforesaid narrated undisputed facts and the discussions on the legal perspective, it is manifestly clear that the Director vide Letter dated 20.09.2019 instructed to disengage the petitioner treating his appointment as illegal inasmuch as the recommendation for appointment of the petitioner was not made by the Selection Committee, which is not constituted under Rule 10 of the Rules, 2015, as if the consideration for appointment of the petitioner was made under the said Rules. This fact is very much apparent from the stand taken by the counter affidavit, which this Court has already repelled hitherto.

10. In the wake of above, the Letter No.10640/P, Bhubaneswar, dated 20.09.2019 issued by the Deputy Director to Government in Planning and Convergence Department, Odisha-Opposite Party No.2 (Annexure-8) cannot be held to be sustained. Hence, the same is liable to be set aside and this Court does so.

10.1. As a consequence thereof, the order of disengagement of the petitioner treating his appointment as irregular and illegal vide Letter No.1416, dated 27.09.2019 under Annexure-9 issued by the Deputy Director (P&S), DPMU, Ganjam, Chhatrapur-Opposite Party No.4 is hereby set aside.

11. Needless to say that the Opposite Parties shall grant all consequential service and financial benefits available to the petitioner.

12. In the result, the writ petition stands disposed of with the above terms, but in the circumstances there shall be no order as to costs.

Headnotes prepared by: *Result of the case:*
Shri Pravakar Ganthia, Editor-in-Chief . Writ Petition disposed of.

—— o ——

2025 (I) ILR-CUT-968

RUPALI BADAPANDA
V.
DIRECTOR GENERAL OF CENTRAL RESERVE POLICE FORCE, NEW DELHI & ANR.

[W.P.(C) NO. 23736 OF 2023]

20 FEBRUARY 2025

[MURAHARI SRI RAMAN, J.]

Issue for Consideration

Whether rejection of the candidature of the petitioner for the post of Constable in Central Armed Police Force is sustainable.

Headnotes

RECRUITMENT MATTER – Advertisement issued by the Staff Selection Commission on 27.10.2022 for recruitment to the post of Constable in different Central Armed Police Force including the post of Constable of Central Reserve Police Force – Petitioner submitted her candidature online on 14.11.2022 – Erroneously typed the High School Certificate Examination Roll Number – Whether such rejection of candidature is sustainable.

Held: No – The rejection of candidature of the petitioner *vide* Rejection Slip dated 21.07.2023 (Annexure-6) is not supported by germane consideration inasmuch as the reason ascribed to does not fall within the circumstances enumerated in paragraph 7.3 of the Guidelines No.A.VI-1/2022-Rectt (SSB)-CT/GD-2022, dated 12.06.2023 issued by the Directorate General, Central Reserve Police Force (Recruitment Branch).

In the wake of the above, having diligently considered the undisputed factual matrix, averments and contentions of both the parties, and regard being had to the decisions of the Hon'ble Supreme Court of India, the reason for rejecting the candidature of the petitioner vide Rejection Slip dated 12.06.2023 issued by the Presiding Officer, DV/DME, CT/GD-2022, Board No.1 (Annexure-6), being found to be jejune, this Court is of the considered opinion that said Rejection Slip in Annexure-6 is liable to be set aside and this Court does so. (Paras 8 & 9)

Citations References

Union of India Vrs. Miss Pritilata Nanda, **(2010) 8 SCR 733 = AIR 2010 SC 2821;** Sweety Kumari Vrs. The State of Bihar, **(2023) 12 SCR 556;** Vashist Narayan Kumar Vrs. The State of Bihar, **(2024) 1 SCR 1**; Ajay Kumar Mishra

Vrs. Union of India, **2016 SCC OnLine Del 6553;** Divya Vrs. Union of India, **(2023) 15 SCR 44– referred to.**

Keywords

Representation; Advertisement; Rejection of candidature; Roll number.

Case Arising From

Rejection slip dated 21.07.2023 issued/ passed by Opposite Party No. 2 – Presiding Officer, DV/DME, CT/GD-2022, Board No. 1 on the ground of mismatch in the Application Form and the Original High School Certificate Examination issued by the Board of Secondary Education.

Appearances for Parties

For Petitioner	: M/s. Laxmikanta Mohanty, Rashmita Das & Sumanta Das
For Opp. Parties	: Mr. Prasanna Kumar Parhi, Deputy Solicitor General of India (for High Court of Orissa & Mr. Deepak Gochhayat, CGC

Judgment/Order

Judgment

MURAHARI SRI RAMAN, J.

Questioning the propriety of rejection of candidature *vide* Rejection Slip dated 21.07.2023 issued/passed by the opposite party No.2-Presiding Officer, DV/DME, CT/GD-2022, Board No.1 on the ground of mismatch in the Application Form and the Original High School Certificate Examination issued by the Board of Secondary Education, the petitioner has knocked the doors of this Court by way of this writ petition craving to invoke extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India, with the following prayer(s):

> *"It is, therefore, prayed that this Hon'ble Court may graciously be pleased to issue notice to the opp. Parties calling upon them to file show cause as to why a direction shall not be issued to quash the order of rejection dated 21.07.2023 issued by the opposite party No.2 on the plea of mismatching in High School Certificate between Application Form and Original High School Certificate taking into consideration her successful in written test as well as physical test as well as the judgment of Hon'ble Apex Court of India rendered in between Union of India Versus Pritilata Nanda reported in AIR 2010 SC 2821.*
>
> *And after hearing the parties be pleased to quash/set aside the order of rejection dated 21.07.2023 under Annexure-6 issued by the opposite party No.2.*
>
> *A further direction be issued to the opposite party No.2 to allow the petitioner to appear in the Medical Test which shall continue till 10.08.2023 and if the petitioner found fit, she may be issued order of appointment.*
>
> *And pass such other order/orders granting complete relief to the petitioner.*
>
> *And for this act of kindness the petitioner shall as in duty bound ever pray."*

Facts:

2. Facts, as adumbrated by the writ petitioner, reveal that an advertisement was issued by the Staff Selection Commission on 27.10.2022 for recruitment to the post of Constable in different Central Armed Police Force including the post of Constable of Central Reserve Police Force. Responding to said advertisement, the petitioner made application through online on 14.11.2022. At the time of submission of online application, the Roll Number of the petitioner mentioned in the High School Certificate Examination has been erroneously typed as "18302BB0006" instead of "302BB0024".

2.1. Thereafter, the petitioner was issued e-Admission Certificate for "Constable (GD) in Central Armed Police Forces (CAPFs), SSF, Rifleman (GD) in Assam Rifles and Sepoy in Narcotics Control Bureau Examination, 2022" by the Staff Selection Commission. On being successful in the written test, the petitioner was allowed to appear in Physical Standard Test (PST) and Physical Efficiency Test (PET) for Constable (General Duty) in CAPFs. Being found qualified in the said test(s), she was issued with e-Admit Card for Detailed Medical Examination fixing date of medical test on 21.07.2023 at 6.00am.

2.2. Before medical examination, the testimonials of the petitioner was verified by the Office. The petitioner submitted all the original documents evidencing her academic qualification(s). On such verification, it was pointed out that the Roll Number given by the petitioner in the Certificate issued by the Board of Secondary Education, Odisha does not tally with the Roll Number uploaded in the online Application Form. Accordingly, by issue of Rejection Slip dated 21.07.2023 the candidature of the petitioner was rejected.

2.3. On receipt of the Rejection Slip dated 21.07.2023 (Annexure-6), the petitioner filed representation (Annexure-7) before the authority concerned on 24.07.2023 with a request to allow her for correction of mistake in feeding the Roll Number in the online Application Form. The petitioner in her representation explained as follows:

> *"****
>
> *The humble submission is as follows: The applicant Rupali Badapanda, Daughter of Rajnikanta Badapanda is a resident of Ekadia, P.O.: Siko, District: Khordha, Odisha, 752038. The application of the applicant is as follows that the applicant had applied for the post of SSC GD released on 14.11.2022.* ***At the time of application, due to the mistake of the shop owner, the roll number of the applicant's tenth class has been typed mistakenly 18302BB0006 instead of 302BB0024, while in reality the roll number of the applicant is 302BB0024.*** *Due to incorrect Roll Number, the applicant was caught with a rejection slip by 2 I/C Enjirkan Kindo of 19BN. When the applicant pleaded to appeal to the Deputy Inspector General, the applicant was refused to accept the application by 2 I/C Enjirkan Kindo, who is currently the Presiding Officer of DV/DME at GC CRPF BBSR.*
>
> *It is a humble request to the Respected sir kindly examine the original document of the applicant keeping in mind the above things and provide an opportunity to do correction roll no and medical treatment again. The applicant will always be grateful to you."*

2.4. Since the aforesaid representation of the petitioner vide Annexure-7 was not considered by the opposite parties, the petitioner has preferred this writ petition challenging the rejection of her application vide Rejection Slip dated 21.07.2023 (Annexure-6).

Counter affidavit filed by the opposite parties:

3. It has been admitted that,

> *"On being successfully qualified in Computer Based Examination as well as Physical Efficiency Test/Physical Standard Test, the petitioner was called for document verification/ detailed medical examination which was conducted at Group Centre, CRPF, Bhubaneswar with effect from 17.07.2023 to 02.08.2023. The petitioner appeared before the DV/DME, Board No.1 on 21.07.2023 at Group Centre, Bhubaneswar and her candidature was rejected as her Roll Number (302BB0024) mentioned in Matriculation Certificate issued from Board of Secondary Education, Odisha was found different than the online application. Thus, as per guidelines issued by the DIG (Recruitment), Directorate General, CRPF, New Delhi letter No.A.VI— 1/2022-Rectt— (SSB) CT/GD-2022 dated 12.06.2023, the petitioner was issued rejection slip on the same day, i.e., 21.07.2023 due to mismatch of her Roll Number."*

3.1. Refuting the contention of the petitioner, it is affirmed that the candidates must ensure that they have filled up correct details in each field of the Application Form before submission of final online application and after submission of final online application, no change/ correction/modification is circumstances. allowed under any

3.2. It has further been asserted by the opposite parties that, as per Guidelines contained in paragraph 7.2 of DIG (Rectt), Directorate General, CRPF Letter No.A.VI-l/2022-Rectt-(SSB) CT/GD-2022 dated 12.06.2023, when scrutiny of documents was undertaken during DV/DME, if any claim made in the application is not found substantiated, the candidature would be cancelled straightaway by the Presiding Officer and a photocopy of the check list shall be provided to the candidate by endorsing proper remarks/reasons of rejection.

3.3. During document verification of the petitioner by the Recruitment Board, it was noticed that the Roll Number (302BB0024) mentioned in the Certificate issued by the Board of Secondary Education, Odisha mismatched with the online application submitted by the petitioner.

Hearing:

4. Pleadings, being completed and exchanged between the counsel for respective parties, on their consent, this matter is taken up for final hearing at the stage of admission.

4.1. Accordingly, heard Sri Laxmikanta Mohanty, learned counsel appearing for the petitioner and Sri Prasanna Kumar Parhi, learned Deputy Solicitor General of India along with Sri Deepak Gochhayat, learned Central Government Counsel appearing for the opposite parties.

4.2. On conclusion of hearing, the matter stood reserved for preparation and pronouncement of Judgment.

Rival contentions and submissions:

5. Reiterating the facts as narrated in the writ petition, Sri Laxmikanta Mohanty, learned counsel appearing for the petitioner submitted that mere error in specifying the Roll Number assigned in the High School Certificate Examination of the Board of Secondary Education, as "18302BB0006" in place of "302BB0024", could not lead to indicate that the High School Certificate Examination issued by the Board of Secondary Education, Odisha is disputed. The opposite parties have never disputed said certificate and denied the petitioner to have produced wrong certificate. It is only mismatch in the feeding of the Roll Number in the online Application Form. Such trivial mistake being innocuous particularly when the Original Certificate is not disputed, the candidature of the petitioner should not have been rejected.

5.1. He vehemently contended that the candidate has qualified in every test including the written test, PST/ PET and is eligible for being considered for the post of Constable (General Duty) in CAPFs. Having declared so qualified in the tests conducted by the Staff Selection Commission, the petitioner ought to have been allowed to correct the typographical error and the opposite parties should not have denied her employment. Rather the opposite parties could have ignored such error.

5.2. Heavy reliance has been placed on *Union of India Vrs. Miss Pritilata Nanda, (2010) 8 SCR 733 = AIR 2010 SC 2821* to suggest that once the petitioner's application was accepted by the authorities and she was allowed to appear in the written and other tests and after her name could find mentioned in the merit list, it was no longer open to the authorities concerned to raise any question relating to petitioner's application for the purpose of disentitling her from the benefit of issuing her with an appointment letter. Rejection of Application Form on flimsy ground is to be construed to be a gross abuse of the power. Callous attitude of the authorities are writ large in the counter affidavit filed on behalf of opposite parties. It is indeed unfortunate that a female candidate of remote pocket of the State who applied for a post has been denied appointment on mere typographical error crept in while feeding on to the online Application Form. The Union of India, supposed to be an ideal and model employer, is required show more pragmatic than adopting pedantic approach. 6. Sri Prasanna Kumar Parhi, learned Deputy Solicitor General of India referring to Guidelines dated 12.06.2023 of the Directorate General, CRPF laid stress on the following paragraph thereof:

> *"7.2. When scrutiny of document is undertaken during DV/DME, if any claim made in the application is not found substantiated, the candidature will be cancelled straightaway by Presiding Officer and a photocopy of cheek list by endorsing proper remarks/reasons of rejection be provided duly signed by Presiding Officer to the candidate. Documents produced by the candidate may be kept in the dossier for future reference.*

In case of mismatch in name, father/mother name, gender, DOB and domicile district, the candidature will be rejected and candidate will not be allowed to participate in further stage, i.e., DME."

6.1. Having emphasised on said clause of the Guidelines, it is submitted that there is justification in rejecting the candidature of the petitioner, inasmuch as it is admitted fact that she has furnished wrong information while filling up the online Application Form.

Analysis and discussions:

7. The undisputed factual matrix would depict that,

i. The petitioner-candidate was found successful not only in written test but also qualified in PST/PET.

ii. The candidate has furnished the Original Certificate issued by the Board of Second Education indicating that the petitioner has passed the High School Certificate Examination.

iii. Said certificate evidencing that the petitioner passed Matriculation is admitted.

iii. In the Guidelines dated 12.06.2023, on which reliance has been placed by the opposite parties, it has been stipulated that,

"7.3. During the process of documents verification and before permitting the candidates for DME, following documents will be checked carefully;

7.3.1. Matriculation Certificate:

Must have passed Matriculation and the result of qualifying examination must be declared on or before 01.01.2023.

Date of Birth on the Matriculation Certificate should be same as filled by the candidate in his/her online Application failing which candidature will be cancelled (DoB is also printed on Admission Certificate).

Age of the candidate must be between 18-23 years (plus 3 years special relaxation in upper age limit as one time measure as on 01.01.2023, i.e., candidates should not have been born earlier than 02.01.1997 and later than 01.01.2005.

Note: Due to unprecedented COVID pandemic, it has been decided by the Government to grant three (3) years age relaxation beyond respective prescribed upper age limit for all categories of the candidates as one-time measure for this recruitment."

7.1. The reason for rejection of candidature of the petitioner has been reflected in the "Rejection Slip" dated 21.07.2021 is this:

"Rejection due to mismatch in Matric Certificate between Application Form Original Matric Certificate."

7.2. Said reason for rejection of candidature tested against the circumstances/ eventualities stipulated in paragraph 7.2 of the Guidelines dated 12.06.2023 would make it clear that such reason does not fall within the ken of the circumstances/ eventualities envisaged in the said paragraph of the Guidelines.

7.3. The nature of mismatch which entails rejection of candidature are that:

i. name,

ii. father/mother name,

iii. gender,

iv. date of birth and

v. domicile district.

Nevertheless, the reason for rejection of candidature/ online application of the petitioner does not envisage mismatch in typing out Roll Number. It is not the case of the opposite parties that the petitioner has not fulfilled conditions given in paragraph 7.3 of the Guidelines, dated 12.06.2023.

7.4. Thus, mismatch in furnishing the Roll Number in the online Application Form warranting rejection of candidature of the petitioner is arbitrary exercise of power vested in the Board.

7.5. It is not denied that while typing out the Roll Number in the online Application Form error has crept in. There is no allegation of misrepresentation nor suppression of material fact or undue advantage has been taken by the petitioner.

7.6. In *Sweety Kumari Vrs. The State of Bihar, (2023) 12 SCR 556* the question fell for consideration was:

> *"7. In view of the foregoing factual scenario, the questions that fall for consideration before us are as under:*
>
> *i) Whether the rejection of the candidatures of the appellants due to non-production of the original certificate at the time of interview by the Bihar Public Service Commission (hereinafter referred to as "BPSC") is justified?*
>
> *ii) In the facts and circumstances of the case, what relief can be granted to the appellants?"*

The Hon'ble Supreme Court of India while answering the question, observed thus:

> *"19. In the present case, the proof is available and true photocopies were on record. The appellants" candidature could not have been rejected merely because the original was not produced before the Commission at the time of interview in particular when such requirement was not mandatory, in view of the manner in which the Rules are couched.*
>
> ***
>
> *28. Accordingly, we set-aside the impugned judgments dated 03.11.2021, 04.09.2021 and 19.04.2023 passed by the High Court. The appellants Sweety Kumari and Vikramaditya Mishra be accommodated being successful candidate in the 30th Examination and appellant Aditi be accommodated being a successful candidate in the 31st Examination.*
>
> *29. We clarify that this judgment is passed in the peculiar facts of the case to mitigate the plea of discrimination to candidates who are before us and who knocked the door of the court well within time. It is made clear here that similarly situated candidates would not be entitled to claim the same benefit further, because they have not come before this Court within a reasonable time."*

7.7. In *Vashist Narayan Kumar Vrs. The State of Bihar, (2024) 1 SCR 1* it has been observed as follows:

> *"11.* ***Admittedly, the appellant derived no advantage as even if either of the dates were taken, he was eligible; the error also had no bearing on the selection and the appellant himself being oblivious of the error produced the educational certificates which reflected his correct date of birth.***

12. The facts are undisputed. The appellant's application uploaded from the cyber café did mention the date of birth as 08.12.1997 while his date of birth as recorded in the educational certificate was 18.12.1997. It is also undisputed that it is the appellant who produced the educational certificates. He was oblivious of the error that had crept into his application form. It is also undisputed that the advertisement had all the clauses setting out that in case the information given by the candidates is wrong or misleading, the application form was to be rejected and necessary criminal action was also to be taken. It also had a clause that the candidates had to fill the correct date of birth, according to their 10th board certificate. The clause further stated that candidates will fill their name, father's name, address etc. correctly in the application form. It states that any discrepancy, if found, while checking the documents, the candidature of the candidate will stand cancelled. There was also a clause providing for correction of wrong/erroneously filled application forms, which stated that the errors can be corrected once by redepositing the application fee and filling a new application. It also provided that those filling the application on the last date could correct the application till the following day.

13. Equally undisputed is the fact that after filling out the application, the appellant cleared the written examination and the Physical Eligibility Test. It was also stated in the counter affidavit that there were 61 unfilled vacancies though it was submitted that it was meant for the Gorkha candidates.

14. We are not impressed with the argument of the State that the error was so grave as to constitute wrong or mis-leading information. We say on the peculiar facts and circumstances of this case. Even the State has not chosen to resort to any criminal action, clearly implying that even they did not consider this error as having fallen foul of the following clause in the advertisement: „Instructions to fill online application form are available on the website. It is recommended to all the candidates to carefully read the instructions before filling the online application form and kindly fill the appropriate response in the following tabs. In case, the information given by the candidates found wrong or misleading, the application form will get rejected and necessary criminal actions will also be taken against the candidate."

15. Recently this Bench in Divya Vrs. Union of India & Ors., 2023:INSC:900 = 2023 (13) Scale 730, while declining relief to candidates who acquired eligibility after the date mentioned in the notification carved out a narrow exception. There, the judgment in Ajay Kumar Mishra Vrs. Union of India & Ors., (2016) SCC OnLine Del 6563, a case very similar to the facts of the present case, was noted. In Ajai Kumar Mishra (supra), Indira Banerjee, J. (as Her Ladyship then was) speaking for the Division Bench of the Delhi High Court in para 9 stated as under:

'9. It is true that whenever any material discrepancy is noticed in the application form and/or when any suppression and/ or misrepresentation is detected, the candidature might be cancelled even after the application has been processed and the candidate has been allowed to participate in the selection process. However, after a candidate has participated in the selection process and cleared all the stages successfully, his candidature can only be cancelled, after careful scrutiny of the gravity of the lapse, and not for trivial omissions or errors.'

The exception for trivial errors or omissions is for the reason that law does not concern itself with trifles. This principle is recognized in the legal maxim: De minimis non curat lex.

*****

25. ***On the peculiar facts of this case, considering the background in which the error occurred, we are inclined to set aside the cancellation.*** *We are not impressed with the finding of the Division Bench that there was no prayer seeking quashment of the results declared over the web. A reading of the prayer clause in the writ petition indicates that the appellant did pray for a mandamus directing the respondents to consider the candidature*

treating his date of birth as 18.12.1997 and also sought for a direction for issuance of an appointment letter. A Writ Court has the power to mould the relief. ***Justice cannot be forsaken on the altar of technicalities.***

Conclusion

26. For the reasons stated above, we set aside the judgment of the Division Bench of the Patna High Court in LPA No. 1271 of 2019 dated 22.08.2022 and direct the respondent-State to treat the appellant as a candidate who has "passed", in the selection process held under the advertisement No. 1 of 2017 issued by the Central Selection Board (Constable Recruitment), Patna with the date of birth as 18.12.1997. ***We further direct that if the appellant is otherwise not disqualified, the case of the appellant be considered and necessary appointment letter issued. We further direct that, in the event of there being no vacancy, appointment letter will still have to be issued on the special facts of this case. We make the said direction, in exercise of powers under Article 142 of the Constitution of India.*** *We further direct that the State will be at liberty in that event to adjust the vacancy in the next recruitment that they may resort to in the coming years. We notice from the written submissions of the State that 21,391 vacancies have been notified in Advertisement No.1 of 2023 and it is stated that the procedure for selection is ongoing. We place the said statement on record. We direct compliance to be made of the aforesaid direction within a period of four weeks from today."*

7.8. In the case of Ajay Kumar Mishra Vrs. Union of India, 2016 SCC OnLine Del 6553, a Division Bench of Delhi High Court has made the following observation:

"6. There can be no doubt that a candidate applying for a Government job, or for that matter, any job should fill in the Application Form carefully. No candidate can claim any vested right to rectification of arrears in an application. Union Public Service Commission and the State Public Service Commissions deal with lacs of applications, which are received pursuant to an advertisement. Such applications are required to be processed within a short time. A candidate, who is not short-listed and/or not allowed to participate in the selection process by reason of his own laches in making careless mistakes, cannot claim any right to be allowed to participate in the selection process.

7. It is for the body conducting the selection process to decide whether mistakes should be allowed to be rectified, if so, whether they should be rectified within any specific time and what are the mistakes which can be allowed to be rectified and other similar questions. However, in view of the mandate of Articles 14 to 16 of the Constitution of India, there should be no discrimination or arbitrariness in deciding these questions. All candidates applying for the particular post/posts should be treated equally.

8. This is not a case where the petitioner had not at all been short-listed. It is not a case where the petitioner has not been allowed to participate in the selection process. The petitioner had been allowed to participate and had emerged successful in every stage.

9. It is true that whenever any material discrepancy is noticed in the application form and/or when any suppression and/or misrepresentation is detected, the candidature might be cancelled even after the application has been processed and the candidate has been allowed to participate in the selection process. However, after a candidate has participated in the selection process and cleared all the stages successfully, his candidature can only be cancelled, after careful scrutiny of the gravity of the lapse, and not for trivial omissions or errors.

***

> *15. As observed above, it is not the case of the respondents that the petitioner derived any advantage by entering the wrong date of birth in his online and application. There is a difference between a mere inadvertent error and misrepresentation or suppression. There could be no intentional misrepresentation as the school certificate was submitted. The penalisation of cancellation of the candidature on the ground of a typographical error is arbitrary, unreasonable harsh and disproportionate to its gravity of the lapse. The writ petition is, therefore, allowed and the pending application also stands disposed of. The impugned order is set aside."*

7.9. The Hon'ble Supreme Court of India in Divya Vrs. Union of India, (2023) 15 SCR 44, while considering the scope of "interference with the decision of the Selecting Body" having noticed the above case of Hon'ble Delhi High Court, observed as follows:

> *"80. It will be noticed that UPSC has considered these omissions as trivial and as not going to the root of the eligibility, unlike in the case of the petitioners herein. In Ajay Kumar Mishra vs. Union of India (2016) SCC OnLine Del 6563 (sic. 6553), Indira Banerjee, J. (as Her Ladyship then was) speaking for the Division Bench of the Delhi High Court felicitously put the issue about the examining body's right to decide as to which errors are material and which are inessential and trivial."*

7.10. The copies of the testimonials were available with the online Application Form and the candidate was allowed to participate in the examination conducted by the Staff Selection Commission. It is not the case of the opposite parties that the candidate has not fulfilled the conditions stipulated in the Advertisement/Guidelines; nonetheless, the petitioner was found successful in written test and PST/PET. The mistake is found in feeding the figures of Roll Number in the online Application Form, which does not comprehend within the connotation of the expression "mismatch" as envisaged in Paragraph 7.2 of the Guidelines dated 12.06.2023.

7.11. The present case is not a case where any suppression and/or misrepresentation is detected.

7.12. Taking cue from the above view expressed in the decisions of the Hon'ble Supreme Court of India, this Court has no alternative but to hold that the rejection of candidature of the petitioner *vide* Rejection Slip dated 21.07.2023 cannot be countenanced.

Conclusion:

8. The rejection of candidature of the petitioner vide Rejection Slip dated 21.07.2023 (Annexure-6) is not supported by germane consideration inasmuch as the reason ascribed to does not fall within the circumstances enumerated in paragraph 7.3 of the Guidelines No.A.VI1/2022-Rectt (SSB)-CT/GD-2022, dated 12.06.2023 issued by the Directorate General, Central Reserve Police Force (Recruitment Branch).

9. In the wake of the above, having diligently considered the undisputed factual matrix, averments and contentions of both the parties, and regard being had to the decisions of the Hon'ble Supreme Court of India, the reason for rejecting the

candidature of the petitioner vide Rejection Slip dated 12.06.2023 issued by the Presiding Officer, DV/DME, CT/GD-2022, Board No.1 (Annexure-6), being found to be jejune, this Court is of the considered opinion that said Rejection Slip in Annexure-6 is liable to be set aside and this Court does so.

9.1. This Court on 08.08.2023 passed interim Order, which is to the following effect:

> *"1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).*
>
> *2. Pursuant to the order passed by this Court, Mr. Dash, learned counsel appearing for the Opposite Parties submitted that he has received instruction. On the basis of such instruction, it was submitted by the learned counsel for the opposite parties that in case of mismatch in name, father/mother name, general, DOB and Domicile District, the candidature will be rejected and candidate will not be allowed to participate in further stage I.E., DME.*
>
> *3. Learned counsel for the Petitioner submitted that the Petitioner has been qualified in the Physical and Written Test.*
>
> *4.* ***In such view of the matter, the Opposite parties are directed to permit the Petitioner to participate in the Medical Test. However, the same shall be subject to the final outcome of the present Writ Petition****.*
>
> *5. List this matter in the 1st week of September, 2023.*
>
> *6. Issue urgent certified copy of this order in course of the day."*

9.2. There is no plea set up at any stage by the opposite parties that the petitioner was disqualified in the Medical Test. Having found the petitioner successful at every stage of examination conducted in the recruitment process, it is, therefore, directed that the opposite parties are required to treat the online Application Form, as submitted by the petitioner as a candidate, is in order.

9.3. It is further directed that as the petitioner is not otherwise disqualified, and there being no misrepresentation or misstatement in the Application Form but for typographical error in filling up the figures of Roll Number, which is of innocuous nature, her candidature be considered and necessary steps be taken to consider appointment of the petitioner.

9.4. Having given anxious consideration to the instant fact and circumstance, this Court may also observe and direct that in the event there being no vacancy, the opposite parties may also consider appointment of the petitioner in the post applied for on the special facts of this case.

10. In the result, the writ petition stands disposed of with the above terms, but in the circumstances there shall be no order as to costs.

Headnotes prepared by: *Result of the case:*
Shri Pravakar Ganthia, Editor-in-Chief . Writ Petition disposed of.

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2025 (I) ILR-CUT-979

Sk. RIASATULLA
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 18247 OF 2024]

28 FEBRUARY 2025

[SANJAY KUMAR MISHRA, J.]

Issue for Consideration

Public Distribution System (P.D.S.) – Suspension of License – Whether the order of suspension dated 22.02.2023 is sustainable.

Headnotes

PUBLIC DISTRIBUTION SYSTEM (CONTROL) ORDER, 2016 – Clause 17 – Suspension of P.D.S. License – Show-cause notice was called for from the Petitioner – Petitioner approached Opposite Party No. 3 to supply him the documents relating to allegations leveled against him – No document was supplied – Whether the order of suspension is sustainable.

Held: No – The order dated 22.02.2023 passed by the Licensing Authority is intended to be under sub-clause (1) in the guise of suspension of P.D.S. license for an indefinite period, which is not permissible under law – The said erroneous order was also confirmed by the Appellate Authority incorrectly vide order dated 19.06.2014, which amounts to non-application of mind – That apart, the Licensing Authority, while passing the impugned order, did not follow the guidelines of Government of India vide letter No.26(12)/86-ECR dated 09.02.1988 (Annexure-7) – Hence, such an order, vide which the Petitioner's license stood suspended until further order, so also the confirming order of the Appellate Authority are illegal and unsustainable. (Para 25)

Accordingly, both the order of suspension of the P.D.S. license of the Petitioner dated 22.02.2023 at Annexure-4 as well as the confirming order dated 19.06.2024 passed by the Collector, Cuttack in P.D.S. (Appeal) No.11 of 2023 at Annexure-5 are hereby set aside. (Para 26)

List of Acts

Public Distribution System (Control) Order, 2016; Guidelines of the Government of India vide Letter No. 26(12)/86-ECR dated 09.02.1988.

Keywords

Control order; License; Public Distribution System; Licensing Authority; Suspension of license.

Case Arising From

Order of suspension dated 22.02.2023 passed by the Sub-Collector and Licensing Authority, Sadar, Cuttack and order dated 19.06.2024 passed in P.D.S. (Appeal) No. 11 of 2023 by the Appellate Authority (Collector, Cuttack) refusing to revoke the order of suspension.

Appearances for Parties

For Petitioner : Mr. L. Dash
For Opp. Parties : Mr. S.K. Parhi, A.S.C.

Judgment/Order

Judgment

S.K. MISHRA, J.

This writ petition has been preferred by the Petitioner, who is a P.D.S. Retailer, challenging the order of suspension dated 22.02.2023 passed by the Sub-Collector & Licensing Authority, Sadar, Cuttack (Opposite Party No.3) so also the Order dated 19.06.2024 passed in P.D.S (Appeal) No.11 of 2023, vide which the Collector, Cuttack (Opposite Party No.2), being the Appellate Authority, refused to revoke the order of Suspension dated 22.02.2023.

2. The factual matrix of the case, as stated in the Writ Petition, is that the Petitioner is functioning as PDS Retailer at Batapur under Nandol Gram Panchayat in Salipur, Block, Cuttack for about last 30 years without any complaint. The PDS license of the Petitioner was valid till 31.03.2023. However, on 28.12.2022, the Petitioner received a show cause notice from Opposite Party No.3 alleging some minor irregularities against the Petitioner, asking him to file reply within seven days. On 30.12.2022, the Petitioner filed an application before the Opposite Party No.3 seeking for time to file reply along with a medical certificate. Thereafter, though the Petitioner approached the Opposite Party No.3 to supply him the documents relating to allegations leveled against him, no document was supplied to the Petitioner to file his show cause. Further, on 22.02.2023 (wrongly typed as 02.02.2023) the order of suspension was passed against the Petitioner without affording any opportunity of hearing to him. Being aggrieved, the Petitioner preferred an Appeal challenging the said order dated 22.02.2023 before the Opposite Party No.2 in P.D.S (Appeal) No.11 of 2023. The said order was also upheld by the Opposite Party No.2 vide order dated 19.06.2024. Hence, this Writ Petition.

3. This writ petition has been preferred mainly on the grounds that the Opposite Party No.3 passed the order of suspension relying on some documents, which were not supplied to the Petitioner so also without disclosing about the report submitted by the Marketing Inspector, Salipur as well as the report of the Block Development Officer, Salipur regarding allegations of irregularities committed by the Petitioner. It is the case of the Petitioner that, after passing of the suspension order, an application was filed by the consumers of the Petitioner unanimously

before the Opposite Party No.3 on 13.02.2023 stating about the innocence of the Petitioner so also the allegations leveled against him to be baseless.

4. It is further case of the Petitioner that, the allegations leveled against him, are made on political consideration to oust him from PDS channel. Further, neither any document was supplied to the Petitioner along with show cause notice nor on demand made by the Petitioner to rebut the allegations. Moreover, the Order of suspension was passed by the Opposite Party No.3 without following due procedure so also without giving opportunity of hearing to the Petitioner.

5. Further, the Opposite Party No.2 also passed the impugned order dated 19.06.2014 relying on the unsupplied documents so also without assigning any reason regarding such non-supply of documents to the Petitioner and also without dealing with the point regarding providing opportunity of hearing to the Petitioner before passing the Order of suspension. The Petitioner was kept in dark about the real allegations leveled against him. Therefore, the impugned order dated 19.06.2024 being illegal, is liable to be set aside.

6. A Counter Affidavit has been filed by the State/Opposite Parties stating therein that the Opposite Party No.3 (Sub-Collector, Sadar, Cuttack) made an enquiry on the allegation made against the Petitioner. After receiving the Enquiry Report, a show cause notice was issued to the Petitioner on 28.12.2022. The Petitioner submitted an application seeking two weeks' time to file show cause on the ground that he is suffering from Amoebic colitis & Lumbago, for which the treating Physician advised him to take rest for two weeks. Subsequently, in absence of any reply from the Petitioner, the Opposite Party No.3 suspended the license of the Petitioner vide order dated 22.02.2023, which was challenged by him in P.D.S (Appeal) No.11 of 2023 before the Opposite Party No.2 on the ground that though the Opposite Party No.3 received his application along with the medical report for time to file show cause reply, his license was suspended vide order dated 22.02.2023 without considering the application so also the medical report. However, the Opposite Party No.2, after going through the submissions of the parties and the LCR/documents relating to the suspension order, rejected the Appeal and pronounced the order on 19.06.2024.

7. It is the stand of the State-Opposite Parties that, an allegation petition was made by some of the consumers of the locality alleging gross irregularities in the PDS supply against the Petitioner. An enforcement squad visited the retail point of the Petitioner and found certain irregularities committed by the Petitioner, which is evident from the report dated 23.12.2022 prepared and submitted by the enforcement squad. It is further stand of the Opposite Parties that, the Opposite Party No.3, basing upon the investigation report dated 23.12.2022, pointing out some irregularities asked the Petitioner to submit reply within seven days, failing which, it was warned to take proper action against him. A request was also made to the B.D.O, Salipur to instruct the Inspector of Supplies of the Block to conduct an enquiry at the PDS Centre of the Petitioner and submit a report. An enquiry was

conducted and a comprehensive report was submitted by the Marketing Inspector, Salipur illustrating certain irregularities in distribution system on the basis of which the license of the Petitioner was suspended vide order dated 22.02.2023. The Petitioner preferred an Appeal before the Opposite Party No.2 vide P.D.S (Appeal) No.11 of 2023 on the question as to whether he has been heard by the Opposite Party No.3 before passing the order of suspension. Though the Petitioner prayed for documents before the Opposite Party No.3, he did not turn up to collect the same.

8. In response to the Counter Affidavit filed by the Opposite Parties, the Petitioner has filed a Rejoinder Affidavit stating therein that the Show Cause Notice dated 28.12.2022 issued by the Sub-Collector, Sadar, Cuttack as well as the report of the Marketing Inspector at Annexure-D do not contain the date and time of the verification, which allegedly took place at the Depot of the Petitioner. The Petitioner also questioned about the possibility of the Inspecting Authority scrutinizing the stock and the missing price declaration board, if his shop was closed, as alleged by the Opposite Parties. Further, the Petitioner also denied the allegation with regard to charging of Rs.2/- to Rs.3/- excess price per liter of K.Oil from Ration Card beneficiaries relying on the joint representation made by consumers about his innocence at Annexure-6. Further, it is the case of the Petitioner that in Para-10 of the Counter it has been admitted that he appeared before the Sub-Collector, Sadar, Cuttack in person and prayed for the document, but allegedly did not turn up to collect the documents. Since the show cause notice was not clear about the specific allegations leveled against the Petitioner; he was not in a position to file reply for want of documents. Hence, he preferred the P.D.S (Appeal) No.11 of 2023 before the Opposite Party No.2 praying for providing opportunity of hearing before passing the order of suspension.

9. It is the case of the Petitioner that while passing the order of suspension, the Sub-Collector, Sadar, Cuttack relied on some documents, which were not supplied to the Petitioner. Nothing about the Report submitted by the Marketing Inspector, Salipur Block and Report of the Block Development Officer, Salipur, containing the allegation of irregularities committed by the Petitioner, were disclosed to him. The order passed by the Sub-Collector, Sadar, Cuttack was without providing the copies of such documents to the Petitioner enabling him to rebut the allegations. It is further case of the Petitioner that the Collector, Cuttack, in an unilateral manner, passed the order of rejection refusing to revoke the suspension order of PDS license of the Petitioner, specially relying on the documents supplied by the Marketing Inspector and Block Development Officer. It is the case of the Petitioner that soon after the order of suspension was passed, the Consumers of the Petitioner held a meeting and unanimously filed an application before the Sub-Collector, Sadar, Cuttack on 13.02.2023, stating all about the innocence of the Petitioner and that the allegations leveled against him to be baseless. It is also the case of the Petitioner that the allegations mentioned in the Show Cause Notice are minor in nature and also there was no complaint against the Petitioner from the side of the consumers.

10. Pursuant to order dated 21.10.2024, liberty being granted, the Petitioner has also filed an Additional Affidavit on 06.11.2024, in addition to the Rejoinder, stating therein that the Petitioner moved to the office of the Civil Supplies Section in the Office of the Sub-Collector, Sadar, Cuttack twice, dates of which are not recollected by the Petitioner, for collection of the documents prior to passing of the order of suspension. On the first occasion the Asst. Civil Supplies Officer, Sadar, Cuttack was found absent in the office and the Petitioner was told that the officer is on field duty. On the second occasion the A.C.S.O, Sadar, Cuttack was busy in a meeting. Thus, the Petitioner was advised to visit again for collection of the documents after receiving a letter from that office. However, no such letter was issued to him prior to issuance of order of suspension of PDS license of the Petitioner. Thus, the order of suspension was passed without affording an opportunity of hearing to the Petitioner.

11. Learned Counsel for the Petitioner, reiterating the grounds stated in the writ petition, submitted that the allegations leveled against the Petitioner are politically motivated in order to oust the Petitioner from PDS channel so also the order of suspension was passed against the Petitioner without supplying him the relevant documents to rebut the allegations along with the show cause notice dated 28.12.2022. Thus, the suspension order was passed by the Opposite Party No.3 without providing opportunity of hearing to the Petitioner, and in violation of principle of natural justice.

12. Learned Counsel for the Petitioner, drawing attention of this Court to Para-10 of the Counter Affidavit, so also Para-2 of the Additional Affidavit, submitted that though the Petitioner went to the Civil Supplies Section in the office of the Sub-Collector, Sadar, Cuttack twice for collection of the documents prior to passing of the order of suspension, on both the occasions the documents were not supplied to him. Rather, the Petitioner was advised to visit again for collection of the documents after receiving letter from the said office. But to the reason best known to the Opposite Party No.3, no such letter was issued to the Petitioner prior to issuance of order of suspension of PDS license of the Petitioner. The said fact has also been admitted by the Opposite Parties in their Counter Affidavit that the Petitioner appeared before the Sub-Collector in person and prayed for documents. But a false stand has been taken stating that the Petitioner did not turn up to take the documents. Paragraph No.2 of the Additional Affidavit filed by the Petitioner, being relevant, is extracted below for ready reference;

> *"02. That, it is humbly submitted that it is admitted in Paragraph- 10 of the Counter Affidavit that, the Petitioner appeared before the Sub-Collector, Sadar, Cuttack in person and prayed for documents. But, the Petitioner did not turn up to take the documents.* ***In this respect, it is submitted that the Petitioner moved to he Office of the Civil Supplies Section in the Office of the learned Sub-Collector, Sadar, Cuttack two times for collection of documents prior to passing of the Order of suspension, but he is not able to recollect the dates. In the first occasion, the Petitioner found the Officer, i.e. learned Asst. Civil Supplies Officer, Sadar, Cuttack, was absent in his Office and it was told that the learned A.C.S.O., Sadar, Cuttack was on field duty. On the second***

occasion, the Officer was also absent in the Office and the Petitioner was told that the learned A.C.S.O., Sadar, Cuttack was busy in meeting. The person present in the Office advised the Petitioner to come for collection of documents after receipt of the Letter from this Office. But, in vain, no letter was issued to the Petitioner prior to issuance of Order of suspension of PDS License of the Petitioner. As such, the Petitioner was not given an opportunity of hearing before passing of Order of suspension." (Emphasis supplied)

13. Learned Counsel for the Petitioner, drawing attention of this Court to joint representation at Annexure-6 of the Writ Petition, further submitted that, since the consumers of the Petitioner represented the Opposite Party No.3 on 13.02.2023 regarding the innocence of the Petitioner, the allegation as to charging excess price per liter of K.Oil from Ration Card beneficiaries is not correct. Apart from the same, the said fact regarding joint representation of the beneficiaries so also the facts detailed in Para-2 of the Additional Affidavit have not been denied by the State-Opposite Parties.

14. Per contra, learned State Counsel for the Opposite Parties submitted that, though the show cause notice dated 28.12.2022 was issued to the Petitioner by the Opposite Party No.3 before passing the order of Suspension, the Petitioner failed to give reply to the same. Thus, the Opposite Party No.3 rightly suspended the license of the Petitioner vide order dated 22.02.2023, which was further challenged by the Petitioner in P.D.S Appeal No.11 of 2023 before the Opposite Party No.2. After going through the submissions of the parties, LCR/documents relating to the suspension order, the Opposite Party No.2 has rightly rejected the Appeal vide order dated 19.06.2024 upholding the order of suspension passed by the Opposite Party No.3.

15. On perusal of the impugned order dated 19.06.2024 passed by the Collector, Cuttack, it is ascertained that, the observations by the Appellate Authority are that firstly, the irregularities leveled against the Appellant (Petitioner in the present case) were established; secondly, the Appellant was given enough opportunity to submit his show cause reply, which he failed to avail; thirdly, the villagers of the Nandol Village also submitted a petition against the Appellant pointing out irregularities in distribution of PDS materials, which corroborates the suspension order passed by the Licensing Authority and lastly, as the Appellant has been given opportunity of hearing, the Principle of Natural Justice was abided by.

16. As is revealed from LCR in PDS (Appeal) No.11 of 2023, vide order dated 24.05.2023, the Appellate Authority ordered to call for the LCR so also a detailed report of the Sub-Collector & Licensing Authority, Sadar, Cuttack. Pursuant to such order, a communication was made to the Sub-Collector and Licensing Authority by the Office of the Court Officer-cum-Deputy Collector (Jud.) Cuttack vide letter No. 184 dated 24.05. 2023 to submit the LCR along with the detailed report in connection with P.D.S (Appeal) No.11 of 2023, followed by a reminder vide letter No.307 dated 27.09.2023.

As is further revealed from the LCR, pursuant to such communication made by the Office of the Appellate Authority, instead of producing the LCR, the Additional CSO, Sadar, Cuttack, vide forwarding letter No.2219 dated 27.02.2024, submitted attested photocopies of various documents pertaining to suspension of license of the Petitioner and the Appellate Authority, without insisting for LCR, vide Order dated 19.06.2024 incorrectly mentioned that "Perused the LCR/documents submitted by the respondent and show cause reply by the appellant."

17. As is further revealed from LCR, the Marketing Inspector, Salipur, submitted a verification report dated 23.12.2022 before the Sub-Collector, Cuttack, in which it has been stated that on reaching the spot, the retail center of the Petitioner was found closed and the stock price declaration board was not maintained. Further, it was ascertained from the consumers that the Petitioner has been receiving Rs.2/- to Rs.3/- more on the price of K. Oil per liter, basing upon which the Opposite Party No.3 passed the order of suspension dated 22.02.2023.

18. However, on perusal of the representation dated 13.02.2023, submitted by huge number of consumers of Nandol G.P before the Sub-Collector, Sadar, Cuttack, which also forms part of the L.C.R., it has been mentioned therein that fake allegations have been leveled against the Petitioner due to some political reasons. It is further ascertained from the LCR that, when the matter was pending before the Opposite Party No.2, who is the Appellate Authority, a letter dated 31.05.2023 was submitted by the MLA, Salipur before him requesting for dismissal of the Appeal coupled with the letter of the Sarpanch dated 12.05.2023 and the so called representation of some of the villagers, which is also dated 12.05.2023, prior to passing of Order dated 19.06.2024 by the Collector, Cuttack.

19. In the Additional Affidavit dated 06.11.2024, in para-2, which has been reproduced above, the Petitioner has specifically stated that he had been to the Office of the Sub-Collector, Sadar, Cuttack (Licensing Authority) in person twice and approached for documents and he was asked to come for collection of documents only on getting intimation from the Office of the Opposite Party No.3. No objection/response to the said Additional Affidavit was filed by the State-Opposite Parties denying the said averments/allegations made by the Petitioner.

20. Further, in terms of order dated 21st October, 2024, an Additional Affidavit was filed by the State-Opposite Parties on 08.11.2024. In the said Affidavit, the allegation made by the Petitioner in the Additional Affidavit dated 06.11.2024 has also not been dealt with. Apart from that, the L.C.R., which has been produced by the learned State Counsel before this Court, being so directed vide order dated 21st October, 2024, does not disclose the dates of the proceedings before the Sub-Collector, who is the Licensing Authority. Further, the order sheet in P.D.S. (Appeal) No.11 of 2023 has also not been properly maintained by the Appellate Authority. Apart from that, in view of the proviso under Sub-Clause 2 of Clause 17 of the Control Order, 2016, the Petitioner should have been heard in person before passing the final order dated 22.02.2023 by the Opposite Party No.3.

21. Clause 17 of PDS Control Order, 2016, being relevant, is extracted below 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.* ***(Emphasis supplied)***

22. It is clear from the order passed by the Appellate Authority that though the subsequent representation dated 12.05.2023 submitted before him by the so called few villagers was taken into consideration while passing the impugned order dated 19.06.2024, but the joint representation of large number of villagers dated 13.02.2023 (Annexure-6) was not taken into consideration. Further, though the show cause notice dated 28.12.2022 given by the Licensing Authority indicates that one of the allegations/illegalities is Rs.2/- to Rs.3/- excess price charged per liter on K.Oil from the ration card beneficiaries, the joint representation allegedly made by some of the villagers of Nandol village dated 12.05.2023, addressed to the Collector, Cuttack-Cum-Appellate Authority, does not disclose such allegation regarding charging of extra price for K.Oil from the beneficiaries. That apart, there is also no such written report of any of the beneficiary on record to substantiate such allegation made in the verification report dated 23.12.2022 submitted by the Marketing Inspector, Salipur. Rather, the joint representation submitted by huge number of villagers/beneficiaries dated 13.02.2023, which bears their signatures, thumb

impressions and mobile numbers, as at Annexure-6 of the Writ Petition, which also forms part of the so called L.C.R. submitted before the Appellate Authority, indicates that the Petitioner has a unblemished record for the past 25 years in distribution of P.D.S. commodities to the retailers and he never demanded any extra price from any of the beneficiaries and he gives P.D.S. commodities of right quantity at right time to the beneficiaries. After suspension of his PDS license, though the said joint request was made by the beneficiaries to the Sub-Collector-cum-Licensing Authority to enquire into the matter, but the same is still pending for consideration.

23. Petitioner Apart from that, admittedly, neither the was given documents to give his response/reply to the show cause notice dated 28.12.2022 nor he was called upon to remain present before the Sub-Collector, Cuttack-cum-Licensing Authority to be heard in person before passing of the final order dated 22.02.2023, vide which his P.D.S. license was suspended until further order. It is further revealed from the L.C.R. that despite taking such a ground in the Memorandum of Appeal, the Collector, Cuttack (Appellate Authority), while passing the impugned order dated 19.06.2024, erroneously came to a conclusion that from the documents and report of the Civil Supplies Squad dated 23.12.2022 and report of the B.D.O., Salipur, all the irregularities leveled against the Petitioner-Appellant have been established and the action as per the provision of law has been taken against the Petitioner. It was also erroneously held that the Petitioner was given due opportunity for submitting his show cause reply. That apart, the Appellate Authority, though took note of the so called alleged objection filed by the villagers of Nandol village before him during pendency of the said Appeal, but did not furnish a copy of the same to the Petitioner-Appellant to have his say in the said regard. Hence, this Court is of the view that the order of suspension passed by the licensing authority dated 22.02.2023, as at Annexure-4, is illegal, being passed without giving opportunity to the Petitioner in terms of provisions enshrined under Clause-17 of the Control Order, 2016. Similarly, this Court is also of the view that the confirming order passed by the Appellate Authority dated 19.06.2024, being influenced by the alleged representation given by some of the villagers of Nandol Gram Panchayat before him on 12.05.2023, which also does not form part of the bunch of documents submitted by the Additional C.S.O., Sadar, Cuttack before him so also without dealing with the specific grounds urged before him by the Petitioner, is illegal, perverse and deserves to be set aside.

24. Pertinent to mention here that sub-clause-(4) under Clause-17 of the Control Order, 2016 empowers the Licensing Authority to suspend the license of a Dealer during pendency of the proceeding under sub-clause (1) even without giving any prior notice to the Dealer. Sub-clause (2) empowers the Licensing Authority to cancel the license for contravention of any of the terms and conditions of license or of any control order under the Act.

25. In view of such clear and unambiguous provisions under Clause-17 of the Control Order, 2016, this Court is of further view that license of a Dealer, in the interest of the smooth operation of the Public Distribution System, can be suspended during pendency of proceeding under Sub-clause (1) of Clause-17 of the Control Order and not for indefinite period even after disposal of the 17(1) proceeding, as has been ordered vide the impugned order dated 22.02.2023. Surprisingly, the Licensing Authority did not suspend the license of the Petitioner during pendency of the proceeding initiated in terms of sub-clause (1) of Clause 17 of the Control Order, 2016. The impugned order of suspension dated 22.02.2023 was passed at the end of the said proceeding on the plea that the Petitioner did not file reply to the show cause notice, instead of passing an order of cancellation in terms of sub-clause(1). As it seems, the order dated 22.02.2023 passed by the Licensing Authority is intended to be under sub-clause (1) in the guise of suspension of P.D.S. license for an indefinite period, which is not permissible under law. The said erroneous order was also confirmed by the Appellate Authority incorrectly vide order dated 19.06.2014, which amounts to non-application of mind. That apart, the Licensing Authority, while passing the impugned order, did not follow the guidelines of Government of India vide letter No.26(12)/86-ECR dated 09.02.1988 (Annexure-7). Hence, such an order, vide which the Petitioner's license stood suspended until further order, so also the confirming order of the Appellate Authority are illegal and unsustainable.

26. Accordingly, both the order of suspension of the P.D.S. license of the Petitioner dated 22.02.2023 at Annexure-4 as well as the confirming order dated 9.06.2024 passed by the Collector, Cuttack in P.D.S. (Appeal) No.11 of 2023 at Annexure-5 are hereby set aside. The matter is remitted back to the Sub-Collector, Cuttack (Opposite Party No.3), who is the Licensing Authority, to rehear the matter after supplying the Petitioner all the documents, based on which the said proceeding was initiated against him. The Licensing Authority, after supplying the documents, shall give time to the Petitioner to submit his reply/response to the show cause notice and pass appropriate order following the guidelines in the said regard dated 09.02.1988 so also in terms of Clause-17 of the Control Order, 2016. The Opposite Party No.3 is further directed to recall the order of suspension of P.D.S. license of the Petitioner forthwith and allow him to continue as Retailer as before, till he takes a decision afresh in terms of the observation made above.

27. The Writ Petition stands allowed and disposed of.

Headnotes prepared by: *Result of the case:*
Shri Pravakar Ganthia, Editor-in-Chief. Writ Petition allowed.

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2025 (I) ILR-CUT-989

PRIYADARSHINI AMRITA PANDA
V.
BISWAJIT PATI

[CRLA NO. 1257 OF 2024]

25 FEBRUARY 2025

[G. SATAPATHY, J.]

Issue for Consideration

Whether Section 379 of Bharatiya Nagarik Suraksha Sanhita, 2023 **(**BNSS) mandates a preliminary enquiry in every case.

Headnotes

BHARATIYA NAGARIK SURAKSHA SANHITA, 2023 – Section 379 – The Appellant challenges the order passed by the Judge, Family Court refusing to entertain the Petition of the Appellant essentially U/s. 379 of BNSS without making any preliminary enquiry – Whether Section 379 of BNSS mandates a preliminary enquiry in every case.

Held: No – Section 379 of BNSS does not mandate a preliminary enquiry, so also such a course may not be required to be adopted in every case – It is not in all and every case, the court has to exercise the jurisdiction of Section 379 of BNSS, unless there is an expediency in the interest of justice in the opinion of the Court – In this case, this Court does not feel such expediency in the matter because the dispute between the parties is relating to a matrimonial discord in which there is allegation and counter allegation, but the petition stated to be filed U/s. 340 of CrPC by the appellant-petitioner does not persuade this Court to direct to conduct a preliminary enquiry or to direct for institution of complaint against the respondent in this case.

(Para 5)

Citations Reference

State of Punjab Vrs. Jasbir Singh, **2022 SCC Online SC 1240;** Iqbal Singh Marwah Vrs. Meenakshi Marwah, **(2005) 4 SCC 370 – referred to.**

List of Acts

Bharatiya Nagarik Suraksha Sanhita, 2023; Code of Criminal Procedure, 1973.

Keywords

Preliminary enquiry; Jurisdiction of Court to cause enquiry; Interest of justice.

Case Arising From

Order dated 06.11.2024 passed by the Learned Judge, Family Court, Cuttack in C.P. No. 488 of 2018.

Appearances for Parties

For Appellant : Mr. B. Pujari
For Respondent : None

Judgment/Order

Judgment

G. SATAPATHY, J.

1. This criminal appeal has been stated to be filed U/S. 341 of the Code of Criminal Procedure which has already been repealed w.e.f. 1st July, 2024, but this Court, however, considers it to be a petition U/S. 379 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (in short, "BNSS"). The appellant, however, in essence challenges the impugned order dated 06.11.2024 passed by the learned Judge Family Court, Cuttack in Civil Proceeding No. 488 of 2018 refusing to entertain the petition of the appellant essentially U/S. 379 of the BNSS.

2. In the course of hearing, Mr.Basudev Pujari, learned counsel for the appellant by taking this Court through the impugned order submits that although the application of the appellant discloses some materials to take action against the respondent in terms of provision of Sec. 379 of BNSS, but fact remains that the learned trial Court by the impugned order has in fact not heard the appellant on the point and rather he has passed an order by observing inter alia that "the petition for initiation of criminal proceeding without authentic particular deserves no positive consideration, as such the same stands rejected". It is further submitted that the respondent/husband has deliberately and maliciously made false statement and suppressed facts in his disclosure affidavits filed before the learned trial Court and in such disclosure affidavit, the respondent has made a claim as if he is the only son of his father Nrushinga Charan Pati, but he has got a brother namely, Biswanath Pati who is working in a reputed company and earning Rs.3 lakhs per month and respondent-husband has also lied by stating that his father has left practice and depends on him for his maintenance, but his father N.C.Pati being an reputed Advocate has never left practice. It is also submitted by Mr.B.Pujari that the father of the respondent has landed properties and a two story building in his native place and another two story building in CDA, Cuttack, besides some landed properties in his name, but the respondent has intentionally withheld such facts in the disclosure affidavits as well as in evidence and thereby liable to be prosecuted for perjury in an action U/S. 340 of the CrPC, but the learned trial Court ignoring aforesaid facts has erroneously dismissed the application of the appellant to proceed against the respondent in terms of Sec. 340 of the CrPC.

3. In view of the aforesaid challenge by the appellant, this Court right now embark upon the petition filed by the appellant to see as to whether any action is required U/S. 379 of BNSS, but before doing that this Court considers it proper to refer to the provisions of Sec. 379 of BNSS which reads as under:

> *"**379. Procedure in cases mentioned in Section 215.-** (1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub section (1) of section 215, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in*

a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by subsection (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 215.

(3) A complaint made under this section shall be signed,-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorise in writing in this behalf.

(4) In this section, "Court" has the same meaning as in section 215".

On a comparative study of the provisions of law as exposited above vis-à-vis the averments taken by the appellant in her petition for initiation of a proceeding against the respondent U/S 379 of BNSS, this Court does not find any cogent material to proceed against the OP in terms of Sec. 379 of BNSS since according to the appellant, the respondent has made misrepresentation by suppressing facts viz. incorrect answer has been given at point No. 6 to Column No.'A' of the disclosure affidavits, so also the respondent concealing the fact of having a younger brother namely, Biswanath Pati who is earning Rs.3 lakhs monthly, but these are being question of facts needs to be established in the hearing and no opinion thereon can be framed to proceed against the respondent in terms of Sec. 349 of BNSS. Further, it was also alleged in such petition that the application U/S. 125 of the CrPC was dismissed for default, but the petition was restored on 04.10.2023 and the affidavit has been sworn by the maker of the affidavit sometime around 02.04.2024. It is also a fact that in his petition for initiation of proceeding against the respondent U/S 379 of BNSS, the appellant has raised some disputed questions which need to be adjudicated in the trial, but the provision U/S. 379 of BNSS makes it abundantly clear that the Court in which such an application has been filed to take action against a person has been conferred with discretion to proceed against such person, but the Court is not bound to proceed in the matter on the complaint of a private person and the learned trial Court in the impugned order has rightly held that the petition for initiation of criminal proceedings being without authentic particular deserves no positive consideration.

4. Be that as it may, the learned counsel for the appellant has, however, contended that if there is an application for initiation of a criminal proceeding in the nature of 379 of BNSS, the Court has to hold a preliminary enquiry and the learned counsel for the appellant in order to buttress his such submission has relied upon the decision in ***State of***

Punjab Vrs. Jasbir Singh; 2022 SCC Online SC 1240 wherein the Apex Court has called upon to answer a reference of the following two questions:-

> *(i) whether Section 340 of the Code of Criminal Procedure, 1973 mandates a preliminary inquiry and an opportunity of hearing to the would-be accused before a complaint is made under Section 195 of the Code by a Court?*
>
> *(ii) What is the scope and ambit of such preliminary inquiry ?"*

In answering the first question in above reference ***in negative***, the Apex Court has taken note of the paragraph-23 of the Constitutional Bench decision in ***Iqbal Singh Marwah Vrs. Meenakshi Marwah; (2005) 4 SCC 370***, with approval. For clarity, the paragraph-23 of the aforesaid judgment in ***Iqbal Singh Marwah (supra)*** is extracted hereunder;-

> *"In view of the language used in make Section 340 Cr.P.C.* ***the Court is not bound to a complaint regarding commission of an offence referred to in Section 195(1) (b),*** *as the Section is conditioned by the words "****Court is of opinion that it is expedient in the interest of justice."*** *This shows that* ***such a course will be adopted only if the interest of justice requires and not in every case****. Before filing of the complaint, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195 (i) (b).* ***This expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice.*** *It is possible that such forged document or forgery may cause a very serious or substantial injury to a person n the sense that it may deprive him of a very valuable property of status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and* ***the effect of such piece of evidence on the broad concept of administration of justice may be minimal.*** *In such circumstances,* ***the Court may not consider it expedient in the interest of justice to make a complaint."***

5. On a cumulative analysis of the position of law as referred to above and settled by the Apex Court in ***Jasbir Singh*** and ***Iqbal Singh Marwah (supra),*** it appears that Sec. 379 of BNSS does not mandate a preliminary enquiry, so also such a course may not be required to be adopted in every cases. However, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interest of justice that enquiry should be made into any of the offence referred to in Sec. 215(1)(b) of the BNSS. However, it is not in all and every case, the Court has to exercise the jurisdiction of Sec.379 of BNSS, unless there is an expediency in the interest of justice in the opinion of the Court. In this case, this Court does not feel such expediency in the matter because the dispute between the parties is relating to a matrimonial discord in which there is allegation and counter allegation, but the petition stated to be filed U/S.340 of CrPC by the appellant-petitioner does not persuade this Court to direct to conduct an preliminary enquiry or to direct for institution of complaint against the respondent in this case.

6. In the result, the CRLA stands dismissed.

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter CRLA dismissed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I) ILR-CUT-993

BHUPENDRA SINGH NOTEY
V.
GAGANDEEP KAUR

[W.P.(C) NO. 4283 OF 2024]

04 MARCH 2025

[G. SATAPATHY, J.]

Issue for Consideration

Whether remaining unemployed despite being a qualified person would be a ground for non-payment of *pendente lite* maintenance to wife and children.

Headnotes

HINDU MARRIAGE ACT, 1955 – Section 24 – *Pendente lite* maintenance – Petitioner-husband filed writ application challenging the maintenance award passed by the learned Family Court – The petitioner took a plea that during pendency of the case he resigned from service due to the trauma inflicted by wife and thereby he became incomeless & unable to pay the *pendente lite* maintenance – Whether remaining unemployed despite being a qualified person would be a ground for non-payment of *pendente lite* maintenance to wife and children.

Held: No – The husband, however, has not disputed his qualification, but has taken a plea of "joblessness" – At the cost of repetition, this Court with annoyance needs it to emphasize that spouses having high qualification taking plea of unemployment with no income without any sincere efforts needs to be condemned – In the backdrop of standard of living and the social standing of the husband together with his qualification and past employment in reputed organization and balancing the same with his own requirement vis-à-vis the requirement of OP-wife and the daughter of the party on the admitted income of the OP-wife, this Court considers that the learned Trial Court has not committed any illegality in awarding .15,000/- per month to be paid by the petitioner-husband to OP-wife for the maintenance of OP-wife and the daughter which by any standard cannot be considered to be unreasonable. (Para 9)

Citations References

Parvin Kumar Jain vs. Anju Jain, **(2024) SCC Online SC 3678;** Rajnesh Vrs. Neha and another, **(2021) 2 SCC 324;** Kiran Jyot Maini vrs. Anish Pramod Patel, **(2024) SCC Online SC 1724– referred to.**

List of Acts

Hindu Marriage Act, 1955.

Keywords

Joblessness; *Pendente lite* maintenance.

Case Arising From

Order dated 20.01.2024 passed by learned Judge, Family Court, Rourkela in I.A. No.48-A of 2022.

Appearances for Parties

For Petitioner : Mr. S. Sharma
For Opp. Party : Mr. A. Routray

Judgment/Order

Judgment

G. SATAPATHY, J.

1. This writ petition by the petitioner-husband is directed against the impugned order dated 20.01.2024 passed by learned Judge, Family Court, Rourkela in I.A. No.48-A of 2022 arising out of C.P. No.115 of 2018 directing the petitioner-husband to pay a sum of Rs.15,000/- per month to the OP-wife and her daughter as pedentelite maintenance w.e.f. 22.04.2017 and a sum of Rs.10,000/- towards litigation expenses to them in an application U/S. 24 of the Hindu Marriage Act (In short "the Act").

2. In the course of hearing, Mr. Subham Sharma, learned counsel appearing for the petitioner-husband, however, has empathetically submitted that the OP-wife is guilty of protracting litigation for ulterior motive by filing different applications, but fact remains that the petitioner-husband has in the meanwhile resigned from his service for the trauma inflicted by the OP-wife and, thereby, he being income-less is unable to pay such a high amount of *pendentelite* maintenance to the OP-wife. Mr. Sharma has further submitted that there is no express provision in Section 24 of the Act to provide maintenance to the children, but the learned trial Court has taken into consideration the maintenance of the child and granted such an exorbitant amount to the OP-wife. It is also submitted by Mr. Sharma that the OP-wife has given prevaricating statements with regard to income of the petitioner-husband in different proceedings under DV Act & Hindu Marriage Act and, therefore, the claim for *pendentelite* maintenance by the OP-wife having been allowed by the learned trial Court granting exorbitant amount, this Court in exercise of power under Articles 226 & 227 of the Constitution of India may kindly reduce the quantum of *pendentelite* maintenance to Rs.5,000/- by taking into consideration the unemployment of the petitioner-husband & income and qualification of the OP-wife.

3. On the contrary, Mr. Achyutananda Routray, learned counsel appearing for the OP-wife by taking this Court through the relevant portion of the counter affidavit has submitted that the petitioner-husband is not only a qualified person, but also an Electrical Engineer by profession with 32 years of experience in a reputed organization and he thereby may be directed to pay the *pendentelite* maintenance of Rs.50,000/- per month because the wife and daughter of the petitioner are also entitled to live commensurate to the standard of living of the petitioner. Further, Mr. Routray by referring to the decision in ***Parvin Kumar Jain vs. Anju Jain; (2024) SCC Online SC 3678*** has submitted that not only the wife, but also the minor children are entitled to the *pendentelite* maintenance U/S.24 of the Act and even though the children have not been explicitly referred to therein in Section 24 of the Act, but the minor children being dependents to their parents for maintenance and Section 26 of the Act provides for the maintenance of children, it would not be advisable to read application U/S. 24 of the Act in isolation to these factors while granting pendentlite maintenance to the spouse and children. Mr. Routray accordingly has prayed to dismiss the writ petition.

4. After having considered the rival submissions upon going through the materials placed on record, since the relationship between the parties is not in dispute and they being in litigating terms, the application of the wife for *pendentelite* maintenance and litigation expenses in a proceeding of this nature has to be considered in the light of provision of Sec. 24 of the Act which provides for grant of *pendentelite* maintenance and litigation expenses to either of the spouses. It is an admitted fact that more particularly the minor children of the litigating spouses for grant of relief under the Act has not been explicitly referred to in Sec.24 of the Act, but such minor children can be considered implicitly within the sweep of Sec. 24 of the Act inasmuch as the litigating spouses claiming for *pendentelite* maintenance and litigation expenses being in-charge of the custody and maintenance of minor children who depend solely on him/her have not only the onerous responsibility to bring up such children by providing proper education, but also have they the duty to see their children in the main stream of the society. The objective behind Sec.24 of the Act is intended to provide support to the spouse having no independent income sufficient for his/her support and the necessary expenses of the proceeding, but the support for his/her requirement also implicitly includes the need of their children for bringing up and providing proper education to stand in the society. Further, Sec.26 of the Act also provides the Court to pass such interim order for making provision for the maintenance and education of minor children consistently with their wishes and such order can also be passed in pending proceeding in terms of the proviso to Sec.26 of the Act.

5. In view of the aforesaid narration of facts and provisions of law together with the law laid down by the Apex Court in Parvin Kumar (supra), this Court rejects the argument/plea of the petitioner that Sec.24 of the Act does not mean to provide maintenance to the children while awarding *pendentelite* maintenance to the

wife. In this case, the wife and husband being in litigating terms in a matrimonial proceeding and admittedly the daughter of the party being in custody of OP-wife, it is now further to be seen whether the order passed by the learned trial Court granting *pendentelite* maintenance and litigation expenses to the OP-wife is just and proper or liable to be interfered with.

6. It is undisputed that the present OP is the wife of the petitioner who has brought a proceeding in the year 2016 before the learned Family Court at Jabalpur U/S. 11 read with Section 12 of the Act for a decree of nullity of marriage and/or dissolution marriage U/S. 13(1)(i-a) of the Act which was registered in CS No. 928-A of 2016, but the OP-wife moved the said Court U/S. 24 of the Act for grant of *pendentelite* maintenance and litigation expenses to her and her son, however, the aforesaid proceeding was transferred to learned Judge, Family Court, Rourkela with the intervention of the Apex Court in transfer petition (Civil) No. 16 of 2018 and the wife in her disclosure affidavit of assets and liabilities has admitted to be working as a teacher in a private school and earning net Rs.23,334/- per month. On the contrary, the petitioner-husband has taken the plea that right now he is unemployed and jobless and does not have any source of income, but in his disclosure affidavit, he has stated that he is unemployed w.e.f. 01.03.2023 and had taken personal loan of Rs.3 lakhs from brother and Rs.1 lakh from sister, but at the same time, it is stated in the disclosure statement that his qualification is BE Power Electronics and his monthly expenses Rs.5,000/- per month and his father is a pensioner and he also pays Rs.26,000/- approximately towards medical insurance.

7. Be that as it may, it is the experience that spouses in a matrimonial proceeding does not disclose the true income and thereby, the Apex Court has to step in and come with the celebrated judgment in ***Rajnesh Vrs. Neha and another; (2021) 2 SCC 324***; wherein comprehensive guidelines have been issued to file disclosure affidavit, but even thereafter the spouses are taking one or other plea to avoid to disclose their real income. Remaining unemployed is one thing and sitting idle having qualification and prospect to earn is other thing and if a husband being well qualified sufficient enough to earn sits idle only to shift the burden on the wife and expects „dole" by remaining entangled in litigation should not only be deprecated, but also be discouraged inasmuch as law never helps indolent, so also idles and does not intend to create an army of self made lazy idles. A person who is well qualified and was also in job earlier, but remains idle by quitting the job without any logic only to shift or avoiding the responsibility of maintenance of the wife cannot be appreciated in a civilized society. Law will definitely come to the rescue of such person who after making sincere efforts has failed in their pursuit to earn to maintain himself or herself together with his/her family members. Many a time, the attitude of the spouses is most important and when such instinct of such spouse is only to fight and frustrate the efforts of others is quite deplorable. In other words, spouses having high qualification, but desirous to remain idle and not making any efforts for the purpose of finding out the source of livelihood should be

discouraged. True it is that even if the husband claims to have no source of income, but his ability to earn given his education and qualification is to be taken into account as held in paragraph-26 of the judgment of the Apex Court in ***Kiran Jyot Maini vrs. Anish Pramod Patel; (2024) SCC Online SC 1724;*** wherein the Apex Court has held as under:-.

> *"26. Furthermore, the financial capacity of the husband is a critical factor in determining permanent alimony. The Court shall examine the husband's actual income, reasonable expenses for his own maintenance, and any dependents he is legally obligated to support. His liabilities and financial commitments are also to be considered to ensure a balanced and fair maintenance award. The court must consider the husband's standard of living and the impact of inflation and high living costs.* ***Even if the husband claims to have no source of income, his ability to earn, given his education and qualifications, is to be taken into account****. The courts shall ensure that* ***the relief granted is fair, reasonable, and consistent with the standard of living to which the aggrieved party was accustomed****. The court's approach should be to balance all relevant factors to avoid maintenance amounts that are either excessively high or unduly low, ensuring that the dependent spouse can live with reasonable comfort post-separation."*

8. In order to have an equitable determination of financial support required to the wife and dependent child, it can be said that maintenance should be determined after considering the status and life style of the parties, and their reasonable needs, educational qualification of the wife, so also her earning capacity as well as the financial standing and obligation of the husband shall be taken into consideration to address the rising cost of living and inflation to ensure a standard living that is proportionate to the husband's financial capacity and commensurate to the standard of his living and the standard of living of the wife and children were accustomed to prior to separation. However, there cannot be any straight jacket formula for fixing the amount, but the quantum of maintenance must be subjective to each case and his dependent on various circumstance and factors and such factors may be the income of both the parties; their conduct during subsistence of the marriage; their individual social and financial status; their personal expense; their individual capacities and duties to maintain their dependents; the quality of life enjoyed by the wife during the subsistence of marriage and such other similar factors. At the same time, it is not only equitable, but also obligatory for a father to provide for his children, especially when he has means and capacity to earn, the quality of life in the standard of his own social standing. It is also useful to refer to the principle as culled out by Apex Court in ***Rajnesh (supra)***, wherein the Apex Court at paragraphs 91 & 92 has held as under:-

> *"****91.*** *The living expenses of the child would include* ***expenses for food, clothing, residence, medical expenses, education of children. Extra coaching classes or any other vocational training courses to complement the basic education must be factored in, while awarding child support.*** *Albeit, it should be a reasonable amount to be awarded for extracurricular/ coaching classes, and not an overly extravagant amount which may be claimed.*

> ***92.*** *Education expenses of the children must be normally borne by the father. If the wife is working and earning sufficiently, the expenses may be shared proportionately between the parties."*

9. On a consideration of the principles settled by the Apex Court and applying the factors of the present case pragmatically to the provision of Sec. 24 of the Act, it appears that the proceeding between the parties is pending since 2016, but although the husband claims to be unemployed and not having independent income, but has filed application seeking custody of the child by showing him to have served at renowned organization at senior post and sufficient means. The husband, however, has not disputed his qualification, but has taken a plea of "joblessness". At the cost of repetition, this Court with annoyance needs it to emphasize that spouses having high qualification taking plea of unemployment with no income without any sincere efforts needs to be condemned. In the backdrop of standard of living and the social standing of the husband together with his qualification and past employment in reputed organization and balancing the same with his own requirement vis-à-vis the requirement of OP-wife and the daughter of the party on the admitted income of the OP-wife, this Court considers that the learned trial Court has not committed any illegality in awarding Rs.15,000/- per month to be paid by the petitioner-husband to OP-wife for the maintenance of OP-wife and the daughter which by any standard cannot be considered to be unreasonable. Further, the grant of Rs.10,000/- as litigation expenses to the OP-wife cannot be termed as arbitrary or excessive. In view of the aforesaid discussions and conspectus of facts, this Court considers that the writ petition by the petitioner-husband merits no consideration.

10. In the result, the writ petition stands dismissed on contest, but in the circumstance, there is no order as to cost.

Headnotes prepared by:
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Writ Petition dismissed.

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2025 (I) ILR-CUT-999

BASUDEV BEHERA
V.
STATE OF ODISHA

[CRLMC NOS. 2220, 2196, 2197, 2208, 2224 OF 2024]

13 FEBRUARY 2025

[SIBO SANKAR MISHRA, J.]

Issue for Consideration

Whether the order rejection passed by the learned P.O. on the plea of non-compliance of procedural facet without giving importance to the right to life and personal liberty of an accused is permissible under the law.

Headnotes

CODE OF CRIMINAL PROCEDURE, 1973 – Section 436-A r/w Art. 21 of the Constitution of India – Petitioner has been entangled under Sections 420,468,471, 506, 294 of IPC r/w Section 06 of the OPID Act, 2011 – Petitioner was taken into custody on 13.11.2017 – Resultantly, he is behind the bar for a period of more than 7 years – Petitioner filed bail application – Bail granted but the petitioner could not furnish/fulfill the bail bond/condition i.e. cash security despite repeated reduction in cash security – The petitioner instead of filing the application for modification of the bail condition, filed bail application before the Presiding Officer but the same was rejected – Challenging the rejection of the bail, present Miscellaneous application U/s. 482 of Cr.P.C. has been filed – The plea of right to personal liberty under Art.21 of the Constitution as well right to bail as provided under section 436-A of the Cr.P.C. raised.

Held: This Court is of the considered view that Section 436A of the Code of Criminal Procedure, 1973 being a statutory provision akin to the provisions of default bail provided under Section 167 of Cr.P.C., aims to safeguard the interests of under-trial accused in custody from the prolonged incarceration – In the present case, it is evident that the accused has been in custody for a prolonged period exceeding seven years and has not been released on bail due to the inability to fulfill the bail conditions – It is apparent from the face of records that the accused-petitioner has been in custody for a duration that surpasses half of the maximum sentence prescribed under the charged sections of the Indian Penal Code, 1860, and Section 6 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 – Continuing to detain the accused as an under trial for such an extended period not only contravenes the statutory rights under Section 436A but also

infringes the constitutional principles embodied in Article 21 of the Constitution of India, which along with personal liberty also includes the right to a speedy trial as an integral part of the right to life – This Court is also alive to the fact that procedurally the petitioner ought to have moved for modification of the bail condition that has been imposed by this Court while admitting him to bail – Inability to comply such bail condition despite repeated reduction of cash security amount by this Court on the application of the petitioner, itself speaks of the onerous nature of the bail condition – Condition of bail being a procedural facet of the matter, should not be allowed to prevail upon fundamental right to life and liberty of an accused – Therefore, while reaffirming the constitutional and statutory rights of the petitioner and by giving a go bye to the procedural entanglement, I prefer to allow these petitions. (Para 8)

Citations References

Satender Kumar Antil Vs. Central Bureau of Investigation & Anr, **2022 LiveLaw (SC) 577;** Vijay Madanlal Choudhary & Ors. v. Union of India & Ors., **[2022] 6 S.C.R. 382;** Bhim Singh Vs Union of India (UOI), **(2015) 13 SCC 605;** Rakesh Mukesh Shah Vs State of Maharashtra, **2018 SCC OnLine BOM 17551 – referred to.**

List of Acts

Code of Criminal Procedure, 1973; Indian Penal Code, 1860; Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011; The Constitution of India, 1950.

Keywords

Bail; Personal Liberty; Half of sentence; Statutory bail; Under trial accused; Prolonged incarceration; Condition of bail; Modification of bail condition; Procedural facet.

Case Arising From

Order of rejection of Bail Applications passed by the learned Presiding Officer, Designated Court under OPID Act, Cuttack.

Appearances for Parties

For Petitioner : Mr. Bijay Kumar Mohanty
For Opp.Party : Mr. Bibekananda Bhuyan

Judgment/Order

Judgment

SIBO SANKAR MISHRA, J.

In delivering this judgment, I am reminded of a story I heard as a child - one that speaks of the profound importance of liberty and freedom for a human being. The story goes as follows: A *jail barrack man was arrested on allegation of a petty crime and was put behind bars. This broke him into tears. The co-prisoner observantly said it shouldn't make any difference to him as he has been all along sitting on the other side of the door in the barrack for last 20 years, it shouldn't bother him now. The barrack man replied with all his consciousness, sitting on the other side of the door for 20 years was unrestrictive with all his freedom and liberty at his command. Today my liberty is withdrawn which indeed was my life.* Liberty is the breath of life. Sans it, it's like a bird with crippled wings.

Much like the story, the case before this Court is not purely about the procedural jargon that the petitioner is facing, but about his fundamental right of life and liberty enshrined under Article 21 of the Constitution of India. With this prospective, I now venture into the facts of the present case.

Entitlement of the petitioner of his release from the custody after completion of more than 50% of the maximum sentence prescribed for the offences he is charged with the issues involved in all these five cases. Therefore, analogously the matters are being heard and by a common Judgment, all the five matters are being disposed of.

2. Heard Mr. B.K. Mohanty, learned counsel for the petitioner and Mr. Bibekananda Bhuyan, learned Counsel for the OPID.

3. For better appreciation of facts of each case and developments that have taken place in the interregnum are enumerated herein in seriatim.

A. <u>CRLMC No.2220 of 2024</u>

An FIR lodged by the informant, Arun Rana, who alleged that he had given a total amount of Rs.16,50,000/- to six individuals associated with M/s. Satyam Sai Infrastructure Office in Cuttack for the purchase of land at two locations. The petitioner, Basudev Behera, issued two cheques amounting to Rs.4,00,000/- (Rs.3,00,000/- and Rs.1,00,000/-), which were dishonored due to insufficient funds and account closure. The incident was later published in a newspaper, leading to the arrest of four individuals by Chauliaganj Police Station. The petitioner was implicated under Sections 420/34 of the IPC read with Section 6 of the OPID Act, alleging fraudulent inducement and misappropriation of money without fulfilling the promise of land transaction.

* Petitioner was taken into custody on 13.11.2017.

* The petitioner had earlier moved for bail before the High Court in BLAPL No.1050 of 2019, and bail was granted on 15.05.2019, subject to his furnishing a cash security of Rs.10,00,000/-.

* Unable to comply with the condition, he filed I.A. No.61/2020, seeking modification of bail conditions.

* The High Court, vide order dated 12.02.2020, reduced the cash security to Rs.5,00,000/-, but the petitioner was still unable to arrange the amount and remained in custody.

B. CRLMC No. 2196 of 2024

This case concerns with a complaint filed by Jitendra Kumar Nayak and Priyaranjan Behera on 09.11.2017, alleging that the petitioner misrepresented himself as the Managing Partner of M/s. Satyam Sai Infratech and deceived them into paying Rs.2,50,000/- and Rs.1,60,000/- respectively, for land transactions. The petitioner failed to execute the sale deed and issued cheque, which on presentation got bounced. The offences alleged against the petitioner include Sections 420/468/471 /34 of IPC r/w Section 6 of the OPID Act.

* The petitioner filed a bail application being BLAPL No.1063 of 2019 before this Court.

* This Court granted bail on 15.05.2019, with the condition to furnish cash security of ₹1,00,000/-.

* Due to financial constraints, the petitioner filed I.A. No.64/2020 for modification of bail conditions.

* On 12.02.2020, this Court although reduced the cash security to ₹40,000/-, but the petitioner was still unable to arrange the amount and remained in custody.

C. CRLMC No. 2197 of 2024

An FIR lodged by the informant, Ajay Kumar Sahoo, who alleged that on 10.02.2017, he had engaged with the petitioner and his wife, Deepanjali Sahoo, for a land transaction worth ₹10,00,000/- at M/s. Satyam Sai Infratech. The amount was paid through Bijay Sahoo, but the accused failed to provide the land and returned only ₹1,50,000/-. As per an agreement dated 17.06.2017, the accused promised to refund the remaining amount by 28.06.2017. He issued cheques totalling ₹1,80,000/- and assured further payment by 15.07.2017. However, instead of fulfilling his commitment, the accused threatened the informant over phone, denying any wrongdoing and warned him not to file a police complaint. The accused‟s wife also allegedly threatened the informant, disclaiming any knowledge of the transaction. As a result, an FIR was registered, implicating the petitioner for commission of alleged offences under Sections 420/ 468/ 294/ 506/34 of IPC and Section 6 of the OPID Act.

* The petitioner filed a bail application being BLAPL No.1951 of 2019 before this Court.

* This Court granted bail on 11.09.2019, with the condition to furnish cash security of ₹5,00,000/-.

* The petitioner filed I.A. No.62/2020 for modification of bail conditions.

* On 06.02.2020, this Court although reduced the cash security to ₹2,00,000/-, but the petitioner was still unable to arrange the amount and remained in custody.

D. CRLMC No. 2208 of 2024

An FIR lodged by the informant, Smt. Kabita Mohanty, a 47 year-old resident of Mahanadi Vihar. She alleged that the petitioner, representing M/s. Satyam Sai Infratech Real Estate, fraudulently convinced her to pay Rs.1,70,000/- for a land transaction that never materialized. After facing delays and discovering that the petitioner had no actual land to offer, she realized that she had been deceived. The investigation revealed that the petitioner had similarly collected large sums from various individuals, issuing cheques, all of which got bounced on presentation and misrepresenting ownership of land. Basing on these allegations, the petitioner was charged for alleged commission of offences under Sections 420/468/471/34 of IPC read with Section 6 of the OPID Act.

* The petitioner moved for bail before this Court in BLAPL No.1953 of 2019.

* This Court granted bail on 11.09.2019, subject to furnishing cash security of Rs.1,50,000/-.

* The petitioner filed I.A. No.63/2020 for modification of bail conditions.

* On 06.02.2020, this Court reduced the cash security to Rs.57,500/-, but the petitioner was still unable to arrange funds and continued in custody.

E. <u>CRLMC No. 2224 of 2024</u>

A complaint was lodged by Snehalata Sukla on 11.11.2017, alleging that her husband, Chakradhar Sukla paid Rs.8,00,000/- to the petitioner for purchase of a plot at Gopalpur, which the petitioner failed to deliver. Despite repeated assurances, the petitioner did not return the money, leading to file a complaint for which FIR has been registered against the petitioner for alleged commission of offences under Sections 420/34 IPC r/w Section 6 of the OPID Act.

* The petitioner filed a bail application being BLAPL No.1057 of 2019 before this Court.

* This Court granted bail on 15.05.2019, subject to furnishing a cash security of ₹5,00,000/-.

* The petitioner filed I.A. No.64/2020 for modification of bail conditions.

* On 12.02.2020, this Court reduced the cash security to ₹2,00,000/-, but the petitioner was still unable to arrange the amount and remained in custody.

In the above five cases the accused has been in custody for more than seven years and he has been charged under various offences of the IPC and Section 6 of the OPID Act, 2011. For ready reference, the provision of the penal Sections under which the accused is charged are reproduced below: -

420 of IPC: - Cheating and dishonestly inducing delivery of property: -

Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be ***<u>punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine</u>***.

Section 468 of I.P.C Forgery for purpose of cheating:

Whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose of cheating, ***shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.***

Section 471 of I.P.C Using as genuine a forged document or electronic record:-

Whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be a forged document or electronic record, ***shall be punished in the same manner as if he had forged such document or electronic record.***

Section 506 of I.P.C. Punishment for criminal intimidation. —

Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc.— And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, ***shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.***

Section 294 of I.P.C. Obscene acts and songs: -

Whoever, to the annoyance of others— (a) does any obscene act in any public place, or (b) sings, recites or utters any obscene song, ballad or words, in or near any public place, ***shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.***

Section 6 of The Odisha Protection Of Interests Of Depositors (In Financial Establishments) Act, 2011*: - Notwithstanding anything contained in section 3, where any Financial Establishment defaults the return of the deposit or defaults the payment of interest on the deposit or fails to return in any kind or fails to render service for which the deposit have been made, every person responsible for the management of the affairs of the Financial Establishment shall be* ***punished with imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees and such Financial Establishment is also liable for a fine which may extend to two lakh rupees.***

Of all the offences, petitioner has been charged for and he is facing trial, the maximum sentence prescribed is ten years as has been reflecting from the provisions extracted herein above.

4. In the aforementioned five cases, the petitioner separately moved bail application for grant of regular bail. Besides the ground on merits of the individual cases, petitioner precisely contended that under statutory command of Section 436A of the Cr.P.C., he is entitled to be released on bail having undergone more than 50% of the maximum sentence prescribed for the offences he has been charged for and facing trial. The learned Trial Court rejected the application by separate order in all the five cases. The ground for rejection of the bail application in all the five matters are similar and for ready reference operative part of the impugned order passed in one of the aforementioned cases, namely, in CRLMC No.2224 of 2024 is reproduced below:

"Perused the case record and rival submissions of the learned counsel for accused-petitioner as well as the learned Spl.PP for the State. It is found from the record that accusation against Basudev Behera in the alleged prosecution case relates to offence punishable u/s 420 IPC r/w Sec.6 of the OPID Act, 2011. Perused the operative portion of order No.05 dtd. 15.05.2019 passed by the Hon'ble High Court of Orissa in BLAPL No.1057 of 2019 which is read as follows

XXX XXX XXX

"Considering the submissions and the circumstances, it is directed that let the petitioner be released on bail by furnishing cash security of Rs.5,00,000/- (Rupees five lakhs) besides other conditions to be imposed by the learned trail court as deemed proper."

XXX XXX XXX

Further on perusal of order No.06 dtd.20.02.2019, of the Hon'ble High Court of Orissa passed in IA No.55 of 2019 arising out of BLAPL No.1057 of 2019, it is found that Hon'ble High Court of Orissa in the above order have modified the amount of cash security to be furnished by accused-petitioner. The accused-petitioner has already been granted to release on bail but due to non-furnishing of cash security as imposed by the Hon'ble High Court of Orissa vide order dtd. 15.05.2019 in BLAPL No.1057 of 2019, the accused-petitioner is still in jail custody. As the accused-petitioner has already been granted bail by the Hon'ble High Court of Orissa, therefore the present bail petition moved by the learned counsel for accused-petitioner u/s 436A Cr.P.C is not maintainable in the eye of law. Hence, the bail petition stands rejected."

Petitioner is aggrieved by such rejections and hence challenged the same by filing five different cases.

5. Mr. Mohanty, learned Counsel for the petitioner, submitted that, petitioner had empathetically relied upon Section 436A before the learned Presiding Officer, Designated Court under OPID Act, Cuttack, while pressing for regular bail with a prayer to release him on the ground that he has already undergone detention for the period of more than onehalf of the maximum period of sentence prescribed for the offences charged against him. He emphasized the provision of Section 436A of Cr.P.C. which reads as under:

"Section 436A of Cr.P.C – Maximum period for which an under-trial prisoner can be detained: -

Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) ***undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties;***

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties;

Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law."

The provision clearly limits the duration of detention for under-trial prisoners during investigation, inquiry or trial of an offence not punishable by death to one half of the maximum period specified for that offence under the relevant law. This provision gives a statutory right to all the accused to be released after completion of more than 50% sentence prescribed for the offences they are charged for, except for the offences for which punishment of death has been specified as one of the punishment. The provision is more or less akin to Section 167(2) of Cr.P.C.

6. The learned counsel for the State while objecting to the prayer made by the petitioner, submitted that the trial court has rightly rejected the bail application, because in the form of bail application, the petitioner indeed has been seeking for the modification of conditions of bail imposed by this Court. The learned trial court had no jurisdiction to modify any condition imposed by this Court while admitting the petitioner on bail. Therefore, the petitioner needs to move separate application in all the cases before this Court seeking variation of bail conditions. He further submitted that this is not a case u/s.436A of Cr.P.C. In that view of the matter, the impugned order is justified and interference is not called for.

7. In the conspectus of the above background, the petitioner beseeches this Court to consider the application under Section 436A in the present case vis-à-vis his fundamental right enshrined under Article 21 of the Constitution of India. Liberty of a citizen supersedes the procedural barriers created under law. The Hon'ble Supreme Court in ***Satender Kumar Antil Vs. Central Bureau of Investigation & Anr***[1] has held that Section 436A of the Code of Criminal Procedure, inserted by Act 25 of 2005, serves the vital objective of preventing excessive detention of undertrial prisoners. This provision mandates that an undertrial, who has undergone detention for one-half of the maximum prescribed sentence for the offence shall be released on personal bond, with or without sureties. The use of expression "shall" in the provision signifies its mandatory nature, eliminating the necessity for a formal bail application, particularly when delays are not attributable to the accused. The period of incarceration includes custody during investigation, inquiry, trial, appeal and revision. The Hon'ble Supreme Court in the judgment has held thus: -

> "46. Section 436A of the Code has been inserted by Act 25 of 2005. This provision has got a laudable object behind it, particularly from the point of view of granting bail. This provision draws the maximum period for which an undertrial prisoner can be detained. This period has to be reckoned with the custody of the accused during the investigation, inquiry and trial. We have already explained that the word „trial" will have to be given an expanded meaning particularly when an appeal or admission is pending. Thus, in a case where an appeal is pending for a longer time, to bring it under Section 436A, the period of incarceration in all forms will have to be reckoned, and so also for the revision.
>
> 47. Under this provision, when a person has undergone detention for a period extending to one-half of the maximum period of imprisonment specified for that offense, he shall

[1] 2022 LiveLaw (SC) 577

> be released by the court on his personal bond with or without sureties. The word „shall" clearly denotes the mandatory compliance of this provision. We do feel that there is not even a need for a bail application in a case of this nature particularly when the reasons for delay are not attributable against the accused. We are also conscious of the fact that while taking a decision the public prosecutor is to be heard, and the court, if it is of the view that there is a need for continued detention longer than one-half of the said period, has to do so. However, such an exercise of power is expected to be undertaken sparingly being an exception to the general rule. Once again, we have to reiterate that '**bail is the rule and jail is an exception'** coupled with the principle governing the presumption of innocence. We have no doubt in our mind that this provision is a substantive one, facilitating liberty, being the core intendment of Article 21. The only caveat as furnished under the Explanation being the delay in the proceeding caused on account of the accused to be excluded…"

In ***Vijay Madanlal Choudhary & Ors. v. Union of India & Ors.***[2], the Hon'ble Apex Court echoed the same view that Section 436A of the Code of Criminal Procedure, 1973, is a beneficial provision aimed at upholding the right to a speedy trial under Article 21 of the Constitution. It establishes the outer limit for detention of undertrial prisoners, beyond which they should not be held unless specific reasons are recorded in writing by the court. However, the relief under this Section is not automatic and must be granted on a case-to-case basis, unlike default bail under Section 167 Cr.P.C. The Court has discretion to extend detention beyond one-half of the maximum sentence prescribed for the offence, subject to conditions ensuring the accused's availability for trial. It is further held that the State has a duty to ensure that trials, particularly in cases with stringent bail conditions are concluded expeditiously, preventing prolonged incarceration without trial. While this provision does not apply to offences punishable with the death penalty, it functions as a statutory bail provision, akin to Section 167 Cr.P.C. The Hon'ble Apex Court held as under:

> "147. Section 436A of the 1973 Code, is a wholesome beneficial provision, which is for effectuating the right of speedy trial guaranteed by Article 21 of the Constitution and which merely specifies the outer limits within which the trial is expected to be concluded, failing which, the accused ought not to be detained further. Indeed, Section 436A of the 1973 Code also contemplates that the relief under this provision cannot be granted mechanically. It is still within the discretion of the Court, unlike the default bail under Section 167 of the 1973 Code. Under Section 436A of the 1973 Code, however, the Court is required to consider the relief on case-to-case basis. As the proviso therein itself recognises that, in a given case, the detention can be continued by the Court even longer than one-half of the period, for which, reasons are to be recorded by it in writing and also by imposing such terms and conditions so as to ensure that after release, the accused makes himself/herself available for expeditious completion of the trial.
>
> 148. However, that does not mean that the principle enunciated by this Court in Supreme Court Legal Aid Committee Representing Undertrial Prisoners, to ameliorate the agony and pain of persons kept in jail for unreasonably long time, even without trial, can be whittled down on such specious plea of the State. If the Parliament/Legislature provides

[2] [2022] 6 S.C.R. 382

for stringent provision of no bail, unless the stringent conditions are fulfilled, it is the bounden duty of the State to ensure that such trials get precedence and are concluded within a reasonable time, at least before the accused undergoes detention for a period extending up to one-half of the maximum period of imprisonment specified for the concerned offence by law. [Be it noted, this provision (Section 436A of the 1973 662 Supra at Footnote No.658 Code) is not available to accused who is facing trial for offences punishable with death sentence].

149. In our opinion, therefore, Section 436A needs to be construed as a statutory bail provision and akin to Section 167 of the 1973 Code. Notably, learned Solicitor General has fairly accepted during the arguments and also restated in the written notes that the mandate of Section 167 of the 1973 Code would apply with full force even to cases falling under Section 3 of the 2002 Act, regarding moneylaundering offences. On the same logic, we must hold that Section 436A of the 1973 Code could be invoked by accused arrested for offence punishable under the 2002 Act, being a statutory bail."

In the judgement of ***Bhim Singh Vs Union of India (UOI)***[3] the Hon"ble Apex Court also expressed similar view, and held thus: -

"5. Having given our thoughtful consideration to the legislative policy engrafted in Section 436A and large number of under-trial prisoners housed in the prisons, we are of the considered view that some order deserves to be passed by us so that the under-trial prisoners do not continue to be detained in prison beyond the maximum period provided Under Section 436A.

6. We, accordingly, direct that jurisdictional Magistrate/Chief Judicial Magistrate/ Sessions Judge shall hold one sitting in a week in each jail/prison for two months commencing from 1st October, 2014 for the purposes of effective implementation of 436A of the Code of Criminal Procedure. In its sittings in jail, the above judicial officers shall identify the under-trial prisoners who have completed half period of the maximum period or maximum period of imprisonment provided for the said offence under the law and after complying with the procedure prescribed Under Section 436A pass an appropriate order in jail itself for release of such under-trial prisoners who fulfil the requirement of Section 436A for their release immediately. Such jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge shall submit the report of each of such sitting to the Registrar General of the High Court and at the end of two months, the Registrar General of each High Court shall submit the report to the Secretary General of this Court without any delay."

This Court also deems fit and proper to refer to the judgement of Hon'ble Bombay High Court in the case of ***Rakesh Mukesh Shah Vs State of Maharashtra***[4], where it has been held thus:

"5. It is a matter of record that the applicant has been in custody for 3½ years. The offence punishable under Section 420 Indian Penal Code contemplates imprisonment upto seven years. Hence, it is clear that the applicant has served more than half of the sentences."

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[3] (2015) 13 SCC 605

[4] 2018 SCC OnLine BOM 17551

> "7. It is made clear that this Court has not gone into the merits of the matter and the applicant is being enlarged on bail only under the provisions of Section 436-A of Cr.P.C."

8. In light of the foregoing discussion, this Court is of the considered view that Section 436A of the Code of Criminal Procedure, 1973 being a statutory provision akin to the provisions of default bail provided under Section 167 of Cr.P.C, aims to safeguard the interests of under-trial accused in custody from the prolonged incarceration. In the present case, it is evident that the accused has been in custody for a prolonged period exceeding seven years and has not been released on bail due to the inability to fulfil the bail conditions. It is apparent from the face of records that the accused-petitioner has been in custody for a duration that surpasses half of the maximum sentence prescribed under the charged sections of the Indian Penal Code, 1860, and Section 6 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011. Continuing to detain the accused as an undertrial for such an extended period not only contravenes the statutory rights under Section 436A but also infringes the constitutional principles embodied in Article 21 of the Constitution of India, which along with personal liberty also includes the right to a speedy trial as an integral part of the right to life. This Court is also alive to the fact that procedurally the petitioner ought to have moved for modification of the bail condition that has been imposed by this Court while admitting him to bail. Inability to comply such bail condition despite repeated reduction of cash security amount by this Court on the application of the petitioner, itself speaks of the onerous nature of the bail condition. Condition of bail being a procedural facet of the matter, should not be allowed to prevail upon fundamental right to life and liberty of an accused. Therefore, while reaffirming the constitutional and statutory rights of the petitioner and by giving a go bye to the procedural entanglement, I prefer to allow these petitions.

9. On the conspectus of the above discussion on law and fact, this Court allow all the five petitions and direct the court below to release the petitioner on bail, subject to any condition as deemed fit and proper. It's made clear that this Court has not expressed any view on the merits of the case. In the event the petitioner is found misusing the concession granted to him by this judgment, in any manner whatsoever, on the application of the prosecution, the liberty granted to the petitioner shall be withdrawn by the trial court by giving reasons.

10. Consequently, all the five CRLMCs filed by the petitioner are hereby disposed of.

Headnotes prepared by: *Result of the case:*
Sri. Jnanendra Ku. Swain, Judicial Indexer CRLMCs disposed of.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

—— o ——

2025 (I) ILR-CUT-1010

M/s. ARSS DAMOH-HIRAPUR TOLLS PVT. LTD. & ORS.
V.
REPUBLIC OF INDIA (CBI) & ORS.

[CRLMC NO.2091 OF 2022]

13 FEBRUARY 2025

[SIBO SANKAR MISHRA, J.]

Issue for Consideration

Whether in criminal cases having overtones of civil dispute with criminal facets, the High Court can exercise its inherent power and jurisdiction to quash the criminal proceedings in view of the settlement between the parties.

Headnotes

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent Power – Offences under Sections 120-B, 420 of the Penal Code as well as under Section 13(2) & 13(1) (d) of the Prevention of Corruption Act – Non-payment of bank loan – Initiation of criminal proceeding – It was alleged that disbursal of the loan was not as per the sanctioned plan and in terms of loan agreement – The Opp.Party/investigating agency pleaded that it was a condition of the One Time Settlement (OTS) and as per agreed condition, criminal case was agreed to be proceeded with, so petitioner is forbidden to take recourse to the present case seeking quashing of the criminal case and the offence being economic offence inherent jurisdiction is not warrantable – Admittedly, no forged document has been used to get the loan sanctioned – The factum of repayment of Rs. 40 crores towards full and final settlement of the loan amount under OTS is also undisputed – Consent decree from the DRT has been obtained – Whether in criminal cases having overtones of civil dispute with criminal facets, the High Court can exercise its inherent powers and jurisdiction to quash the criminal proceedings in view of the settlement between the parties.

Held: The contention of the prosecution that the OTS agreement contains stipulation to the effect that the criminal proceedings to be continued even after the settlement of the loan amount would prohibit this Court from exercising its inherent power cannot be sustained for a simple reason that a private agreement cannot take away the inherent jurisdiction of this Court U/s.482 Cr.P.C. Moreover, in the light of aforesaid discussion, this Court is of the considered opinion that no fruitful purpose would be served in keeping the criminal proceeding pending and subjecting the petitioner to the rigors of protracted trial. (Para 24)

Citations References

CBI vs. B B Aggarwal and Ors., **(2019) 15 SCC 522;** Nikhil Merchant vs. CBI and Anr., **(2008) 9 SCC 677;** State of Maharashtra Through Central Bureau of Investigation vrs. Vikram Anantrai Doshi and others, **(2014) 15 SCC 29;** Smt. Suman Devi Kela vrs. CBI, **WPCR No.678 of 2019, High Court of Chhattisgarh;** Gian Singh vrs. State of Punjab, **(2012) 10 SCC 303;** Alpic Finance Ltd. vs. Sadasivan and Anr., **(2001) 3 SCC 513 – referred to.**

List of Acts

Indian Penal Code, 1860, Prevention of Corruption Act, 1988, Code of Criminal Procedure, 1973, Prevention of Money Laundering Act, 2002.

Keywords

Inherent power; Quashing of F.I.R.; Settlement of Loan amount; One Time Settlement (OTS), Settlement between the parties; Civil disputes with criminal facet; Power of Court.

Case Arising From

F.I.R. in connection with CBI/BS & FC No. RCBSK2018E0003 dated 09.04.2018 registered at Head of Branch, CBI, BS & FC, Kolkata, and the consequent Charge Sheet No. 2/2020, dated 28.12.2020.

Appearances for Parties

For Petitioners : Mr. Gaurav Khana.

For Opp.Parties : Mr. Sarthak Nayak for CBI
Ms. Pratyusha Naidu (O.P. No.3)

Judgment/Order

Judgment

SIBO SANKAR MISHRA, J.

The petitioners by way of the present petition have invoked the inherent jurisdiction of this Court seeking quashing of proceeding emanating from the F.I.R. in connection with CBI/BS & FC No. RCBSK2018E0003 dated 09.04.2018 registered at Head of Branch, CBI, BS & FC, Kolkata, and the consequent Charge Sheet No. 2/2020, dated 28.12.2020, under section 120-B r/w 420 of the Indian Penal Code and section 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988 before the Court of the Special Judge, CBI, Bhubaneswar, Odisha along with the cognizance order dated 25.02.2021 passed by the learned Special Judge (CBI-I), Bhubaneswar in T.R. No.04 of 2021, and the supplementary Charge Sheet No.1/2022, dated 27.06.2022.

2. Heard Mr. Gaurav Khana, learned counsel for the petitioners, Mr. Sarthak Nayak, learned counsel for the CBI and Ms. Pratyusha Naidu, learned counsel for the Opposite Party No.3.

3. The prosecution has filed the charge sheet against seven persons and two Companies, the petitioner no.1 is M/s. ARSS Damoh-Hirapur Tolls Pvt. Ltd. (Accused no.4), petitioner no.2 is Sri Sunil Kumar Agarwal (Accused no.1), petitioner no.3 is Sri Sumendra Keshari Pattanaik (Accused no.2), petitioner no.4 is Sri Shiv Kumar Singla (Accused no.3) and petitioner no.5 is Sri Subash Agarwal (Accused no.5).

4. The contention of the petitioners in nutshell is that, the petitioner no.1 through rest of the petitioners (functionaries of petitioner no.1) has been awarded concession agreement to construct the highway between Damoh and Hirapur in the State of Madhya Pradesh by M/s. Madhya Pradesh Road Development Cooperation Limited (MPRDCL). The said project was to be executed on Build Operate Transfer (BOT) basis. As such, the petitioner no.1 was to construct the patch of highway running for 96 Kms and thereafter, it had the right to operate the same and collect revenue in the form of toll collection from the said project.

5. The petitioner nos.2 to 5 approached the Central Bank of India, Janpath Branch, 95 Janpath, Unit-III, Bhubaneswar and sought term loan for the purpose of construction of the Highway under the concession agreement. The bank, after long discussion and deliberation, sanctioned a loan of Rs. 87 crores. It is to be noted, for the purpose of sanctioning the loan, the bank has not taken any collateral, however, the bank had the first lien over the revenue to be generated from the collection of tolls after the construction of the Highway project. Pursuant to that, the loan agreement dated 24.10.2011 was executed between the bank and the accused persons. Between 27.10.2011 to 26.03.2012 in six tranches a total sum of Rs.56,29,06,708/- was disbursed by the bank and between 31.12.2012 to 02.05.2013, another Rs.6,03,91,961/- was disbursed to the petitioner no.1. As per the terms of the loan agreement, the repayment of the loan amount was to be started after 2 years from the Commercial Operation Date (COD), however, during this period, the petitioners had to service the interest component over that principal amount.

6. It is the contention of the petitioners that, during the period between 14.12.2011 to 28.12.2013, the petitioner no.1 i.e. M/s. ARRS Damoh Hirapur Tolls Private Limited (ADHTPL) paid interest to the tune of Rs. 10.21 crores. It has been further contended by the petitioners that, due to the default attributable to M/s. MPRDCL, the project could not be executed in timely fashion and ultimately, the dispute between M/s. ADHTPL and M/s. MPRDCL arose leading to cancelation of the concession agreement. The petitioner no.1 (M/s. ADHTPL) purportedly initiated arbitration proceedings against M/s. MPRDCL, which is still pending.

7. The petitioner no.1 fell in default in repayment of interest as well as the principal loan amount. A complaint was made to the investigating agency i.e. CBI

alleging that, the petitioners herein, in connivance with the senior bank officials of the Central Bank of India, Janpath Branch hatched a conspiracy to dishonestly take loan on the basis of the concession agreement for the road project and thereafter diverted the loan amount before defaulting in the repayment of causing wrongful loss to the bank. On the basis of such complaint, the CBI initiated the investigation and finally submitted the charge sheet no.2/2020 dated 28.12.2020 under section 120-B r/w 420 of the Indian Penal Code and Section 13(2)/13(1)(d) of the Prevention of Corruption Act against as many as 9 accused persons including the petitioners in the present petition. The two other accused persons other than the petitioners herein are Sudarsan Raj (accused no.7), Chief Manager and Branch Head, Central Bank of India, Janpath Branch, Bhubaneswar and Udaya Nath Giri (accused no.8), Assistant General Manager and Branch Head, Central Bank of India, Janpath Branch, Bhubaneswar, against whom the allegations are that, they have misused their government official position to assist the accused persons in taking bogus loan and thereby caused loss to the bank.

8. It has been argued on behalf of the petitioners that, nothing is due against the bank, as the petitioners have repaid the loan to the satisfaction of the bank under One Time Settlement (OTS) Offer, whereby the petitioners were to pay a total sum of Rs. 40 crores towards full and final settlement of the loan amount. It has been further submitted on behalf of the petitioners that, in lieu of the repayment of the loan under the OTS, the Debt Recovery Tribunal (DRT), Cuttack, vide its order dated 27.11.2020, has closed the recovery proceedings initiated by the bank against the petitioners.

9. As per the case setup by the prosecution in the charge sheet filed before the learned trial Court, the main allegation against the petitioners is that, the disbursal of the loan was not as per the sanctioned plan and in terms of the loan agreement. It has been alleged by the prosecution that disbursal of the loan amount to the tune of Rs.56,29,06,708/- was not as per the sanctioned plan and instead of the said amount, the maximum that could have been disbursed was Rs.13.05 crores. Further, it is alleged that the said huge amount has been disbursed by the accused bank official in connivance with the petitioners without adhering to the terms and conditions of loan agreement.

10. The petitioners have strenuously argued that after the settlement and repayment of loan amount to the satisfaction of the bank under the OTS, there will not be any loss to the bank and therefore, no fruitful purpose will be served by subjecting the petitioners to suffer a protracted criminal trial. In order to buttress their argument, the petitioners have heavily relied upon the judgment of Hon'ble Apex Court in the case of ***CBI vs. B B Aggarwal and Ors. (2019) 15 SCC 522 and Nikhil Merchant vs. CBI and Anr. (2008) 9 SCC 677.***

11. *Per contra,* Mr. Sarthak Naik, learned counsel for the CBI, vehemently opposed the petition submitting that settlement of civil liabilities does not per-se

exonerate the petitioners from the criminal liability for which the petitioners must face the trial. Mr. Naik has further argued that, the petitioners, in connivance with the bank officials, have caused huge loss to a national bank. It has been argued on behalf of the prosecution the fact that the disbursement of Rs. 56,29,06,708/- in only six tranches of the term loan within period from 27.10.2011 to 26.03.2012 was not in conformity with the terms of the loan agreement, which shows that the petitioners have hatched conspiracy with the accused bank officials and got the loan amount disbursed and thereafter, committed default and caused loss to the bank.

12. Mr. Nayak, further submits that it was a conditional One Time Settlement (OTS). As per the agreed condition between the bank and the petitioners, the criminal case is agreed to be proceeded with. Therefore, the petitioners are forbidden to take recourse to the present petition seeking quashing of the criminal cases initiated against them despite having agreed to the terms. He has also submitted that the cases of the present nature where serious economic offence are complained of, the same cannot be quashed by invoking the inherent jurisdiction of this Court under Section 482 Cr.P.C. To substantiate the said submission, he has relied upon the judgment of the Hon'ble Supreme Court in the case of ***State of Maharashtra Through Central Bureau of Investigation vrs. Vikram Anantrai Doshi and others***, reported in ***(2014) 15 SCC 29***. He has emphasized paragraphs-14 & 26 of the said judgment, which read as under:-

> *"14. To appreciate the complete picture in proper perspective we think it seemly to refer to the relevant decisions in the field. In Rumi Dhar vrs. State of W.B.5 while dealing with an order declining to discharge the accused under Section 239 of the Code by the learned Special Judge which has been affirmed by the High Court, a two-Judge Bench referred to the decision in CBI v Duncans Agro Industries Ltd.6 and Nikhil Merchant v. CBI came to hold as follows:*
>
> *It is now a well-settled principle of law that in a given case, a civil proceeding and a criminal proceeding can proceed simultaneously. Bank is entitled to recover the amount of loan given to the debtor. If in connection with obtaining the said loan, criminal offences have been committed by the persons accused thereof including the officers of the bank, criminal proceedings would also indisputably be maintainable."*
>
> *In the said case, the Court took note of the fact the compromise entered into between Oriental Bank of Commerce and the accused pertaining to repayment of loan could not form the foundation of discharge of the accused. The twoJudge Bench appreciated the stand of CBI before the High Court that the criminal case against the accused had started not only for obtaining loan but also on the ground of criminal conspiracy with the bank officers and accordingly upheld the order passed by the High Court.*
>
> *26. We are in respectful agreement with the aforesaid view. Be it stated, that availing of money from a nationalized bank in the manner, as alleged by the investigating agency, vividly exposits fiscal impurity and, in a way, financial fraud. The modus operandi as narrated in the chargesheet cannot be put in the compartment of an individual or personal wrong. It is a social wrong and it has immense societal impact. It is an accepted principle of handling of finance that whenever there is manipulation and cleverly conceived contrivance to avail of these kind of benefits it cannot be regarded as a case having overwhelmingly and predominantingly of civil character. The ultimate*

victim is the collective. It creates a hazard in the financial interest of the society. The gravity of the offence creates a dent in the economic spine of the nation. The cleverness which has been skillfully contrived, if the allegations are true, has a serious consequence. A crime of this nature, in our view, would definitely fall in the category of offences which travel far ahead of personal or private wrong. It has the potentiality to usher in economic crisis. Its implications have its own seriousness, for it creates a concavity in the solemnity that is expected in financial transactions. It is not such a case where one can pay the amount and obtain a "no due certificate" and enjoy the benefit of quashing of the criminal proceeding on the hypostasis that nothing more remains to be done. The collective interest of which the Court is the guardian cannot be a silent or a mute spectator to allow the proceedings to be withdrawn, or for that matter yield to the ingenuous dexterity of the accused persons to invoke the jurisdiction under Article 226 of the Constitution or under Section 482 of the Code and quash the proceeding. It is not legally permissible. The Court is expected to be on guard to these kinds of adroit moves. The High Court, we humbly remind, should have dealt with the matter keeping in mind that in these kind of litigations the accused when perceives a tiny gleam of success, readily invokes the inherent jurisdiction for quashing of the criminal proceeding. The court's principal duty, at that juncture, should be to scan the entire facts to find out the thrust of allegations and the crux of the settlement. It is the experience of the Judge that comes to his aid and the said experience should be used with care, caution, circumspection and courageous prudence. As we find in the case at hand the learned Single Judge has not taken pains to scrutinize the entire conspectus of facts in proper perspective and quashed the criminal proceeding. The said quashment neither helps to secure the ends of justice nor does it prevent the abuse of the process of the Court nor can it be also said that as there is a settlement no evidence will come on record and there will be remote chance of conviction. Such a finding in our view would be difficult to record. Be that as it may, the fact remains that the social interest would be on peril and the prosecuting agency, in these circumstances, cannot be treated as an alien to the whole case. Ergo, we have no other option but to hold that the order of the High Court is wholly indefensible."

He has also relied upon many other judgments of different High Courts and submitted that the defrauding of the bank by the petitioners is an offence that affects to the society at large. Quashing of the proceeding on the ground that the money has been paid back to the bank is of no consequence as the crime has already been committed an offence under the Prevention of Corruption Act has been initiated against the petitioners. Economic offences involving financial and economic wellbeing of the State have implications which lies beyond the domain of a mere dispute between private disputants. Therefore, this Court should decline to interfere with this matter at this stage. He has further argued that the cases involving Prevention of Corruption Act should not be quashed. He has also pointed out that the Directorate of Enforcement, Bhubaneswar Zonal Office vide order dated 31.01.2023 has already passed a provisional attachment order against the petitioners. That apart, the Enforcement Directorate has also instituted a complaint on 03.08.2023 under Section 45 read with Section 44 of the Prevention of Money Laundering Act, 2002 (PMLA Act). Hence, interference by this Court at this stage would have direct implication on the parallel proceedings initiated against the petitioners under various other statutes.

13. Ms. Naidu, learned counsel for the opposite party No.3 (bank) has highlighted the terms of OTS and drawn attention of this Court to the letter dated 28.03.2019, whereby the OTS proposal of the petitioners were accepted. It would be relevant to reproduce the contents of the said letter:-

> *"BM/JABHUB/2018-19/538*
>
> *Director*
> *M/s. ARRS Damoh-Hirapur Tolls Pvt. Ltd*
> *Plot No.38, Sector-A, Zone-D*
> *Mancheswar Industrial Estate*
> *Bhubaneswar.*
>
> *Reg:- Your OTS proposal dated 07/03/2019.*
>
> *Ref:- Your letter ARSS/CBI/2018-19/1209 dated 07/03/2019.*
> *On the subject maker, please take the reference of your above letter. We are pleased to inform you that our higher authorities have accepted your OTS offer of Rs.40.00 crore and approved the proposal on the condition mentioned hereunder:-*
>
> *1.Upfront amount of Rs.4.00 crore deposited by you, which is presently kept under "no lien", will be accounted for immediately towards your dues.*
>
> *2. You have to pay Rs.6.00 crore by 31/03/2019.*
>
> *3. Remaining amount of Rs.30.00 crore to be paid in three quarterly equal instalment of Rs. (10.00) crore each by 30th June 2019, 30th September 2019 & 31st December 2019 respectively and interest @ 10% simple on reducing balance is to be recovered.*
>
> *4. The said OTS has been approved with the stipulation that entire dues of the group concern M/s Anil Contractor Pvt. Ltd must be paid by 31/03/2019.*
>
> ***5. Criminal action will continue.***
>
> *6. All litigation filed by you against the bank should be withdrawn.*
>
> *7. You will enter consent decree with the usual default clause.*
>
> *8. In case you fail to pay the compromise amount within stipulated period entire concessions will stand withdrawn and it will be treated as if there was no compromise settlement in the account and in that case all recovery proceeding will continue further.*
>
> *Please acknowledge and ensure compliance positively."*

Relying upon the Clause-(5) of the aforementioned OTS, Ms. Naidu, submits that the criminal action already initiated should continue, as agreed upon by the bank and the petitioners.

14. Heard learned counsel for the parties and after perusing the records, the issue for consideration by this court falls in a very narrow compass as to whether subjecting the petitioners, who have repaid their oan liability to the satisfaction of the bank under the OTS, would serve the ends of justice or would constitute an abuse of process of law?

15. For the purpose of deciding the issue in lis, it is essential to note the admitted fact of the case that the loan was properly sanctioned by the bank and there is no dispute that any forged document has been used in order to get the loan sanctioned by the petitioners. Further, it is nobody's case that any forged document

is used to create any collateral against the sanctioned loan rather, there was no collateral taken by bank for the purpose of sanctioning the loan. It is further admitted fact on record that the repayment of the loan was to be started after two years from the Commercial Operation Date (COD). However, during this period, the interest on the disbursed amount was to be paid by the petitioners. It is further undisputed fact that the petitioners during the period between 14.12.2011 to 28.12.2013 have paid Rs. 10.21 crores to the bank towards the interest. However, the prosecution has disputed that the said amount on the ground that between 13.12.2012 to 02.05.2013, the bank has disbursed Rs.6,03,91,961/- to the petitioner no.1, therefore, only an amount of Rs.4,14,74,608/- has been realized by bank as interest. This is pure and simple banking reconciliation accounting.

16. The factum of repayment of Rs.40 Crores towards full and final settlement of the loan amount under OTS is undisputed. After the OTS amount was paid to the bank, the opposite party No.3 (bank) moved an application before the learned Debts Recovery Tribunal to withdraw its Original Application, in view of the fact that the petitioners had deposited the settlement amount to the full and final satisfaction of bank. The learned Tribunal vide its order dated 27.11.2020 dismissed the Original Application of the opposite party No.3, the bank as withdrawn, observing as follows:-

> *"it has been stated that during the pendency of the above O.A. the defendants had entered into a compromise settlement with the Bank and had deposited the entire compromise amount amounting to Rs.40.00 Crores with the bank towards full and final satisfaction of the Bank's dues. In view of the above payment the loan account has been closed, no cause of action exists to proceed with the original application and the original application has become infructuous. A prayer has been made to withdraw the Original Application.*
>
> *In the view of the payment made under compromise in full and final settlement of the dues of the bank and closure of the loan account, the interest of justice warrants that the case be closed."* *(emphasis supplied)*

17. In this backdrop, the rival contention of the prosecution as well as the petitioners is to be weighed.

18. The Hon'ble Supreme Court in the case of Nikhil Merchant (supra) has held that in criminal cases having overtones of civil dispute with criminal facets, the High Courts can exercise their inherent powers and jurisdiction to quash the criminal proceedings, since in view of the settlement between the parties, continuance of the criminal proceeding would be a futile exercise. The relevant paragraphs of the said judgment are extracted herein below :-

> *"30. In the instant case, the disputes between the Company and the Bank have been set at rest on the basis of the compromise arrived at by them whereunder the dues of the Bank have been cleared and the Bank does not appear to have any further claim against the Company. What, however, remains is the fact that certain documents were alleged to have been created by the appellant herein in order to avail of credit facilities beyond the limit to which the Company was entitled. The dispute involved herein has overtones of a*

civil dispute with certain criminal facets. The question which is required to be answered in this case is whether the power which independently lies with this Court to quash the criminal proceedings pursuant to the compromise arrived at, should at all be exercised?

31. On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this Court in B. S. Joshi case [(2003) 4 SCC 675: 2003 SCC (Cri) 848] and the compromise arrived at between the Company and the Bank as also clause 11 of the consent terms filed in the suit filed by the Bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise."

(emphasis supplied)

19. Similarly, in the case of ***B B Aggarwal (supra)*** wherein the facts are almost identical to the facts of the present case, the Hon'ble Apex Court has held that, when the parties have settled their dispute and consent decree from the DRT has been obtained after repaying the settlement amount, no live issue survives and therefore, it would be an abuse of process of law to continue the criminal trial against the accused person. The relevant paragraphs of the said judgment are extracted herein below :

"12. The High Court was of the view that on resettlement of accounts, the parties obtained the consent decree from DRT and paid the entire sum, therefore, there is no live issue, which now survives. The High Court then examined the question as to whether the issue of criminality is involved so as to allow the trial court to continue on its merits. After examining this issue with reference to charges and found involved notwithstanding the settlement of the case between the parties.

13. We are also of the view that there arises no occasion to prosecute the respondents as was rightly held by the High Court while quashing the criminal case against the respondents.

14. The learned counsel for the appellant, placing reliance on the decision of this Court in Rumi Dhar v. State of W.B. [Rumi Dhar v. State of W.B., (2209) 6 SCC 364: (2009) 2 SCC (Crl. 1074] contended that notwithstanding settlement of the civil suits by the parties, the criminal case out of which these appeals arises has to be brought to its logical end one way or the other on merits and the High Court was, therefore, not right in quashing the charge-sheet at its threshold under Section 482 CrPC.

15. We find no merit in her submission. When we take into account the entire undisputed controversy mentioned above, we also find that there is no criminality issue surviving qua those accused, who are alive so as to allow the prosecuting agency to continue with the criminal trial on merits. Indeed, it would be an abuse of process, as was rightly held by the High Court to which we concur." *(emphasis supplied)*

While delving upon the judgment of the Hon'ble Supreme Court in the case of ***B.B. Agarwal (supra***), it is appropriate to deal with the submission of Mr. Nayak. It was specifically urged by Ms. Naidu, learned counsel for the opposite party No.3 supported by Mr. Nayak that the OTS letter dated 28.03.2019 mentioned at Clause-(5) that ***"Criminal action will continue"***. Based on the same, it was argued before this Court that despite the full and final settlement under the OTS, the criminal proceedings should not be quashed. It is relevant to mention that the bank officials

have no authority to scuttle the criminal proceeding by mentioning it in OTS. Once criminal law set into motion, the Court of Law assumes its jurisdiction and the same can only be terminated in accordance with law. By way of a contract, the parties cannot terminate a criminal proceeding. Therefore, it was beyond the realm of the bank authorities to touch the criminal proceeding at the time of OTS. It is only the High Courts while exercising their inherent powers or the Hon'ble Supreme Court, which can direct quashing or closure of the criminal proceedings in the OTS. In fact, a similar condition was contained in the OTS in the case of B.B. Agarwal (supra), and the same is reproduced in the detailed judgment of the Delhi High Court in CRLMC No.5722-30 of 2006 passed on 18.04.2009 which had travelled to the Supreme Court. Relevant would be to reproduce the said order:-

> *14. Pursuant to the notice issued to it, PNB has filed an affidavit of reply dated 6th April 2009 in which it is inter alia stated as under:-*
>
> **** ***** ****
>
> *"8. I say that during the year 2005 after initiation of SARFAESI action, Mr. Sunil Patel claiming to be director of applicant No.7 had given the One Time Settlement proposal. I say that after negotiations with said Mr. Sunil Patel, the Respondent No.5 accepted the offer for Rs.1220.00 Lakhs on various terms and conditions settled by the respondent No.5. The acceptance along with the terms and conditions was informed to the concern parties wherein it was clearly mentioned that on payment of the entire compromise amount the parties shall be released of their liabilities and bank charge shall be released. Further, it was also mentioned that as regards ongoing criminal proceedings in a charge sheet filed by CBI, bank shall not interfere with these matter except informing to CBI that notwithstanding the criminal breach of trust and criminal conspiracy, parties have settled their civil liabilities with the bank.*
>
> **** **** ****
>
> *10. I say that in the aforesaid circumstances the respondent No.5 have discharge (sic discharged) the applicant No.6 and 7 from their civil liabilities towards respondent No.5. I further say that the acceptance of compromise by the respondent No.5 is commercial decision taken by them without prejudice to the ongoing investigation or outcome of the criminal proceedings pending in the Hon'ble Court."*

20. Similarly, the High Court of Chhattisgarh in the case of ***Smt. Suman Devi Kela vrs. CBI in WPCR No.678 of 2019*** was also dealing with the case of quashing, where the accused persons had entered into an OTS, wherein one of the conditions was that the bank will not withdraw the criminal proceedings being prosecuted by the CBI. The OTS conditions are recorded of the said judgement, which reads as under:-

> *"(C) Bank will not withdraw any criminal proceedings filed against the company and/or its promoters/guarantor, however, settlement of the account under OTS would be informed to CBI and RBI."*

21. The High Court also noted that such a condition is mentioned because a bank employee is not empowered to compound the offence in an OTS letter and thereafter, relying upon the decisions of the Hon'ble Supreme Court in ***Nikhil Merchand*** (supra) and ***Gian Singh vrs. State of Punjab*** reported in ***(2012) 10 SCC***

303, whereas the Hon'ble Supreme Court quashed the criminal proceedings against the accused persons on the ground of OTS:-

> *"16……. In the settlement order of DRT dated 31.01.2018, this was recorded that the Bank will not withdraw any criminal proceedings filed against the company or its representatives, but the settlement of the account under the OTS would be informed to the CBI & RBI. The said action of the bank would demonstrate the intention of the bank and it can be logically inferred that the Bank was not empowered to compound the offence despite the dues of the bank are totally liquidated, however, the obligation to informant CBI & RBI about the OTS was recorded."*

22. On the similar line, the Hon'ble Supreme Court in the case of ***Alpic Finance Ltd. vs. Sadasivan and Anr. (2001) 3 SCC 513*** has held that the failure to repay the debt itself will not amount to commissioning the offence of cheating punishable under Section 420 of the Indian Penal Code (I.P.C.). To bring the charges under Section 420 of the I.P.C., it is essential that the accused, at the time of taking loan, had intention to defraud the lender and, for that purpose, the borrower had deceived the lender to believe things which are false to be true. The relevant paragraphs of the said judgment are extracted herein below:-

> *"10. The facts in the present case have to be appreciated in the light of the various decisions of this Court. When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law. The injury alleged may form the basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have a right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that the respondents committed the offence under Section 420 IPC and the case of the appellant is that the respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any wilful misrepresentation. Even according to the appellant, the parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception."*

23. In the facts of the present case, it is very much clear that the genesis of the dispute lies in commercial activities and transactions. The bank has sanctioned the loan and in the process of sanctioning, no forged documents have been used. In our Country, delay in execution of infrastructure projects leading to derailment of infrastructural projects like construction of Highway and Bridges is not a new

phenomenon. Therefore, finding criminality in non-completion of the projects would be farfetched. The facts of the present case shows that the loan was taken for the purpose of construction of the Highway project and interest of the bank was secured by creating first lien over the revenue of the toll, which was to be generated after commencement of the project. The criminal proceedings cannot go into the real cause of disruption of the highway project or, for that matter, whether the petitioners have deliberately stalled the Highway project to cause loss to the bank, particularly in view of the fact that the petitioners have repaid Rs. 40 Crores to the bank under the OTS to the full and final settlement of the loan amount.

24. The contention of the prosecution that the OTS agreement contains stipulation to the effect that the criminal proceedings to be continued even after the settlement of the loan amount would prohibit this Court from exercising its inherent power cannot be sustained for a simple reason that a private agreement cannot take away the inherent jurisdiction of this court under Section 482 Cr. P.C. Moreover, in the light of aforesaid discussion, this court is of the considered opinion that, no fruitful purpose would be served in keeping the criminal proceeding pending and subjecting the petitioners to the rigors of protracted trial.

25. Accordingly, in the light of and following the judgments of the Hon'ble Supreme Court in the cases of ***B B Aggarwal (supra.) & Nikhil Merchant (supra.)***, the F.I.R. No. RCBSK2018E0003 dated 09.04.2018 registered at Head of Branch, CBI, BS & FC, Kolkata, the consequent Charge Sheet No. 2/2020,dated 28.12.2020, under Section 120-B r/w 420 of the Indian Penal Code and Section 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988, along with the cognizance order dated 25.02.2021 passed by the learned Special Judge (CBI), Bhubaneswar in T.R. No. 04 of 2021, and supplementary Charge Sheet No. 1/2022, dated 27.06.2022 and the proceedings consequent thereto are hereby stand quashed qua the petitioners.

26. The petition stands allowed, and the pending applications stand disposed of.

Headnotes prepared by: *Result of the case:*
Sri. Jnanendra Ku. Swain, Judicial Indexer Petition allowed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

—— o ——

2025 (I) ILR-CUT-1022

RATNAKAR SAHOO (DEAD) & ORS.
V.
SIBA PRASAD RAJU (DEAD) & ORS.

[S.A. NO. 411 OF 2001]

17 JANUARY 2025

[A.C. BEHERA, J.]

Issues for Consideration

1. Whether the measurement of the suit properties by the Amin without the fixed point is acceptable under law.

2. Whether the dismissal of the suit due to irregularity in Amin's report is sustainable under law.

Headnotes

(A) CODE OF CIVIL PROCEDURE, 1908 – Order 26, Rule 9 – Measurement of the suit properties by the Amin on being deputed by the learned Trial Court – The Amin (P.W.4) himself has admitted in his deposition that he did not find the fixed point for measurement – Taking into account the evidence of the Amin (P.W.4) and his report vide Ext. 4, the Learned Trial Court passed the decree – Whether the measurement of the suit properties by the Amin without the fixed point is acceptable under law.

Held: No – The measurement report without fixed point cannot be acceptable under law. (Paras 18 & 19)

(B) PROPERTY LAW – Irregularity in Amin report – Duty of Court – 1st Appellate Court has set aside the entire judgment and decree of the Trial Court on the sole ground of rejection of the report of Amin vide Ext. 4 – Amin himself in his deposition stated that he did not find the fixed point for measurement – Whether the dismissal of the suit due to irregularity in Amin's report is sustainable under law.

Held: No – When the report of the Amin is discarded/ rejected, it is the proper course for the court either to issue a fresh Amin or to remand the matter for re-consideration or to pass an order for re-appointment of another Amin for same purpose – Proposition of law to the context – Explained in reference to case law. (Paras 19 & 21)

Citations Reference

Sumitra Devi and Anr. vrs. Dinesh and Ors.**, 2022 (I) Civil Court Cases-642 & 2022 (3) CCC-38 (Uttarakhand);** Laly Joseph@ Laly Sebastian vrs. K.U. Francis, **2023 (2) Civil Court Cases-472 (Kerala)- (D.B);** Yasin Gulab Shikalkar vrs. Maruti Nagnath Aware & Ors., **2023 (2) Civil Court Cases-674 (Bombay);** R.V. Ganesa Naicker vrs. Painter Selvaraj and Anr, **2019 (1) CCC-24 & 2018 (I) Civil Court Cases-470 (Madras);** Benudhar Mohapatra and Ors. vrs. Collector-cum-District Magistrate, Nayagarh and Ors., **2018 (I) Civil Court Cases-662 (Orissa);** Ram Lal and Ors. vrs. Salig Ram and Ors., **2019 (I) CLR (S.C.)-825;** Vijay Singh vrs. Jamshed Ali and Ors., **2021 (4) Civil Court Cases-200 (Delhi);** Jala Swamydas and Ors. vrs. Jadani Sumayun Raju, **2006 (1) Civil Court Cases-73 (Andhara Pradesh);** Durgam Mangamma vrs. P. Mohan and Ors., **1991 Civil Court Cases-294 (Andhra Pradesh);** Ram Lakhan and another vrs. District Judge and others**, 1993 Civil Court Cases-332 (Allahabad) – referred to.**

List of Acts

Code of Civil Procedure, 1908.

Keywords

Measurement of suit property; Deputation of Amin; Report of Amin; Acceptance, Establishment of fix point; Remand; Re-appointment.

Case Arising From

Judgment and decree dated 03.08.2001 & 28.08.2001 passed in T.A. No. 10 of 1993.

Appearances for Parties

For Appellants : Mr. D.P. Mohanty
For Respondents : Mr. S.S. Rao, Sr. Adv. & Mr. B.K. Moahnty

Judgment/Order

Judgment

A.C. BEHERA, J.

This 2nd appeal has been preferred against the reversing judgment.

2. The appellant in this 2nd appeal was the plaintiff before the trial court in the suit vide T.S. No.09 of 1986 and respondent no.1 before the 1st appellate court in the 1st appeal vide T.A. No.10 of 1993.

3. The respondents in this 2nd appeal were the defendants before the trial court in the suit vide T.S. No.09 of 1986 and appellants before the 1st appellate court in the 1st appeal vide T.A. No.10 of 1993.

The suit of the plaintiff (appellants in this 2nd appeal) against the defendants (respondents in this 2nd appeal) vide T.S. No.09 of 1986 was a suit for declaration, confirmation of possession and for permanent injunction.

4. The suit properties are Hal Plot No.2359 under Hal Khata No. 475 Ac.0.06 decimals, which corresponds to part of Sabik Plot No.769 under Sabik Khata No.184.

As per plaintiff's case, the area of Sabik Plot No.769 under Sabik Khata No.184 was Ac.0.52 decimals in Mouza Patnagarh and the said Ac.0.52 decimals properties were the ancestral properties of the plaintiff, in which, the father of plaintiff, i.e., Dharanidhar Sahoo along with two brothers of the father of the plaintiff, i.e., Sridhar Sahoo and Gouri Sahoo were the joint owners.

Out of that Ac.0.52 decimals of Sabik Plot No.769, Dharanidhar Sahoo, Sridhar Sahoo and Gouri Sahoo sold Ac.0.16 decimals of land to the predecessors of the defendants, i.e., Rama Raju and Narayan Raju by executing and registering sale deed dated 29.10.1954 and delivered possession thereof. After selling Ac.0.16 decimals of land from Sabik Plot No.769 to the predecessors of the defendants, the remaining Ac.0.36 decemals of that Sabik Plot No.769 remained with Dharanidhara Sahoo, Sridhar Sahoo and Gouri Sahoo.

When Rama Raju and Narayan Raju died leaving behind the defendants as their successors, then, the defendants became the owners of the above purchased Ac.0.16 decimals of land from Sabik Plot No.769 by their predecessors, i.e., Rama Raju and Narayan Raju and they (defendants) have been possessing that Ac.0.16 decimals of land jointly. The said Ac.0.16 decimals has become Hal Plot No.2359 Ac.0.16 decimals in the Hal RoR under Hal Khata No.475, which has been recorded jointly in the names of the defendants.

When, after selling Ac.0.16 decimals of land from Sabik Plot No.769, the predecessors of the plaintiffs, i.e., Dharanidhar Sahoo, Sridhar Sahoo and Gouri Sahoo were the joint owns and in possession over rest Ac.0.36 decimals of land of Sabik Plot No.769, they (Dharanidhar Sahoo, Sridhar Sahoo and Gouri Sahoo) partitioned their said Ac.0.36 decimals of land of Plot No.769 along with their other joint properties between them and in such partition, the above Ac.0.36 decimals of land of Sabik Plot No.769 had fallen in the share of the father of the plaintiff, i.e., Dharanidhar Sahoo. Accordingly, Dharanidhar Sahoo became the exclusive owner over the said Ac.0.36 decimals of land of Sabik Plot No.769.

After partition, the Hal settlement RoR in respect of the said Ac.0.36 decimals of land of Sabik Plot No.769 was published exclusively in the name of Dharanidhar Sahoo (father of the plaintiff) under Hal Khata No.458 Plot No.2360 Ac.0.36 decimals.

When Dharanidhar Sahoo died leaving behind the plaintiff as his only successor, then, the above Ac.0.36 decimals of land of Hal Plot No.2360 devolved upon the plaintiff and as such, the plaintiff is the exclusive owner of Ac.0.36

decimals of land of Hal Plot No.2360 and he (plaintiff) had/has been possessing the same.

When, on dated 20.10.1985, the defendants created disturbances in the possession of the plaintiff over his Hal Plot No.2360 disclosing that, the Map area of their Hal Plot No.2359 is covering Ac.0.06 decimals area of Hal Plot No.2360 of the plaintiff, for which, he(plaintiff) measured the Map area of Hal Plot Nos.2359 and 2360 through an Amin and compared the same with the recorded areas thereof in the respective Hal RoRs as well as with the filed position and came to know that, though he (plaintiff) is in possession over Ac.0.36 decimals of land of Hal Plot No.2360 as per recorded area thereof in the Hal RoR, but, in the Hal village Map, the area of that Hal Plot No.2360 has been reduced for Ac.0.06 decimals and the area of that Hal Plot No.2360 in the present Hal village Map has become Ac.0.30 decimals and that Ac.0.06 decimals area of Hal Plot No.2360 have been mixed with the Map area of Hal Plot No.2359 of the defendants.

Likewise, the defendants are in possession over Ac.0.16 decimals of land of Hal Plot No.2359 and the recorded area in the Hal RoR of that Hal Plot No.2359 is Ac.0.16 decimals, but, in the Hal village Map, the area of that Hal Plot No.2359 has become Ac.0.22 decimals, which is Ac.0.06 decimals excess than the recorded area of that Hal Plot No.2359. Accordingly, the reduced Ac.0.06 decimals area of Hal Plot No.2360 has been mixed with the Map area of Hal Plot No.2359, for which, erroneously, the Map area of Hal Suit Plot No.2359 has become Ac.0.22 decimals instead of Ac.0.06 decimals and the Map area of Hal Plot No.2360 has become to Ac.0.30 decimals instead of Ac.0.36 decimals. So, he (plaintiff) approached the civil court by filing the suit vide T.S. No.09 of 1986 against the defendants praying for declaration of his right, title and interest only in respect of Ac.0.06 decimals area in the Hal Map of Hal Plot No.2359 and to confirm his possession thereon and to injunct the defendants permanently from creating any sort of disturbances in respect of the said Ac.0.06 decimals excess area of Hal Map of Hal Plot No.2359 than its recorded area.

5. Having been noticed from the trial court in the suit vide T.S. No.09 of 1986, the defendants contested the same by filing their written statement denying the averments made by the plaintiff in his plaint taking their stands therein that, they(defendants) have been possessing the entire Map area of Hal suit Plot No.2359 since the date of their purchase, i.e., since 29.10.1954 and accordingly, they(defendants) have title and possession over the same, but, the plaintiff has filed the suit on false and imaginary grounds in order to harass them(defendants), for which, there is no merit in the suit of the plaintiff. The same is liable to be dismissed against them (defendants).

6. Basing upon the aforesaid pleadings and matters in controversies between the parties altogether eight numbers of issues were framed by the trial court and the said issues are:-

I S S U E S

i. Whether the suit is maintainable?

ii. Whether there is any cause of action to file the suit?

iii. Whether the plaintiff is the rightful owner and in a peaceful possession over the suit land?

iv. Whether the defendants are in peaceful possession over the suit land on the strength of registered sale deed dated 29.10.1954 and they have perfected their right and title by way of adverse possession?

v. Whether the suit is under-valued?

vi. Whether the plaintiff is entitled to get any relief as prayed for?

vii. Whether the suit is bad for non-joinder of necessary parties? And

viii. Whether the suit is barred by law of limitation?

7. In order to substantiate the aforesaid reliefs sought for by the plaintiff against the defendants in the suit vide T.S. No.09 of 1986, the (plaintiff) examined four numbers of witnesses on his behalf including him as P.W.1 and relied upon the documents vide Exts.1 to 4/a including report of the Amin as Ext.4.

On the contrary, in order to nullify/defeat the suit of the plaintiff, the defendants also examined four numbers of witnesses from their side including defendant no.2 as D.W.4.

8. After conclusion of hearing of the suit vide T.S. No.09 of 1986 and on perusal of the materials, documents and evidence available in the record, the trial court answered all the issues in favour of the plaintiff and against the defendants.

9. Basing upon the findings and observations made by the trial court in all the issues in favour of the plaintiff and against the defendants, the trial court decreed the suit of the plaintiff vide T.S. No.09 of 1986 on contest against the defendants as per its judgment and decree dated 11.10.1993 and 11.11.1993 respectively and declared the right, title and interest of the plaintiff in respect of Ac.0.06 decimals area of Hal Plot No.2359 in the Hal Map and confirmed his possession on the same and restrained the defendants from creating any sort of disturbances in the peaceful possession of the plaintiff thereon assigning the reasons on the basis of the report of the Amin (P.W.4) vide Ext.4 and his evidence that, after selling Ac.0.16 decimals of land from Sabik Plot No.769 out of Ac.0.52 decimals of land to the defendants on dated 29.10.1954 by the predecessors of the plaintiff, the plaintiff is the owner and in possession over the remaining Ac.0.36 decimals of land of Sabik Plot No.769, which has become Hal Plot N.2360 in the Hal RoR under Hal Khata No.458, but, the map area of Hal Plot No.2360 has become Ac.0.30 decimals instead of Ac.0.36 decimals, whereas the map area of Hal Plot No.2359 under Hal Khata No.475 has become Ac.0.22 decimals instead of Ac.0.16 decimals, for which, the map area of Hal Plot No.2359 in the Hal Map has been erroneously prepared mixing Ac.0.06 decimals area of Hal Plot No.2360 of the plaintiff with the same, in which, the

plaintiff is the owner, but, defendants are not the owners of the same, for which, the defendants have no interest on the same.

10. On being dissatisfied with the aforesaid judgment and decree dated 11.10.1993 and 11.11.1993 respectively passed in T.S. No.09 of 1986 by the trial court in favour of the plaintiff and against the defendants, they(defendants) challenged the same by preferring the 1st appeal vide T.A. No.10 of 1993 being the appellants against the plaintiff arraying him(plaintiff) as respondent.

11. After hearing from both the sides, the 1st appellate court allowed that 1st appeal vide T.A. No.10 of 1993 of the defendants and set aside the judgment and decree passed by the trial court and dismissed the suit of the plaintiff vide T.S. No.09 of 1986 discarding/rejecting the evidence of the Amin (P.W.4) as well as his report vide Ext.4 as per its judgment and decree dated 03.08.2001 and 28.08.2001 respectively assigning the reasons in paragraph no.11 of that judgment and decree of the appellate court that, "when the Amin, i.e., P.W.4 has stated in his evidence that, as he did not find any fixed point and started his measurement from the neighbouring house not from the road or temple or any permanent structure or old tree etc., for which, his evidence and his report cannot be held to be accurate and his report vide Ext.4 could not have been relied on and when the evidence of the Amin (P.W.4) and his report vide Ext.4 have become inadmissible on the ground of making measurement without any fixed point, for which, the 1st appellate court set aside the judgment and decree of the trial court and dismissed the suit of the plaintiff."

12. On being aggrieved with the aforesaid judgment and decree dated 03.08.2001 and 28.08.2001 respectively passed by the 1st appellate court in T.A. No.10 of 1993 in favour of the defendants and against the plaintiff, he (plaintiff) challenged the same by preferring this 2nd appeal being the appellant against the defendants arraying them(defendants) as respondents.

13. This 2nd appeal was admitted on formulation of the following substantial question of law, i.e.:-

> Whether the 1st appellate court is correct in ignoring the report of the civil court Amin commissioner vide Ext.4 for setting aside the judgment and decree of the trial court?

14. I have already heard from the learned counsel for the appellant and learned counsel for the respondents.

15. It is the undisputed case of the parties that, the suit Hal Plot No.2359 Ac.0.16 decimals under Hal Khata No.475 is in the name of the defendants and its adjacent plot vide Hal Plot No.2360 Ac.0.36 decimals under Hal Khata No.458 is in the name of the plaintiff and both Hal Plot Nos.2359 and 2360 correspond to Sabik Plot No.769 Ac.0.52 decimals under Sabik Khata No.184.

It is also the undisputed case of the parties that, the area of Sabik Plot No.769 was Ac.0.52 decimals and the said Sabik Plot No.769 was the ancestral properties of the plaintiff. The predecessors of the plaintiff have sold Ac.0.16 decimals of land out of Ac.0.52 decimals from Sabik Plot No.769 in favour of the predecessors to the defendants on dated 29.10.1954. The area of the Hal RoR of suit Hal Plot No.2359 under Hal Khata No.475 in the names of the defendants is Ac.0.16 decimals, which has been recorded correctly according to their purchase.

The area of Hal Plot No.2360 under Hal Khata No.458 in the favour of the plaintiff is Ac.0.36 decimals, which has been recorded correctly according to the title and possess of plaintiff.

The plaintiff is in possession over entire Ac.0.36 decimals areas of his Hal Plot No.2360. The defendants are in possession over entire Ac.0.16 decimals areas of their Hal Plot No.2359.

The dispute between the plaintiff and the defendants is that, the areas of Hal Plot Nos.2359 and 2360 in the Hal village Map have not been prepared inconformity with the areas in the Hal RoRs of the said Hal Plot Nos.2359 and 2360.

16. According to the plaintiff, the Map area of suit Hal Plot No.2359 has become erroneously Ac.0.22 decimals instead of Ac.0.16 decimals and likewise, the Map area of its adjacent plot vide Hal Map of Plot No.2360 has become erroneously Ac.0.30 decimals instead of Ac.0.36 decimals.

An Amin (P.W.4) was deputed by the trial court in the suit for measurement of the areas of suit Hal Plot No.2359 and Hal Plot No.2360 in the map as well as in the spot/field and to submit a report about the same. Accordingly, Amin (P.W.4) had visited the spot for its measurements and after measurement, he (Amin, P.W.4) submitted report vide Ext.4 before the trial court stating that, the area of suit Hal Plot No.2359 has enhanced for Ac.0.06 decimals in the Hal Map and the area of the Hal Plot No.2359 in the Hal Map has become Ac.0.22 decimals instead of its recorded area Ac.0.16 decimals in the Hal RoR. Likewise the area in the Map of Hal Plot No.2360 has reduced for Ac.0.06 decimals, and the area of the same in the Hal Map has become Ac.0.30 decimals.

17. So, by taking into account the evidence of the Amin (P.W.4) and his report vide Ext.4, the learned trial court decreed the suit of the plaintiff, but, whereas, the learned 1st appellate court set aside the same discarding/ignoring the report of the Amin vide Ext.4 assigning the reasons that, when, Amin (P.W.4) himself has admitted in his deposition that, he did not find the fixed point for the measurement, for which, his report vide Ext.4 cannot be held to be accurate and the same could not be relied upon for acceptance in order to pass any decree on the prayers of plaintiff.

In this 2nd appeal, a question arises, whether the above findings of the 1st appellate court discarding/ignoring the report of the Amin vide Ext.4, on the ground of preparation of the same through measurement without fixed point is sustainable under law.

18. The law regarding the evidentiary value of a report of Amin through measurement like this suit/appeal at hand without fixed point has already been clarified by the Hon'ble Courts in the ratio of the following decision:-

> (i) In a case between ***Sumitra Devi and another vrs. Dinesh and others :*** reported in ***2022(I) Civil Court Cases-642 & 2022(3) CCC-38 (Uttararkhand)*** that, measurement of the suit properties by the Amin on being deputed as per Order-26, Rule-9 of the C.P.C. without establishment of fixed point cannot be acceptable under law.

19. Herein this suit/appeal at hand, when the Amin(P.W.4) has deposed in his evidence that, no fixed point was established by him for measurement of the suit Plot No.2359 and its adjacent Plot No.2360, then at this juncture, in view of the principles of law enunciated by the Hon'ble Courts in the ratio of the aforesaid decision, his report vide Ext.4 on the basis of measurement without fixed point cannot be acceptable under law. For which, the findings and observations made by the learned 1st appellate court in paragraph-11 of its judgment in dismissing the suit of the plaintiff setting aside the judgment and decree of the trial court discarding/rejecting the Amin report vide Ext.4 cannot be held as erroneous.

20. The 1st appellate court has set aside the entire judgment and decree of the trial court on the sole ground, i.e., for the rejection of the report of Amin vide Ext.4, as the judgment and decree of the trial court was passed on the basis of the said Amin report vide Ext.4.

It is the settled law that, dismissal of suit for any irregularity in Amin's report cannot be sustainable under law, because, as per law, when, the report of the Amin is discarded/rejected, it is the proper course for the court either to issue a fresh Amin or to remand the matter for re-consideration or to pass an order for re-appointment of another Amin for the same purpose.

21. 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) In a case between ***Laly Joseph@ Laly Sebastian vrs. K.U. Francis- :*** reported in ***2023(2) Civil Court Cases-472(Kerala)- (D.B) (Para-10.)—***What should be the duty of the court on Amin Commissioner's report given under Order-26, Rules-9, 10 and 14 of the C.P.C. that-

(1) Court can set aside commissioner's report, if Court is totally dissatisfied with commissioner's report.

(2) Court can remit commission for further inquiry.

(3) Court can appoint a fresh commission without setting aside the earlier commission report and

(4) Court can very well appreciate both the reports, i.e., 1st and 2nd and decide accordingly at the time of trial.

> (ii) In a case between ***Yasin Gulab Shikalkar vrs. Maruti Nagnath Aware and others :*** reported in ***2023(2) Civil Court Cases-674(Bombay)*** that, when the appointed commissioner fails to present before the court, correct picture prevails at

the site, trial court itself is empowered to appoint an another court commissioner and there is no question of attracting principle of *res judicata*.

(iii) In a case between ***R.V. Ganesa Naicker vrs. Painter Selvaraj and another***: reported in ***2019(1) CCC-24 & 2018(I) Civil Court Cases-470 (Madras)*** that, while the court expressing dissatisfaction on first commissioner's report, court is expected to set aside first commissioner's report for issuance of 2nd commission.

(iv) In a case between ***Benudhar Mohapatra and others vrs. Collector-cum-District Magistrate, Nayagarh and others*** : reported in ***2018(I) Civil Court Cases-662(Orissa)***—In a suit for declaration and for correction of map prepared in the settlement, there is no impediment to appoint Amin Commissioner to ascertain measurement of land.

(v) In a case between ***Ram Lal and others vrs. Salig Ram and others*** : reported in ***2019(I) CLR(S.C.)-825—***The dismissal of suit for any irregularity on the part of the local commissioner, not justified, but, proper course for the High Court either to issue a fresh Commissioner or to remand the matter for reconsideration.

(vi) In a case between ***Vijay Singh vrs. Jamshed Ali and others*** : reported in ***2021(4) Civil Court Cases-200(Delhi)—***When there is dispute, i.e., whether the disputed property falls within the Khasara as claimed by the petitioner or when Khasara as claimed by the respondent, in that case, one of the proper method for ensuring a complete and just adjudication of said dispute is by way of demarcation of property.

(vii) In a case between ***Jala Swamydas and others vrs. Jadani Sumayun Raju*** : reported in ***2006(1) Civil Court Cases-73 (Andhara Pradesh)—***That, without setting aside the report of the 1st commissioner, a 2nd commissioner for the self-same purpose cannot be appointed.

(viii) In a case between ***Durgam Mangamma vrs. P. Mohan and others*** : reported in ***1991 Civil Court Cases-294 (Andhra Pradesh)—***That, 2nd Commissioner under Order-26, Rule-9 of the C.P.C. cannot be appointed for the same purpose unless and until 1st report is expunged.

(ix) In a case between ***Ram Lakhan and another vrs. District Judge and others*** : reported in ***1993 Civil Court Cases-332 (Allahabad)—***Second Commissioner as per Order-26, Rule-9 of the C.P.C. can be appointed when in the opinion of the court, report of 1st Commissioner is insufficient or it is desirable to obtain further details.

22. Here, in this suit/appeal at hand, the dispute between the parties has arisen only due to the conflict between the recorded areas of Hal Plot Nos.2359 and 2360 in the Hal RoR and the areas thereof in the Hal Map.

When in view of the ratio of the aforesaid decisions, the said conflict between the parties cannot be ascertained by oral evidence without appointment of survey knowing Amin commissioner and when the trial court has passed the judgment and decree only on the basis of Amin report vide Ext.4 and when the learned 1st appellate court set aside the judgment and decree of the trial court discarding/rejecting the said report of the Amin vide Ext.4 due to preparation of the same through measurement without fixed point, then at this juncture, by applying the principles of law enunciated in the ratio of the aforesaid decisions of Hon'ble

Courts and Apex Court, it should be the duty of the High Court in this 2nd appeal to remand the matter, i.e., the suit vide T.S. No.09 of 1986 to the trial court for its adjudication afresh after setting aside the judgments and decrees of the trial court as well as 1st appellate court directing the trial court to decide the same again after deputing a fresh Amin commissioner for answering appropriate questions through its fresh report giving them(parties) liberties for making necessary amendments, if requires, in their respective pleadings in order to decide their controversies between them finally in the suit for all times to come.

For which, there is justification under law for making interference to a limited extent with the judgments and decrees passed by the trial court and 1st appellate court through this 2nd appeal preferred by the appellant(plaintiff). So, there is some merit in the 2nd appeal of the appellant. The same is to be allowed in part.

23. In result, this 2nd appeal preferred by the appellant (plaintiff) is allowed in part, but, without cost.

24. The judgments and decrees passed by both the courts, i.e., by the trial court and 1st appellate court in T.S. No.09 of 1986 and T.A. No.10 of 1993 respectively are set aside.

25. The matter, i.e., suit vide T.S. No.09 of 1986 is remanded back (remitted back) to the trial court, i.e., to the court of learned Munsif, Patnagarh for its *de novo* and fresh trial by deputing a 2nd survey knowing Amin commissioner for answering the appropriate questions put to him concerning the real controversies between the parties giving liberty to the parties for making necessary amendments, if any, in their respective pleadings.

26. The trial court is directed to decide the suit vide T.S. No.09 of 1986 afresh on the basis of fresh evidence and fresh Amin report without using the earlier evidence in any manner within a period of seven months positively from the date of communication of this judgment to the trial court.

27. The parties in this 2nd appeal are directed to appear before the trial court on dated 31.01.2025 in the suit vide T.S. No.09 of 1986 for the purpose of receiving the directions of that court as to further proceedings of the suit.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Second Appeal allowed in part.

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2025 (I) ILR-CUT-1032

STATE OF ORISSA
(DISTRICT COLLECTOR, SAMBALPUR)
V.
PRAFULLA KUMAR PRADHAN (DEAD) & ORS.

[S.A. NO. 315 OF 1989]

31 JANUARY 2025

[A.C. BEHERA, J.]

Issue for Consideration

Whether the vendor has the right to execute the sale deed in favour of plaintiff in respect of Gounti-Raiyati land as per the Orissa Merged Territories (Village Office Abolition) Act, 1962.

Headnotes

ORISSA MERGED TERRITORIES (VILLAGE OFFICE ABOLITION) ACT, 1962 – Section 3(g) – The suit land was Gounti-Rayati land and Nishakara Pradhan was the Gountia in respect of the said suit land – Nishakara Pradhan sold the said land to the plaintiff and on the strength of such purchase plaintiff has claimed his right, title and interest over the suit land – The Full Bench of this Hon'ble Court in S.A. 192/1977 held that Gounti-Rayati land in the ex-state of Bamparda was not the personal land of Gountia, but he was in charge of said land by virtue of his office and as per Section 3(g) of the 1962 Act the said land vested in the State – Whether the vendor has the right to execute the sale deed in favour of plaintiff in respect of Gounti-Rayati land as per the Orissa Merged Territories (Village Office Abolition) Act, 1962.

Held: No – When, Nishakara Pradhan was the Gountia of the suit land, but, he (Nishakara Pradhan) had no title in the suit land, then at this juncture, it can safely be concluded that the plaintiff as a purchaser of the suit land through sale deed dated 02.11.1955 cannot get any better right or title in the suit land than his vendor Nishakara Pradhan – For which, no interest was created in respect of the suit land in favour of the plaintiff, through sale deed dated 02.11.1955 executed by Nishakara Pradhan – Therefore, the recording of the suit land in the Hal RoR in the name of its owner i.e. State of Orissa (defendant) cannot be held as erroneous. (Para 19)

Citations Reference

Paramananda Pradhan and others vrs. Palau Sahu and others, **56 (1983) CLT-482 (F.B.);** Mangulu Jal and others vrs. Bhagaban Rai and others, **AIR 1975 Orissa 219;** Dhanu Malik through L.Rs. Savitri Bewa and others vrs. Lal Sitanshu Sekhar Singh Deo and others, **37(1971) CLT-1152;** Sidheswar

Panigrahi vrs. State of Orissa and others, **2019 (I) CLR-651;** State of Orissa vrs. Prafulla Kumar Pradhan (dead) through L.Rs., **2018 (II) CLR-542 – referred to.**

List of Acts

Orissa Merged Territories (Village Office Abolition) Act, 1962

Keywords

Gounti-Rayati land; Sale of land by Gountia-Rayati, Jurisdiction of Civil Court.

Case Arising From

T.A. No 06 of 1987 passed by the First Appellate Court.

Appearances for Parties

For Appellant : Mr. G. Mohanty, Learned Standing Counsel
For Respondents : None

Judgment/Order

Judgment

A.C. BEHERA, J.

This 2nd appeal has been preferred against the reversing judgment.

2. The appellant-State in this 2nd appeal was the defendant before the trial court in the suit vide T.S. No.32 of 1985 and respondent before the 1st appellate court in the 1st appeal vide T.A. No.06 of 1987.

3. The respondent in this 2nd appeal was the plaintiff before the trial court in the suit vide T.S. No.32 of 1985 and appellant before the 1st appellate court in the 1st appeal vide T.A. No.06 of 1987.

The suit of the plaintiff(respondent in this 2nd appeal) vide T.S. No.32 of 1985 before the trial court against the defendant(appellant in this 2nd appeal) was a suit for declaration.

4. As per plaintiff's case, the suit properties are under Khata No.184 in Plot Nos.911, 941, 1046, 1360 and 1361 in Mouza-Bamparda, corresponds to part of Sabik Plot Nos.643, 675, 786, 917 and 1643 under Sabik Khata No.65. The properties Ac.10.23 decimals under Sabik Khata No.65 were recorded in the name of one Nishakara Pradhan. The said Nishakara Pradhan sold that, Ac.10.23 decimals under Sabik Khata No.65 to the plaintiff executing and registering a sale deed dated 02.11.1955. After purchasing that Ac.10.23 decimals from Nishakara Pradhan, plaintiff applied for mutation of the said properties to his name, but, the prayer of the plaintiff for mutation was refused by the revenue authorities on the ground that, the said properties are the properties of the State. For which, the plaintiff approached the civil court by filing the suit vide T.S. No.19 of 1962 against the State in the court of learned Munsif,

Deogarh praying for declaration of his right, title and interest over that Ac.10.23 decimals properties under Sabik Khata No.65 and also prayed for recovery of possession along with mesne profits.

That suit of the plaintiff vide T.S. No.19 of 1962 was dismissed by the learned Munsif, Deogarh.

Then, he (plaintiff) challenged the said dismissal of his suit preferring 1st appeal vide F.A. No.46/110 of 1963 in the court of learned District Judge, Sambalpur.

The said 1st appeal vide F.A. No.46/110 of 1963 filed by the plaintiff was allowed and the judgment and decree of the trial court passed in T.S. No.19 of 1962 was set aside and the suit of the plaintiff vide T.S. No.19 of 1962 was decreed.

Thereafter, the defendant/State challenged the same by preferring 2nd appeal vide S.A. No.160 of 1964, but, that 2nd appeal vide S.A. No.160 of 1964 of the State was dismissed by the Division Bench of the Hon'ble Courts on dated 10.03.1967 confirming the judgment and decree passed by the 1st appellate court in F.A. 46/110 of 1963.

Then, as per Execution Case No.04 of 1983, the plaintiff got recovery of possession of the suit properties, i.e., Ac.10.23 decimals under Sabik Khata No.65 and possessed the same paying rent to the Government.

Subsequent thereto, the plaintiff sold Ac.3.81 decimals, out of Ac.10.23 decimals from the same to a person/vendee. Accordingly, in the Major Settlement, the said sold Ac.3.81 decimals was recorded in the name of his purchaser/ vendee/transferee and only Ac.0.10 decimals was recorded in the name of plaintiff under Hal Khata No.98, but, the rest properties, i.e., Ac.6.69 decimals, out of Ac.10.23 decimals were recorded in the name of the State of Orissa erroneously in the Hal Major Settlement under Abadajogya Anabadi Khata vide Hal Khata No.184.

The said Ac.6.69 decimals under Hal Khata No.184 are the disputed properties in the present suit.

When, in the Hal Major Settlement, the settlement authorities did not record the suit properties in the name of the plaintiff in spite of getting recovery of possession of the said properties through Execution Case No.04 of 1983 on the basis of the judgment and decree passed in the 2nd appeal vide S.A. No.160 of 1964 and recorded the same illegally in the name of the State under Abadajogya Anabadi Khata No.184, then, he (plaintiff) decided for filing a suit for declaration of his right, title and interest over the suit properties against the State.

So, he (plaintiff) issued statutory notice under Section 80 of the C.P.C., 1908 to the State(defendant) requesting the State for correction of wrong recordings of the name of State in respect of the suit properties to his name, but, the defendant(State) did not pay any heed to the request of the plaintiff. For which, after expiry of the statutory period of service of notice under Section 80 of the C.P.C., 1908, he(plaintiff) approached the civil court by filing the suit vide T.S. No.32 of 1985 against the State praying for a declaration that, the record of right in respect of the suit properties under Hal Khata No.184 in the name of State(defendant) is erroneous and to declare that, he(plaintiff) is the owner of the suit properties.

5. Having been noticed from the trial court in the suit vide T.S. No.32 of 1985, the defendant(State) contested the same by filing its written statement denying the averments made by the plaintiff in his plaint taking its specific stands therein that, the properties under Sabik Khata No.65 Ac.10.23 decimals were the Gounti-rayait properties. Nishakara Pradhan was the Gountia in respect of the said properties. For which, that Nishakara Pradhan had no right, title and interest in the properties covered under Sabik Khata No.65, because, the same were not the private properties of Nishakara Pradhan. For which, alienation made by the Gountia Nishakara Pradhan on dated 02.11.1955 in favour of the plaintiff in respect of the properties, i.e., Ac.10.23 decimals covered under Sabik Khata No.65 is *ab-nitio void*. Because, Nishakara Pradhan had no alienable right in the suit properties to transfer the same in favour of the plaintiff.

The further plea of the defendant(State) was that, the decision made in the 2nd appeal vide S.A. No.160 of 1964 in favour of the plaintiff by the Hon'ble Courts in respect of the properties covered under Sabik Khata No.65 has already been ruled by the Full Bench decision of the Hon'ble Court's passed in S.A. No.192 of 1977 reported in ***82(1983) CLT 137***. Due to over-ruling of the decision of the Hon'ble Court's passed in S.A. No.160 of 1964 through the above Full Bench decision of the Hon'ble Court's passed in S.A. No.192 of 1977, the plaintiff has been treated as a trespasser of the suit properties having his no right, title and interest on the same. For which, non-recording of the suit properties in the Hal RoR in the name of the plaintiff is neither improper nor illegal. Because, after coming into force of The Orissa Merged Territories (Village Office Abolition) Act, 1962 (Orissa Act 10 of 1963), the suit properties under Sabik Khata No.65 were vested in the State of Orissa as per law being free from encumbrances. For which, the judgment of the Court cannot over-ride the legislation, i.e., The Orissa Merged Territories (Village Office Abolition) Act, 1962. Therefore, the State of Orissa(defendant) is empowered under law to maintain RoR of the suit properties in its name, as the same are Government properties. As such, the Hal Settlement Authorities have rightly omitted the name of the plaintiff from recording the same in the name of plaintiff. Therefore, the suit of the plaintiff is not maintainable under law being hit and bar as per the provisions of law envisaged in The Orissa Merged Territories (Village Office Abolition) Act, 1962(Orissa Act 10 of 1963). For which, the suit of the plaintiff vide T.S. No.32 of 1985 is not entertainable under law in the civil court. Therefore, the suit of the plaintiff is liable to be dismissed against the State(defendant) with costs.

6. Basing upon the aforesaid pleadings and matters in controversies between the parties altogether seven numbers of issues were framed by the trial court in the suit vide T.S. No.32 of 1985 and the said issues are:-

I S S U E S

i. Whether the suit is maintainable?

ii. Whether the plaintiff is the occupancy tenant in respect of the said land?

iii.Whether the decree passed in T.S. No.19 of 1962 of the court of Munsif, Deogarh and 2nd appeal No.160 of 1964 are binding upon the defendant?

iv. Whether the entries in the RoR in recording the suit land in the name of the defendant in Major Settlement is illegal and erroneous?

v. Whether the suit is under-valued?

vi. Whether the suit is bad for non-joinder of necessary parties?

vii. To what relief, the plaintiff is entitled to?

7. In order to substantiate the aforesaid relief sought for by the plaintiff against the defendant (State), the plaintiff examined himself as P.W.1 and relied upon the documents vide Exts.1 to 11.

On the contrary, in order to nullify/defeat the suit of the plaintiff, the defendant(State) neither examined any witness nor proved any document on its behalf.

8. 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 defendant (State).

Basing upon the findings and observations made by the trial court in the issues against the plaintiff and in favour of the defendant(State), the trial court dismissed the suit of the plaintiff vide T.S. No.32 of 1985 on contest against the defendant(State) as per its judgment and decree dated 31.03.1987 and 12.08.1987 respectively assigning the reasons that, in view of the Full Bench decision passed in the 2nd appeal vide S.A. No.192 of 1977 by the Hon'ble Court's, the findings and observations made in the 2nd appeal vide S.A. No.160 of 1964 arising out of the suit vide T.S. No.19 of 1962 have been over-ruled and, it has been held by the Full Bench of the Hon'ble Courts that, the suit properties are covered by The Orissa Merged Territories (Village Office Abolition) Act, 1962(Orissa Act 10 of 1963) and as per the said Act, the suit properties were vested in the State and became the Government properties. Because, the suit properties were Gounti-raiyati Land (properties). Due to lack of settlement of the same as per Sections 5, 6 and 7 of the above Orissa Act 10 of 1963 and since vesting, the said properties are the properties of the State(defendant). Except the statutory authorities under The Orissa Merged Territories(Village Office Abolition), Act, 1962 (Orissa Act 10 of 1963), no other authorities or Courts including civil court has any jurisdiction to deal with the said properties.

10. On being dissatisfied with the aforesaid judgment and decree of the dismissal of the suit of the plaintiff vide T.S. No.32 of 1985 passed by the trial court as per its judgment and decree dated 31.03.1987 and 12.08.1987 respectively, the plaintiff challenged the same by preferring the 1st appeal vide T.A. No.06 of 1987 being the appellant against the defendant (State) arraying the defendant/State as respondent after taking several grounds in his appeal memo.

11. After hearing from both the sides, the learned 1st appellate court allowed that 1st appeal vide T.A. No.06 of 1987 filed by the plaintiff on contest and set aside the judgment and decree of the dismissal of the suit of the plaintiff vide T.S. No.32 of 1985 passed by the trial court as per its judgment and decree in T.A. No.06 of 1987 dated 10.05.1987 and 19.06.1989 respectively and decreed the suit of the plaintiff vide T.S. No.32 of 1985 against the defendant(State) assigning the reasons that, despite over-

ruling of the decision passed in S.A. No.160 of 1964 arising out of T.S. No.19 of 1962 by the Full Bench of the Hon'ble Court's in S.A. No.192 of 1977, the said Full Bench judgment cannot affect the right, title and interest of the plaintiff over the suit properties, which was finally decided by the Hon'ble Courts earlier in S.A. No.160 of 1964 by the Division Bench in favour of the plaintiff. Because, the said Full Bench decision of the Hon'ble Court's passed in S.A. No.192 of 1977 cannot un-settle the findings made earlier by the Hon'ble Courts in its Division Bench in S.A. No.160 of 1964 relating to the right, title and interest of the plaintiff over the suit properties. For which, the decision passed by the Division Bench in S.A. No.160 of 1964 is binding on the parties and the same operates as *res judicata* for the State/defendant to claim the suit properties as the properties of the State/defendant. So, the State(defendant) is bound by the earlier Division Bench decision passed in S.A. No.160 of 1964 against the defendant(State) and in favour of the plaintiff in respect of the suit properties.

12. On being aggrieved with the aforesaid judgment and decree dated 10.05.1987 and 19.06.1989 respectively passed by the 1st appellate court in T.A. No.06 of 1987 against the defendant(State) in setting aside the judgment and decree of the dismissal of the suit of the plaintiff vide T.S. No.32 of 1985 passed by the trial court, the defendant(State) challenged the same by preferring this 2nd appeal being the appellant against the plaintiff arraying him (plaintiff) as respondent.

13. This 2nd appeal was admitted on formulation of the following substantial questions of law, i.e.:-

> I. Whether the decree of a civil court, incompetent to draw up a decree for the particular purpose is binding on the parties?
>
> II. Whether on the face of the findings that question of jurisdiction of civil court was not considered by the court, which passed the decree, but, really the said civil court was incompetent to pass the said decree (as per observations of the subsequent Full Bench), the said decree can stand as a binding on the parties?
>
> III. Whether a decree, over-ruled in another case, be held binding on parties in a subsequent suit?

14. I have already heard, only from the learned Standing Counsel for the State(appellant), as none appeared from the side of the respondent(plaintiff) for participating in the hearing of this 2nd appeal.

15. In order to assail the judgment and decree passed by the 1st appellate court, the learned Standing Counsel for the State(appellant) relied upon the following decisions:-

> (i) In a case between Paramananda Pradhan and others vrs. Palau Sahu and others (decided on 16.11.1983 in S.A. No.192 of 1977) reported in 56(1983) CLT482(F.B.)
>
> (ii) In a case between Mangulu Jal and others vrs. Bhagaban Rai and others (decided on 15.04.1975 in S.A. No.340 of 1970) reported in AIR 1975 Orissa 219.
>
> (iii) In a case between Dhanu Malik through L.Rs. Savitri Bewa and others vrs. Lal Sitanshu Sekhar Singh Deo and others (decided on 14.10.1971 in F.A. No.124 of 1965) reported in 37(1971) CLT-1152.

16. When, as per the pleadings of the parties, findings and observations made by the trial court and 1st appellate court, the above three formulated substantial questions of law are inter-linked having ample nexus with each other, then, all the three formulated substantial questions of law are taken up together analogously for their discussions hereunder:-

It is the undisputed case of the parties, as per their pleadings as well as the findings and observations made by the trial court and the 1st appellate court that,

> "the suit land were under Sabik Khata No.65 and the said suit land were the Gounti-raiyati Land during Sabik Settlement of the year 192526 and Nishakara Pradhan was the Gountia in respect of the said suit land. Nishakara Pradhan sold the said land covered under Sabik Khata No.65 Ac.10.23 decimals on dated 02.11.1955 to the plaintiff and on the strength of such purchase(sale deed), he (plaintiff) has claimed his right, title and interest over the suit land by filing a suit vide T.S. No.19 of 1962. The right, title and interest of the plaintiff over the suit land was declared as per judgment and decree passed in F.A. No.46/110 of 1963 arising out of T.S. No.19 of 1962 by the 1st appellate court and the said judgment and decree passed by the 1st appellate court in F.A. No.46/110 of 1963 in favour of the plaintiff was confirmed by the Hon'ble Court's in a Division Bench decision passed in S.A. No.160 of 1964 with the observations therein that, "the Gounti-raiyati Land are in no way different from the other ordinary Rayati land and the said land shall continue to remain as the land of the Gountia, even after abolition of his office of Gountia. For which, alienation made by the Gountia-Nishakara Pradhan to the plaintiff through sale deed dated 02.11.1955 was valid and through such sale deed, the right, title and interest of the plaintiff over the sold land under Sabik Khata No.65 has been created.
>
> In Para Nos.15 and 16 of S.A. No.192 of 1977 passed by the Full Bench of this Hon'ble Court's in a case between ***Paramananda Pradhan and others vrs. Palau Sahu and others*** (decided on dated 16.11.1983) reported in ***56(1983) CLT-482(F.B.),*** the above principles of law enunciated in the Division Bench in S.A. No.160 of 1964, i.e., "Gountiraiyati Land are in no way different from other ordinary rayati land and the said land shall continue to remain as the land of the Gountia even after abolition of the office of Gountia were taken into consideration and after considering the same, it was held by the Full Bench of this Hon'ble Courts that, Gounti-raiyati Lands in Ex-State of Bamparda were not the personal land of Gountia, but, he(Gountia) was in-charge of those land by virtue or as incidental to his office and according to the provisions of Section 3(g) of The Orissa Merged Territories (Village Office Abolition) Act, 1962(Orissa Act 10 of 1963), he(Gountia) ceases to have right to hold those land and as such, the Gountia ceases to have right to hold Gounti-raiyati Land. Because, the said land were vested in the State, for which, the principles as well as findings made in S.A. No.160 of 1964 by the Division Bench of this Hon'ble Courts, i.e., Gounti-raiyati Land are in no way different from other ordinary Royati land and the same continue to remain as land of Gountia even after abolition of the office of Gountia were over-ruled. Because, in that Division Bench decision passed in S.A. No.160 of 1964, the provisions of The Orissa Merged Territories (Village Office Abolition) Act, 1962 (Orissa Act 10 of 1963) were not brought to the notice of the Division Bench of the Hon'ble Court's by the parties, for which, the above principles enunciated in S.A. No.160 of 1964 are contrary to the law."

17. When, as per the decisions of the Full Bench of this Hon'ble Courts passed in S.A. No.192 of 1977, the principles as well as the findings made by the Division Bench in S.A. No.160 of 1964 that, Gounti-raiyati land are in no way different from ordinary rayati land and the said land shall continue to remain as the land of Gountia even after abolition of the office of Gountia have been over-ruled by the Full Bench of this Hon'ble Court in S.A. No.192 of 1977 clarifying that, the above findings and observations made by the Division Bench in S.A. No.160 of 1964 are contrary to law and held by the Full Bench that, "Gounti-raiyati land in ex-State of Bamparda were not the personal land of Gountia, but, he(Gountia) was in-charge of said land by virtue of as incidental to his office and as per Section 3(g) of The Orissa Merged Territories (Village Office Abolition) Act, 1962 (Orissa Act 10 of 1963), the said land vested in the State", then at this juncture, the findings in S.A. No.160 of 1964 by the Division Bench of this Hon'ble Court's confirming the judgment and decree passed in F.A. No.46/110 of 1963 have automatically been overruled (turned down) and accordingly, the judgments and decrees passed in the said 2nd appeal vide S.A. No.160 of 1964 arising out of F.A. No.46/110 of 1963 have become un-useful in view of the above Full Bench decision of this Hon'ble Court's passed in S.A. No.192 of 1977.

18. When, the judgments and decrees passed in the earlier 2nd appeal vide S.A. No.160 of 1964 arising out of the judgment and decree of F.A. of 18 No.46/110 of 1963 have become un-useful, then, at this juncture, it can be held as per the Full Bench decision of this Hon'ble Court's passed in S.A. No.192 of 1977 that, the suit land under Sabik Khata No.65 being Gounti-raiyati land have been vested in the State as per The Orissa Merged Territories (Village Office Abolition) Act, 1962 (Orissa Act 10 of 1963) and as such, the suit land are Government land.

19. The conclusions drawn above finds support from the ratio of the following decisions:-

> ***(i) Dhanu Malik through L.Rs. Savitri Bewa and others vrs. Lal Sitanshu Sekhar Singh Deo and others (decided on 14.10.1971)*** reported in ***37(1971) CLT1152***. The Orissa Merged Territories (Village Office Abolition) Act, 1962 (Sections 3, 5, 6 and 7). The Gounti-raiyati Lands were towards emolument to the office of the Gountia, but, as per Section 3 of the Act, 1963, the properties those were Gounti-raiyati Lands, were vested in the State of Orissa free from all encumbrances. Sections 5, 6 and 7 for settlement of the properties comes into operation after vesting for settlement of the vested land. Power to settle is vested exclusively in certain revenue authorities. Appeal and revision forums are provided under Section 13 of the said Act and orders passed under Section 13 are treated as final. So, the parties are at liberty to pursue their remedies available to them under the said Act, i.e., The Orissa Merged Territories (Village Office Abolition) Act, 1962 before appropriate authorities those are empowered under the Act, but, not before the civil court.
>
> ***(ii) 2019(I) CLR-651 : Sidheswar Panigrahi vrs. State of Orissa and others—The Orissa Offices Village Police Abolition Act, 1964***—After abolition of village offices, the Gountia shall cease to have the right to hold the Gounti-raiyati Lands as provided under Section 3(g) of the Act. Gounti-raiyati Lands in exState of Bamra were not personal property of Gountia.

(iii) 2018(II) CLR-542 : State of Orissa vrs. Prafulla Kumar Peradhan (dead) through L.Rs.—Orissa Merged Territories (Village Officer Abolition) Act, 1963 (Orissa Act 10 of 1963)—Section 3(g)—After abolition of village office, the Gountia ceased to hold the Gounti-raiyati Lands, the Gounti-Rayati Lands in the ex-State of Barma were not the personal properties of Gauntia, Civil Court has no jurisdiction to entertain a suit for partition of Gounti-raiyati Lands.

As per the discussions and observations made above, when, Nishakara Pradhan was the Gountia of the suit land, but, he (Nishakara Pradhan) had no title in the suit land, then at this juncture, it can safely be concluded that, the plaintiff as a purchaser of the suit land through sale deed dated 02.11.1955 cannot get any better right or title in the suit land than his vendor Nishakara Pradhan. For which, no interest was created in respect of the suit land in favour of the plaintiff, through sale deed dated 02.11.1955 executed by Nishakara Pradhan. Therefore, the recording of the suit land in the Hal RoR in the name of its owner, i.e., State of Orissa(defendant) cannot be held as erroneous.

For which, findings and observations made by the 1st appellate court in T.A. No.06 of 1987 in setting aside the judgment and decree of the dismissal of the suit of the plaintiff vide T.S. No.32 of 1985 cannot be sustainable under law.

20. So, there is justification under law making interference with the judgment and decree passed by the 1st appellate court in T.A. No.06 of 1987 through this 2nd appeal filed by the defendant (State).

As such, there is merit in the appeal of the appellant/defendant(State). The same must succeed.

21. In result, the 2nd appeal filed by the appellant(State) is allowed on merit, but without cost.

22. The judgment and decree dated 10.05.1987 and 19.08.1989 respectively passed by the learned 1st appellate court in T.A. No.06 of 1987 is set aside.

The judgment and decree, i.e., the dismissal of suit of the plaintiff (respondent in this 2nd appeal) vide T.S. No.32 of 1985 passed by the learned trial court is confirmed.

Headnotes prepared by:
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case:
Second Appeal allowed.

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2025 (I) ILR-CUT-1041

SNEHALATA BEURA
V.
MAHESWAR THATOI (DEAD) & ORS.

I.A. NOS. 612, 613 & 614 OF 2024
(ARISING OUT OF S.A. NO.251 OF 1993)

31 JANUARY 2025

[A.C. BEHERA, J.]

Issues for Consideration

1. Whether any argument advanced by the learned Counsel appearing for the opposite parties would be sustainable in absence of any written objection/ pleadings thereof.
2. When the application for condonation of delay has remained uncontroverted by any of the Opposite Parties including the contesting PLRs of the deceased/respondent, whether the delay should be condoned by the Court.

Headnotes

(A) PRINCIPLE OF NON-TRAVERSE – In the present case three interlocutory applications have been filed by the petitioner/ Appellant – These three IAs are supported with separate affidavits – Neither any of the opposite parties nor any of the PLRs of the Respondents filed any written objection against the IAs of the petitioner – Whether any argument advanced by the learned Counsel appearing for the opposite parties would be sustainable in absence of any written objection/ pleadings thereof.

Held: No – When, the averments made in the I.As filed by the petitioner about the cause and reason for non-filing the petition for substitution in due time as indicated above remained uncontroverted/unchallenged, then at this juncture, by applying the principles of law enunciated in the ratio of the decisions referred to (supra), the arguments advanced by the learned counsel for the LRs of the deceased respondent No.1 relying upon the decisions of the Apex Court indicated above in Para No.3 of this order in absence of any written objection from the side of the said PLRs of deceased respondent No.1 cannot be acceptable under law. (Para 7)

(B) INDIAN LIMITATION ACT, 1963 – Section 5 – Condonation of delay – When the application for condonation of delay has remained uncontroverted by any of the Opposite Parties including the contesting PLRs of the deceased/respondent, whether the delay should be condoned by the Court.

Held: Yes – It is felt proper to condone the delay in filing the I.As by the petitioner for substitution of the LRs of the deceased respondent No.1 in S.A. No.251 of 1993 subject to payment of cost only to the contesting PLRs of the deceased respondent No.1 in S.A. No.251 of 1993 for no other reason, but, only in order to avoid the multiplicity of litigations between the parties for the self-same matter – Because, if the LRs of the deceased respondent No.1 shall not be allowed to be substituted after condoning the delay, then, the adjudication of civil rights of the petitioner (appellant in S.A. No.251 of 1993) shall be curtailed forever – For which, by adopting, liberal pragmatic, non-pedantic and justice oriented approach and for removal of injustice taking the substantial justice as paramount consideration, it is felt proper to allow the I.As filed by the petitioner with condition. (Para 9)

Citations Reference

Esha Bhattacharjee Vrs. Managing Committee of Raghunathpur Nafar Academy & Others**, AIR 2013 SCW 6158;** Office of the Chief Post Master General & Others Vrs. Living Media India Ltd. & Another**, AIR 2012 SCW 1812;** Jagran Prakashan (Private), Ltd. Vrs. Fourth Industrial Tribunal & Others**, 1992 Civ.C.C. 232 (Allhabad);** Ram Ujagar Yadava Vrs. State of U.P. & Others**, 2008 Criminal Court Cases 664, (Allahabad);** (Smt.) Aditi Das Vrs. Sri Seshadev Das**, 2019 (I) CLR (D.B.) 461;** Dr. Kshitendra Narayan Mishra Vrs. State of Orissa & Others**, 2017 (I) OLR 950;** Pratap Kumar Jena Vrs. Government of Odisha & Others**, 2017 (I) OLR 222;** Madho Singh & Others Vrs. Ramkali & Others**, 2015(2) CCC 690 (M.P.);** C.S. Rowjee Vrs. State of Andra Pradesh & Others**, AIR 1964 S.C. 962;** Union of India Vrs. K.V. Lakshman & Others**, 2016 (II) CLR (S.C.) 300;** Yanaimal Thottam Trust Vrs. B.Lakshmanan & Another**, (2005) C.L.T. 347 (Madras);** Sumiti Bai & Others Vrs. Paras Finance Company & Others**, IV (2007) Civ.L.T. 37 (S.C.); M.S. Grewal & Another Vrs. Deep Chand Sood & Others, 2001 (8) SCC 151;** Sheo Raj Singh (deceased) through LRs & Others Vrs. Union of India & Another**, 2023 (4) CCC 162 (S.C.);** Rajendra Kumar Vrs. Smt.Mangla Devi**, 2024 (3) Civ.C.C. 378 (Rajasthan); – referred to.**

Keywords

Uncontroverted pleadings; Condonation of delay; Substantial Justice, Technical consideration, Principle of Non-Traverse

Case Arising From

S.A. No. 251 of 1993.

Appearances for Parties

For Petitioner : Mr. D.K. Mohanty

For Opp.Parties : Mr. A.P.Bose (for the LRs of Respondent No.1)

Judgment/Order

Order

A.C. BEHERA, J.

1. These three interlocutory applications have been filed by the petitioner (appellant in S.A. No.251 of 1993) under Order 22 Rule 4 and 9 of the C.P.C., 1908 and Section 5 of the Indian Limitation Act, 1963 praying for substitution of the LRs of the deceased respondent No.1 (Maheswar Thatoi) in S.A. No.251 of 1993 after setting aside the abatement order and condoning the delay in filing the I.A..

2. It has been stated by the petitioner in these three I.As, supported with separate affidavits for condoning the delay that, the respondent No.1 in S.A. No.251 of 1993 i.e. Maheswar Thatoi expired on 31.12.2007 leaving behind his LRs indicated in the petition vide I.A. No.612 of 2024, but, the appellant could not take steps for substitution of his LRs in due time, only due to her innocence and ignorance about the law being a rustic village old lady coupled with her sufferings from various ailments due to her extreme old age being in the age of 75 years. In the month of June 2024, when the second appeal vide S.A. No.251 of 1993 was listed, then, her counsel came to know for the first time from the counsel for the respondent No.1 that, the respondent No.1 has expired in the meanwhile and thereafter, his counsel contacted her (petitioner) and instructed her (petitioner) to file the petition for substitution. Then, she (petitioner) filed these three I.As praying for substitution of the LRs of the deceased respondent No.1 after setting aside the order of abatement and condoning the delay stating that, the delay in filing the petition for substitution of the LRs of respondent No.1 by her (petitioner) is neither intentional nor deliberate, but, only due to the above bona fide reasons.

Accordingly, the notices were issued to the PLRs of the deceased respondent No.1 and after receiving the said notices, the PLRs of the deceased respondent No.1 made their appearance in this I.A. engaging their learned counsel.

3. At the time of hearing of these three I.As, only the LRs of the deceased respondent No.1 contested through their learned counsel without filing any written objection and relied upon the decisions reported in ***AIR 2013 SCW 6158: Esha Bhattacharjee Vrs. Managing Committee of Raghunathpur Nafar Academy & Others and AIR 2012 SCW 1812: Office of the Chief Post Master General & Others Vrs. Living Media India Ltd. & Another.***

4. Accordingly, neither any of the Opposite Parties nor any of the PLRs of the respondent No.1 in S.A. No.251 of 1993 filed any written objection against the I.As of the petitioner.

5. So, The contents of all the three I.As filed by the petitioner supported with separate affidavits have not at all been controverted by the Opposite Parties including the LRs of the deceased respondent No.1 in S.A. No.251 of 1993 through any written objection.

6. As such, the contents in the I.As filed by the petitioner supported with affidavits separately in each I.As remained uncontroverted.

The law concerning the uncontroverted affidavits have already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

(i) ***1992 Civ.C.C. 232 (Allhabad):Jagran Prakashan (Private), Ltd. Vrs. Fourth Industrial Tribunal & Others***—Affidavit—Uncontroverted affidavit should normally be believed unless there was something on record falsifying the facts mentioned in the affidavit. (Para10)

(ii) ***2008 Criminal Court Cases 664, (Allahabad): Ram Ujagar Yadava Vrs. State of U.P. & Others***— Affidavit—If no affidavit in rebuttal is filed and the averments made in the affidavit are not controverted then the said averments must be accepted is true and correct drawing the presumption in favour of the petitioner. (Para 8)

(iii) ***2019 (I) CLR (D.B.) 461: (Smt.) Aditi Das Vrs. Sri Seshadev Das***—Though, the petitioner has filed this petition along with an affidavit, in order words, her petition is supported by annexing affidavit, the counter filed by the Opposite Party is not supported by any affidavit. Rather, it has been signed by the counsel for the Opposite Party only. From the aforesaid aspect, it is clear that, there was no bonafide and meaningful assurance made by the Opposite Party. (Para 10)

(iv) ***2017 (I) OLR 950: Dr. Kshitendra Narayan Mishra Vrs. State of Orissa & Others***—In absence of counter affidavit, averments made in the writ petition are to be taken into consideration, by applying the doctrine of non-traverse.

v) ***2017 (I) OLR 222: Pratap Kumar Jena Vrs. Government of Odisha & Others***—Principle of nontraverse—In the present case, since the opposite parties have not filed the counter affidavit to controvert the contention raised in the writ application, the facts which have been pleaded by the petitioner are deemed to be admitted—Any argument advanced by the learned counsel appearing for the opposite parties cannot sustain in the absence of any pleadings thereof.

(vi) ***2015(2) CCC 690 (M.P.):Madho Singh & Others Vrs. Ramkali & Others***—When application supported by affidavit—No justification in disbelieving same. (Para 6)

(vii) ***AIR 1964 S.C. 962: C.S. Rowjee Vrs. State of Andra Pradesh & Others***—When, facts in the affidavit uncontroverted by the Opposite Parties, the same can be deemed as admitted to rely.

(viii) ***2016 (II) CLR (S.C.) 300—Union of India Vrs. K.V. Lakshman & Others***—Averments in the application were supported with an affidavit, which remained unrebutted. (Para 34)

7. When, the averments made in the I.As filed by the petitioner about the cause and reason for non-filing the petition for substitution in due time as indicated above remained uncontroverted/unchallenged, then at this juncture, by applying the principles of law enunciated in the ratio of the decisions referred to (supra), the arguments advanced by the learned counsel for the LRs of the deceased respondent No.1 relying upon the decisions of the Apex Court indicated above in Para No.3 of this order in absence of any written objection from the side of the said PLRs of deceased respondent No.1 cannot be acceptable under law.

8. It is the settled propositions of law that,

> *"the rights of the parties are to be adjudicated/decided upon the merits of controversies between them. Any party should not be thrown out merely on technicalities. Even if, a party is negligent in defending a proceeding, still other party can be compensated through costs. Because, Law Courts will lose their efficacy, if they cannot possibly respond to the needs of the societies. Technicalities their might be many, but, the justice oriented approach ought not to be thwarted on the basis of such technicality, since technicality cannot and ought not to outweigh the course of justice. So, law courts should always be in favour of condoning delay for giving opportunity to the parties to meet their case on merits instead of debarring them to adjudicate their rights on technical grounds without condoning the delay. The object of C.P.C. is really rules of natural justice. Its purpose is to enable both the parties to get hearing on merit instead of dismissing the suit debarring the parties* on any technical ground from testing their rights".

The above propositions of law has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

> (i) ***IV (2005) C.L.T. 347 (Madras):Yanaimal Thottam Trust Vrs. B.Lakshmanan & Another***—Courts would always be in favour of substantial justice rather than technicalities. (Para 5)
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> (ii) ***IV (2007) Civ.L.T. 37 (S.C.)—Sumiti Bai & Others Vrs. Paras Finance Company & Others***—(Para 8)—CPC, 1908— Purpose of enactment and object—Civil Procedure Code is really rules of natural justice, its purpose is to enable both parties to get hearing.
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> (iii) ***2001 (8) SCC 151:M.S. Grewal & Another Vrs. Deep Chand Sood & Others***—(Para 28)—Law Courts will lose their efficacy, if they cannot possibly respond to the need of the society. Technicalities their might be many, but, the justice oriented approach ought not to be thwarted on the basis of such technicality, since the technicality cannot and ought not to outweigh the course of justice.
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> (iv) ***2023 (4) CCC 162 (S.C.):Sheo Raj Singh (deceased) through LRs & Others Vrs. Union of India & Another***— Indian Limitation Act, 1963—Section5—When substantial justice and technical considerations are pitted against one another, former would prevail.
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> (v) ***2024 (3) Civ.C.C. 378 (Rajasthan): Rajendra Kumar Vrs. Smt.Mangla Devi***—Indian Limitation Act, 1963—Section 5— Dismissal of suit for non-prosecution would led to civil rights of a litigant being curtailed forever. (Para 9)

9. When, the averments made in the I.As of the petitioner have remained uncontroverted (non-traversed) by any of the Opposite Parties including the contesting PLRs of the deceased respondent No.1 in S.A. No.251 of 1993, then at this juncture, by applying the principles of law enunciated in the ratio of the aforesaid decisions of the Hon'ble Courts and Apex Court, it is felt proper to condone the delay in filing the I.As by the petitioner for substitution of the LRs of the deceased respondent No.1 in S.A. No.251 of 1993 subject to payment of cost only to the contesting PLRs of the deceased respondent No.1 in S.A. No.251 of 1993 for no other reason, but, only in order to avoid the multiplicity of litigations between the parties for the self-same matter. Because, if the LRs of the deceased respondent

No.1 shall not be allowed to be substituted after condoning the delay, then, the adjudication of civil rights of the petitioner (appellant in S.A. No.251 of 1993) shall be curtailed forever.

For which, by adopting, liberal pragmatic, non-pedantic and justice oriented approach and for removal of injustice taking the substantial justice as paramount consideration, it is felt proper to allow the I.As filed by the petitioner with condition.

10. Therefore, the three Interlocutory Applications vide I.A Nos.612, 613 and 614 of 2024 filed by the petitioner are allowed with condition.

11. The delay in filing I.A. Nos.612 and 613 of 2024 under Order 22 Rule 4 and 9 of the C.P.C, 1908 for substitution of the LRs of the deceased respondent No.1 in S.A. No.251 of 1993 is condoned subject to payment of cost i.e. Rs.5000/- only to the contesting PLRs of the deceased respondent No.1 through their learned counsel within a period of two weeks from the date of this order. For which, the order of abatement of appeal passed against the deceased respondent No.1 in S.A. No.251 of 1993 is set aside and the PLRs of the deceased respondent No.1 in S.A. No.251 of 1993 be substituted in his place.

12. It is made clear that, only after submission of an acknowledgement regarding the payment of the above cost i.e. Rs.5000/- by the petitioner to the PLRs of the deceased respondent No.1 through their learned counsel within the stipulated period as indicated above, the S.A. No.251 of 1993 shall be listed for necessary order as per law.

13. Accordingly, all the three I.As filed by the petitioner are disposed of finally.

Headnotes prepared by: *Result of the case:*
Smt. Madhumita Panda, Law Reporter I.As. disposed of.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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