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ORISSA HIGH COURT, CUTTACK

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2023 (III) ILR-Cut…… 1001

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2023 (III) ILR-Cut…… 1287

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2023 (III) ILR-Cut…… 1249

PROPERTY LAW – Injunction – Permanent injunction – The consolidation authority have prepared RORs in the year 1990 in respect of suit land indicating there in that defendant no.1 is the son of Sobani(1st husband of the

SERVICE LAW – Regularization – Effective date – Whether the regularization of service of the parties will be made from the date of order of the Court? – Held, when the incumbent possessed requisite qualifications and after facing the interview appointed against a post, his service should be regularised from the date of initial appointment.

Union of India & Ors.-V- Subhankari Das & Ors.
2023 (III) ILR-Cut…… 979

SERVICE LAW – Regularization – Pensionary benefit to work charged employee – The petitioners have worked for several decades in the work charged establishment – The Opp. Parties rejected the representation for regularization and extension of pension as well as other pensionary benefits – Whether the rejection order is sustainable? – Held, No – The rejection order is hereby quashed – It is directed that the opp. Party shall do well to regularise the service of petitioners for a day at least, a day before the date of their retirement and the petitioner be paid the pensionary benefit.

Banshidhar Behera -V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 1182

SERVICE LAW – Regularization – Petitioner being a Swechhasevi Siksha Sahayaka acquired qualification of Diploma in Elementary Education from National Open School – The Opp.Party took a stand that the qualification acquired by the petitioner is not equivalent to C.T as he has not passed the same from the Board of Secondary Education and not eligible for regularization – Whether such a plea of the State/ Opp.Party is acceptable? – Held, No – When the Opp.Party allowed the petitioner to take the OTET examination conducted by the Board after taking note of the qualification so acquired as training qualification equivalent to C.T, the stand taken by the State in the present case is not acceptable.

Bichitra Nanda Behera -V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 1204

SERVICE LAW – Scope of Promotion during pendency of Vigilance Proceeding – The DPC has recommended the case of the petitioner for the promotion since 2014 which has been kept in sealed cover – The vigilance proceeding was initiated in the year 2001 – The proceeding is moving in the snail pace nearly about 25 years – Effect of – Held, for a delinquent /government servant impeding such delay trial is indeed a case of double jeopardy – State/Opp.Parties are directed to give promotion to the petitioner from the date of his juniors and batch mates got such promotion subject to the condition that in the event the petitioner is convicted in the impeding criminal case, he shall be reverted back down the hierarchy.

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2023 (III) ILR-CUT-979

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

W.P.(C) NO. 34332 OF 2023

UNION OF INDIA & ORS. .....Petitioners

-V-

SUBHANKARI DAS & ORS. ..... Opp.Parties

SERVICE LAW – Regularization – Effective date – Whether the regularization of service of the parties will be made from the date of order of the Court? – Held, when the incumbent possessed requisite qualifications and after facing the interview appointed against a post, his service should be regularised from the date of initial appointment.

Case Laws Relied on and Referred to :-

1. W.P(C) No. 24759 of 2012 : Basanta Kumar Sahoo & Ors. Vs. Union of India.
2. W.P(C) No. 5906/2018 : Amrish Kumar Vs. Indian Institute of Mass Communication.
3. 2006 (4) SCC 1 : State of Karnataka Vs. Umadevi.
4. 2023 SCC OnLine SC 393 : Government of Tamil Nadu & Anr Vs. Tamil Nadu Makkal Nala Paniyalargal & Ors.
5. 2023 LiveLaw (SC) 91 : Vibhuti Shankar Pandey Vs. State of Madhya Pradesh & Ors.
6. W.P(C) No. 24758 of 2012 : Manoj Kumar Jena & Ors. Vs. Union of India & Ors.

For Petitioners : Mr. Partha Sarathi Nayak, Sr. Standing Counsel (UoI)

For Opp.Parties : M/s. Tanmay Mishra & D.K. Patnaik

JUDGMENT Date of Judgment : 02.11.2023

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

1. The Union of India and its functionaries, being the petitioners, have filed this writ petition challenging the order dated 13.07.2023 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 260/00/163 of 2018, whereby direction was given to the present petitioners to regularise the services of the present opposite parties from initial date of their joining with all consequential benefits.

2. The factual matrix of the case, in brief, is that the opposite parties, having possessed with the requisite qualifications and after facing the interview, were appointed against the posts of Library in charge, Technical Assistant and Computer Instructor/ Teacher in Indian Institute of Mass Communication (IIMC), Dhenkanal. While continuing as such, the designation of opposite party no.1 was changed to Library Coordinator, designation of opposite party no. 2 was changed to Technical Coordinator and designation of opposite party no.3 was changed to Academic Coordinator (IT) vide order dated 17.10.2017. The opposite parties no.1 and 2 were appointed against their respective posts in the year 1995 and continuing and discharging their duty since then. Similarly, opposite party no.3 was appointed in the year 2002

and since then he has been continuing and discharging his duty. Though sanctioned posts were made available, but the opposite parties were appointed on contractual/ ad hoc basis and were paid consolidated remuneration per month. However, the said remuneration was enhanced from time to time and they have been continuing in IIMC, Dhenkanal since the date of their appointment uninterruptedly. Even though the opposite parties no.1 and 2 were continuing in service for more than 23 years and opposite party no.3 was continuing for more than 16 years uninterruptedly, instead of regularising their services, since a circular was issued on 15.02.2018 regarding revised procedure for engagement of contractual staff indicating therein that all contractual staff who have been working in IIMC/its regional campuses for more than 5 years have to be discontinued, therefore, the opposite parties approached the Central Administrative Tribunal, Cuttack Bench, Cuttack by filing O.A. No. 260/00/163 of 2018 seeking to quash the order dated 15.02.2018 and to regularise their services from the date of their initial joining and to release all consequential service benefits. The Tribunal disposed of the said Original Application, vide order dated 13.07.2023, with the following observation and direction:-

> *"In view of the above discussion, settled position of law and the facts that the applicants are similarly placed to the applicants in the case before Hon'ble High Court of Orissa & New Delhi who have been given regular appointment, on the ground of parity they are to be regularized. The decision relied upon by learned counsel for the respondents are not applicable to the facts and circumstances of this case. Accordingly, the respondents are directed to regularize the services of the applicants from initial date of joining with all consequential benefits. The entire exercise shall be completed within a period of 90 days from date of receipt of copy of this order."*

The present writ petitioners, who were the respondents before the Tribunal, have filed this writ petition challenging the order of the Tribunal, as referred above.

3. Mr. P.S. Nayak, learned Senior Standing Counsel appearing for the petitioners-Union of India contended that the opposite parties are not entitled to get such benefit from the date of their initial joining. At best, their services can be regularised from the date of passing of the order by the Tribunal and not from the date of their initial appointment. According to him, in a similarly situated case, i.e. in the case of ***Basanta Kumar Sahoo and others v. Union of India*** (W.P.(C) No. 24759 of 2012) disposed of on 31.07.2017, pursuant to the order passed by this Court, the present petitioners created supernumerary posts since sanctioned posts were not available and accordingly regularised their service in such posts. Therefore, according to him, the order of the Tribunal may be modified by directing the authorities to regularise the service of the opposite parties by creating supernumerary posts from the date of passing of the order.

4. Mr. D.K. Patnaik, learned counsel appearing for opposite parties vehemently disputed such position and contended that the petitioners are trying to mislead this Court by giving information which is not based on record. He further contended that

the Tribunal is well justified in passing the order impugned and directing the authorities to extend the benefit of regularisation of the service of the opposite parties from initial date of their joining along with all consequential benefits. He further contended the Tribunal, while passing the order impugned, has taken note of the order passed by the High Court of Delhi in the case of ***Amrish Kumar v. Indian Institute of Mass Communication*** (W.P.(C) No. 5906/2018 & CM APPL 23016/ 2018 disposed of on 14.02.2020). In ***Amrish Kumar*** (supra), the High Court of Delhi has also taken note of the order passed by this Court in the case of ***Basanta Kumar Sahoo*** (supra) and directed for extension of benefit of regularisation from the initial date of joining with all consequential benefits. The order passed by the High Court of Delhi in ***Amrish Kumar*** (supra) was also challenged by the authorities before the apex Court in Special Leave to Appeal (C) No. 710 of 2010, which was dismissed vide order dated 10.12.2021 and accordingly the authorities implemented the order. Therefore, the order passed by the Tribunal is well justified and, as such, the writ petition is liable to be dismissed.

5. Having heard learned counsel for the parties and after going through the records, it is admitted that the opposite parties are discharging their duties and responsibilities from the date of their initial appointment in the year 1995 and 2002. In the year 2017, their designations were changed without any change of remuneration. Without regularising their services, the authorities issued a circular on 15.02.2018, which is absolutely a camouflaged way of approach to the difficulties of the opposite parties to deprive them of the benefit of their regularisation after utilising their services from 1995 and 2002, i.e., for more than 23 years and 16 years by then.

6. The reliance was placed by the present petitioners before the Tribunal on the cases of ***State of Karnataka v. Umadevi***, 2006 (4) SCC 1; ***Government of Tamil Nadu & another v. Tamil Nadu Makkal Nala Paniyalargal & others***, 2023 SCC OnLine SC 393 and ***Vibhuti Shankar Pandey v State of Madhya Pradesh and others***, 2023 LiveLaw (SC) 91 and submission was made that there was no sanctioned post available for engagement of the opposite parties and that the process of engagement of the opposite parties was not in accordance with Article 14 of the Constitution of India. Therefore, the opposite parties have no right for regularisation.

7. The above stand of the petitioners cannot have any application to the case of the present opposite parties, as because, in a case of similarly situated persons, i.e. ***Basanta Kumar Sahoo*** (supra), relying on the decisions rendered in ***Umadevi*** (supra) and ***State of Karnataka v. M.L. Keshari***, 2010 (II) OLR (SC) 932, direction was issued for regularisation of such employees. Similarly, in the case of ***Manoj Kumar Jena and others v. Union of India and others***, W.P.(C) No. 24758 of 2012 disposed of 31.07.2017, this Court also took the similar view as was taken in the case of ***Basanta Kumar Sahoo*** (supra). The order passed in the case of ***Manoj Kumar Jena*** (supra) was assailed by the authorities before the Apex Court in S.L.P. No.

35963 of 2017, which was dismissed vide order dated 05.01.2018. Thereby, the order passed by this Court in ***Manoj Kumar Jena*** (supra) got affirmed in the apex Court. Here, it is worth mentioning that in both the cases indicted above, i.e. in the case of ***Basanta Kumar Sahoo*** and ***Manoj Kumar Jena*** (supra), the orders have been passed by one of us (Dr. B.R. Sarangi, ACJ). The said order having been affirmed by the apex Court, as a consequence thereof, the same has been implemented. The decision of ***Basanta Kumar Sahoo*** (supra) was referred to by the High Court of Delhi in the case of ***Amrish Kumar*** (supra).

8. In ***Amrish Kumar*** (supra), the High Court of Delhi observed as follows:-

> *"In the present case too, the workmen admittedly have been working for 23 years. It clearly tantamount to unfair labour practice by denying them the benefits of regular services for 23 years. The objective of the Act is to prevent unfair labour practice which is defined in detail in 5th Schedule of the Industrial Disputes Act, 1947 with reference to section 2A. The specific definition applicable to the present case is clause 10 which reads as under:*
>
> *"10. To employ workmen as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen".*
>
> *7. The facts of the instant case as discussed hereinabove clearly shows that keeping the workmen in uninterrupted service for 23 years as casual workmen and denying them the status and privilege of permanent workmen, constitutes unfair labour practice which is illegal and needs to be quashed. Furthermore, similarly situated workmen of the respondent who worked in its other administrative unit in Orissa (Dhenkanal), for roughly half a century on ad hoc basis, have been directed by the Orissa High Court in Basanta Kumar Sahoo vs Union of India, WP(C) 24759/2012, decided on 31.07.2017 to be regularized. The said judgment has referred to and relied upon Umadevi (supra) and State of Karnataka and Ors vs M L Kesari (2010) 9 SCC 247. The SLP against the said judgment of the Orissa High Court was dismissed by the Supreme Court on 05.01.2018; therefore, it has attained finality. The case of the present petitioners is identical. That being the position i.e. they had worked for almost 23 years; the employer was same; they had been working against the sanctioned posts; they were not considered as regular employees, therefore, the treatment meted out to them constitutes unfair labour practice. In the circumstances, their services too shall be regularized from initial date of joining, with all consequential benefits.*

9. It is pertinent to mention here that the decision rendered by the High Court of Delhi in ***Amrish Kumar*** (supra) was challenged before the apex Court in Special Leave to Appeal (C) No. 710 of 2021, which was dismissed vide order dated 10.12.2021 and, as a consequence thereof, the same has also been implemented. Therefore, the Central Administrative Tribunal, relying on the said judgment, having passed the order impugned, this Court is not inclined to interfere with the same. As such, the order passed by the Central Administrative Tribunal dated 13.07.2023 in O.A. No. 260/00/163 of 2018 is hereby confirmed and the petitioners are directed to

regularise the service of the opposite parties from initial date of their joining with all consequential benefits within a period of sixty days from the date of receipt of the order.

10. In view of the above, the writ petition merits no consideration and the same stands dismissed. However, there shall be no order as to costs.

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2023 (III) ILR- CUT- 983

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

W.P(C) NO. 14204 OF 2023

M/s. BALASORE ALLOYS LTD, BALASORE & ANR. ……Petitioners
-V-
UNION OF INDIA & ORS. ….....Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of mandamus – When can be issued? – Discussed with reference to case laws.

(Paras 17-21)

Case Laws Relied on and Referred to :-

1. (1996) 9 SCC 709 : Tata Iron & Steel Co. Ltd. Vs. Union of India & Anr.
2. W.P(C) No.202/1995 (dt.12.12.1996) : T.N. Godavarman Thirumulpad Vs. Union of India
3. W.P(C) 562 of 2009 (dt. 01.09.2014) : Samaj Parivartana Samudaya Vs. State of Karnataka.
4. 2020) 12 SCC 56 : Chowgule and Company Private Ltd. Vs. Goa Foundation & Ors.
5. (1986) 2 SCC 679 : AIR 1987 SC 537:Auditor-General of India Vs. K.S.Jagannathan.
6. (2002) 4 SCC 638 : AIR 2002 SC 1598:Directors of Settlements, Andhra Pradesh Vs. M.R.Appa Rao.
7. (2004) 9 SCC 786 : AIR 2004 SC 1998 :National Textile Corpn. Ltd. Vs. Haribox Swalram.

For Petitioners : Mr. N. Gupta, Sr. Adv, Mr.S. P.Mishra, Sr. Adv.
Mrs. Pami Rath, Sr. Adv, Mr. N. Kumar, Sr. Adv.
M/s. S. Mishra, R.K. Agrawal, M. Mishra, G.N. Parida, & O. Panda.

For Opp.Parties : Mr. P.K. Parhi, DSGY, Mr. S.S. Kashyap, CGC
Mr. A.K. Parija, A.G, Odisha, Mr. P.P. Mohanty, AGA.

JUDGMENT Date of Hearing: 30.10.2023:: Date of Judgment: 03.11.2023

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

1. Petitioner no.1-M/s. Balasore Alloys Limited, a company registered under the Companies Act, 1956, represented through petitioner no.2, who is a shareholder of petitioner no.1-company, has filed this writ petition seeking following prayers:-

"a) Allow the present Writ Petition and pass an appropriate writ, order or direction including a writ in the nature of mandamus or any other appropriate writ/order directing the Opposite Party No. 1 to expeditiously grant the formal letter of Stage-II Forest Clearance to the Petitioner in respect of the Subject Mineral Block over an area of 64.463 ha. situated in Kaliapani Village in Sukinda Tehsil of Jajpur District in the State of Odisha in a time-bound manner within a period of 3 months, in view of the fact that the Petitioner has already complied with all the essential and necessary conditions of Stage-I Forest Clearance; And/Or

b) Pass an appropriate writ, order or direction including a writ in the nature of mandamus or any other appropriate writ/order directing the Respondent No. 2 to grant permission to the Petitioner Company to resume its mining operations in the Subject Mineral Block over an area of 64.463 ha. situated in Kaliapani Village in Sukinda Tehsil of Jajpur District in the State of Odisha in view of the fact that the Petitioner has paid NPV and has also substantially complied with all the requirements of Stage-I Clearance and only formal approval letter is awaited for issuance of Stage-II Forest Clearance; And/Or

c) Pass an appropriate writ, orders or direction including a writ in the nature of mandamus or any other appropriate Writ directing the State Govt. of Odisha not to deny the required and necessary transit passes/permit to the Petitioner Company for removal/transportation of minerals from the Subject Mineral Block to the Petitioner No. 1: And/Or

d) Pass any other further orders/directions as this Hon'ble Court may deem fit and proper in the present set of facts and circumstances."

2. The factual matrix of the case, in brief, is that M/s. Tata Iron and Steel Company Limited (for short "TISCO") is the original holder of the subject mineral block over an area of 64.463 hectares, which is a part of larger area of Sukinda Chrome Valley, from the year 1953 till 1993. It had applied to the Raja of Sukinda Block, Odisha for grant of a prospecting licence and the same was granted in the year 1952. Thereafter, on 22.10.1952, TISCO was granted a mining lease over an area of 1813 hectares for mining of Chromite, which was renewed for a period up to 1993 over reduced area of 1261.476 hectares.

2.1. Pursuant to the judgment dated 23.07.1996 of the Supreme Court of India in ***Tata Iron & Steel Co. Ltd. v. Union of India & Anr***., (1996) 9 SCC 709, a part of the Sukinda Chromite Block was retrenched from TISCO and was granted to other Chrome-based Industries, one of which is the petitioner-company. The petitioner-company was granted mining lease over an area of 100.063 hectares, which consists of 64.463 hectares non-forest land and 35.600 hectares forest land for which terms and conditions were issued, vide letter dated 24.05.1999, and it was accepted instantly by the petitioner-company on 25.05.1999.

2.2. The petitioner-company, vide letter dated 03.12.1999, requested for splitting of the mining lease area into two parts, i.e., 64.463 hectares of non-forest area and 35.600 hectares of forest land. In pursuance of the request letter, the ML area granted to the petitioner-company was splitted into two blocks i.e. 64.463 hectares

of non-forest block and 35.600 hectares of forest block, vide order dated 16.02.2000 issued by the State, and petitioner-company was requested to furnish two separate mining plans with due approval of IBM. Accordingly, the subject mineral block consisting of 64.463 hectares non-forest land was granted to petitioner-company and a lease deed was executed on 15.07.2000. After having obtained all the required clearances, petitioner-company commenced with the mining operations from September, 2000. The said mining lease was granted as captive mining lease and the minerals produced from the subject mineral block are entirely consumed in the two captive ferro chrome plants of petitioner-company, of which one is situated at Balasore, having a capacity of 145000 TPA (Ton Per Annum) with an investment of Rs.615 crores with 2000 employees working, and the other at Sukinda, having a capacity of 15660 TPA with an investment of Rs.31 crores with 250 employees working. Throughout the mining operations, the subject mineral block was treated as a non-forest area, right from the beginning, i.e., from September, 2000 till 2015. The State Government, Central Government, IBM, MoEF & CC and all other concerned entities accepted the position that the subject mineral block consisted entirely of non-forest area.

2.3. For the first time in the year 2014, the MoEF & CC, vide its letters dated 19.02.2014 and 07.05.2014, was of the view that the change of kisam of land from forest (in the sabik records) to non-forest land (in Hal settlement) after 25.10.1980 would require prior approval of the Central Government under Section 2 of the Forest (Conservation) Act, 1980 (for short "F.C. Act"), in view of judgment dated 12.12.1996 of the apex Court in ***T.N. Godavarman Thirumulpad v. Union of India*** (W.P.(Civil) No.202 of 1995).

2.4. Petitioner-company assailed the said letters dated 19.02.2014 and 07.05.2014 before this Court by filing W.P.(C) No. 25350 of 2014. When the matter was sub-judice before this Court, the MoEF & CC issued further guidelines on 10.03.2015, wherein the MoEF & CC held that prior approval of the Central Govt. shall be required under the F.C Act for areas falling in the mining leases, which were or are recorded as 'forest' in the Government record on or after the day the F.C. Act came into force, i.e., on or after 25.10.1980. But, it was directed that the mining operations would be allowed to continue in already broken up area of all such lands for a period of one (1) year from the date of issuance of the guidelines, i.e. up to 09.03.2016.

2.5. In adherence to the guidelines issued by the MoEF & CC, the Forest and Environment Department, Govt. of Odisha issued directions to the Divisional Forest Officers (for short "DFO"), vide notification dated 30.03.2015, to inter alia take follow-up actions, pursuant to the Guidelines dated 10.03.2015 and to verify the position of the broken-up area and instruct the lease holders to ensure compliance of the said Guidelines. As a consequence thereof, the DFO, Cuttack, vide his letter dated 09.04.2015, intimated the petitioner-company that non-forestry activities may

only continue till 09.03.2016, as per the MoEF & CC's guidelines, and the petitioner-company was advised to approach the MoEF & CC seeking diversion of the area as per the provisions of the F.C. Act.

2.6. In view of the guidelines of MoEF & CC dated 10.03.2015 and the notification of the Forest and Environment Department, Govt. of Odisha dated 30.03.2015, the petitioner-company withdrew W.P.(C) No.25350 of 2014 on 15.04.2015 with liberty to approach this Court, if any future action of any or all the opposite parties so demands. After withdrawal of the said writ petition, petitioner-company started the process for obtaining the forest clearance and accordingly, vide its letter dated 18.05.2015, approached the DFO, Cuttack seeking appropriate direction for allotment of non-forest land for the purpose of compensatory afforestation, which is a mandatory pre-requisite for prior approval of diversion proposal under Section 2 of the F.C. Act. Pursuant to said letter, the DFO, Cuttack, vide letter dated 19.05.2015, issued a demand for Net Present Value (for short "NPV") to the tune of Rs. 4,68,06,870/-, which was to be deposited in the Compensatory Afforestation Funds Management and Planning Authority (for short "CAMPA") fund. On the request of petitioner-company, the DFO, Cuttack, vide letter dated 28.05.2015, informed the Collector, Jajpur, Odisha that the petitioner-company had applied for providing non-forest land for raising compensatory afforestation over an area of 64.119 hectares and the DFO requested the Collector, Jajpur to allocate the non-forest land for the purpose of Compensatory Afforestation.

2.7. Petitioner-company, vide its letter dated 27.07.2015, again approached the Collector and District Magistrate, Jajpur, seeking allotment of non-forest land over 64.119 hectares for the purpose of compensatory afforestation. Petitioner-company again requested for allotment of compensatory afforestation land so that it could expedite the process of filing of forest diversion proposal, vide another letter dated 27.07.2015. Petitioner-company had made a detailed representation to the Deputy Director of Mines, Jajpur, requesting that the joint survey of the mining lease area could be conducted so that DGPS survey is completed, which is another mandatory pre-condition for applying for the forest diversion proposal.

2.8 In response to the application of petitioner-company, the Deputy Collector, Revenue Collectorate, Jajpur, vide letter dated 05.08.2015, requested the Tahasildar, Darpan/Dharmasala to identify the area of 64.119 hectares of Government non-forest land under his jurisdiction in lieu of forest land to be diverted for the mining lease. Petitioner-company had also deposited an amount of Rs.4,68,06,870/- as NPV and informed the same, vide its letter dated 21.09.2015, to the DFO. On 30.10.2015, the Tahasildar, Sukinda sent to petitioner-company the certificate of the land schedule dated 29.10.2015 in respect of the Kaliapani Chromite Mines having an area of 64.463 hectares. Having completed the mandatory pre-requirements for applying the forest diversion proposal, petitioner-company submitted an online proposal dated 01.01.2016 seeking prior approval of the Central Govt. under Section

2 of the Forest Conservation Act and, thereafter, an online application dated 06.01.2016 was submitted with regard to details of land identified for compensatory afforestation. Since the forest diversion proposal, its preparation, ancillary requirements and processing took multiple processes by different agencies at district level, State level and Central Govt. level and it was an inherently lengthy, cumbersome, complex and time consuming process, petitioner-company, vide its letter dated 21.01.2016, requested the Principal Secretary, Forest and Environment Department, Govt. of Odisha seeking extension of 1 (one) year from the time granted, which was due to expire on 09.03.2016. Petitioner-company therein listed out all the steps taken for obtaining required approval and then requested for extension of the time limit in the light of the delay by the various Government agencies, whom petitioner-company had been vigorously pursuing to ensure an early completion of the Forest Diversion Proposal.

2.9. The apex Court in ***Samaj Parivartana Samudaya v. State of Karnataka***, [I.A Nos.204 & 219, 223 & 224 in WP. (C) 562 of 2009], vide its order dated 01.09.2014, recognised that even if all the processes are completed timely by a lessee, the process for obtaining Stage I and Stage II approval takes almost two and a half years. The letter dated 08.09.2014 from the Forest and Environment Department, Government of Odisha to the Principal Chief Conservator of Forests, Odisha goes to show that the Government of Odisha was well aware of this order of the apex Court and the amount of time it would take to process both Stage I and Stage II approvals under the F.C. Act. Request of the petitioner-company was forwarded by the DFO, Cuttack to Regional Chief Conservator of Forest, Angul, which was further forwarded to the Principal Chief Conservator of Forests, Odisha and, ultimately, it was forwarded to the MoEF & CC. While the process on the Forest Diversion Proposal was in advance stage, petitioner-company and other similarly situated lease holders received letter dated 22.02.2016 from DDM, Jajpur Road directing them to stop raising and transportation of minerals w.e.f. 10.03.2016 inasmuch as the time granted by the Guidelines dated 10.03.2015 was due to expire on 09.03.2016. Challenging the said letter issued by the DDM, Jajpur Road suspending mining operations, petitioner-company and other similarly situated lease holders filed writ petitions. The writ petition of the petitioner-company was numbered as W.P. (C) No. 4157 of 2016. On 04.03.2016, this Court passed an interim order granting status quo with regard to operations of the mines.

2.10 The State Govt., vide its letter dated 29.06.2016, forwarded the forest diversion proposal of the petitioner-company to MoEF & CC. In the said letter, the State Govt. had clearly recorded that the area was treated as non-forest area right from the beginning till the issuance of the Guidelines dated 10.03.2015. The State Govt. and all other concerned agencies have always regarded the subject area as non-forest. The position was changed only in view of the Guidelines issued by the MoEF & CC in the year 2015. The State Govt. also recorded that there is no violation on account of the petitioner-company in the present area.

2.11 The Forest Advisory Committee (for short "FAC") considered the forest diversion proposal of the petitioner-company and recommended the proposal for clearance under the F.C Act with certain guidelines. The State Govt. and the petitioner-company have always maintained that there has been no violation of the F.C. Act by the petitioner-company in respect of the subject mining block and accordingly, the petitioner-company protested some of the observations made by the FAC, vide its letter dated 07.10.2016. The said letter was duly forwarded by the State Govt. to the MoEF & CC inter alia accepting the position that there is no violation by the petitioner-company and accordingly, the FAC was requested to review its observations with regard to alleged violations of the F.C. Act. Pursuant to the recommendations made by the FAC, the MoEF & CC granted Stage-I forest clearance to the petitioner-company, vide letter dated 18.11.2016 stipulating as many as 32 conditions, which were to be complied by the petitioner-company. The request of the petitioner-company seeking review of the observations made by the FAC with regard to the alleged violations by the petitioner-company was reconsidered by the FAC and the FAC, vide its Agenda No. 5, bearing File No. 8-14/2016-FC dated 25.04.2017, accepted the request of the petitioner-company and agreed to constitute a high power committee to decide the policy framework and quantum of penalty to be imposed in case of unavoidable violations of provisions of the F.C Act. The FAC further held that the quantum of penalty shall be imposed on the petitioner-company as per the recommendations of the committee so constituted by the FAC.

2.12. The MoEF & CC, vide its letter dated 25.07.2017, issued a modified Stage-I Forest Clearance replacing two conditions stipulated in earlier Stage-I clearance dated 18.11.2016 with regard to alleged violations and it was stipulated in the said letter that the further action will be taken on the issue of the alleged violations only after the receipt of the recommendations of the committee. On 26.10.2017, the committee rendered its final recommendations holding that where the forest land has been changed to non- forest land in Govt. records, as it was done in the present case, no penalty shall be imposed if the violation is not attributable to user agency. Later on, vide Guidelines dated 29.01.2018, the said recommendations were issued by MOEF & CC.

2.13. Petitioner-company was constrained to stop mining operations by virtue of order dated 20.05.2022 passed by this Court in W.P. (C) No. 4157 of 2016, wherein the interim order dated 04.03.2016 passed by this Court was not extended, by which, as an interim measure, petitioner-company was allowed to carry out mining operations and the said writ petition was disposed of as infructuous, vide order dated 12.09.2022. The apex Court, vide order dated 06.06.2022 in SLP (C) No. 10237 of 2022 declined to interfere with the order dated 20.05.2022 passed by this Court in W.P. (C) No. 4157 of 2016. The interim order dated 04.03.2016 was extended from time to time. However, due to inadvertence on the part of the Advocate of petitioner-company, there was no express order to extend the interim order after 17.12.2019.

At the same time, on 20.05.2022, there was no order expressing to vacate or discontinue the order dated 04.03.2016. The State Govt. was also under belief that the interim order dated 04.03.2016 continued to operate inasmuch as prior to 06.06.2022, the State Govt. allowed the petitioner to continue its mining operations. Thereafter, a letter dated 06.06.2022 was issued by the Deputy Director of Mines, Jajpur to petitioner-company suspending the mining operations in the subject mineral block due to want of statutory clearance. The position of petitioner-company, since the mining operation was suspended on 06.06.2022, has further developed, inasmuch as, at the time when the order dated 20.05.2022 was passed in W.P.(C)) No. 4157 of 2016 read with the order dated 06.06.2022 in SLP (C) bearing No. 10237 of 2022, there was one condition of Stage I Forest Clearance which was pending for compliance, i.e., the transfer and mutation of land in favour of the Forest Department for compensatory afforestation. But, all the conditions had been complied with and only the formal letter of Stage II Forest Clearance was awaited. Petitioner-company has fully complied with all the conditions stipulated by the MoEF & CC, while granting Stage-I Forest Clearance, and in total the petitioner-company has made payment of Rs.17,39,88,515/- for obtaining the required forest clearances. It also obtained all the required statutory clearances, approvals, permissions for resuming the mining operations. It has also made huge investments for restarting its plant, which was closed due to shortage of raw materials, and consecutive operational losses. Now the petitioner has started its operations with great difficulty and is unable to sustain its operations in the absence of source of raw material, i.e. Chromite Ore. It also made huge payments including Rs.69,09,20,000/- to the TP Northern Odisha Distribution Limited Company since 23.09.2022 for the purpose of restarting its plant which was lying non-operational due to shortage of raw material.

2.14. The Principal Chief Conservator of Forest, Nodal Govt. of Odisha, vide letter dated 08.12.2022, reported to the MoEF & CC that petitioner-company has fully complied with all the conditions imposed by the MoEF & CC while granting Stage I clearance. After providing a detailed list of point-wise compliances, the Principal Chief Conservator of Forest, Odisha recommended that in view of the compliance of the conditions by the petitioner-company, the MoEF & CC may grant final approval under Section 2 of the F.C. Act for diversion of forest land in the subject mineral block. The authorities have been delaying the process of granting formal approval, which is evident from the letters dated 14.01.2023, 16.02.2023, 21.02.2023 and 20.03.2023 despite clear and unequivocal recommendation by the State Government vide letter dated 08.12.2022. In terms of the CEC's report dated 26.04.2010 submitted to the apex Court in I.A. No.2746-2748 in W.P.(C) No.202 of 1995, the NPV was to be for the entire forest falling within the mining lease and it had to be deposited in the Compensatory Afforestation Fund as a condition for permitting mining in forest land.

2.15. The petitioner-company having complied with all the conditions stipulated by the MoEF & CC and having paid the NPV, it was advised to approach the Forest Bench of the apex Court in ***T.N. Godavarman Thirumulpad*** (supra), wherein the apex Court allowed continuation/resumption of mining operations in already broken up area subject to payment of NPV and compliance of other conditions. Accordingly, on 28.01.2023, petitioner-company filed I.A. No.21531 of 2023 and I.A. No.21636 of 2023 before the Forest Bench of the apex Court. On 15.03.2023, the apex Court issued notice in the aforesaid I.A. and directed the opposite parties to file their response, but no response was forthcoming nor was the same filed by the opposite parties.

2.16. The apex Court, vide order dated 19.04.2023 passed in I.A. No.21531 of 2023 and I.A. No.21636 of 2023 filed in W.P.(Civil) No.202 of 1995, granted liberty to the petitioner-company to approach this Court. Hence, this writ petition.

3. Mr. N. Gupta, learned Senior Counsel, Mr. S.P. Mishra, learned Senior Counsel, Ms. Pami Rath, learned Senior Counsel and Mr. N. Kumar, learned Senior Counsel appearing along with Mr. M. Mishra, learned counsel for the petitioners contended that the apex Court, vide order dated 19.042023, granted liberty to the petitioner-company to approach this Court. It is further contended that the petitioner-company has fully complied with all the 32 conditions of Stage-I forest clearance and is entitled to be granted formal Stage-II forest clearance expeditiously and in a time-bound manner inasmuch as it has already complied with all the requisite conditions of the Stage-I forest clearance. It is further contended that the petitioner-company, having deposited the NVP, payment of compensatory afforestation and other levies, there is no impediment on the part of the Central Government to grant Stage-II forest clearance. Non-grant of forest clearance is an arbitrary action of the authority. It is further contended that the subject mineral bearing area consists of large stretch of already broken up area and the petitioner-company was allowed to continue its mining operations in the said broken up area. Since the petitioner-company has fully and substantially complied with the requirements of Forest (Conservation) Act, 1980, it may be allowed to conduct its mining operations till its application is being processed by MoEF & CC for issuance of the formal Stage-II forest clearance. It is further contended that 61.968 hectares out of the total 64.463 hectares is already broken up, as per IBM approved mining plan and worked upon area and, therefore, keeping the same into consideration, the petitioner-company ought to be permitted to resume the mining operations in such worked upon and broken up area till the grant of formal letter of Stage-II forest clearance. It is further contended that the petitioner-company has excavated and stored different grades of Chromite Ore, i.e., approximately 40,000/- MT, which is evident from the closing balance of the month of May, 2022, as per statutory returns filed with IBM. Therefore, it may be allowed to transport and dispose of the said legally excavated minerals for use in its captive plant. It is further contended that the petitioner-company has large number of employees in its plant and mines, who are entirely

dependent on the operation of the said plant and the mines for their livelihood. Unless the permission for resumption and to remove and dispatch mineral intended to be used in the Ferro Chrome Plants is granted, the employees engaged and employed by the petitioner-company will be heavily prejudiced. It is further contended that the State Government would receive huge amount of revenue in terms of royalty, District Mineral Fund and State GST in case the petitioner-company is allowed to resume its mining operations. As such, it has already made a total payment of approximate Rs.17, 39, 88, 515 for obtaining the required forest clearance. But inaction on the part of the MoEF & CC causes immense difficulties for survival of the industry. It is further contended that in cases where the mining operations were closed due to expiry of lease or due to expiry of statutory clearances, this Court as well as the apex Court has allowed transportation of minerals taking into account the legislative policy enshrined under Rule 12(1)(gg) of the MCR 2016, even where mining operations were closed due to expiry of the mining lease or due to any other reason. It is further contended that as per Rule 12(1)(gg) of the MCR 2016, the lessee may after paying rents, rates and royalties payable under the Act and Rules made thereunder or under lease deed, at the expiry or sooner termination of the lease term or within six calendar months thereafter (unless the lease is terminated for default of the lessee, and in that case at any time not less than three calendar months nor more than six calendar months after such termination) take down and remove for its own benefit, all or any ore mineral excavated during the currency of the lease, engines, machinery, plant, buildings structures, tramways, railways and other works, erections and conveniences which may have been erected, set up or placed by the lessee in or upon the leased lands and which the lessee is not bound to deliver to the State Government or which the State Government does not desire to purchase. To substantiate their contentions, reliance has been placed on ***Chowgule and Company Private Limited v. Goa Foundation and Others***, (2020) 12 SCC 56.

4. Mr. P.K. Parhi, learned Deputy Solicitor General of India along with Mr. S.S. Kashyap, learned Central Government Counsel appearing for opposite party no.1 vehemently urged before this Court that the State Government, vide letter dated 08.12.2022 submitted the compliance report vis-à-vis conditions stipulated in Stage-I approval dated 18.11.2016 read with letter dated 25.07.2017, after elapse of six years. But, this opposite party after examination of the compliance report, sought clarification from the State Government, vide letter dated 14.01.2023, as the said report was not complete. It is further contended that the compliance report vis-à-vis Stage I approval dated 18.11.2016 was received from the State Government after a lapse of six years. Sub-rule (2) of Rule-8 of the Forest (Conservation) Rules, 2003 provides certain requirements to be followed and the same having not been done so, no action has been taken from the side of MoEF & CC. It is further contended that the State Government reiterated that the mining operations were running up to 06.06.2022 without a valid approval under Forest (Conservation) Act, 1980. Therefore,

the penalties, as prescribed in the conditions of approval, are required to be realized by the State and intimated to the MoEF & CC for further necessary action in the matter. Therefore, the MoEF & CC requested the State Government to furnish the requisite information, vide letter dated 20.03.2023 and the reply of the same is awaited. It is further contended that the role of the Central Government is limited, but that has to be in consonance with the provisions of the Act and Rules and more particularly, the State Government has to make compliance so as to extend the benefit to the petitioner-company. The same having not been done so by the State Government till now, the Central Government is not able to take necessary steps for grant of Stage II forest clearance nor grant any permission to the petitioner-company to go on mining operations over the broken up area.

5. Mr. A.K. Parija, learned Advocate General of Odisha along with Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties contended that the Government of India, Ministry of Environment Forest and Climate Change will take into consideration of the matter after careful examination for approval of Stage II under Forest (Conservation) Act, 1980. Moreover, the calculation of value of penal NPV is in process of calculation on the basis of evaluation of quantity of excavated mining material done in violation to the said Act by the petitioner-company. No non-forest activity can be permitted unless final approval granted by the Govt. of India, MoEF & CC as per order dated 06.06.2022 of the apex Court that "under the guise of the order of status quo, the petitioner, who is not having the Forest Clearance cannot be permitted to excavate and/or continue the mining activities". It is further contended that the excavated stock of minerals were produced without forest clearance by the petitioner-company. Till now the petitioner-company has not obtained forest clearance from MoEF and CC. Therefore, the contentions raised that the petitioner-company to remove and dispatch those excavated materials in absence of forest clearance is not permissible in view of the provisions of F.C. Act, 1980 and the aforesaid order of the apex Court. It is further contended that the plea taken by the petitioner-company that continuation /resumption of mining operations by some of the lease holders without having forest clearance is not a fact. It is further contended that in the order of the apex Court, not only the payment of NPV or Compensatory Afforestation are important, but also satisfactory compliances of all the conditions/observations raised by the authorities, prior to Stage II approval are equally important for final approval of diversion of the forest land for non-forest uses, i.e. forest clearances. In the instant case, the payment of penal NPV by the petitioner-company is still outstanding as observed by the MoEF & CC and under process. It is further contended that in the order dated 06.06.2022, the apex Court clearly observed that "under the guise of the order of status quo, the petitioner, who is not having the Forest Clearance cannot be permitted to excavate and/or continue the mining activities". Therefore, without Stage II clearance, the petitioner-company is not entitled to operate the mines as well as removal of ore. It is further contended that the petitioner has not complied

with the conditions of payments of penal NPV, and still in process of representation to MoEF & CC to consider for exemption and any mining activities without forest clearance will violate the aforesaid ruling of the apex Court and the provisions of the F.C. Act, 1980. Thereby, it is contended that unless the petitioner-company complies with the statutory requirements, it cannot be granted permission either to operate the broken up area or to go for mining.

6. This Court heard Mr. N. Gupta, learned Senior Counsel, Mr. S.P. Mishra, learned Senior Counsel, Ms. Pami Rath, learned Senior Counsel and Mr. N. Kumar, learned Senior Counsel appearing along with Mr. M. Mishra, learned counsel for the petitioners; Mr. P.K. Parhi, learned Deputy Solicitor General of India along with Mr. S.S. Kashyap, learned Central Government Counsel appearing for opposite party no.1 and Mr. A.K. Parija, learned Advocate General of Odisha along with Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties in hybrid mode. The pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

7. There is no dispute with regard to the factual matrix of the case, as mentioned above. It is the admitted fact that after granting Stage I forest clearance, Stage II forest clearance from the forest authorities is pending and, as such, the conditions stipulated to be complied with and the same has already been done except to which has got relaxation, as has been pointed out by the learned Senior Counsel appearing for the petitioners. Therefore, there is no impediment on the part of the Central Government to grant Stage II clearance for mining operation.

8. While entertaining the writ petition, this Court passed an order on 15.05.2023 to the following effect:

> *"This matter is taken up through hybrid mode.*
>
> *2. Heard Mr. Pinaki Mishra, learned Senior Counsel along with Mr. Nabin Kumar, learned counsel appearing for the petitioners; Mr. P.K. Parhi, learned Deputy Solicitor General of India appearing for opposite party no.1 and Mr. P.P. Mohanty, learned Additional Government Advocate along with Mr. A.K. Parija, learned Advocate General of Odisha appearing for the State-opposite parties no.2 to 4.*
>
> *3. The petitioners have filed this writ petition seeking direction to opposite party no.1 to grant the formal letter of Stage-II Forest Clearance to the petitioner-company in respect of the Subject Mineral Block over an area of 64.463 ha. situated in Kaliapani village under Sukinda Tahsil of Jajpur district in the State of Odisha in a time-bound manner within a period of three months, as the petitioner-company has already complied with all the essential and necessary conditions of Sage-I Forest Clearance.*
>
> *4. Mr. Pinaki Mishra, learned Senior Counsel appearing for the petitioners contended that in a similar case, i.e. Writ Petition (Civil) No.202 of 1995 (**T.N. Godavarman Thirumulpad v. Union of India**), the petitioner therein filed I.A. Nos.168479 and 168463 of 2021 and the apex Court, vide order dated 02.05.2022, issued direction to the following effect:*

"Subject to the compliance of other conditions to be imposed by the Ministry of Environment, Forest and Climate change and payment of Rs.6,15,81,436/-, the State government is directed to pass suitable orders for diversion of 54.668 ha. of forest land for non-forestry use."

It is further contended that the petitioner in the aforesaid case also filed I.A. No.21531 of 2023 and the apex Court, vide order dated 19.04.2023, issued following direction:

"1. In view of the subsequent development, learned counsel for the application seeks permission to withdraw this application, with liberty to approach the High Court afresh.

2. Permission is granted.

3. The application is, accordingly, disposed of with the liberty as prayed for.

4. The applicant is also at liberty to file a fresh application before this Court, if the grievance of the applicant is not redressed."

It is further contended that in view of the above orders passed by the apex Court, the petitioners have approached this Court by filing this writ petition, as the State Government, having considered the petitioner's application for diversion of 64.119 ha of Sabik Kisam forest land, as on 25.10.1980, within total mining lease area of 64.463 ha for Chromite mining in Kaliapani Chromite Mines of Stage-I, has recommended to opposite party no.1-Central Government vide Annexure-5 dated 08.12.2022, but the CentralGovernment is sitting over the matter without considering such recommendation. It is further contended that the petitioner-unit is using the Chromite mining for captive purpose. Once the petitioner unit is using the Chromite mines for captive purposes, there is no difficulty on the part of the State Government and the Central Government to grant formal letter of Stage-II Forest Clearance to the petitioner-company in respect of the Subject Mineral Block over an area of 64.463 ha. situated in Kaliapani village under Sukinda Tahsil of Jajpur district.

5. Mr. P.K. Parhi, learned Deputy Solicitor General of India appearing for opposite party no.1 contended that he has received the copy of the writ petition and he seeks ten days time to obtain instructions in the matter.

6. Issue notice to the opposite parties both in main case and Interlocutory Application.

7. Let two extra copies of the writ petition be served by tomorrow (16.05.2023) on Mr. P.K. Parhi, learned Deputy Solicitor General of India to enable him to obtain instructions or file counter affidavit.

8. Let four extra copies of the writ petition be served by tomorrow (16.05.2023) on learned Additional Government Advocate, as he appears for opposite parties no.2 to 4 to enable him to obtain instructions or file counter affidavit.

9. Put up this matter after 10 days. However, it is open to the petitioners to move before the Vacation Court for interim order, if they are so advised."

9. On 13.09.2023, this Court passed the following order:

"This matter is taken up through hybrid mode.

2. Mr. P.K. Parhi, learned Deputy Solicitor General of India appearing for Union of India contended that he has received copy of the rejoinder affidavit filed by the Petitioner and also sought for instruction but he has not been possessed with such instruction. Therefore, he prays for two weeks' time to obtain instruction.

3. This Court is not inclined to grant two weeks' time, rather ten days' time is granted to him to obtain such instruction.

4. Needless to say Mr. P.K. Parhi, learned DSGI shall also obtain instruction with regard to the transportation of the extracted minerals which are lying in the mining area.

5. List this matter after ten days."

10. This Court passed an order on 29.09.2023, which reads as follows:-

"This matter is taken up through hybrid mode.

2. Mr. S. Dave, learned Senior Advocate appearing for the petitioner contended before this Court that though 1 st Stage clearance has been granted long since, but for the reasons best known, the 2nd Stage clearance is not being granted, even though the same is pending before the Central Government since 18.02.2022. In view of such position, the value of the excavated minerals which are lying in the mining area are going to be diminished.

3. Mr. S.S.Kashyap, learned Central Government Counsel prayed for a short adjournment to obtain instruction and file the same by way of affidavit.

4. In view of the above 10 (ten) days time is granted to learned Central Government Counsel to furnish the instruction by way of affidavit or else on the next date if he will ask for filing of the affidavit, no adjournment will be made on that ground.

5. Call this matter after ten days."

11. The Government of India, Ministry of Environment, Forests and Climate Change (Forest Conservation Division), vide Annexure-4 dated 18.11.2016 granted Stage I permission to the petitioner-company. While considering Stage II permission, certain conditions are required to be complied and, as such, the petitioner-company has complied with the same, as per letter dated 08.12.2022 under Annexure-5. Condition no.(vii) thereof reads as follows:

*"**Condition No. (vii) :- The User Agency shall transfer online, the Net Present Value (NPV) of the forest land being diverted under this proposal, as per the orders of the Hon'ble Supreme Court of India 28.03.2008, 24.04.2008 and 09.05.2008 in Writ Petitioner (Civil) No.202/1995 and guidelines issued by this Ministry vide its letter No.5-3/2007-FC dated 05.02.2009. The requisite funds shall be transferred through online portal into Ad-hoc CAMPA account of the State Concerned**.*

***Compliance**:- In compliance to the above, the RCCF, Angul Circle has reported that the user agency has transferred an amount of Rs.7,16,14.567/- (seven Crore Sixteen Lakhs Fourteen Thousand Five Hundred Sixty-Seven only) in the accounts of Ad-hod CAMPA as per there guidelines issued by this Ministry vide letters No.5-./2011-FC (vol.) dated 06.01.2022 and 19.01.2022.*

Demand letter by DFO, Cuttack	Demand in Rs.	Mode of payment made by user agency
Letter No.4732 dated 19.05.2015	4,68,06,926	RTGS No.SBIN5201509232028442 0
Letter No.5770 dated 02.07.2022	2,48,07,641	UTR No.UBIN0996335 dated 18.10.2022

Besides, the user agency has furnished an undertaking to deposit all compensatory levies through e-payment module.
Copies of the payment details and undertaking are enclosed as Annexure-VII."

12. Page-93 of the brief which forms part of Annexure-5 dated 08.12.2022, the conditions for compliance mentioned therein reads as follows:

"In view of the above, the compliance to the conditions imposed by the GoI, MoEF & CC, New Delhi and State Government is sent herewith for favour of kind information and according final approval for diversion of 64.119 ha of Sabik Kisam forest land as on 25.10.1980 within total mining lease area of 64.463 ha for Chromite mining in their Kaliapani Chromite Mines by M/s Balasore Alloys Ltd. in Jajpur district, Odisha."

13. In letter dated 16.02.2023, wherein certain queries made by the Central Government have been meted out by the State Government, the "Observation vi" at page 320 of the brief reads as under:-

Observation vi:- Stage–I compliance report has been submitted after lapse of a period of more than 6 years; valid and cogent justification for delay needs to be submitted by the State for the aforesaid lapse of more than six years. The State Government may also revisit the various project parameters considered at the time of grant of Stage-1 approval viz number of projects affected trees, suitability of CA land, etc and accordingly, intimate the change in any of the parameters, if any, to the Ministry

***Compliance**:- In compliance to this observation, the RCCF, Angul has reported that the User Agency has submitted their representation regarding justification for delay to submit the compliance of Stage-I approval order. The User Agency has clarified that due to Covid-19 pandemic, transfer and mutation of CA land, financial crisis and the stay order of Hon'ble High Court, Orissa have caused the delay process to submit the compliance. The ML area of 64.463 has already been broken up after commencement of mining operation since September, 2000, and only 244 nos. of sound trees were found during trees were found during tree enumeration. Moreover,Compensatory Afforestation land was re-visited by the Competent Authority and accordingly the Scheme has been revised as per present guidelines with respect to letter from PCCF (Nodal) vide Memo No:-17224 dated 05.09.2022. The same land is found suitable for compensatory afforestation. The representation of the User Agency is enclosed as Annexure-VI and uploaded in the Parivesh Portal.*

As informed by user agency some of the conditions stipulated in the stage-l order remained non-compiled for an extended period due to the financial crisis arising from the recession in the market followed by flood & Covid-19. In the mid of 2019, heavy rains led to a situation beyond the Control of UA Balasore Alloys Ltd.

Since then, UA Balasore Alloys Ltd's business has suffered drastically and could not make payments for the power supply. NESCO (Now Tata Power) disconnected the power supply at Balasore Alloys Ltd's ferroalloys Plant at frequent intervals and it was forced to shut down its operations at plant and mines as the mines is a captive one and all the revenue streams of organization were blocked.

Further due to non-extension of interim order of the Hon'ble Court to operate the mine, the mining operation was suspended, which also led to financial crisis to Balasore Alloys Ltd and there caused the delay to comply the Stage-I conditions.

> *In view of the above, the compliance to the observations of Government of India, MoEF & CC, New Delhi is sent herewith for according final approval for non-forestry use of 64.119 ha of Sabik Kisam Forest land as on 25.10.1980 within total mining lease area of 64.463 ha for Chromite mining in their Kaliapani Chromite Mines by M/s Balasore Alloys Ltd in Jajpur District, Odisha."*

14. In view of the above observation, there is no iota of doubt that whatever requirement is to be complied with, the same is being complied with by the State Government and communication was also made to the Central Government for necessary permission by granting Stage II clearance. Needless to say, earlier the petitioner-company had approached this Court by filing W.P.(C) No.4157 of 2016, wherein status quo order was granted for a specific period. After 2019, the said interim order was not extended and consequentially, this Court had not extended the interim order after 17.12.2019 and the matter was ready for hearing. Thereby, this Court directed the matter to be heard on 20.05.2022, but the petitioner-company withdrew the said writ petition on 12.09.2022 stating that it has become infructuous. Accordingly, the said writ petition was disposed of as infructuous. Against non-extension of interim order passed in W.P.(C) No.4157 of 2016, the petitioner-company approached the apex Court by filing SLP(C) No.10237 of 2022 and the apex Court on 06.06.2022 passed the following order:

> *"It is not in dispute that the petitioner is not having the Forest Clearance at this stage. Merely because the application for Forest clearance is pending cannot be treated as Having obtained the forest Clearance permitting the petitioner to carry on the excavation and the mining activities. Under the guise of the order of status quo, the petitioner, who is not having the Forest Clearance cannot be permitted to excavate and/or continue the mining activities. Therefore, as such, the High Court has rightly not extended the order of status quo.*
>
> *At this stage, learned counsel appearing on behalf of the petitioner seeks permission to withdraw the present Special Leave Petition as the main petition is yet to be considered by the High Court on merits. Permission is, accordingly, granted. The Special leave Petition stands dismissed as withdrawn.*
>
> *Before parting with the present order, we request the High Court to decide and dispose of all such pending matters where the order of status quo is continued since long and the mining activities have been continued under the order of status quo without Forest Clearance, within a period of six months from today without fail.*
>
> *With this, the present Special Leave Petition stands dismissed as withdrawn."*

15. After this order was passed by the apex Court, the petitioner-company withdrew W.P.(C) No.4157 of 2016 on 12.09.2022 as infructuous. Therefore, the said writ petition was not decided finally on merits. The present writ petition has been filed by the petitioner-company with similar nature of prayers when Stage II clearance was not granted by the Central Government. It is, therefore, contended that so far as broken up area is concerned, there is no impediment on the part of the authorities to grant such permission and, as such, reliance has been placed on ***Chowgule and Company Private Limited*** (supra), paragraphs-32-34 whereof read as follows:

32. It could thus be seen that the Division Bench which had delivered the judgment in Goa foundation (2) by subsequent orders dated 4-4-2018 and 11-5-2018 has permitted the iron ore which was royalty paid and which was lying on the jetties on or before 15-3-2018 to be loaded on the barges and on the vessels so that it can be transported to their destinations.

33. It will also be relevant to refer to Rule 12(1)(gg) of the said Rules:

***"12 Terms and conditions of a mining lease**.- (1) Every mining lease shall be subject to the following conditions:*

(a)-(ff) x x x

(gg) the lessee may, after paying the rents, rates and royalties payable under the Act and Rules made thereunder or under the lease deed, at the expiry or sooner termination of the lease term or within six calendar months thereafter (unless the lease is terminated for default of the lessee, and in that case at any time not less than three calendar months nor more than six calendar months nor more than six calendar months after such termination) take down and remove for its own benefit, all or any ore mineral excavated during the currency of the lease, engines, machinery, plant, buildings structures, tramways, railways and other works, erections and conveniences which may have been erected, setup or placed by the lessee in or upon the leased lands and which the lessee is not bound to deliver to the State Government or which the State Government does not desire to purchase."

34. A perusal of clause (gg) of Rule 12(1) of the said Rules would reveal that on the expiry or sooner termination of the lease term, six months' period is granted to the lessees to remove for its own benefit, all or any ore mineral excavated during the currency of the lease, engines, machinery, plant, buildings, structures, tramways, railways, and other works, erections and conveniences which may have been erected, set up or placed by the lessee in or upon the leased lands. An exception is carved out in case of lease being terminated for default of the lessee paying the rents, rates and royalties payable under the Act and the Rules made thereunder."

Thereby, it is contended that in view of provisions contained in Rule 12(1)(gg), at the expiry or sooner termination of the lease term or within six calendar months thereafter (unless the lease is terminated for default of the lessee, and in that case at any time not less than three calendar months nor more than six calendar months after such termination) take down and remove for its own benefit, all or any ore mineral excavated during the currency of the lease, engines, machinery, plant, buildings structures,tramways, railways and other works, erections and conveniences which may have been erected, set up or placed by the lessee in or upon the leased lands and which the lessee is not bound to deliver to the State Government or which the State Government does not desire to purchase. Relying upon such provision, the apex Court in paragraph-39 in the said judgment, directed that all such transportation shall be completed within a period of six months from the date of passing of the said order. Thereby, it is contended that whatever minerals have been excavated and stacked should be granted permission to remove the same. But fact remains, till date the petitioner-company has not got Stage II clearance from the MoEF & CC and thus any removal of minerals without getting clearance from the authorities will be

in violation of the F.C. Act, 1980. Therefore, this Court is refrained from issuing any such direction for removal of the stacked minerals, as have been excavated by the petitioner-company, as claimed in the writ petition.

16. Learned Senior counsel appearing for the petitioners persuaded this Court with emphasis stating that due to inaction of opposite party no.1, the petitioner-company is suffering a lot. Therefore, this Court should issue a writ of mandamus for compliance forthwith.

17. HALSBURY, 4th Edn., Vol-1, Para 89, p.111, while extending mandamus, it states as follows:

> *"The order of mandamus is an order of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."*

18. Halsbury's Laws of England, 4th Edn. (Re-issue), Vol-1(1) Para 133 states mandamus as follows:

> *"Mandamus (mandatory order) is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing specified in it which appertains to his or their office and is in the nature of a public duty."*

19. In ***Controller and Auditor-General of India v. K.S. Jagannathan***, (1986) 2 SCC 679 : AIR 1987 SC 537, the apex Court held as follows:

> *"The High Courts exercising their jurisdiction under Article 226 have power to issue a writ of mandamus or in the nature of mandamus where the Government or a public authority has failed to exercise or has wrongly exercised discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion malafide or on irrelevant consideration. In all such cases, the High Court can issue writ of mandamus and give directions to compel performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority. In appropriate cases, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed, had it properly and lawfully exercised its discretion. Supreme court went to the length of even giving direction to promote the respondents as they had been wrongfully denied the same."*

18. In ***Directors of Settlements, Andhra Pradesh v. M.R. Appa Rao***, (2002) 4 SCC 638 : AIR 2002 SC 1598, the apex Court held as follows:

> *"One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the court must come to the conclusion that the aggrieved person has a*

legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus, "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior courts or government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by a statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition. The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law."

19. In ***Union of India v. S.B. Vora***, AIR 2004 SC 1402, the apex Court held as follows:

"Mandamus literally means a command. It's object is to prevent disorder from failure of justice. Writ of mandamus is required to be granted in all cases where law has established no specific remedy. It is issued in favour of a person who establishes a legal remedy in himself and against a person who has a legal duty to perform but has failed or neglected to do."

20. In National Textile Corpn. Ltd. v. Haribox Swalram, (2004) 9 SCC 786 : AIR 2004 SC 1998, the apex Court held as follows:

"A writ of mandamus is issued in favour of a person who establishes a legal right in himself. A writ of mandamus is issued against a person who has a legal duty to perform but has failed and/or neglected to do so. Such a legal duty emanates from either in discharge of a public duty or by operation of law. The object of mandamus is to prevent disorder from a failure of justice and is required to be granted in all cases where law has established no specific remedy and whether justice despite demanded has not been granted. However, ordinarily the court will not exercise the power of the statutory authorities. It will at the first instance allow the statutory authorities to perform their own functions and would not usher the said jurisdiction itself. In order that a mandamus is issued to compel the authorities to do something, it must be shown that there is a statute, which imposes a legal duty, and the aggrieved party has a legal right under the statute to enforce its performance. A pure and simple business contract cannot be enforced by a writ."

21. Keeping in view the aforementioned provisions, it is made clear that this Court has jurisdiction to issue mandamus to the opposite parties to carry out their statutory duties in accordance with law. Since there is inaction on their part causing harassment to the petitioner-company, then the writ of mandamus can be issued to command opposite parties to discharge their duties in conformity with the provisions of law.

22. In view of such position, this Court directs the opposite parties to grant necessary Stage II forest clearance in respect of subject mineral block over an area 64.463 hectares situated in Kaliapani Village in Sukinda Tehsil of Jajpur District in the State of Odisha by complying all the formalities as expeditiously as possible without creating further hindrances in the matter.

23. Accordingly, the writ petition stands disposed of. But, however, in the circumstance of the case there shall be no order as to costs.

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2023 (III) ILR-CUT-1001

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

W.A. NO. 506 OF 2016

JASOBANT PARIDA ..……Appellant

-V-

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

THE ODISHA PUBLIC PREMISES (EVICTION OF UNAUTHORIZED OCCUPANTS)ACT, 1972 – Section 4(1) r/w Sections 12, 12(2) of OPLE Act, 1972 – The disputed land where the petitioner resides from two decades comes under the territorial Jurisdiction of Kamakhyanagar Notified Area Council – Tahasildar initiated eviction proceeding as per the provision of OPLE Act – The order of eviction has been confirmed by the Appellate Authority, Revisional Authority as well as the judgement passed in writ petition – As per the Section 4(1) of OPP Act the Estate Officer is the competent authority to initiate eviction proceeding – Effect of – Held, the proceeding initiated under the OPLE Act by issuing notice of eviction by the Tahasildar having no Jurisdiction, any order passed by him is nullity in the eye of law and any consequential steps taken under the said Act by the respective authorities also cannot be sustained as they have no Jurisdiction, thereby such orders are nullity in the eyes of law.

Case Laws Relied on and Referred to :-

1. (1960) 3 SCR 887 : 1960 S.C 1080 : K.K. Kochuni Vs. State of Madras.
2. (1953) SCR 1 : 1952 SC 369 : Aswini Kumar Ghosh Vs. Arabninda Bose.
3. (1996) 4 SCC 178 : AIR 1996 SC 1819 : Urban Improvement Trust, Jodhpur Vs. Gokul Nardin.

For Appellant : Mr. Ramakanta Mohanty, Sr. Adv., M/s. D.K. Sahoo-1, B.K. Behera

For Respondents : Mr. A.R. Dash, AGA, Mr. Asok Mohanty, Sr. Adv, M/s. G.K. Mohanty, P.K. Panda & D. Mishra

JUDGMENT Date of Hearing:15.11.2023 : Date of Judgment: 21.11.2023

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

1. This intra-court appeal has been filed by the writ petitioner seeking to set aside the judgment dated 21.10.2016 passed in W.P.(C) No. 24422 of 2013, by which the learned Single Judge, while declining to quash the order dated 01.02.2013 passed by the Tahasildar, Kamakhyanagar, as well as the subsequent orders passed by the appellate authority under Section 12 and the revisional authority under Section 12(2) of the Odisha Prevention of Land Encroachment Act, 1972 (for short "OPLE Act"), which were respectively marked as Annexure-3, Annexure-5 and Annexure-8 to the said writ petition, dismissed the writ petition.

2. The factual matrix of the case, in brief, is that the appellant is in occupation of an area measuring A0.10 dec. out of A 20.75 dec. in the Kisam Gharabari appertaining to Plot No. 2366 under Khata No. 549 in Mouza-Alatuma in the district of Dhenkanal (hereinafter referred to as the disputed property), which comes under the territorial jurisdiction of Kamakhyanagar Notified Area Council (hereinafter referred to as "NAC"), and has been using the same as his only residential house since the time of his forefathers.

2.1 While the appellant was continuing in peaceful possession of the disputed property, the Tahasildar, Kamakhyanagar-respondent no. 5 initiated Encroachment Case No.198/2012-13 under the provisions of the OPLE Act and issued notices to the appellant alleging unauthorized occupation of the disputed property. Challenging such show cause notice, the appellant filed WP(C) No. 18027 of 2012, which was disposed of on 25.09.2012 directing the appellant to file his reply to the show cause, besides directing to maintain status quo till disposal of the eviction case.

2.2 In compliance to the order dated 25.09.2012 passed by this Court in W.P.(C) No. 18027 of 2012, the appellant filed his reply to the notice of show cause, but the Tahasildar-respondent no. 5 passed an order on 01.02.2013 directing for his eviction from the disputed property. Challenging such order, the appellant preferred an appeal, as provided under Section 12 of the OPLE Act, but the same was dismissed on 11.09.2013. The appellant, thereafter, filed revision as provided under Section 12(2) of the OPLE Act, but the same was also dismissed vide order dated 10.10.2013.

2.3 The appellant challenged the orders passed by the Tahasildar, the appellate authority and also the revisional authority by filing W.P.(C) No. 24422 of 2013. The learned Single Judge vide judgment dated 21.10.2016 dismissed the writ petition, thereby confirming the orders passed by the Tahasildar as well as the appellate authority and revisional authority. Hence, this writ appeal.

3. Mr. Ramakanta Mohanty, learned Senior Advocate appearing along with Mr. D.K. Sahoo, learned counsel for the appellant urged before this Court that the

proceeding which was initiated under Section OPLE Act for eviction of the appellant is without jurisdiction and as such the subsequent orders passed by the appellate authority, revisional authority and also by the learned Single Judge cannot be sustained in the eye of law.

4. Mr. A.R. Dash, learned Additional Government Advocate appearing for the State-respondents contended that the order passed by the Tahasildar, which has been confirmed by the appellate authority, revisional authority and also the learned Single Judge, is well justified and does not call for interference by this Court at this stage.

5. This Court heard Mr. R.K. Mohanty, learned Senior Advocate appearing for the appellant and Mr. A.R. Dash, learned Additional Government Advocate appearing for the State-respondents 1 to 5 by hybrid mode, and perused the record. Pleadings have been exchanged between the parties and with their consent, the writ petition is being disposed of finally at the stage of admission

6. It is of relevance to mention at the outset that on 29.10.1954 the OPLE Act, 1954 was enacted, but the same was repealed and the OPLE Act, 1972 came into force by receiving the presidential assent with effect from 12.02.1972. The said OPLE Act, 1972, was published in the official gazette on 16.02.1972 and by virtue of Section 1(3) thereof, the said legislation was made retrospective effect w.e.f. 29.10.1954. The Odisha Public Premises (Eviction of Unauthorized Occupants) Act, 1972 (Orissa Act No. 7 of 1972), hereinafter referred as the "OPP Act, 1972", was published in the official gazette on 25.02.1972 and was made effective retrospectively with effect from 21.12.1961.

7. The Tahasildar-respondent no. 5, after over 3 to 4 decades of residential possession by the appellant over the disputed property, issued notice on 13.04.2012 in Encroachment Case No. 198/2012 under the provisions of the OPLE Act for eviction. Challenging such show cause notice, the appellant filed W.P.(C) No. 18027 of 2012, which was disposed of on 25.09.2012, directing the appellant to file his reply to the show cause and also directed for maintenance of status quo till disposal of the eviction case. In compliance to the said direction, the appellant filed his reply to the notice of show cause on 04.10.2012. Finally, the Tahasildar-respondent no. 5 passed an order on 01.02.2013 directing for his eviction from the disputed property. Against such order, the appellant preferred an appeal, as provided under Section 12 of the OPLE Act, which was dismissed vide order dated 11.09.2013. Against the said dismissal order passed by the appellate authority, the appellant preferred a revision, as provided under Section 12 (2) of the OPLE Act, but the same was also dismissed vide order dated 10.10.2013. Challenging above three orders, the petitioner filed W.P.(C) No. 24422 of 2013 on 01.11.2013 mainly on the ground that the appeal preferred U/s. 12 of the OPLE Act was disposed of without affording any opportunity of hearing to the appellant. The further ground was that since the appellant is residing on the disputed property by constructing his residential house since decades, the authorities under the Act were required to consider settlement of

the land in favour of the appellant instead of his eviction and, as such, the order of eviction is illegal and contrary to the sound principles of law.

8. The respondent nos. 2 to 5 and respondent nos. 6 and 7 filed their counter affidavits. Vide order dated 18.01.2016, the appellant was directed to file affidavit regarding encroachers who are in possession of the disputed property. The appellant filed an affidavit on 25.01.2016 on the basis of the information received under the RTI Act disclosing the names of the encroachers in the area. On perusal of such affidavit, it was found that there are 31 encroachment cases initiated and there are 886 encroachers. Respondent nos. 6 and 7 filed an additional reply affidavit on 08.02.2016. Thereafter, this Court directed the Sub-Collector-respondent no. 4, vide order dated 17.03.2016, to file affidavit regarding the status of the encroachment cases. The Tahasildar-respondent no. 5 filed affidavit disclosing that there are 1329 encroachments within Kamakhyanagar NAC, out of which 1219 have made permanent constructions. So far as the appellant's plot no. 2366 is concerned, it was reported that there are 81 encroachments with 65 permanent structures and in the list attached thereto, it was shown that the appellant is at serial no. 27. In the said affidavit dated 02.05.2016, it was specifically asserted that in the light of the Revenue Dept. letter no. IVC-II-22/2013- 696 dated 09.01.2014, a fresh enumeration list of encroachers was earlier submitted to the Sub-Collector, Kamakhyanagar for initiating cases under the provisions of OPP (EUO) Act, 1972, who has meanwhile returned the same with observations that detailed individual sketch map of land encroached be furnished to him for taking appropriate action, which is under preparation. But the learned Single Judge dismissed the writ petition filed by the appellant confirming the order of eviction passed by the Tahasildar, so also the order passed by the appellate authority and revisional authority. Though the question of jurisdiction was raised, but the learned Single Judge has not answered the same.

9. Therefore, the question which falls for consideration before this Court in the present appeal is-

> *"Whether the provisions of OPLE Act, 1972 are applicable to the cases of unauthorised eviction and whether the statutory authorities under the said Act have jurisdiction to adjudicate the issue of eviction involved in respect of the land covered under Municipalities or NACs coming under urban area in view of the fact that the legislature have subsequently legislated the provisions of OPP Act, 1972 to deal with such cases in respect of the land under Municipality or NAC area?"*

10. As it reveals from the affidavit dated 02.05.2016 filed by the Tahasildar, Kamakshya Nagar, the letter dated 09.01.2014 has been enclosed therein as Annexure-D/5. The said letter was issued by the Government of Odisha, Revenue and Disaster Management Department making clarification with regard to jurisdiction of the Tahasildar under the OPLE Act, 1972 in urban areas. The clarification discloses (a) positive stand of the State that eviction in urban areas should be made through the OPP Act, 1972 and in other areas under the OPLE Act;

(b) in pursuance of such clarification the appellant's case, along with other cases mentioned in the said affidavit, was forwarded to the Sub-Collector for initiating cases under the OPP Act, 1972.

11. Therefore, from the aforesaid disclosure on affidavit, it has now come to light that the disputed property from which eviction of the appellant has been directed under the provisions of the OPLE Act is admittedly situated in an urban area belonging to Kamakhyanagar NAC and the statutory authorities have already put the prescribed evicting machinery under the OPP Act, 1972 to evict the appellant. Therefore, any action taken under the OPLE Act for eviction for alleged encroachment within Kamakhyanagar NAC can be construed to be without jurisdiction.

12. The Odisha Prevention of Land Encroachment Act, 1972 (Orissa Act 6 to 1972) was assented by the President on 12th February, 1972. It is an Act to provide for prevention of unauthorized occupation of lands, which are the property of the Government. The property of the Government has been prescribed under Section 2 of the said Act, which reads as follows:-

> *"**2. Property of Government** :– Subject to the provisions of any law for the time being in force, the following classes of lands are hereby declared to be the property to Government for the purposes of this Act, namely :*
>
> *(a) all public roads, streets, lanes and paths, the bridges, ditches, dikes and fences, on or beside the same, the bed of the sea and of harbours and creeks below high water mark and of rivers, streams, nalas, lakes and tanks and all canals and water sources and all standing and flowing water and all lands including temple sites, house sites or backyards wherever situated, save in so far as the same are the property–*
>
> *(i) of any ruler of Indian State merged with the State of Orissa Zamindar, Proprietor, Sub-proprietor, Landlord,[***] Jagirdar,[***] Khorposhdar or any other tenure holder or any person claiming through or holding under any of them; or*
>
> *(ii) of any person paying shist, kattubadi jodi, porupu or quit rent to any of the aforesaid person; or*
>
> *(iii) of any person holding under raiyatwari tenure or in any way subject to the payment of cess or any other dues direct to Government; or*
>
> *(iv) of any other registered holder of land having proprietary right; or*
>
> *(v) of any other person holding land under grant from Government otherwise than by way of licence; [***]*
>
> *(vi) [***]*
>
> *(b) land belonging to or vesting in any Local Authority which is used or intended to be used for any public purpose such as a road, canal, embankment, tank or ghat or for the repair or maintenance of such road, canal, embankment, tank or ghat;*
>
> *(c) land acquired under the provisions of the Land Acquisition Act 1 of 1894 or under similar Acts for the purposes of any Local Authority, [***] Company owned or controlled by the State Government, Statutory Body or Corporation while such land*

remains as the property of the Local Authority, [***] Company owned or controlled by the State Government, Statutory Body or Corporation;

(d) Immovable property claimed by the rulers of merged territories but conceded in their favour; and

(e) land belonging to an establishment or undertaking owned, controlled or managed by–

(i) any State Government or a Department of such Government;

(ii) any Company in which not less than fifty-one per cent of the share capital is held by one or more State Governments; or

(iii) a corporation established by law which is owned, controlled or managed by any State Government.

Explanation :– In this section "high water mark" means the highest point reached by ordinary spring-tides at any season of the year."

13. The above mentioned provisions, under Sub-sections (a) to (e) of Section 2 of the Act, prescribe which can be termed as the property of the Government. The vires of Orissa Prevention of Land Encroachment Act, 1954, as amended by the Orissa Prevention of Land Encroachment (Amendment) Act, 1970, was challenged in a writ petition bearing O.J.C. No. 1584 of 1968. This Court held that Sec. 3 of the Act is void as it contravenes Article 14 of the Constitution. In a series of cases, this Court has also earlier observed that Sections 5 and 6 of the Act were void. As Sections 3, 5 and 6 forming the very core were void, the Court held the entire Act including the amending Act of 1970 to be void. Thereby, it was necessary to effect the re-enactment of the law permanently to replace the Ordinance. Under the Scheme of the Act it is only encroachment of Government land either by construction of house or otherwise, which can form the subject-matter of a proceeding under the Act. Since OPLE Act, 1972 is enacted to provide for prevention of unauthorized occupation of lands, which are the Government property as mentioned in Section 2 of the Act, the action should be taken in conformity with the said provisions of the Act.

14. The Odisha Public Premises (Eviction of Unauthorized Occupants) Act, 1972, i.e., Odisha Act 7 of 1972 was assented to by the President on 9th February, 1972 to provide for the eviction of unauthorised occupants from public premises and for certain incidental matters. "Public Premises" has been defined under Section 2 (f) to the following effect:-

"(f) "Public Premises" means any premises situated within the jurisdiction of a Municipality or within an area declared by the State Government to be an industrial estate and-

(i) belong to or taken on lease by the State Government or the Board or by any Company, Corporation, [Municipality], Improvement Trust, Special Planning Authority; or University; or

(ii) requisitioned by the State Government."

15. On perusal of the aforesaid provision, it is made clear that 'Municipality' has been substituted by O.A. 1 of 2011- O.G.E. No. 61 dated 03.01.2011. It is specifically mentioned that "Public Premises" means any premises situated within the jurisdiction of a Municipality or within an area declared by the State Government to be an industrial estate. Therefore, taking into account the object and reasons of enactment of OPLE Act vis-a-vis OPP Act, the purpose is distinct and clear to the extent that OPLE Act has been enacted to provide for prevention of unauthorized occupation of lands which are the property of the Government, whereas OPP Act has been enacted to provide for eviction of unauthorized occupants from "Public Premises" and for certain incidental matters. Thereby, two separate Acts have been enacted for two distinct purposes, as mentioned above. In view of aforesaid situation, while interpreting the words or even while departing strict words used, the Court may find out the intention of the legislation by referring to the statements of objects and reasons.

16. In ***K.K. Kochuni v State of Madras***, (1960) 3 S.C.R. 887 : 1960 S.C. 1080, the apex Court held that the statement of objects and reasons was referred to only for the purpose of ascertaining the conditions prevalent at the time when the Bill was introduced in the Parliament and the purpose for which the amendment was made.

17. In ***Aswini Kumar Ghosh v. Arabninda Bose***, (1953) SCR 1 : 1952 SC 369, it was held by the apex Court, in view of the various decisions of the apex Court, that the statement of objects and reasons is not admissible as an aid to the construction of a statute. But it can be referred to for the limited purpose ascertaining the object of the enactment or the condition prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy. Thus, the statement of the objects and reasons can legitimately be referred to for a correct appreciation of -

(1) what was the law before the disputed Act was passed;

(2) what was mischief or defect for which the law has not provided;

(3) what remedy the legislature has appointed; and

(4) the reasons for the remedy.

18. Therefore, taking into consideration the objects and reasons for enactment of two separate Acts for two distinct purposes, it is made clear that in view of the provisions contained in Section 2 (f) of the OPP Act, any premises situated within the jurisdiction of a Municipality or within an area declared by the State Government to be an industrial estate, it can be construed to be "Public Premises". If there is unauthorized occupation without authority of law for such occupation, then action shall be taken in accordance with the provisions of OPP Act, 1972. Section 2 (g) also defines unauthorized occupation, which reads as follows:-

> *"Unauthorised Occupation" in relation to any public premises means the occupation by the person of the public premises without authority for such occupation and includes the continuance in occupation by any person of the public premises after the authority*

(whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever.

19. Admittedly, Kamakhyanagar NAC can come within the meaning of Municipality, as mentioned in Section 2 (f) of the OPP Act. Therefore, the proceeding for eviction from the Public Premises within the meaning of the OPP Act includes any premises situated within NAC area of Kamakhyanagar.

20. The person authorised to take such eviction proceeding is the Estate Officer, as has been provided under Section 3 of the OPP Act, 1972. Section 3 of the Act reads as follows:-

"3. Appointment of Estate Officer :-The State Government may, by notification –

(a) appoint such persons, being gazetted officers of Government or officers of equivalent rank of the Board or of a Company, Corporation, Municipal Council, Notified Area Council, Improvement Trust, Special Planning Authority or University], as they think fit, to be Estate Officers for the purposes of this Act; and

(b) define the local limits within or with the categories of public premises in respect of which each Estate Officer shall exercise the powers conferred, and perform the duties imposed on Estate Officers by or under this Act.

Explanation. - For the purpose of Clause (a) the expression Gazetted Officer of Government shall include any such officer who is on deputation to the services of a 1[the Board or of a Company, Corporation, Municipal Council, Notified Area Council, Improvement Trust, Special Planning Authority or University.]"

21. In view of the aforementioned provision, it is the Estate Officer, as notified by the Government of Odisha by way of notification, can initiate proceeding for eviction from the "Public Premises" within the meaning of OPP Act, 1972 by following due procedure by the Estate Officer for the purpose of the Act. Even Section 5 of the Act prescribes the eviction of unauthorised occupants and mechanisms has also been prescribed under the said Act, i.e., under Section 8 with regard to power of Estate Officer, under Section-9 with regard to appeals, under Section 13 regarding imposition of penalty and under Section 14 bars of suit and proceeding has been provided for. Thus, there is no iota of doubt that by insertion of "Municipality" to the definition of Public Premises, as envisaged under Section 2 (f) with effect from 03.1.2011, the OPP Act is applicable to the municipal areas.

22. Admittedly, in the present case, the Tahasildar- respondent no.5 had issued a notice of show cause on 13.04.2012 in Encroachment Case No. 198/2012 under the provisions of OPLE Act for eviction, while "Municipality" has been incorporated by way of amendment to the OPP Act 1972, which has come into force with effect from 03.01.2011. Therefore, any notice given on 13.04.2012 in Encroachment Case No. 198/2012 by the Tahasildar is without jurisdiction and a nullity in the eye of law.

23. If very initiation of proceeding under the OPLE Act is without jurisdiction and nullity in the eye of law, in view of the insertion of "Municipality" to the definition of "Public Premises" under Section 2 (f) of the OPP Act. As such, the

Estate Officer notified by the State Government under Section 3 of the OPP Act, 1972 has got only jurisdiction to issue such notice and not the Tahasildar under the OPLE Act.

24. In ***Urban Improvement Trust, Jodhpur v. Gokul Nardin***, (1996) 4 SCC 178: AIR 1996 SC 1819, the apex Court held that a decree passed by the Court without jurisdiction is a nullity.

25. Therefore, if a proceeding initiated under the OPLE Act, 1972 by issuing notice of eviction by the Tahasildar having no jurisdiction, any order passed by him is nullity in the eye of law and any consequential steps taken under the said Act by the respective authorities also cannot be sustained as they have no jurisdiction, thereby such orders are nullity in the eye of law.

26. Under the OPP Act, the Estate Officer gets jurisdiction under Section 4(1) only where the premises are Public Premises. Section 2(f) of the OPP Act has defined Public Premises. In order that a premises would be Public Premises, if it is situated within the jurisdiction of Municipal Council or Notified Area Council. By way of amendment to the definition of "Public Premises" under Section 2 (f) "Municipality" has been incorporated by way of gazette notification issued on 03.01.2011 that the municipal area comes under the definition of "Public Premises". Therefore, Kamakhyanagar Notified Area Council, having come under the definition of Public Premises under Section 2 (f) of the OPP Act, the action for eviction can only be taken by the competent authority under Section 4 (1) of the OPP Act, i.e., by the Estate Officer and not by the Tahasildar.

27. In view of the above, the learned Single Judge has committed gross error apparent on the face of the record by misinterpreting the provisions of law, dismissing the writ petition preferred by the appellant by conforming the order of eviction passed by the Tahasildar and affirmed by appellate authority and re-affirmed by the revisional authority under Sections 12 and 12 (2) of the OPLE Act respectively. As a consequence thereof, the judgment dated 21.10.2016 passed by the learned Single Judge in W.P.(C) No. 24422 of 2013 cannot be sustained in the eye of law and is liable to be quashed and is hereby quashed.

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

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2023 (III) ILR-CUT-1009

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

STREV NO. 95 OF 2014

M/s. ARYAN ISPAT & POWER PVT. LTD. .....Petitioner

-V-

STATE OF ODISHA (COMMISSIONER OF SALES TAX, ODISHA) .....Opp.Party

CENTRAL SALES TAX ACT, 1956 – Sections 10(a), 10(b) & 10(d) – The commodity cement was specified in the certificate of registration at the time of effecting inter-state purchase during the period 2004-05 –There was no false representation by the petitioner – Petitioner was served with show cause notice U/s. 10(b) of the Act – Final order imposing penalty U/s. 10(A) was passed for alleged offence U/s. 10(d) – Whether imposition of penalty U/s. 10(d) of the CST Act is sustainable? – Held, No.

Case Laws Relied on and Referred to :-

1. MANU/OR/0039/2008 = (2008) 14 VST 298 (Ori) : South Eastern Coal Fields Limited Vs. Sales Tax Officer.
2. (1992) 87 STC 359 (Ori):Jayshree Chemicals Ltd. Vs. Additional Commissioner of Sales Tax.
3. (1970) 25 STC 211 (SC) : Hindustan Steel Ltd. Vs. State of Odisha.
4. (2010) 35 VST 1 (SC) = (2010) 8 SCR 627 : Commissioner of Sales Tax Vs. Sanjiv Fabrics.
5. (2006) 148 STC 256 (Mad) : State of TN Vs. Nu-Tread Tyres.
6. (2014) 68 VST 19 (Mad) : Shoetek Agencies Vs. State of Tamil Nadu.
7. 1988 (I) OLR 15 : Omkarmal Agarwalla Vs. Additional Commissioner of Sales Tax.
8. (2010) 27 VST 46 (WBTT) : Arvind Kumar Giri Vs. Sales Tax Officer.
9. AIR 1961 SC 1633 = (1961) 42 ITR 589 (SC) = (1962) 1 SCR 788 : Commissioner of Income Tax Vs. Scindia Steam Navigation Co. Ltd.

For Petitioner : Mr. Sumit Lal & Ms. Zenish Wallace

For Opp. Party : Mr. Sunil Mishra, Standing Counsel (Commercial Tax and Goods & Services Tax Organisation).

JUDGMENT Date of Hearing & Judgment: 11.10.2023

MURAHARI SRI RAMAN, J.

The Challenge:

Seeking revision of Order dated 09.12.2013 passed by the Odisha Sales Tax Tribunal in Second Appeal bearing No. 70 (C) of 2007-08 preferred by the State of Odisha through Commissioner of Sales Tax, Odisha, against Order dated 28.04.2007 passed by the Assistant Commissioner of Sales Tax, Sambalpur Range, Sambalpur, in the First Appeal bearing No. AA 263 (SAIC) of 2006-07 quashing Order dated 30.05.2006 imposing penalty under Section 10A of the Central Sales Tax Act, 1956, pertaining to transactions of financial year 2004-05, the petitioner-company filed this petition under Section 9(2) of the Central Sales Tax Act, 1956 read with Section 24 of the Odisha Sales Tax Act, 1947.

2.1. This Court, while entertaining the sales tax revision, *vide* Order dated 22.11.2022, admitted the petition for adjudication of the following question of law:

> *"Whether in the facts and circumstances of the case, the Division Bench of the Orissa Sales Tax Tribunal was justified in upholding the imposition of penalty under Section 10(d) of the CST Act while holding that Petitioner was served with show cause notice under section 10(b) of the CST Act and not under Section 10(d) of the CST Act?"*

Facts:

3. The petitioner, a private limited company, in order to carry out business in manufacture and sale of sponge iron and billets, got registered under the provisions of the Central Sales Tax Act, 1956 ("CST Act", for short) and the Odisha Sales Tax Act, 1947 ("OST Act", for brevity) and allotted Registration Certificate No. SAI-C-3835.

3.1. For the purpose of utilization in the "foundation for the construction" and "civil works" including "construction of compound wall", "Cement", worth Rs.16,31,112/- was purchased from Century Cement, Baikunth (outside the State of Odisha) at concessional rate of tax provided under sub-sections (1) and (4) of Section 8 of the CST Act on the strength of declaration in Form C prescribed under Rule 12(1) of the Central Sales Tax (Registration and Turnover) Rules, 1957 (hereafter be referred to as "CST (R&T) Rules").

3.2. The Sales Tax Officer, Sambalpur-I Circle, Sambalpur, invoked Section 10A of the CST Act for alleged offence committed under Section 10(b) and imposed penalty by Order dated 30.05.2006 holding that "the dealer has purchased cement at a concessional rate of tax by giving declaration Form C which are not used in manufacturing or processing of goods for sale".

3.3. Against such levy of penalty, the petitioner preferred appeal under Section 9(2) of the CST Act read with Section 23(1) of the OST Act before the Assistant Commissioner of Sales Tax, Sambalpur Range, Sambalpur ("first appellate authority"),which came to be disposed of in favour of the petitioner on consideration of the fact that the subject goods "cement" was incorporated in the certificate of registration granted by the Sales Tax Officer, Sambalpur-I Circle, Sambalpur under Section 7(2) of the CST Act. It was the case of the petitioner before the first appellate authority that though the show-cause notice bearing No.23365, dated 31.12.2005 under Section 10A in connection with alleged commission of offence under Section 10(d) of the CST Act was issued, the same remained unattended; however,said authority proceeded with the subsequent show notice bearing No.1807/CT, dated 06.02.2006 issued specifying misutilisation of declaration Form C falling within scope of circumstance enumerated under Section 10(b) of the CST Act. The appellate authority observed as follows:

> *"The 10A penalty record maintained by the learned Assessing Officer reveals that on 31.12.2005 order was passed to issue show-cause notice under Section 10A of the CST Act for 2004-05 fixing date to 13.01.2006. On 06.02.2006 he called for the record and passed order that notice should have been issued under Section 10(b) in place of 10(d) of the CST Act and accordingly show cause notice was issued fixing date to 20.02.2006.*

However, taking the written submission of the appellant submitted before the learned Assessing Officer into consideration, penalty order was passed."

3.4. It was held by the first appellate authority that:

*"*** in order to impose penalty on a dealer for making an unauthorized purchase the authority must arrive at a definite finding about the false representation. The finding should be based on cogent material on record. In the absence of such a finding, any order imposing penalty will not be sustainable under the law.*

In view of the available material on record, in my considered opinion, I hold that there is absence of mens rea to constitute offence under Section 10(b) of the CST Act in this case."

3.5. The State of Odisha, being aggrieved by said Order of the first appellate authority, carried the matter to the Sales Tax Tribunal. Allowing the second appeal, the learned Tribunal set aside the Order of the first appellate authority and directed the Sales Tax Officer to complete assessment afresh.

3.6. Aggrieved thereby, the petitioner preferred this revision petition before this Court.

Arguments:

4. This Court heard Sri Sumit Lal, Advocate for the petitioner and Sri Sunil Mishra, learned Additional Standing Counsel for the Commercial Tax and Goods and Services Tax Organisation.

5. Sri Sumit Lal, learned counsel at the outset submitted that the Revenue having not disputed the fact of existence of commodity, "cement", in the Registration Certificate granted by the Sales Tax Officer, the Odisha Sales Tax Tribunal committed gross error in holding that "there is no absence of *mens rea* to constitute an offence under Section 10(b) of the CST Act". Justifying the Order of the first appellate authority, Sri Sumit Lal vehemently submitted that it is sufficient compliance if the goods— Cement— is specified in the Registration Certificate as required under Section 8(3) of the CST Act, which was allowed to be incorporated by the Sales Tax Officer on consideration of requirement of the petitioner in course of business at the time of grant of Registration Certificate. As long as the goods appear in the Certificate of Registration, the petitioner cannot be imputed with charge of "falsely" represented for availing concessional rate of tax as enabled by sub-section (1) read with sub-section (4) of Section 8 of the CST Act.

5.1. Sri Sumit Lal further urged that the Sales Tax Officer was unsure of the specific violation. Notice dated 31.12.2005 specifying that the petitioner was "found to have attracted penal provision under Section 10(d) of the CST Act, 1956 for misutilisation of C Form", directed it to appear before the Sales Tax Officer on 13.01.2006, but said notice was served on the petitioner on 14.01.2006. However, discarding said notice, subsequent notice was issued on 06.02.2006 calling upon the

petitioner to show cause as the petitioner was "found to have attracted penal provision under Section 10(b) of the CST Act for misutilisation of C Form". Consequent upon such notice, the petitioner participated in the proceeding contending that the goods, "cement", being specified in the Registration Certificate, was purchased on availing concessional rate of tax in terms of sub-section (1) read with sub-section (4) of Section 8 on the strength of declaration in Form C prescribed under Rule 12(1) of the CST (R&T) Rules. Therefore, the Sales Tax Officer committed error of record. He further brought to the notice of this Court that notice dated 12.01.2006 has come to be served on the petitioner specifying therein as to why "cement" would not be deleted from the Certificate of Registration. Essentially, it is the submission of the learned counsel for the petitioner, Sri Lal, is that from the above notice it is *ex facie* clear that the Sales Tax Officer was conscious of the fact that the goods, "cement", was specified in the Registration Certificate as on the date of transactions of purchase from outside the State of Odisha during the period 2004-05, as such, the notice contemplating "false representation" under Section 10(b) of the CST Act without proof of *mens rea* by the Revenue cannot be held to be tenable. The Tribunal could not have gone beyond the records and remanded the matter to the Sales Tax Officer to frame fresh "assessment" as if the Order of the Sales Tax Officer was emanating from an "assessment".

5.2. Sri Lal, learned Advocate urged that there was no material before the Tribunal to hold that "we are of the considered opinion there is no absence of *mens rea* to constitute an offence under Section 10(b) of the CST Act". In view of such, it is ununderstable as to why the Sales Tax Tribunal remitted the matter to the Sales Tax Officer with a direction to complete "the assessment afresh". Therefore, the order of remit to the Sales Tax Officer would result in empty formality.

5.3. Sri Sumit Lal, learned counsel for the petitioner placed reliance on the decision of this Court in the case of *South Eastern Coal Fields Limited Vrs. Sales Tax Officer, MANU/OR/0039/2008 = (2008) 14 VST 298 (Ori).* He submitted that the contention that when the petitioner was called upon to file show cause reply in respect of allegation of "false representation" as contemplated under Section 10(b) of the CST Act, no penalty under Section 10A could be imposed for purported commission of offence under Section 10(d) of said Act by the Sales Tax Officer is countenanced by applying ratio of said Judgment of this Court. Therefore, this Court, while admitting the revision petition on 22.11.2022, directed the counsel for the Revenue, Sri Sunil Mishra, as follows:

> *"3. Learned counsel appearing for the Petitioner states that the above question stands answered in favour of the Petitioner by the judgment in South Eastern Coal Fields Limited Vrs. Sales Tax Officer MANU/OR/0039/2008.*
>
> *4. Mr. Mishra, learned ASC states that he may be granted a short adjournment to examine the said decision."*

6. Sri Sunil Mishra, learned Standing Counsel for the Revenue urged that the said reported Judgment of this Court may not strictly be made applicable in as much

as there was notice bearing No.23365/CT, dated 31.12.2005 contemplating action under Section 10A for cement being used other than for the purpose it was available to be purchased at concessional rate of tax in terms of Section 8(3). Though subsequent notice bearing No.1807/CT, dated 06.02.2006 specified the case of the petitioner attracted violation contained in Section 10(b) of the CST Act, the context essentially would mean provisions of Section 10(d). There, being mistake, the Tribunal appreciating the fact on record, rightly remitted the matter to the Sales Tax Officer.

6.1. Since the Sales Tax Tribunal categorically observed that "we are of the considered opinion there is no absence of *mens rea* to constitute an offence under Section 10(b) of the CST Act", it was correct to say that the first appellate authority should have issued appropriate notice. Therefore, the order remitting the matter to the Sales Tax Officer does not suffer from illegality.

Discussions:

7. The uncontroverted and undisputed fact remained that the commodity, "cement", was specified in the Registration Certificate granted by the Sales Tax Officer, Sambalpur-I Circle, Sambalpur on the date of transaction of purchase during the period 2004-05, and said goods was not deleted. This fact is apparent from the statement made by the petitioner that the Sales Tax Officer had issued notice on 12.01.2006 inviting reply to show cause as to why said goods would not be deleted. It is also fact that during 2004-05, the petitioner purchased cement against declaration in Form C in order to avail benefit under Section 8 of the CST Act.

7.1. There is no dispute about the fact that notice bearing No.23365/CT, dated 31.12.2005 was issued calling upon the petitioner to file show cause on 13.01.2006 as to why penalty under Section 10A of the CST Act would not be imposed as the petitioner was "found to have attracted penal provision under Section 10(d) of the CST Act, 1956 for misutilisation of C Form". The first appellate authority, on perusal of relevant record concerning penalty proceeding under Section 10A of the CST Act, has observed that the Sales Tax Officer subsequent to issue of said notice has passed orders by stating "notice should have been issued under Section 10(b) in place of 10(d) of the CST Act" and, therefore, he issued subsequent Notice bearing No.1807/CT, dated 06.02.2006, which stands as follows:

"Office of the Commercial Tax Officer,
Sambalpur-I Circle, Sambalpur

No.1807/CT. Dt.06.02.2006
NOTICE U/S. 10A OF THE CST ACT

1.	*NameandAddress of the dealer*	*M/s.AryanIspat & Power(P)Ltd,Bomlai,Rengali, Sambalpur*
2.	*R.C.No.ofthedealer*	*TIN-21681705224 SAIC-3835*

It appears that you have purchased the following goods against declaration Form *C for the year 2004-2005.*

Commodity	*Value (Rs.)*
Cement	*16,31,112.00*

As such you are found to have attracted penal provision U/s. 10(b) of the C.S.T. Act 1956 for mis-utilisation of 'C' form.

You are therefore called upon to show cause on 20.02.2006 as to why penalty shall not be imposed U/s. 10-A of the CST Act 1956, failing which action will be taken as per provisions of law.

Sales Tax Officer,
SambalpurICircle,
Sambalpur"

7.2. The Order dated 30.05.2006 of the Sales Tax Officer depicts as follows:

*"*** The dealer has been called upon to show cause as to why penalty shall not be imposed under Section 10A of the CST Act, 1956 against which the learned Advocate for the dealer has filed a written submission on 23.03.2006 in which it is stated that the goods purchased on the strength of 'C' Form are included in the certificate of registration granted by the Sales Tax Officer, Sambalpur.Since the submission furnished appeared unconvincing, cross-examination of 'C' Form utilization statement furnished at the time of proceeding have been made. ***"*

7.3. Observing so, the Sales Tax Officer proceeded as if the notice was in connection with inquiry under Section 10(d) of the CST Act concluded by imposing penalty under Section 10A.

7.4. Sri Sumit Lal, learned counsel for the petitioner contended that the aforesaid fact recorded by the Sales Tax Officer in his order clearly shows that the petitioner was given opportunity to show cause in connection with proposed action under Section 10A on the alleged ground that the petitioner misutilised declaration in Form C *qua* Section 10(b). It is emphatically submitted by Sri Lal that the dealer-petitioner was not given opportunity to show cause for alleged offence under Section 10(d), as the earlier notice was never proceeded with. This cannot be construed to be an innocuous mistake on the part of the Sales Tax Officer, as urged by Sri Sunil Mishra, learned Standing Counsel. Such a stand before the Tribunal, as contended by the Standing Counsel, at this stage is contrary to what emanated from the observations made by the first appellate authority on perusal of the records of the Sales Tax Officer relating to penalty under Section 10A. This Court on perusal of the order of the first appellate authority finds that said authority had recorded finding of fact as follows:

*"*** Astonishingly though the appellant was served with show cause notice under Section 10(b) of the CST Act and the appellant through his learned Advocate responded against the charges of Section 10(b), but the learned Assessing Officer in his order of penalty stated to have held the appellant guilty of committing offence under Section 10(d) of the CST Act. ***"*

7.5. On perusal of Order of the Sales Tax Tribunal, it appears that the Revenue had filed second appeal on the following grounds (paragraph 4 of the Order of Tribunal):

> *"(a) That the order of Ld. ACST is not just and proper.*
>
> *(b) That the Ld. ACST quashed the order Ld. STO on the ground that there is no mens rea and 10(b) & 10(d) separate notice override each other.*
>
> *(c) That 10(b) & 10(d) if happen to be separate parts necessary for issuing notice for one action, how can they override when they are separate, therefore they can co-join together rather than cancel out each other.*
>
> *(d) That the order of the Ld. ACST as regards quashing of penalty under Section 10-A of the CST Act, needs to be quashed and that of the Ld. STO restored."*

7.6. No specific pleading was available before the Tribunal by the Revenue to the effect that the notice to show cause to the petitioner was in connection with offence under Section 10(d), but not under Section 10(b) of the CST Act. Thus, the observation of the first appellate authority that the Sales Tax Officer while issuing subsequent notice dated 06.02.2006 consciously mentioned that earlier notice should have been issued for alleged offence under Section 10(b), but not Section 10(d). However, without ascribing any reason much less plausible reason, the learned Odisha Sales Tax Tribunal has come to conclude that "there is no absence of *mens rea* to constitute an offence under Section 10(b) of the CST Act"; yet having set aside the first appellate order, it remanded the matter to the Sales Tax Officer to "complete the assessment afresh", as if the matter emanated from an assessment. It was not justified to jump to such a conclusion without examining contumacious conduct of the petitioner. There is no denying fact that cement was specified in the registration certificate. At the cost of repetition it is reiterated that the Sales Tax Officer has recorded as a matter of fact in his Order dated 30.05.2006 that the explanation of the petitioner was that cement was incorporated in the certificate of registration. Therefore, it is obvious that the petitioner was given opportunity to file reply in connection with alleged offence under Section 10(b) of the CST Act *vide* Notice dated 06.02.2006, but not Notice dated 31.12.2005.

7.7. Section 10 of the CST Act deals with penalties. Clause (b) of Section 10 speaks that if a person being a registered dealer falsely represents when purchasing any class of goods that goods of such class are covered by his certificate of registration; whereas Clause (d) of Section 10 spells out that if a person after purchasing any goods for any of the purpose specified in clause (b) or clause (c) or clause (d) of sub-section (3) of Section 8 fails without reasonable excuse, to make use of the goods for any such purpose.

7.8. This Court examined the perspective of Section 10(b) and Section 10(d) in the case of *Jayshree Chemicals Ltd. Vrs. Additional Commissioner of Sales Tax, (1992) 87 STC 359 (Ori)*, wherein it has been observed as follows:

*"*** Once it is accepted that there was absence of mens rea, resort to penal provision would not be proper unless it is established that the conduct of the assesse was contumacious or that there was deliberate defiance of the statutory provisions, or wilful disregard thereof. Mens rea plays a very vital role for determination of the question whether penalty is to be imposed on a particular goods.*

'Mens rea' means some blameworthy mental condition whether constituted by knowledge or intention or otherwise. The doctrine of mens rea is not abstruse. The principle is stated in the maxim: 'actus non facit reum, nisi mens sit rea' or 'an act does not make one guilty unless the mind is also guilty'. Section 10(b) provides for an offence if any person being a registered dealer falsely represents when purchasing any class of goods that goods of such class are covered by his certificate of registration. The expression 'falsely represents' clearly shows that element of mens rea is a necessary component of the offence.

Bouvier's Law Dictionary explains the term 'false' thus:

*'Applied to the intentional act of a responsible being, it implies a purpose to deceive. *** It means more than incorrect or erroneous. It implies wrong or culpable negligence, and signifies knowingly or negligently untrue'.*

In Black's Law Dictionary, it is stated:

'In law, this word usually means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud'.

Clause (b) of Section 10 uses the words 'falsely represents' as an ingredient of a criminal offence. Therefore, 'mens rea' is the dominant ingredient. Similarly Section 10(d) deals with a situation where a purchasing dealer in order to have the concessional rate applied to an inter-State sale in terms of Section 8(3)(b), without reasonable excuse uses the goods purchased for a purpose other than, and contrary to the declared purpose. The use of the expression 'without reasonable excuse' in Section 10(d) amply reflects legislative intent that mens rea is an essential ingredient of the offence."

7.9. In *Hindustan Steel Ltd. Vrs. State of Odisha, (1970) 25 STC 211 (SC)*, the Hon'ble Supreme Court while considering an identical provisions contained in Section 25 of the Odisha Sales Tax Act, 1947, which deals with "Offences and Penalties", laid down guidelines as follows:

"Under the Act penalty may be imposed for failure to register as a dealer: Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the

manner prescribed by the statute. Those in charge of the affairs of the company in failing to register the company as a dealer acted in the honest and genuine belief that the company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

7.10. Section 10(b) of the CST Act uses the words "falsely represents" which would mean something done knowingly having knowledge. If anything is done *bona fide,* such act cannot be said to be false representation. The language of Form C shows that declaration is required to be made, that the goods are covered by registration certificate, therefore, while issuing Form C in respect of the goods, it is incumbent upon the dealer to be clear that the goods in respect of which Form C is being issued is covered under the registration certificate. In the case at hand, the petitioner was not only a registered dealer, but also authorised to purchase cement as the said commodity stood incorporated in the registration certificate on the date of transactions during the period 2004-05.

7.11. In *Commissioner of Sales Tax Vrs. Sanjiv Fabrics, (2010) 35 VST 1 (SC) = (2010) 8 SCR 627,* it has been laid down that the use of the expression 'falsely represents' indicates that the offence under Section 10(b) of the CST Act, 1956, comes into existence only when a dealer acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct. Therefore, in proceedings for levy of penalty under Section 10A of the Act, the burden would be on the Revenue to prove the existence of circumstances constituting the said offence. Furthermore, it is evident from the heading of Section 10A, "imposition of penalty in lieu of prosecution", that for the breach of any provision of the Act, constituting an offence under Section 10, the ordinary remedy is prosecution which may entail a sentence of imprisonment and the penalty under Section 10A is only in lieu of prosecution. Therefore, all types of omissions or commissions in the use of Form C do not embrace in the expression "false representation".

7.12. Thus, finding of *mens rea* is a condition precedent for levying penalty under Section 10(b) read with Section 10A, which is found to be absent from a bare reading of the Order of the Tribunal. In amplifying what has been already referred to and stated above, it can further be stated that the use of the word 'falsely' in Section 10(b) of the CST Act implies that the person making the representation knew that the certificate of registration does not cover that item but knowing fully well that it does not, states that it is covered. The expression 'falsely represents' clearly leads to show that unless it is established that the conduct of the dealer was contumacious or that there was deliberate violation of the statutory provision or wilful disregard thereof, invocation of penal provisions under Section 10A of the CST Act is unwarranted. Reference may be had to *State of TN Vrs. Nu-Tread Tyres, (2006) 148 STC 256 (Mad); Shoetek Agencies Vrs. State of Tamil Nadu, (2014) 68 VST 19 (Mad)*.

7.13. This Court in the case of *Omkarmal Agarwalla Vrs. Additional Commissioner of Sales Tax, 1988 (I) OLR 15,* held as follows:

> *"8.*** A similar view was taken by a Bench of this Court in Bisra Limestone Co. Vrs. Sales Tax Officer, Rourkela Circle, AIR 1971 Orissa 122 where it was observed that there may be cases the dealer may purchase articles bona fide, in good faith, that they are covered by a certificate of registration even though there may be an ultimate finding that the goods are not covered by the certificate. But in spite of that, no offence under Section 10(b) would be made out if there was no false representation. This was also a case of imposition of the penalty of fine.*
>
> *9. It is no doubt true that if a dealer does not make a truthful representation which is an equation of false representation, then this is a fact which is to be determined and decided on facts of each case. The representation, therefore, must be intentional that the goods are covered by the certificate on a proof of which ingredient alone, an offence under clause (b) of Section 10 can be said to have been committed."*

7.14. In the instant case, since cement finds place in the certificate of registration, it cannot be said that the petitioner has falsely represented by purchasing goods at concessional rate of tax on the strength of declaration in Form C. It was for the department to prove that the representation was false to the knowledge of the petitioner-dealer.

8. Sri Sumit Lal, learned Advocate for the petitioner refuting the argument of Sri Sunil Mishra, learned Standing Counsel that if the petitioner had no opportunity to meet the allegation under Section 10(d) of the CST Act, this Court can relegate the matter to the Sales Tax Officer for examination by affording opportunity to the petitioner, forcefully argued that before the Tribunal, by way of cross-objection, the petitioner-dealer had raised jurisdictional issue to the following effect:

> *"Cross-objection has been filed on behalf of the respondent-dealer contended that the learned First Appellate Authority is wholly justified to hold that the learned Sales Tax Officer has no jurisdiction to pass the Order of penalty under Section 10(d) when the show cause notice was issued under Section 10(b) of the CST Act and as such, the lower forum has committed an error of law while passing the impugned Order under Section 10(d) of the CST Act."*

8.1. The learned Tribunal made observation as follows:

> *"*** The respondent-firm was served with show cause notice under Section 10(b) of the CST Act, but the learned Sales Tax Officer in his order of penalty stated to have held the dealer guilty of committing of offence under Section 10(d) of the CST Act. The learned DCST (Appeal) contended that due to typographical error the fact cannot ignored. ***"*

8.2. Such stance of the DCST (Appeal) before the Tribunal is not tenable in view of the observation recorded by the first appellate authority that before issuing subsequent notice dated 06.02.2006, the Sales Tax Officer has made himself clear that the earlier notice dated 31.12.2005 could not have been issued for alleged commission of offence under Section 10(d). The observation of the first appellate authority as extracted heretofore has never been proved to be wrong by placing cogent record by the Revenue.

8.3. The rationality behind issuing a notice is making something known of what a man was or might be ignorant before. It provides diverse effects, for, by it, the party who gives the same shall have some benefit, which otherwise he should not have had or the party to whom the notice is given is made subject to some action or charge, that otherwise he had been liable to. The cardinal principle behind issuing a notice is based on the rule *'audi alteram partem'* which means no one should be condemned unheard. Notice being the first limb of this rule, must be precise and definite. It must apprise the party determinatively of the case he has to meet. Adequate time for his representation must be given. See *Arvind Kumar Giri Vrs. Sales Tax Officer, (2010) 27 VST 46 (WBTT)*.

8.4. It has already been extracted herein above from the Order dated 30.05.2006 of the Sales Tax Officer that pursuant to notice dated 06.02.2006 the petitioner-dealer had furnished reply to the effect that "the goods purchased on the strength of C Form are included in the certificate of registration granted by the Sales Tax Officer, Sambalpur".

8.5. Specific stand of the petitioner before the Tribunal was that when notice was for alleged commission of offence under Section 10(b) and as revealed from the Order of the Sales Tax Officer that the reply/explanation of the petitioner was received in respect of such offence, the final Order imposing penalty under Section 10A could not be based on alleged offence under Section 10(d).

8.6. Under Section 24 of the OST Act, this Court is vested with the power to adjudicate any question of law on the ground that the Tribunal has either failed to decide or decided erroneously any question of law. As the question of law was raised before the Odisha Sales Tax Tribunal, but it failed to decide the same, question of law arises for this Court to deal with. In *Commissioner of Income Tax Vrs. Scindia Steam Navigation Co. Ltd., AIR 1961 SC 1633 = (1961) 42 ITR 589 (SC) = (1962) 1 SCR 788,* the principles propounded by the Constitution Bench of the Hon'ble Supreme Court of India are as follows:

> *"39. The result of the above discussion may thus be summed up:*
>
> *(1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.*
>
> *(2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.*
>
> *(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.*
>
> *(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.*
>
> *40. Stating the position compendiously, it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order."*

8.7. Therefore, this Court framed the question whether the Tribunal was justified in upholding the imposition of penalty under Section 10(d) of the CST Act while holding that the petitioner was served with show cause notice under Section 10(b) and not under Section 10(d) of the CST Act. Similar question fell for consideration of this Court in *South Eastern Coal Fields Limited (supra),* which is relied upon by Sri Sumit Lal, learned counsel for the petitioner.

8.8. In the said reported decision, this Court came to hold as under:

> *"We are unable to accept this contention of the Learned Counsel appearing on behalf of the Revenue. In the entire show cause notice, there is no mention of sub-sections (1), (3) and (4) of Section 8 of the C.S.T. Act. It goes without saying that a show cause notice which is issued seeking a reply from the dealer before imposing penalty on him for breach of any statutory provision must be in unambiguous and clear language. It should not be worded in such a manner that one shall be required to derive a clear idea of the case which he has to answer. If there is anything in the mind of any authority issuing show cause notice the same should be translated in clear words and must find place in the notice so as to enable an affected person/dealer to know the exact allegations raised against him on the basis of which he will give his reply.* ***
>
> *The contents of the show cause notice clearly show that the allegations are only in relation to the infraction covered by clause (b) of Section 10 of the C.S.T. Act. Thus no show cause notice was issued by the S.T.O. affording reasonable opportunity to the Petitioner to show cause why it should not be held guilty of offence under clause (d) of Section 10 of the C.S.T. Act, before imposing penalty of Rs. 37,00,000/- under Section 10A of the C.S.T. Act holding that the Petitioner was guilty of an offence under clause (d) of Section 10 of the C.S.T. Act. This amounts to violation of basic principles of natural justice as well as statutory requirement provided under Section 10A of the C.S.T. Act. There was no occasion for the Petitioner to meet the allegation of committing offence under clause (d) of Section 10 of the C.S.T. Act. Such a course is not permissible."*

8.9. Pertinent here to refer to the observation of the first appellate authority, which is to the following effect:

> *"After issue of notice under Section 10(b) of the CST Act, the notice earlier issued for imposing penalty under Section 10A for violation of Section 10(d) is not supported by a valid notice and opportunity of being heard."*

8.10. It transpires from the tenor of both the notice dated 31.12.2005 and the notice dated 06.02.2006, that even before hearing by affording opportunity to the petitioner to furnish its reply, the Sales Tax Officer had made up his mind by holding the petitioner guilty of offence. While in the former he has stated "As such you are found to have attracted penal provision under Section 10(d) of the CST Act, 1956 for misutilisation of C Form", in the latter he mentioned that "As such you are found to have attracted penal provision under Section 10(b) of the CST Act, 1956 for misutilisation of C Form". The learned Standing Counsel has not denied the fact that the earlier notice dated 31.12.2005 scheduled to 13.01.2006 was served on the petitioner on 14.01.2006. Therefore the first appellate authority is correct in holding that the Sales Tax Officer proceeded with the subsequent notice.

8.11. Under the aforesaid premise with the given clear legal position as set forth by the Court(s), the Order of the Odisha Sales Tax Tribunal cannot be sustained in the eye of law.

Decision and Conclusion:

9. On consideration of the facts on record, arguments of counsel for respective parties, legal position enunciated by the Courts,this Court holds that the commodity, cement, being specified in the certificate of registration at the time of effecting inter-State purchase during the period 2004-05, there was no false representation by the petitioner and the Revenue has not discharged its burden by clearly establishing that the purchases were not made *bona fide* on the strength of declaration in Form C. It is also noteworthy to mention that, when the notice alleging offence under Section 10(d) was served after the scheduled date calling upon the petitioner to submit reply and subsequent notice specifying commission of offence under Section 10(b) of the CST Act was responded to by the petitioner, the Sales Tax Officer was not correct in rendering finding as if the petitioner was held guilty of offence under Section 10(d). Therefore, the penalty imposed under Section 10A of the CST Act cannot be sustained. Furthermore, as is apparent from the Order of the first appellate authority, the Sales Tax Officer himself appears to have recorded that the notice dated 31.12.2005 should have been issued for alleged commission of offence under Section 10(b), but not under Section 10(d) of the CST Act.

9.1. Observation of the Sales Tax Tribunal, that there was "no absence of *mens rea* to constitute an offence under Section 10(b) of the CST Act*",* suffers from infirmity, inasmuch as no reason was assigned thereto. Therefore, the Order dated 09.12.2013 of the Sales Tax Tribunal setting aside the order of the first appellate authority and remanding the matter to the Sales Tax Officer for assessment afresh is uncalled for.

9.2. Accordingly, the question of law as framed by this Court is answered in the negative, *i.e.,* in favour of the petitioner-Aryan Ispat & Power (P) Ltd. and against the opposite party-State of Odisha represented by the Commissioner of Sales Tax, Odisha, Cuttack.

9.3. As a sequel to the above answer to question of law, in exercise of power under Section 9(2) of the CST Act read with Section 24(4) of the OST Act, the Order dated 09.12.2013 of the Sales Tax Tribunal is hereby set aside and, thereby the Order dated 28.04.2007 of the Assistant Commissioner of Sales Tax, Sambalpur Range, Sambalpur is restored.

9.4. The sales tax revision petition is disposed off with no order as to costs.

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2023 (III) ILR – CUT- 1023

ARINDAM SINHA, J & SIBO SANKAR MISHRA, J.

W.P.(C) NO. 5534 OF 2019

M/s. NEELACHAL ISPAT NIGAM LTD.
(NINL), JAJPUR …….Petitioner

-V-

PRESIDING OFFICER, INDUSTRIAL TRIBUNAL,
BHUBANESWAR & ANR. ……Opp.Parties

(A) INDUSTRIAL DISPUTE ACT, 1947 – Section 2(k) – "Any Person" – Whether the widow of an ex-operative-cum-senior Technician would come within the meaning of phrase "any person" used in Section 2(k)? – Held, No.

(B) WORD AND PHRASE – "Any person" – Meaning and interpretation – Explain with reference to case law. (Paras 7-10)

Case Laws Relied on and Referred to :-

1. L.P.A. No. 384 of 2008 (D.O.J- 29. 01.2009) : Delhi Development Authority Vs. Sudesh Kumar & Ors.
2. AIR (1958) SC 353 = 1958 1 LLJ 500 : Workmen of Dimakuchi Tea Estate v. Management of Demakuchi Tea Estate.
3. AIR (1959) SC 208 : Kays Constructions Co. (Private) Ltd. Vs. Its Workmen.
4. AIR (1958) SC 1026: Workmen of Dahingeapara Tea Estate Vs. Dahingeapara Tea Estate.

For Petitioner : Mr. Aditya Mishra

For Opp.Parties : Mr. Satyabrata Mohanty

JUDGMENT Date of Hearing & Judgment : 16.10.2023

ARINDAM SINHA, J

1. Mr. Mishra, learned advocate appears on behalf of petitioner-management. He submits, impugned is award dated 16th August, 2018 made by the Industrial Tribunal. By it there was direction upon his client to appoint opposite party no.2, widow of an ex-Operative-cum-Senior Technician. Mainly definition provision in section 2(k) of Industrial Disputes Act, 1947 was relied upon in impugned award. This is because though opposite party no.2 did not come under definition of 'workman' in section 2(s), the tribunal held she would come within meaning of phrase 'any person' used in section 2(k). The direction made in impugned award is reproduced below.

> *"The First Party M/s. Neelachal Ispat and Nigam Ltd. is hereby directed to appoint Smt. Minati Panigrahi, w/o: Late Simanchal Panigrahi, Ex-Operative-cum-Sr. Technician, in a suitable post within a period of six months from the date of publication of the Award."*

2. On query from Court Mr. Mishra submits, the tribunal relied on ***judgment dated 29th January, 2009*** of a Division Bench in the High Court of Delhi, in ***L.P.A. no.384 of 2008 (Delhi Development Authority v. Sudesh Kumar and Ors.).*** The Division Bench had relied upon judgment of the Supreme Court in ***Workmen of Dimakuchi Tea Estate v. Management of Demakuchi Tea Estate*** reported in ***AIR 1958 SC 353 as also (1958) 1 LLJ 500.*** Said Division Bench also relied upon another judgment of the Supreme Court in ***Kays Constructions Co. (Private) Ltd. v. Its Workmen*** reported in ***AIR 1959 SC 208.*** He hands up SCC online print of ***Demakuchi Tea Estate*** (supra) and Manupatra print of ***Kays Construction*** (supra).

3. Mr. Mishra submits, there can be no parity sought by opposite party no.2 with widows of deceased workmen earlier having got appointment under the resettlement and rehabilitation scheme of the Government. His client had since assumed the management. It did not and does not have a policy for compassionate appointment. Opposite party no.2 was never a workman and hence, there could be no industrial dispute arisen nor referred to the tribunal. It proceeded on irrelevant consideration and its decision directing giving appointment is perverse as not based on any relevant material nor the law.

4. Mr. Mohanty, learned advocate appears on behalf of opposite party no.2. On query from Court regarding provision in the Act of 1947, under which the direction for appointment was made, he submits that the right of employment accrued to his client relates back to the order of reference dated 8th December, 2015. On further query from Court he submits, his client's husband died due to illness while in employment. The terms of employment covered death benefit to the employee. On still further query from Court he submits, his client did not apply under section 17-B on having obtained award for getting appointment.

5. In ***Sudesh Kumar*** (supra) the High Court of Delhi relied on ***Dimakuchi Tea Estate*** (supra). In so doing the Court said in paragraph-12 that the tribunal had power to have, by impugned therein award, directed appointment on compassionate ground. Paragraph-12 is reproduced below.

> ***"In our opinion, the Tribunal has the power, in the interest of industrial peace, to direct the appointment of a candidate on compassionate basis upon an industrial dispute espoused by the representative Trade Union.*** *We find no merit in the present appeal and the same is hereby dismissed with costs quantified at Rs.25,000/-. The appellant-DDA is directed to implement the award of the Tribunal within a period of four weeks from today."* (Emphasis supplied)

As such it is necessary for us to try and understand what was said in ***Dimakuchi Tea Estate*** (supra). Said judgment of the Supreme Court was by a Bench of three learned Judges. There was the majority opinion of the Chief Justice and another learned Judge, while the third learned Judge gave a dissenting view.

6. Facts in ***Dimakuchi Tea Estate*** (supra) were that one Dr. K.P. Banerjee, who had been appointed Assistant Medical Officer (AMO) and was on probation, had his services terminated. On query made by the doctor, reason for the termination was supplied. Pursuant to the termination Assam Chah Karmachari Sangha took up the doctor's case of dismissal. Definition of 'workman' underwent amendment in year 1956. The definition as stood prior to the amendment and applied in ***Dimakuchi Tea Estate*** (supra) is reproduced below.

> *"(s) "workman" means any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward and includes, for the purposes of any proceedings under this Act in relation to an industrial dispute,a workman discharged during that dispute, but does not include any person employed in the naval, military or air service of the Government."*

It will be necessary here to reproduce below section 2(k).

> *"(k) "industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person;"*

In context of above facts and law, there was question raised for answer by the Supreme Court on whether an industrial dispute could be raised and maintained regarding dismissal of the doctor. The terms of reference, given in paragraph-3 of the judgment are reproduced below.

> *"(i) whether the management of Dimakuchi Tea Estate was justified in dismissing Dr. K.P. Banerjee, A.M.O.?*
>
> *(ii) If not, is he entitled to reinstatement or any other relief in lieu thereof ?"*

7. Phrase 'any person' used in definition section 2(k) received consideration by the learned judges. Paragraph-9 from the majority view is reproduced below.

> *"A little careful consideration will show, however, that the expression "any person" occurring in the third part of the definition clause cannot mean anybody and everybody in this wide world. First of all, the subject matter of dispute must relate to (i) employment or non-employment or (ii) terms of employment or conditions of labour of any person; these necessarily import a limitation in the sense that a person in respect of whom the employer-employee relation never existed or can never possibly exist cannot be the subject-matter of a dispute between employers and workmen. Secondly, the definition clause must be read in the context of the subject matter and scheme of the Act, and consistently with the objects and other provisions of the Act. It is well settled that "the words of a statute, when there is a doubt about their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained."* (Emphasis supplied)

8. The Bench, by the majority view, proceeded to interpret the phrase by taking into consideration provisions in the Act itself for ascertaining its objects. In

paragraph-11, result of the exercise was stated. Said paragraph is reproduced below.

> "*Thus, an examination of the salient provisions of the Act shows that the principal objects of the Act are-*
>
> *(1) the promotion of measures for securing and preserving amity and good relations* ***between the employer and workmen****;*
>
> *(2)* ***an investigation and settlement of industrial disputes, between*** *employers and employers,* ***employers and workmen,*** *or workmen and workmen,* ***with a right of representation by a registered trade union or federation of trade unions*** *or association of employers or a federation of associations of employers;*
>
> *(3) prevention of illegal strikes and lock-outs;*
>
> *(4) relief to workmen in the matter of lay-off and retrenchment; and*
>
> *(5) collective bargaining.*
>
> ***The Act is primarily meant for regulating the relations of employers and workmen-past, present and future****. It draws a distinction between 'workmen' as such and the managerial or supervisory staff, and confers benefit on the former only."*
>
> (Emphasis supplied)

9. Interpretation of phrase 'any person' was given by the majority view as is contained, inter alia, in a passage from paragraph-14, reproduced below.

> *"14. xxx xxx xxx* ***The reason for the use of the expression "any person" in the definition clause is, however, not far to seek. The word 'workman' as defined in the Act (before the amendments of 1956) included, for the purposes of any proceedings under the Act in relation to an industrial dispute, a workman discharged during the dispute.*** *This definition corresponded to s. 2.(j) of the old Trade Disputes Act, 1929 except that the words "including an apprentice" were inserted and the words "industrial dispute" were substituted for the words "trade dispute". It is worthy of note that in the Trade Disputes Act, 1929, the word 'workman' meant any person employed in any trade or industry to do any skilled or unskilled manual or clerical work for hire or reward.* ***It is clear enough that prior to 1956 when the definition of ' workman' in the Act was further widened to include a person dismissed, discharged or retrenched in connection with, or as a consequence of the dispute or whose dismissal, discharge or retrenchment led to the dispute, a workman who had been discharged earlier and not during the dispute was not a workman within the meaning of the Act. If the expression " any person " in the third part of the definition clause were to be strictly equated with 'any workman', then there could be no industrial dispute, prior to 1956, with regard to a workman who had been discharged earlier than the dispute, even though the discharge itself had led to the dispute. That seems to be the reason why the Legislature used the expression 'any person' in the third part of the definition clause so as to put it beyond any doubt that the non-employment of such a dismissed workman was also within the ambit of an industrial dispute****. There was a wide gap between a 'workman' and an 'employee' under the definition of the word 'workman' in s. 2 (s) as it stood prior to 1956; all existing workmen were no doubt employees; but all employees were not workmen. The supervisory staff did not come within the definition. The gap has been reduced to some extent by the amendments of 1956; part of the supervisory staff (who draw wages not exceeding five hundred rupees per mensem) and*

> *those who were otherwise workmen but were discharged or dismissed earlier have also come within the definition. If and when the gap is completely bridged, workmen will be synonymous with 'employees', whether engaged in any skilled or unskilled manual, supervisory, technical or clerical work, etc. But till the gap is completely obliterated, there is a distinction between workmen and non-workmen and that distinction has an important bearing on the question before us. Limitation no. (3) as formulated by learned counsel for the appellants ignores the distinction altogether and equates 'any person' with any employee'-past, present or future: this we do not think is quite correct or consistent with the other provisions of the Act.* ***The Act avowedly gives a restricted meaning to the word 'workman' and almost all the provisions of the Act are intended to confer benefits on that class of persons who generally answer to the description of workmen.*** *xxx xxx xxx"* (Emphasis supplied)

We have also gone through the dissenting view but are bound by the majority view that prevails and is the declaration of law under article 141 in the Constitution of India.

10. In ***Kays Construction Co.*** (supra) the Supreme Court was again confronted with phrase 'any person' in definition section 2(k). Facts of the case were appellant had decided to close its business claiming financial distress and terminated the services of its employees. In the meantime, it had agreed to sell its machinery, tools, furniture and fittings to respondent no.2. Said respondent had been successful in a tender for construction of railway coaches. Said respondent appointed a few of the terminated workmen. Other workmen of appellant raised the industrial dispute regarding termination of their services on ground of financial difficulties and closure. There was allegation of complete hiatus between appellant and respondent no.2 purchaser. Said respondent had contended that the workmen could not raise industrial dispute against it as they had never been appointed by it.

11. In dealing with the case, the Supreme Court referred to its earlier decision in ***Workmen of Dahingeapara Tea Estate v. Dahingeapara Tea Estate*** reported in ***AIR 1958 SC 1026***. Said Court in the relied upon judgment had in turn relied upon ***Dimakuchi Tea Estate*** (supra). The dispute raised by the union was for reinstatement on continuity by looking through the arrangement entered into between appellant and respondent no.2 for terminating services of the workmen. In that context, there was finding by the Supreme Court that the persons, who were sought to be terminated by appellant, though had never been appointed by respondent no.2 but came within meaning of 'any person' under section 2(k), to maintain the industrial dispute.

12. On analyzing above declarations of law made by the Supreme Court, in context of facts in which the decisions were rendered, we have not been able to find that the direction by the tribunal for giving appointment to a person, who is widow of a deceased workman and therefore, on compassionate ground, is a direction that could be made under any provision in the Act of 1947. Non-employment talked about in the decisions relied upon had direct nexus with the persons, who were no

longer in employment having had employment prior thereto but which employment was sought to be terminated in a roundabout manner. Hence, industrial disputes were raised, maintained and answered in favour of those seeking employment. The relief was re-instatement by necessary appointment. An employer may or may not have a policy for compassionate appointment but the working of the Act, as declared in ***Dimakuchi Tea Estate*** (supra), does not include claims for appointment on compassionate ground. As such we do not find similarity between those persons and the unfortunate widow of the employee who died, for her to claim to be covered by phrase 'any person' in definition section 2(k), to raise an industrial dispute and thereby have direction for appointment.

13. We, therefore, are in respectful disagreement with the Delhi High Court on ***Sudesh Kumar*** (supra). More so, because we have ascertained from Mr. Mohanty that the terms of employment included consequences of death and there is no dispute with regard thereto. Furthermore, the direction is such that it does not come within or under section 17-B for opposite party no.2, successful in the tribunal, to have moved for interim relief during pendency on adjudication of the challenge by this writ petition.

14. We are also not impressed by Mr. Mohanty's contention regarding parity. Challenge before us is impugned award. By reason of there not being challenge to any earlier appointment on compassionate ground, the omission cannot, in our opinion, bar petitioner-management from maintaining the challenge. Furthermore, Mr. Mishra's submission has been that prior appointments on compassionate ground were given under the resettlement and rehabilitation scheme of the Government. Said contention stands stated in impugned award.

15. For reasons aforesaid, we set aside and quash impugned award. The writ petition is allowed and disposed of.

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2023 (III) ILR-CUT-1028

ARINDAM SINHA, J & SIBO SANKAR MISHRA, J.

W.P.(C) NO. 8797 OF 2017

KALLAMUDIN KHAN .....Petitioner

-V-

PRESIDING OFFICER, CENTRAL GOVT. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT & ORS. .....Opp.Parties

INDUSTRIAL DISPUTE ACT, 1947 – The petitioner was neither engaged by the principal employer nor by the contractor – Whether the industrial dispute maintainable in the instant of petitioner as workman? – Held, No.

Case Law Relied on and Referred to :-

1. WP(C) No.8567 of 2006 (D.o.J : 20.04.2011) : Indian Oil Corporation Limited Vs. Union of India & Ors.
2. Appeal (Civil) 1351-53 of 2002 (D.o.J : 05.02.2004) : Workmen of Nilgiri Coop. Mkt. Society Ltd. Vs. State of Tamil Nadu & Ors.
1. (1974) 3 SCC 498 : Silver Jubilee Tailoring House Vs. Chief Inspector of Shops and Establishments.

For Petitioner : Mr. Darpanarayan Pattnayak

For Opp.Parties : Mr. Debaraj Mohanty

JUDGMENT Date of Hearing : 01&08 .11.2023 & Judgment : 08.11.2023

ARINDAM SINHA, J.

1. Petitioner is a workman, who had raised a dispute regarding refusal of employment. The Central Government, by order dated 17th April, 2006 referred the dispute as per schedule therein. Text of the schedule is reproduced below.

> ***"Whether the action of the management of M/s IOCL****, Jatni Depot, Khurda* ***in refusing employment to Sri Kallamuddin Khan w.e.f. 17/6/2003 through their Contractor M/s. Shakti Marketeers*** *instead of regularizing his service in M/s IOCL,* ***even after rendering more than 8 years of continuous service to the organization in regular & perennial nature of job, is legal and justified****? If not, what relief the workman is entitled to?"*
>
> (Emphasis supplied)

2. Mr. Pattnayak, learned advocate appears on behalf of the workman and Mr. Mohanty, learned advocate, for the principal employer. Opposite party no.4 is the contractor. Said opposite party has chosen to go unrepresented inspite of good service.

3. We have ascertained from appearing learned advocates that the principal employer had unsuccessfully challenged the order of reference by writ petition to this Court. Co-ordinate Bench by ***judgment dated 20th April, 2011*** *in* ***WP(C) no.8567 of 2006 (Indian Oil Corporation Limited v. Union of India and others)*** dismissed the challenge on imposing cost of ₹ 5,000/-, pursuant to view taken that the management had unnecessarily questioned validity of the order of reference. It will be sufficient for us to extract and reproduce two sentences from paragraph 8 of the judgment.

> "8. xxx xx xxx *Therefore, the points of dispute formulated in the Schedule is perfectly legal and valid and the appropriate Government is competent to make the reference.* ***Whether it is an industrial dispute or not is a fact to be ascertained by the Tribunal/Labour Court in the enquiry required to be conducted under the I.D. Act."***
>
> (Emphasis supplied)

We have also been told that the management thereafter was unsuccessful in obtaining leave to prefer appeal in the Supreme Court. The special leave petition was dismissed by order dated 8th July, 2011. The reference was there afteradjudicated

by the Central Government Industrial Tribunal (CGIT) and impugned award dated 24th June, 2016 made.

4. On behalf of the workman first submission is, the point of reference was not answered. As such, impugned award is liable to and should be set aside and quashed. Without prejudice the alternative submission that finding in the award is perverse. Management witness (MW-1) had clearly admitted to have competence to depose only on and from year, 1997. He, therefore, could not have deposed on petitioner's engagement prior thereto, from year, 1994. Petitioner had worked as office boy in the earlier period and, thereafter, wrongfully shown to have been transferred to the contractor and engaged through him as 'handler'. Everything regarding the workman was initially done by the principal employer and subsequently through its contractor. In the circumstances and where the point of reference clearly stated the workman had rendered more than 8 years continuous service to the organization in regular and perennial nature of job, the question to be answered was whether refusal of the employment was justified. Instead, the tribunal said the workman was never engaged, neither by the principal employer nor by the contractor.

5. Mr. Pattnayak relies on ***judgment dated 5th February, 2004*** of the Supreme Court in ***Appeal (civil) 1351-53 of 2002 (Workmen of Nilgiri Coop. Mkt. Society Ltd. v. State of Tamil Nadu and others)***. Relied upon passage is reproduced below.

> *"An analysis of the cases, discussed above, shows that they fall in three classes : (i) where contract labour is engaged in or in connection with the work of an establishment and employmentof contract labour is prohibited either because the industrial adjudicator/court ordered abolition of contract labour or because the appropriate Government issued notification under Section 10(1) of the CLRA Act, no automatic absorption of the contract labour working in the establishment was ordered; (ii)* ***where the contract was found to be a sham and nominal, rather a camouflage, in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself****. Indeed, such cases do not relate to abolition of contract labour but present instances wherein the Court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited; (iii) where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor the courts have held that the contract labour would indeed be the employees of the principal employer."* (Emphasis supplied)

6. Mr. Pattnayak relies on another judgment of the Supreme Court in ***Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments*** reported in ***(1974) 3 SCC 498***, paragraph-11, reproduced below.

> "*11. The question for decision was whether the agarias were workmen as defined bySection 2(s) of the Industrial Disputes Act of 1947 or whether they were independent contractors. The Court said that the* ***prima facie test to determine whether there was relationship between employer and employee is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the employee is to do but also the manner in which he had to do the work****. In*

> *other words, the proper test according to this Court is, whether or not the master has the right to control the manner of execution of the work. The Court further said that the nature of (sic) extent of the control might vary from business to business and is by its nature incapable of precise definition, that it is not necessary for holding that a person is an employee that the employer should be proved to have exercised control over his work, that even the test of control over the manner of work is not one of universal application and that* ***there are many contracts in which the master could not control the manner in which the work was done****."* (Emphasis supplied)

He submits, applying the judgment will result in finding that impugned award is perverse inasmuch as control by the principal employer either on directing what work his client was to do or the manner in which he has to do the work cannot be said to be of universal application and the Supreme Court declared that there are many contracts, where the master could not control the manner in which the work was done.

7. On behalf of the principal employer submission is that the tribunal found on facts that there was no office in the period commencing year, 1994 to year, 1997. In the circumstances, consequent finding of fact was that there was no engagement of the workman by the principal employer in that period. The workman had forged a certificate as from MW-1. Further finding of fact was, there was no engagement through the contractor. The tribunal had answered issue no.1 in favour of both, the principal employer and the contractor. We reproduce below the issues framed from impugned award.

"Issues.

> *1.* ***Whether the disputant Shri Kallammuddin Khan has even been a workman under the 1st Party-Management No.1 and 3****.*
>
> *2. Whether the action of the Management of M/s. IOCL, Jatni Depot, Khurda in refusing employment to Shri Kallammuddin Khan w.e.f. 17.6.2003 through their Contractor M/s. Shakti Marketers, instead of regularizing his service in M/s. IOCL, even after rendering more than 8 years of continuous service to the organization in regular & perennial nature of job, is legal and justified?*
>
> *3. If not, what relief the workman is entitled to?"* (Emphasis supplied)

Mr. Mohanty disputes application of ***Silver Jubilee Tailoring House*** (supra) to facts in this case.

8. It is necessary for us to quote below sub-section (4) in section 10 of Industrial Disputes Act, 1947.

> *"10(4) Where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section or in a subsequent order,* ***the appropriate Government has specified the points of dispute for adjudication****, the Labour Court or* ***the Tribunal*** *or the National Tribunal, as the case may be,* ***shall confine its adjudication to those points and matters incidental thereto****."* (Emphasis supplied)

Applying the provision to the schedule of reference it is clear that the tribunal was to answer, either in the affirmative on holding that the refusal of employment was legal

and justified or in the negative, to say that it was illegal and unjustified. To enquire into by trial and come to finding that petitioner was never employed was not what was required to be answered, even as being incidental to the order of reference. However, co-ordinate Bench by **judgment dated 20th April, 2011** (supra) had left open to the tribunal to decide whether the dispute is an industrial dispute on facts to be ascertained. The tribunal finding that petitioner was never engaged either by the principal employer nor by the contractor to work for the principal employer but was engaged by the contractor to handle loading and unloading of oil tanker works appears to suggest that the tribunal found there was no industrial dispute. We reproduce below passages from paragraphs 9, 10 and paragraph 12 from impugned award.

> *"9. xxx xxx xxx On the other hand it is emerging from the evidence of the M.W.1 and documents relied upon by the Management that* ***handling contract i.e. loading and unloading of oil tanker in the Jatni Depot was entrusted to the contractor M/s. Shakti Marketers and thus, the evidence adduced before the Tribunal leads to a conclusion that he was working as a labourer of the contractor M/s. Shakti Markerters, who handle the loading and unloading of oil tanker works****.*
>
> *10. xx xx xx Hence doubt can be entertained regarding existence of any "employer and employee" relationship between the1st party-Management and the workman Kallammuddin Khan and as such it cannot be accepted that the workman was ever employed under the 1st Party-Management as a contract labourer.*
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> *"12. In view of my above findings that* ***Kallammuddin Khan was not ever appointed or he worked in any capacity being employed by the 1st Party-Management or worked as a contract labourer through M/s. Shakti Marketers it cannot be held that he was refused employment*** *by the 1st Party-Management either directly or through M/s. Shakti Marketers and as such he is not entitled to any regularization"* (Emphasis supplied)

Hence, issue no.1 and answer in favour of the management parties.

9. Above finding by the tribunal is urged to be in teeth of the principal employer's unsuccessful challenge to the order of reference. We have already quoted above the order of reference and a paragraph from the judgment of co-ordinate Bench, dismissing the challenge mounted by the principal employer. The schedule clearly formulated the point for answer to be whether refusal of employment with effect from 17th June, 2003 instead of regularizing the workman even after rendering more than 8 years of continuous service to the organization in regular and perennial nature of job, was legal and justified. Embodied in the point of reference were refusal of employment with effect from 17th June, 2003 and the workman having had rendered more than 8 years of continuous service to the organization in regular and perennial nature of job. We clearly understand why the principal employer challenged the order of reference but it was unsuccessful, both before this Court and the Supreme Court, where the special leave petition was dismissed.

10. Nevertheless, we must notice that the Tribunal did enquire and find, as has been submitted on behalf of the principal employer that admitted fact was non-existence of office in period between year 1994 and year 1997. Petitioner's contention before the tribunal was, he was engaged as office boy in the period. Further finding on fact by the tribunal was that petitioner had forged a certificate saying so. Still further finding of fact was, the contractor had engaged petitioner as 'handler' for loading and unloading oil tanker works in executing his handling contract. There has been no attempt by petitioner to assail the findings on perversity.

11. Regarding ***Silver Jubilee Tailoring House*** (supra) it is necessary to also reproduce below paragraphs 28 and 30 from the judgment.

> *"28. It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded which factors should in any case be treated as determining ones.* ***The plain fact is that in a large number of cases, the court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction*** *(12).*
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> *xxx xxx xxx xxx xxx xxx*
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> *30. The fact that generally the workers attend the shop which belongs to the employer and work there, on the machines, also belonging to him, is a relevant factor. When the services are performed generally in the employer's premises, this is some indication that the contract is a contract of service. It is possible that this is another facet of the incidental feature of employment. This is the sort of situation in which a court may well feel inclined to apply the "Organisation" test suggested by Denning, L.J. in Stevenson Jordan and Harrison v. Mac. donal and Evans.(14)."* (Emphasis supplied)

12. We have given our careful consideration to the paragraphs from the judgment reproduced in the last preceding and paragraph 6 above. The Supreme Court said that it is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service, will serve any useful purpose. Nevertheless, it also said that the most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic and then taking relevant factor of where the workman was working, may also apply the 'organization' test. It transpires that petitioner, relying on the judgment, is therefore contending that finding on issue no.1 suggesting there was no industrial dispute on absence of employer workman relationship, as not existing neither between petitioner and principal employer nor between petitioner and the contractor, is perverse. We have already reproduced above findings in impugned award on issue no.1 framed in the reference. The tribunal clearly found that petitioner was neither engaged by the principal employer nor by the contractor, qua principal employer. The tribunal was clear in finding that there was handling contract awarded to M/s. Shakti Marketers, to execute which the contractor had engaged petitioner. By the

award the tribunal also had recorded its finding that the handling contract was not fictitious, or as said, a camouflage. Hence, so far as the reference is concerned, no relief for petitioner was directed in impugned award.

13. In ***Nilgiri Coop. Mkt. Society Ltd.*** (supra), relied upon passage is regarding where the principal employer had acted through the contractor in creating camouflage. Facts found by the tribunal do not attract application of the decision.

14. In view of aforesaid the tribunal appears to have adjudicated on the dispute referred keeping in mind said **judgment dated 20th April, 2011** (supra). As such interference in judicial review is not warranted.

15. The writ petition is dismissed.

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2023 (III) ILR-CUT-1034

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

CRLA NO. 134 OF 2016

KARMA TAMUDIA ……..Appellant

-V-

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Conviction of the appellant for commission of offences U/ss. 450/354/354-A/302/376 r/w Section 511 of the IPC – Whether the conviction can be based on testimony of eye witness with minor discrepancy? – Held, Yes – When eye witnesses give all necessary details regarding assault, weapon and role played by the accused and the presence of the eye witnesses are corroborated by other witnesses, in such circumstances the evidence of eye witnesses cannot be simply thrown out or doubted on the basis of some trivial contradictions.

Case Laws Relied on and Referred to :-

1. AIR 2002 SC 2973 : Laxman Vs. state of Maharashtra.
2. AIR 2001 SC 2383 : Smt. Laxmi Vs. Om Prakash.
3. (2020) 19 SCC 165: Amar Singh Vs. State (NCT of Delhi).
4. (2003) 11 SCC 367: Sunil Kumar Vs. State (NCT of Delhi).
5. (2000) 8 SCC 457 : Narayan Chetanram Chaudhary Vs. State of Maharashtra.
6. (2018) 7 SCC 623 : State of A.P Vs. Pullagummikasi Reddy Krishna Reddy.

For Appellant : Ms. Mamata Mishra, Amicus Curiae.

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

JUDGMENT Date of Hearing : 21.08.2023 : Date of Judgment : 19.10.2023

Dr. S.K. PANIGRAHI, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 14.12.2015 passed by the learned Additional Sessions Judge, Rairangpur in Sessions Trial No.19 of 2014, arising out of G.R. Case No. 92 of 2014 corresponding to Baripada Town P.S. Case No. 37 of 2014, convicting the appellant for commission of offences under Sections 450/354/354-A/302 and under Section 376 read with Section 511 of the Indian Penal Code (for short "the I.P.C.").

I. CASE OF THE PROSECUTION:

2. The case of the prosecution is that that on 05.03.2014, at about 9 PM, Karma Tumudia ("the Appellant") trespassed into the house of Tulasi Hansdah ("the deceased") and demanded sexual favours. At the time, the deceased was alone in her house and the appellant, taking advantage of the situation, tried to force himself onto her with an intention to rape. When she resisted his advances, the appellant poured kerosene oil from a Dibri Lamp and set her on fire. While the flames engulfed her body and apparel, Tulasiran towards the common courtyard of her house and the house of other close relatives.

3. Hearing hue and cry of Tulasi asking for help, her nephew, Chaitanya Hansad (P.W.2) poured a bucket of water on her and doused the flames. Meanwhile, Karma managed to sneak out via the front door of the house. Tulasi was immediately moved to S.D.H., Rainrangpur, wherefrom she was referred to D.H.H., Baripada, on the next day, for better treatment. While undergoing treatment at D.H.H., Baripada, she succumbed to her burn injuries on 22.04.2014.

4. On receipt of the written report relating to the incident of the occurrence on 06.03.2014 from Laxmi Hansad (P.W.l), the O.I.C., Bahalda P.S., Sri Mallick Chandra Sahu (P.W.l6) took up the investigation of the case.

5. During investigation, the police seized one half burnt kantha (quilt), and one plastic jerrycane containing a little kerosene oil from the spot. The O.I.C examined the informant and other witnesses to the event. Taking note of the deteriorating health condition of the victim, the OIC took effective steps to record the dying declaration of the victim. He arrested the accused on 07.03.2014, and at his instance seized the Dibiri lamp from the kitchen of the house of the victim. The Appellant was also referred to a medical examination for it was found that he had sustained burn injury on his hand (palm).

6. On 22.04.2014, on receipt of information about the death of the victim, the charge against the offence under Section 307 was changed to Section 302 of the I.P.C.

7. The O.I.C made requisition to the I.I.C., Town P.S. for obtaining the post-mortem report, inquest report and connected papers in Town U.D. P.S. Case no. 37 of 2014, which was initiated after the death of the victim. On receipt of the same,

and after completion of the investigation, the police submitted the Charge Sheet against the appellant for commission of the offence under aforementioned sections of the I.P.C. Accordingly charge was framed and the trial commenced.

8. The appellant took the plea of complete denial and pleaded not guilty to the charges framed against them.

9. That during trial in order to establish its case the prosecution examined as many as nineteen witnesses and exhibited as many as eleven documents and on the other hand, the defense neither examined any witness nor exhibited any documents..

II. TRIAL COURT JUDGMENT

10. The trial Court began the analysis of the case with the examination of the witness depositions to scrutinize the circumstances of the purported criminal event.

11. The trial court noted that the deposition of deceased's nephew, Chaitnaya Hansdah (P.W.2), brother-in-law of the deceased, Subash Hansdah (P.W.10), and father of deceased, Sudam Marandi (P.W.13) and the I.O. (P.W.16) indicate that the house of deceased and houses of other relatives are situated in one circumference; having a common court-yard with entranced doors approaching their houses.

12. The trial court also noted the deposition of the eye-witnesses P.W.2 and P.W.10, and chance witnesses Koshal Murmu (P.W.6) and Sakila Hansdah (P.W.9) that on the day of occurrence, the village celebrated Phulbhanga Puja and P.W.6 and 9 were present in the house of for the same.

13. The aforementioned witnesses deposed that, around 9 P.M., they noticed Tulasi rushing from her home towards the courtyard while on fire and crying "Mote Banchao, Banchao" (save me, save me). Chaitanya (P.W.2) poured a bucket full of water and thereby doused the flames. Providing support to their evidence P.W.2, states that at the time of incident he was inside his house and on hearing the shriek of the deceased, he came out from his house.

14. It is quite evident from the evidence of the witnesses that after the flames were doused the deceased was able to speak. It is also forthcoming from the evidence of P.W.2 that the deceased told them that the accused set her to fire after her refusal against his sexual advances. This was also corroborated from the deposition of P.W. 13. However, here, the Trial Court also noted thatthe submission of the defence counsel whereby it was pointed that the P.Ws. 6 and 9 did not speak about any disclosure being made by the deceased in their presence. Rather, P.W.6 in his evidence has stated categorically that Tulasi did not state anything about the incident to him. Nonetheless, the trial court concluded that there is nothing substantial from the aforesaid prosecution witnesses to discredit them in the aforesaid aspect. Moreover, no suggestion in that regard has also been given to them by the defence.

15. Furthermore, eyewitnesses P.Ws.2 and 10 conceded that they did not see the setting of fire on the victim by the accused. But, the trial court was satisfied that their claim of seeing the victim running towards the courtyard while on flames raising shriek was unanimous and amply corroborated.

16. P.W.10 states that when he alongwith P.Ws. 6 and 9 were present on the front verandah of his house, they witnessed the accused enter their common court-yard premises. But, such assertion does not get support from the evidence of P.Ws. 6 and 9. More so, even if P.Ws. 2 and 5 state that, on hearing the shriek of the victim, they came out of their house and saw the accused fleeing her house. Yet, P.W.2 has not stated before the I.O. the specific direction in which the accused ran away. Similarly, P.W.10, in his evidence, has not stated specifically that they have seen the accused entering into their common courtyard. Harping on such discrepancies in the evidence of aforesaid witnesses, the defense submitted that the fact of entering into the house of the deceased and going away therefrom is not fully established. The trial court took note of the above but went onto conclude that the same does not go to completely efface the possibility of the accused entering into the house of the deceased in the night of occurrence.

17. Be that as it may, the trial court also took into consideration the evidence of the I.O. the medical test of the appellant revealed three burn injuries on his hand; on his inner aspect of left fore-arm, ring finger (palmer aspect) of left hand and little finger (dorsal aspect) of right hand. The Medical Examiner. Dr. Rita Tudu (P.W.19) testified the aforesaid evidence by her report vide which she opined that the said burn injuries are ought to be of fire.

18. In response, the appellant had taken a plea that he had sustained burn marks by coming in contact with hot silencer of a motor cycle. However, the trial court rubbished the plea as the claim had not been substantiated by adducing any defence evidence.

19. From the aforementioned, the trial court concluded the presence of appellant in the house of deceased at the night of occurrence and his sustaining burn injuries on his hands in the process of setting fire to the victim.

20. Next, the trial court examined the evidence of Dr. Debendranath Tudu (P.W.12) who testified that he admitted the injured-victim in the female ward as she had sustained burn (fire) injuries over her chest, abdomen, back, head, face and both upper limbs. According to him, the burn injuries so sustained by the victim was assessed to be seventy percent. He further stated, specifically, that in spite of the injuries, the deceased was able to talk. This is also corroborated from the evidence of the surgery specialist, Dr. Sibananda Mohanty (P.W.11), who treated the injured during that period at D.H.H., Baripada.

21. The evidence of Dr. Kishore Kumar Panda (P.W.14) had conducted autopsy on the dead body of Tulasi Hansdah on police requisition has been specially considered

by the trial court.P.W.14 has deposed to have found extensive deep burn injuries on her face, both upper limps and anterior as well as posterior trunk. He had found the injuries above are ante-mortem in nature. As regards the cause of the death, he opined that it was due to multi organ failure on account of septicaemia; caused by extensive burn injuries accentuated by severe anaemia. In his cross-examination he has opined that if the victim would have been subjected to treatment under specialised burn injuries with the specific injuries found by him in her body then there might have been a miniscule chance of her survival. Thus, from the above evidence, the trial court held that the death of the victim was on account of burn injuries sustained on the night of the occurrence.

22. Adverting to the evidence of P.W.16, he apprehended the accused, who made his confessional statement before him and disclosed to give away the recovery of the "Dibiri lamp" from the house of the victim, from the place of its concealment. Accordingly, he recorded his statement under Section 27 of the Evidence Act. Thereafter, the accused led him and the witnesses to the kitchen room of the house of the deceased and brought out the Dibiri lamp from the place of concealment which was seized in presence of seizure witnesses, P.Ws.7 and 8under the cover of a seizure list. The trial court has taken note of the fact that even though the seizure witnesses have supported the fact of seizure of "Dibiri lamp" by the I.O. from the house of the deceased, but they have specifically deposed that accused was not present there. The trial court affirmed the rebuttal of but anyway opined that the seizure of the half burnt materials from the house of the victim goes to reinforce the fact of happening of the incident in the house of the victim on the date of occurrence.

23. Now, coming to the Dying declaration of the deceased, recorded by Sri Mukteswar Panigrahi, Executive Magistrate (P.W.18) on 06.03.2014. Firstly, the victim was duly identified by Dr. Sibananda Mohanty (P.W.11) who also gave certificate to the effect that the victim was in a fit condition to give her declaratory statement. He examined the victim in Q&A form and recorded her statement as per her version, as has been given to by her in response to his questions. P.W.18 is specific enough to state that on completion of recording her statement, he could not obtain either her signature or finger print, for her hands were covered with bandage/plaster by gauge cotton. Accordingly, he has given his endorsement in that respect at the foot of the statement in presence of one Lalit Mohanta. Admittedly, witness Lalit Mohanta has not been examined by the prosecution. There is also no endorsement by P.W.18 to indicate that he read over and explained the contents of it to the victim.

24. On the basis of the above short-comings, the defense urged that as the victim was not able to talk properly, so it cannot be taken for granted that she was in a state to give her declaratory statement.

25. The trial court relied on the pronouncements of the Supreme Court in **Laxman v. State of Maharashtra**[1] and **Smt. Laxmi v. Om Prakash**[2] and held that what is essentially required is that person who records the dying declaration must be satisfied that the deceased was in a fit state of mind. It has further been held that where it is proved by the testimony of the Magistrate that the victim was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. The trial court note that the doctor on examination found the victim to be conscious and able to understand rational question. The exact verbatim of deceased was recorded by the Magistrate. Their testimony does not show that any of the relation or attendant of deceased was present at the time of recording, so that it could be presumed that there has not been any effect to induce the decease to make a false statement or that her statement was outcome of tutoring, prompting or imagination. The doctor also appeared in the witness box to support the testimony of the Executive Magistrate. Therefore, on the basis of the above, coupled with consistent positive evidence of other witnesses such as P.Ws. 2,5,6,9,10 and the opinion evidence of medical officers P.Ws.12 and 14, there could be no manner of doubt view the case with tainted eye.

26. Accordingly, the trial court convicted the appellant for commission of offences under Section 450/354/354-A/302 and under Section 376 read with Section 511 of the I.P.C.

III. APPELLANT'S SUBMISSIONS:

27. Learned counsel for the Appellant completely denied the charges pressed herein and decried false implication. It was submitted that the judgment of conviction and sentence passed by the trial is highly illegal, arbitrary, perverse and not sustainable in the eye of law.

28. It is submitted that the trial court failed to appreciate the fact that the fourteen witnesses and all of their statements are contradictory. The statements of all the eye witnesses who were present at the time of the occurrence have variation in statements, for which the impugned judgment is illegal and liable to be set aside.

29. The defence counsel submitted that the prosecution story states that the deceased told before her father (P.W.13) that the appellant set her to fire but P.W.6 & P.W.9 have not spoken about the discloser made by the deceased in their presence. Admittedly, P.W.6 in his evidence stated categorically that Tulasi ("the deceased") did not state anything about the incident to his father (P.W.13).

30. The P.W.2 has not stated before the I.O. the specific direction in which the accused ran away. He only stated that he found that the accused had fled from the spot, but the P.W.10 in his evidence admits that he did not state specifically if they

1. AIR 2002 SC 2973, **2**. AIR 2001 SC 2383

have seen the Appellant/Accused entering their common courtyard. It is therefore submitted that the prosecution has not been able to establish the presence of the appellant in the house of the deceased.

31. Next, it is submitted that the trial court below failed to appreciate that as the deceased was unable to talk properly, it cannot be taken for granted that she was in a fit state to give her declaratory statement. It is submitted that, on account of the aforementioned infirmities on record, the statement of the deceased is shrouded by suspicious circumstances and no safe reliance could be placed on such a statement.

32. It is submitted that as the no eye witness to the occurrence or where there is no scientific evidence to directly connect the accused with the offence and it is only rely on the circumstantial evidence only, which is illegal, arbitrary and liable to set aside.

IV. RESPONDENT'S SUBMISSIONS

33. The learned State counsel has, however, supported the judgment of the court below. He has further emphasized that the prosecution's case stood proved from various factors including the depositions of the P.Ws., medical evidence, the reports of the Forensic Science Laboratory, the Chemical Examiner, from the post-mortem reports etc.

34. It was submitted that by considering the evidence of the P.Ws, the prosecution has proved its case against the accused beyond all reasonable doubt. There may be certain latches and miniscule episodes of procedural negligence but there are no any materials omissions and contradictions on the part of the prosecution witnesses and investigation to disbelieve its case.

35. The prosecution submitted all in favour of the findings returned by the Trial Court in holding the accused to be the author of the crime. According to him, the Trial Court on detail analysis of evidence on record did commit no error in returning the finding that the prosecution has established its case against the accused in causing the murder of Tulasi Hansdah beyond reasonable doubt and therefore, the judgment of conviction and order of sentence are not liable to be interfered with.

V. COURT'S ANALYSIS AND REASONING:

36. Keeping in view the submissions made, we have carefully read the judgment passed by the Trial Court. We have also bestowed our due attention to the evidence on record, both oral and documentary.

37. At the outset, there is no dispute over the fact that the deceased,Tulasi Hansdah, met a homicidal death, which has been well established through the doctor conducting the autopsy over the dead body of the deceased and in view of his opinion remaining unchallenged as to the cause of death. It must nonetheless be emphasized that the plenitude of the chain of events would depend on the facts of

each case emanating from the evidence and no universal yardstick should ever be attempted. It is in this background that we must examine the circumstances in the present case.

38. First, the place of incident in the residential house of the deceased is proved on record. The evidence also reveals that the deceased was living in the premises along with her close relatives which included her father (P.W.13), brother-in-law (P.W.10), and her nephew (P.W.2), who were staying in close sharing an open compound/hall and were present at the time of incident. It is also clear from the evidence that the deceased called for help after she was set ablaze and was tended by the above mentioned persons at first instance.

39. Naturally, the story embroidered by the prosecution is dominantly based on the testimony of P.Ws. 2 and 10 coupled with the dying declaration of the deceased. So, we'll first test the veracity of the P.W. depositions and then check the admissibility of the dying declaration.

40. Now, the principle of law is also says that a conviction can be based on sole eye witness testimony[3]. The rider, however, remains that in order to draw the inference as to the guilt of the accused from such testimony the eye-witness shall be wholly reliable. This is the test of Section 134 of Evidence Act.

41. If we examine the testimony of P.W.2, it is clear that it is consistent with the medical examination report of the deceased as well as the appellant in which burn injuries on the hand of the appellant were mentioned. If the deposition of P.W.2 is considered along with the injuries found in the post-mortem report, it makes it clear that the said injuries referred in the postmortem report are attributable to overt acts of the appellant; as stated in the complaint. P.W.2 has not made any improvements, omission or contradiction, so far as it relates to details of occurrence of the incident in the manner alleged. The counsel for the defence has brought out the fact that P.W.2 did not reveal the direction in which the appellant flee after the incident. However, we do not feel that the above mentioned discrepancy is sufficient to dent the otherwise credible and trustworthy deposition. One can refer to the dictum of the Supreme Court in **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat**, wherein it was held that:

> *"5. .....We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned Counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious :*
>
> *"(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

3. Amar Singh Vs. State (NCT of Delhi), (2020) 19 SCC 165; Sunil Kumar Vs. State (NCT of Delhi), (2003) 11 SCC 367

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

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

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

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

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

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub- conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him -- Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

42. Here, the purported omission made by P.W.2 in the police statement, as alleged by the defence, should be viewed through the lens of the Supreme Court judgment in **Narayan Chetanram Chaudhary v. State of Maharashtra**[4]:

"42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person. The omissions in the earlier statement if found to be of trivial details, as in the present case, the same would not cause any dent in the testimony of PW 2. Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness." (Emphasis supplied)

43. Ergo, minor gaps in the primary eye witness testimony cannot be used to discredit the deposition as a whole even when the deposition of P.W.2 is corroborated by P.W.10 and P.W.13. Here, we must mention that when eye witnesses give all necessary details regarding assault, weapons and role played by the accused and when the presence of the eye witness is corroborated by other

4. (2000) 8 SCC 457

witnesses, in such circumstances, the evidence of eye witnesses cannot be simply thrown out or doubted on the basis of some trivial contradictions. In the decision reported in, **State of A.P. v. PullagummiKasi Reddy Krishna Reddy[5],** the Supreme Court has observed that minor contradictions and omissions in the evidence of a witness are to be ignored if there is a ring of truth in the testimony of a witness. Even in case of trained and educated persons, memory sometimes plays false and this would be much more so in case of man who saw her aunt on fire and tried to extinguish it.

44. The evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnessed by another though both are present at the scene of offence, and therefore, it would not be right to reject the testimony of such witnesses merely on the basis of minor contradictions. The fact that P.W.2 did not mention the direction in which the accused flee can be ignored. Ergo, in absence of any satisfactory argument by the defence, the testimony of P.W. 2 stands credible. Relying on the strong evidence of the eye witness, other discrepancies in the depositions of the post-occurrence witnesses can be ignored.

45. Coming to the next argument, the defence has tried to establish that the informant was not at all present at the spot of occurrence with the testimony relying on the fact that nobody actually witnessed the appellant doing the deed. However, the same deposition is untrustworthy and unreliable as already refuted by P.Ws. 2 and 10as rightfully affirmed by the trial court. In any event, such a hypothetical reason would not be sufficient to discard credible eye witness version.

46. Moreover, the medical test of the appellant has revealed three burn injuries on his hand which according to P.W.19 ought to be caused by fire. While the defence has claimed that hot silencer of a motorbike had caused the said burn injuries, they did not substantiate their claim with sufficient evidence to rebut the medical opinion of P.W.19. It is sufficient for purposes of defence that the accused should create a reasonable doubt in the mind of the Court whether the accused person is entitled to the benefit of the exception or not, preponderance of probabilities implies balance of evidence. In order to succeed, the accused must make out balance of evidence in his favour. However, it is not the case in this matter. The appellant has not only failed to adduce evidence of his absence from the scene of occurrence but also failed to effectively rebut prosecution arguments. Herein, we can assume that the presence of the appellant at the scene of occurrence is more or less established. The remaining doubts should be clarified when we scrutinize the dying declaration of the deceased.

47. A dying declaration under Section 32 of the Evidence Act is certainly important evidence as the law presumes that a person approaching the maker will

5. (2018) 7 SCC 623

not state falsely at that point of life. Yet a dying declaration is not to be taken as a gospel truth if there are surrounding circumstances rendering it doubtful. We shall therefore examine all surrounding circumstances to satisfy itself with regard to the genuineness of the dying declaration. This is more important because the person making the statement is no more available for cross-examination. If the dying declaration is convincing and reliable, conviction can be based on it alone but not otherwise.

48. An important prosecution witness in the case is Sri Mukteswar Panigrahi, Executive Magistrate (P.W.18) who recorded the dying declaration on 06.03.2014. The victim was duly identified by Dr. Sibananda Mohanty (P.W.11) who also gave certificate to the effect that the victim was in a fit condition to give her declaratory statement. He examined the victim in Q&A form and recorded her statement as per her version, as has been given to by her in response to his questions. P.W.18 is specific enough to state that on completion of recording her statement, he could not obtain either her signature or finger print, for her hands were covered with bandage/ plaster by gauge cotton. Accordingly, he has given his endorsement in that respect at the foot of the statement in presence of one Lalit Mohanta. It has been made sure that when the dying declaration was being recorded, the relatives of the deceased or the Police personnel, were not present.

49. The defence cast doubts on the dying declaration for they contend that the deceased was not conscious during the recording of the dying declaration relying on the absence of the signature/thumb print of the deceased on the declaration. The said objection, according to us, is without any basis. The deceased had suffered about seventy percent burn injuries covering her body surface. In such a situation, it was not possible to take her signature or LTI on the dying declaration. There is also no reason why a dying declaration which is otherwise found to be true, voluntary and correct should be rejected only because the person who recorded the dying declaration did not or could not take the signature or the Left Thumb Impression of the deceased on the dying declaration. Once it is found thatthe dying declaration is true and made voluntarily and as also trustworthy, there is no reason why the same should not be believed and relied upon. In this case, the said dying declaration is corroborated by the oral dying declaration made by the deceased before P.W.2 and also corroborated by the medical evidence and the facts contained in the FIR. While the counsel for the defence has also argued that witness Lalit Mohanta has not been examined by the prosecution which questions the veracity of the dying declaration, we are of the opinion that it does not cast substantial doubt on the otherwise sufficient dying declaration. Ergo, we find no reason to differ with the conclusion of the Trial Judge that the dying declaration is aptly convincing and reliable.

50. Therefore, we conclude that the evidence in this case is clear to the effect that the appellant was clearly involved in this crime. The prosecution has adduced sufficient evidence to show that the appellant was present at the house of the informant

at the time of the crime. The defence has been blatantly unsuccessful in rebutting their claim. Furthermore, the samples collected during the investigation and the later post-mortem also solidifies the story of the prosecution. The legitimate dying declaration vindicates the minor gaps and contradictions in the prosecution story.

51. It is significant to notice that the defence has been unable to provide a satisfactory explanation to the accusations of the prosecution save rebut them effectively. We are aware of the fact that it is not necessary for the appellant to adduce evidence in their favour and they can rely on the evidence adduced by the prosecution to show that the prosecution has not succeeded in establishing the case beyond reasonable doubt. In the present case, the entire evidence has already been discussed and it has been found that the circumstances relied on by the prosecution have been established.

VI. CONCLUSION:

52. There is no reason to believe that the appellant has been falsely implicated in this case. No such suggestion was made by the witnesses or the investigating officer. All the circumstances relied on by the prosecution have been proved and they form a chain which leads to the only conclusion that the offence must have been committed by the appellant person.

53. The result is that the appeal is without merits and the same is liable to be dismissed. We do so, confirming the conviction and sentence passed by the court below.

54. The CRLA is dismissed, accordingly.

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2023 (III) ILR-CUT-1045

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

JCRLA NO. 98 OF 2022

RAJESH DHARUA ……Appellant

-V-

STATE OF ORISSA .....Respondent

(A) INDIAN EVIDENCE ACT, 1872 – Section 27 – Offence punishable U/ss. 302/201-B/34 of IPC – P.W.5 stated in his evidence that both the accused person and police went to the spot in police Jeep but which is the spot was not stated by them – P.W.5 stated that on being asked by police the accused brought one tangia from the cultivable land situated by the side of the road – He did not say anything about the recording of the statements of the accused person – The other witness (P.W.8) has

not supported the prosecution case – When there is inconsistent in the evidence of witnesses, whether the test as to the admissibility of the same U/s. 27 is acceptable? – Held, No.

(Paras 12-13)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Sections 401,482 – Whether the conviction and sentence passed against other accused who has not appealed before the higher forum can be quashed in exercise of discretionary power enshrined from Sections 401, 482 of the code? – Held, Yes – The court has to see that manifest injustice may not be continued to be perpetuated for merely not filing of the appeal by the co-convict. (Para 15)

Case Laws Relied on and Referred to :-

1. AIR 1952 Calcutta 835 : Parbati Devi Vs. The State.
2. AIR 1988 SC 345 : Hari Nath & Anr. Vs. State of U.P.
3. (2003) 24 (SC) 431 : Nirmal Pasi & Anr. Vs. State of Bihar.

For Appellant : Miss Gayatri Patra

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

JUDGMENT Date of Hearing : 30.10.2023 : Date of Judgment :13.11.2023

D. DASH, J.

The Appellant, by filing this Appeal from inside the Jail, has challenged the judgment of conviction and order of sentence dated 13th April, 2018 passed by the learned Additional Sessions Judge, Bargarh in C.T Case No.67/17 of 2016, arising out of C.T Case No.1879 of 2015, corresponding to Attabira P.S. Case No.299 of 2015 of the Court of the learned Sub-Divisional Judicial Magistrate (SDJM), Bargarh.

The Appellant (accused) faced the Trial with another accused i.e. Rama Budek (non-Appellant) standing charged for commission of offence under section 302/201/120-B/34 of the Indian Penal Code, 1860 (for short 'the IPC'). The Appellant as well as accused Rama Budek (Non-Appellant) have been convicted for commission of offence under section 302/120-B/34 of IPC. Accordingly, they have been sentenced to undergo imprisonment for life and pay fine of Rs.10,000/- in default to undergo rigorous imprisonment for a period of one (01) year each for the offence under section 302/120-B/34 of the IPC.

It is stated at the Bar and also reported by the Registry that the accused Rama Budek has not yet filed any appeal challenging his conviction and sentence.

Prosecution case:-

2. On 26.11.2015 around 7 a.m., one Okil Badi (P.W.1), was the Gram Rakhi under Attabira Police Station presented a written report with the Inspector-in-Charge

(IIC) of Attabira Police Station, stating therein that in the previous night around 10.30 p.m., when he was conducting night patrolling in the village Laderpali, he got the informant that one person was lying on NH-6 in a bleeding condition. So he proceeded to the spot which was in between the Panchayat Office and the Ghantasuni Temple and saw a man lying dead on the road with severe injuries on left side of his body and head. Okil (Informant-P.W.1) suspected that the deceased had received such injuries on account of vehicular accident. On the next morning, the dead body was identified to be that of Ratan Bhue of village-Laderpalli. The IIC, on receipt of the above written report, treated the same as FIR (Ext.1) and registering the case, directed the Sub Inspector (S.I) of Police (P.W.11) to take up investigation.

3. In course of investigation the Investigating Officer (I.O-P.W.11) examined the Informant (P.W.1), visited the spot and prepared the spot map (Ext.9). He held inquest over the dead body of the deceased and prepared the report (Ext.3). He then examined the witnessed to the inquest. He also sent requisition to the A.D.M.O, Bargarh for post mortem examination of the deceased. He visited village Laderpali and examined Kumari Bhue, wife of the deceased and other witnesses. On 28.11.2015 at 4 p.m., he apprehended the accused Rajesh Dharua and examined him. The accused Rajesh Dharua while in the custody of the I.O (P.W.11) led him and the witnesses to Pathar Khodan, where accused Rama Budek was present. The I.O then arrested the other accused Rama Budek pursuant to the statement of the accused Rajesh Dharua recorded vide Ext.4 under Section 27 of the Evidence Act, he led the I.O (P.W.11) to the backside of Ghanteswari temple situated near village Laderpali. The accused Rajesh Dharua gave recovery of one axe lying in the cultivable land in the presence of the witnesses. The blood stained earth and sample earth were collected under seizure list (Ext.2). The I.O (P.W.11) sent the requisition to the M.O, CHC, Attabira for collection of biological samples of the accused persons. The I.O (P.W.11) then seized the collected sample hand wash, blood, nail clipping of both the accused persons on production of the same by the Police Constable who had taken the accused persons for said collection vide seizure list (Ext.6). The wearing apparels of the accused persons, namely, Rajesh Dharua & Rama Budek were seized by him (P.W.11) under seizure lists Ext.7 & Ext.8 respectively. He also collected the finger prints of both the accused persons. On 12.12.2015 being asked, the I.O (P.W.11) handed over the charge of the case to the IIC (P.W.14). On the same day, the second I.O (P.W.14) revisited the spot and examined the informant, Okil Badi, wife of the deceased and other witnesses. The seized articles were sent to R.F.S.L., Sambalpur for chemical examination through Court.

4. Finally on completion of investigation, the Final Form was submitted by the second I.O (P.W.14) placing this accused and Rama Budek (non-appellant), to face the Trial for commission of offence under section 302/201/120-B/34 of IPC.

5. Learned SDJM, Bargarh, having received the Final Form as above, took cognizance of the above offences and after observing formalities committed the case to the Court of Sessions. That is how the Trial commenced by framing the charges for the said offences against this accused and Rama Budek.

6. In the Trial, the prosecution in total examined fourteen (14) witnesses. As already stated P.W.1, is the Gram Rakhi of village Laderpali and P.W.2 is the wife of the deceased. P.W.4 & P.W.5 are the witnesses to the inquest. P.W.6 & P.W.4 7 are two sons of the deceased Ratan Bhue. The Doctor who had conducted the post mortem over the dead body of the deceased is P.W.13 and the Investigating Officers are P.W.11 and P.W.14.

The prosecution besides leading the evidence by examining the above witnesses has proved several documents which have been admitted in evidence and marked Ext.1 to Ext.19/1. Out of those, the important are the FIR, Ext.1, Inquest Report, Ext.3, the disclosure statement of accused Rajesh Dharua, Ext.4; whereas the Post Mortem Report is Ext.13. Some of the incriminating articles having been produced during Trial, those have been marked as Material Objects (M.O.-I to M.O.-IX) and out of those, the important one is that Axe (M.O.I) which is said to be the weapon used in causing the fatal injury upon the deceased leading to his death.

7. The defence case is that of complete denial and false implication. However, no evidence either oral or documentary has been led from the side of the accused despite the opportunity.

8. Miss Gayatri Patra, learned counsel for the Appellant (accused, Rajesh Dharua) submitted that the prosecution case rests upon the circumstantial evidence. She further submitted that the circumstances are that the deceased was last seen with this accused (Appellant) as well as accused Rama Budek (non-Appellant) and that this accused had led the police personnel and others in giving recovery of a tangia from the cultivable land situated near the road. He submitted that for establishment of the last seen theory, the prosecution when relies upon the evidence of P.W.2 saying that it also receives corroboration from the evidence of P.W.6 and P.W.7; their evidence are wholly unbelievable and under the circumstance that they have stated the deceased to have been in the company of this accused is not at all acceptable. She further submitted that the evidence as to the fact that this accused led the police and others in giving recovery of the tangia is also not acceptable. Inviting our attention to the depositions of P.W.2 on the score of last seen theory and P.W.2, P.W.6 & P.W.7 on the score of last seen theory as also those of P.W.5 and P.W.8 as well as the I.O (P.W.11). She placed the infirmities surfacing therein in further submitting that these circumstances as stated by the witnesses are not at all incriminating and even if joined together do not make the chain of events so complete for drawal of an irresistible conclusion that it is the accused persons, who have done the deceased to death.

9. Mr. P. K. Mohanty, learned Additional Standing Counsel for the State-Respondent while supporting the finding of the guilt against the accused as has been returned by the Trial Court contended that the evidence as to the deceased and the accused persons going together in the night being established and the dead body having been recovered shortly thereafter when the accused persons are not coming forward with any explanation as to what it all happened to the deceased, the Trial Court has rightly held the accused persons to be the perpetrators of the crime. He further submitted that the evidence of recovery of the tangia at the instance of this accused while in police custody from the place known to him lends further assurance as to his complicity.

10. Keeping in view the submissions made, we have carefully read the impugned judgment of conviction passed by the Trial Court. We have also extensively travelled through the depositions of all the witnesses i.e. P.W.1 to P.W.14 and have perused the documents admitted in evidence and marked Ext.1 to Ext.19/1.

11. P.W.1, the informant, having got the information about the dead body lying on the road at 10 p.m. on 25.11.2015 had been to the place and saw the deceased lying dead. He does not state as to from whom he got the information. He then states to have heard from the wife of he deceased examined as P.W.2 that her husband was murdered by some people. He, however, specific in saying that P.W.2 had not disclosed before him, the names of the culprits.

P.W.2 has stated that around 9 p.m., two accused persons had been to their house and stayed for there one and two hours and thereafter, asked her husband to accompany them for consuming liquor and then they all went together. She has stated that as her husband did not return, she went in search of him but it was in vein and sometime thereafter, accused Rama came and he on being asked stated that they had left Ratan (deceased) at the Chaka. She has further deposed that thereafter accused Rama and she (P.W.2) went in search of her husband and on the way, they saw Upin and Sukru (both not examined) who stated to have seen the accused persons with her husband going to the house of Santosini of their village to consume liquor. This P.W.2 then surprisingly states that in the night, P.W.1 with other police personnel had gone to her house and asked about her husband and she had narrated the matter to them but interestingly enough that is not supported by P.W.1. Her further evidence is that the police personnel then stated before her that both the accused persons had assaulted and killed her husband. The above narration of P.W.2 raises suspicion as to the presence of accused Rama with P.W.2 during that period. The evidence of P.W.6 and P.W.7, who are the two sons of deceased Ratan are not direct on the point that they had seen their father going with the accused. In such state of affair in the evidence, we are not in a position to conclude that the prosecution has established the last seen theory in such a manner that the burden of proof of the fact as to what happened with the deceased thereafter would rest on the

shoulders of the accused persons that non-explanation thereof by them would lead to a conclusion that it is they, who are responsible for the said happenings of the deceased as those facts were within their special knowledge.

12. Coming to the evidence as to the recovery of tangia, which is said to have been made at the instance of this accused, let us glance at the evidence of P.W.5. He has stated that three days after the incident, he had gone to the police station where both the accused persons were present and there both the accused persons described the entire crime scenario, which is per se not admissible in the eye of law. His further evidence is that he with both the accused persons and police then went to the spot in police jeep but which is the spot is not stated by this witness. He states that on being asked by police, this accused brought one tangia from the cultivable land situated by the side of the road. He does not state anything about the recording of the statements of the accused persons. The other witness P.W.8 has not supported the prosecution case as to the recovery of the weapon at the instance of this accused. The I.O (P.W.11) has stated that on 28.11.2015, accused Rajesh gave his statement and accordingly led him and the witnesses to a place where the other accused Rama was present and thereafter accused Rajesh led them to the backside of the Ghanteswari Temple and gave recovery of the axe from the cultivable land. His evidence and the evidence of P.W.5 are wholly inconsistent with one another almost on every aspect and those also in our considered view do not pass through the test as to the admissibility of the same under the provision of section 27 of the Evidence Act for whatever limited purpose it may be.

13. On a conspectus of the analysis of the evidence in our considered view, the finding of the Trial Court that prosecution has established the charges against this accused beyond reasonable doubt by leading clear, cogent and acceptable evidence is not sustainable and therefore, the judgment of conviction and order of sentence against the accused Rajesh Dharua impugned are liable to be set aside.

14. Having held as above, since this Appeal has been preferred by only one of the accused persons out of the two and that other convict, namely, Rama Budek, who was on Trial with the present accused, namely, Rajesh Dharua standing charged for the same offence, we have heard Mr. P.K. Mohanty, learned Additional Standing Counsel as to what would be the impact of our foregoing findings on the fate of the judgment of conviction and order of sentence insofar as the accused Rama, who has not appealed, is concerned.

15. In this context, it may be stated that while dealing with a Criminal Appeal filed by only one of the convicts if the Court finds that there is no evidence worth the same to sustain the conviction of not only the accused, who has filed the Appeal but also the other accused, who has not appealed, we find no reason or justification as to why the power of this Court in view of the provisions contained in sections 401 & 482 of the Code of Criminal Procedure, 1973 (for short, 'the Cr.P.C.') cannot be exercised in certain eventuality to set aside the conviction and sentence passedagainst

the other accused, who has not appealed so as to see that manifest injustice may not be continued to be perpetrated for merely non filing of the Appeal by the co-convict. We are of the view that if in such eventuality, the Court would simply rule upon the judgment of conviction and order of sentence in so far as the convict, who has filed the Appeal is concerned, then such provisions as noted above in the Cr.P.C. would serve no purpose as having no life.

16. Upon discussion of evidence on record in great detail in the foregoing paragraphs, we have arrived at the conclusion that the prosecution has failed to establish its case, which is based on circumstantial evidence beyond reasonable doubt by leading clear, cogent and acceptable evidence in proving the circumstances in showing that all circumstance taken together complete the chain of events in every respect that all the hypothesis other than the guilt of the accused persons are ruled out. The findings rendered by us are inter-dependant and inextricably integrated in so far as this Appellant-Accused as well as the convict who has not filed the Appeal are concerned. In this context, we may refer to few authorative pronouncements which provide full supports to the view that we are going to take.

17. In case of **Parbati Devi -V- The State; AIR 1952 Calcutta 835**; two persons were convicted under section 120-B read with section 366 of the IPC. One of them appealed against the judgment of conviction and order of sentence. The Court came to the conclusion that there was absolutely no evidence to sustain the conviction of the Accused-Appellant as well as the other Accused-Non-Appellant. The question then arose for consideration was whether the conviction and sentence passed on that Accused-Non-Appellant be set aside even, though he had not appealed. While dealing with that question, it has been observed as under:-

> "When we were considering the appeal by Parvati Devi we came to the definite conclusion that there was no evidence on the record which would justify a conviction for conspiracy as between Parvati Devi arid Shew Nath. It is not only in the exercise of the inherent power, but we consider it to be the duty of the Court to exercise jurisdiction in such a manner that manifest injustice may not be continued to be perpetrated. It does not matter that Shew Nath has not appealed. This matter having come to the notice of the Court, we think that we have got sufficient jurisdiction under the inherent powers of the Court under Section 561-A, Criminal P. C., 1898 to pass appropriate orders in the case of Shew Nath also."

18. In case of **Hari Nath & Another -V- State of U.P.; AIR 1988 SC 345**, the Hon'ble Supreme Court, while setting aside the judgment of conviction and order of sentence passed against the Appealing Accused, who had been convicted under section 396 of the IPC and sentenced thereunder, also set aside the conviction and order of sentence passed against the Non-Appealing Accused holding that the same cannot sustain, consistent with the finding in and the result of the Appeal as the findings are inter-dependent and inextricably integrated.

19. In case of **Nirmal Pasi & Another -V- State of Bihar; (2003) 24 OCR (SC) 431**, the Hon'ble Apex Court, upon discussion of the evidence, came to conclude that

the prosecution case, which relates to the arrest of the Accused-Appellants suffers from serious infirmities. The Trial was also held to be defective as most of the relevant incriminating evidence had not been put to the Accused-Appellants during their examination under section 313 Cr.P.C. in seeking explanation from them. So, the conviction of the Accused-Appellants and the order of sentence for the offence under section 396 of the IPC and the consequential order of sentence were set aside. Having said so, coming to deal with the case of the third Accused whose conviction, having been maintained by the High Court, he had not chosen to file an Appeal before the Apex Court, it has been held as follows:-

> " However, in view of what has been stated hereinabove, we find the case of Accused Krishna Choudhary not distinguishable from the cases of Sona Pasi and Nirmal Baheliya, Accused-Appellants and his conviction and the sentence passed therein should also be set aside."

With the above, the Hon'ble Court, while directing that the Accused-Appellants, namely, Sona Pasi and Nirmal Baheliya to be set at liberty forthwith, if not wanted in any other case, has also set aside the conviction for commission of offence under section 396 of the IPC and the sentence passed thereon as against the third Accused, namely, Krishna Choudhary though he has not appealed and directed that he too be released forthwith if not wanted in any other case.

20. In view of our foregoing discussion and the position of law, as noted above, we, in the case at hand, conclude that the judgment of conviction and order of sentence passed by the Trial Court against Accused Rama Budek though he has not appealed cannot be sustained and as such are liable to be set aside.

21. Resultantly, the judgment of conviction and order of sentence dated 13th April, 2018 passed by the learned Additional Sessions Judge, Bargarh in C.T Case No.67/17 of 2016 in respect of both the Accused persons i.e. Rajesh Dharua, who is in Appeal before us and the other one, namely, Rama Budek who has not Appealed, are hereby set aside. Accordingly, it is directed that Rajesh Dharua, the Appealing Accused and Rama Budek, the non-Appealing Accused be set at liberty forthwith, if their detention is not wanted in connection with any other case.

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2023 (III) ILR-CUT-1052

D. DASH, J.

R.S.A. NOS. 383 & 385 OF 2023

BISHNUPRIYA NAIK @ NAYAK …….. Appellant

-V-

RAMESH CHANDRA BEHERA & ORS. .....Respondents

SPECIFIC PERFORMANCE OF CONTRACT – Plaintiff filed the suit for specific performance of contract seeking direction against defendants to execute the sale-deed in respect of the suit land while performing their part of the contract under the agreement dated 19.11.2003 – The plaint was amended in the year 2014 to introduce the factom of execution of will (Ext-1) by the testatrix in favour of plaintiff and consequent prayer of declaration of title based on that – Whether prayer for declaration of title as an alternative prayer in the suit for specific performance of contract is maintainable? – Held, No – This is totally beyond the scope for adjudication in the suit for specific performance of contract by wholly changing nature and character.

For Appellant : Mr. A.P. Bose, D.Sahoo, S.Swain, D.K. Sethy, B.P. Chhualsingh.

For Respondents : Mr. Manoj Mishra, Sr. Adv., Mr. T. Mishra, S.Das, S.S. Parida, R.Mishra. (Caveator)

JUDGMENT Date of Hearing : 06.10.2023 : Date of Judgment : 01.11.2023

D.DASH, J.

Since both these Appellants, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment dated 28.08.2023 passed by the learned Additional District Judge, Balliguda in R.F.A. No.01 of 2019 arising out of the judgment and decree passed in Civil Suit No.36 of 2008 of the Court of learned Civil Judge (Sr. Division), Balliguda, those were heard together for their disposal by this common judgment.

The present Respondent no.1 as the Plaintiff had filed Civil Suit No.36 of 2018 in the Court of Civil Judge (Senior Division), Balliguda arraigning one Indumati Naik and the present Appellant as well as the Respondent no.8 as the Defendants. During pendency of the said suit, Indumati; the original Defendant no.1 having died; Respondent nos. 2 to 7 being her legal representatives had been brought on record as Defendant nos.1(a) to 1(f).

The Respondent No.1 in that suit prayed for a decree of Specific Performance Contract for a direction to Indumati; the original Defendant no.1 to sale the suit land to him on receipt of balance consideration of Rs.15,000/- in performing her part under the agreement executed by her on 28.05.1988 and 19.11.2003, subsequently rectified and to declare the sale-deed executed by the present Appellant (Defendant no.2), the power of attorney holder of Indumati; the original Defendant no.1 in favour of the Respondent no.8 (Defendant no.3) and the power of attorney in favour of the Appellant (Defendant no.2) executed by Indumati; the original Defendant no.1 as illegal and void. Alternatively, it is prayed that the registered Will dated 15.07.2004 be declared as genuine with further prayer of injunction etc.

The present Appellant (Defendant no.2) in that suit filed a counter claim to declare one Will dated 14.01.2009 along with the affidavit dated 12.08.2008 as genuine and binding on the Respondent no.1 (Plaintiff) and other Respondents (Defendants) seeking further declaration that she (Appellant-Defendant no.2) be held entitled to get the suit land as absolute owner and declared to be having the right, title and interest over the suit land by virtue of said Will dated 14.01.2009.

The Trial Court dismissed the Suit filed by the Respondent no.1 (Plaintiff) and decreed the Counter Claim filed by the Appellant (Defendant No.2). In the result, the right, title and interest of the Appellant (Defendant no.2) over the suit land was declared on the strength of Will dated 14.01.2009 executed by Indumati; the original Defendant no.1 and the Respondent no.1 as well as other Respondents were permanently restrained from creating any disturbance and interfering in the peaceful possession of the Appellant (Defendant no.2) over the suit land.

The Respondent no.1 (Plaintiff) thus having been non-suited and also having suffered from the decree passed in the Counter Claim filed by the Appellant (Defendant no.2) preferred an Appeal under section-96 of the Code.

The First Appellate Court has allowed the said Appeal and set aside the judgment and decree passed by the Trial Court in Civil Suit No.36 of 2018. Resultantly, the First Appellate Court has declared the Will dated 15.07.2004 executed by Indumati; the original Defendant no.1 to be valid and accordingly, the right, title and interest of the Respondent no.1 (Plaintiff) over the suit land by virtue of said Will (Ext.1) have been declared. The present Appellant (Defendant no.2) and other Respondent nos.2 to 8 have been permanently injuncted from entering upon the suit land and create any disturbance.

Thus, now the present Appellant (Defendant no.2) being aggrieved by the judgment and decree passed by the First Appellate Court in decreeing the Suit filed by the Respondent No.1 (Plaintiff) and also having suffered from the dismissal of her Counter Claim has filed the above noted Second Appeals.

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

3. At the outset, it be stated that the Plaintiff while instituting the suit on 26.12.2008 had prayed for the following reliefs:-

> "a) To declare that the Plaintiff is entitled for a decree of specific performance of his contract for sale of suit plots by Defendant No.1-Smt. Indumati Naik in his favour by taking the balance amount of Rs.15,000/- from the Plaintiff, in view of his agreement for sale dated 28.05.1988 and 19.11.2003 executed by said Defendant No.1.
>
> b) For rectification of the 2nd agreement of sale of the suit plots dated 19.11.2003 by mentioning all the suit plots and Khata No.771 therein, before passing the decree for specific performance of contract in favour of the Plaintiff.

c) To declare that the purported sale deed dt. 03.12.2008 of Plot No.2250 in Khata No.769/1586 in favour of the Defendant No.3 and the alleged Power of Attorney in favour of Defendant No.2 dated 03.12.2008 executed by Defendant No.1 are all illegal, void and inoperative and never acted upon and not binding on the Plaintiff and to cancel the same and further direct them to register the sale deed if so required, along with Defendant No.1 in favour of the Plaintiff for all the suit plots.

d) To permanently restraining the Defendants from making any other sale transaction relating to the suit plots in favour of any other person and from entering upon the suit lands.

e) In case the Defendant No.1 or Defendants would not register the sale deed for the suit plots in favour of the Plaintiff after the decree, then appoint a Commissioner to execute the register the sale deed on behalf of the Hon'ble Court.

f) For cost of the suit.

g) For such other relief or reliefs as the Hon'ble Court deems just and proper under the facts and circumstances of the suit."

The plaint being amended the following prayers were advanced. On a comparison of the above prayers made at the beginning and then it appears that by amendment, the Plaintiff introduced one more and important prayer which finds mention in the consolidated plaint filed on 31.03.2014 under item '(d)' and the rest of the items below were renumbered. Said item '(d)' is as follows:-

"(d) Alternatively, to declare that registered WILL document No. 33/2004 dated 15.07.2004 is genuine and binding on the Defendants and the Plaintiff is accordingly entitled to get the suit lands as absolute owner thereof."

4. **Plaintiff's Case:-**

(A) The Plaintiff in an exclusive possession and enjoyment of the land described in the schedule of the plaint which is the subject matter of the suit. It measures Hc.2.00 (Ac.5.00) under Khata no.769/1586 corresponding to old Khata No.771 covering 8 plots. The Plaintiff is a member of Scheduled Caste being 'Dhoba' by caste and the Indumati (hereinafter for better appreciation is so referred to) is also a member of Scheduled Caste being 'Pana' by caste. On 28.05.1988, Indumati voluntarily executed agreement for sale of her HC4.00R of dry land under lease plot No.2250 measuring HC 436R in Khata no.771 of mouza: Balliguda in favour of the Plaintiff bounded by PWD Nayanjari in the East, Anabadi land of the State on the West, Cow farm on the North and the balance land of plot no.2250 on the South. The agreement was executed on two stamp papers of Rs.3/- and Rs.2/- denominations purchased by Indumati. It was executed at Balliguda. As per the terms and conditions of the said agreement dated 28.05.1998. Indumati received advance consideration of Rs.1,000/- from the Plaintiff out of total agreement consideration of Rs.5,000/-, which was the then the prevailing market price of the land. It was agreed that Indumati would receive the balance consideration of Rs.4,000/- from the Plaintiff at the time of registration of the sale-deed. Under that agreement, the registered sale-deed was to be executed by Indumati after obtaining

final Patta in her favour, which she had then applied for by filing mutation case before the Tahasildar, Balliguda.

(B) After 10 days of the said agreement dated 28.05.1988 as the Plaintiff needed the very said land for being taken on lease for long term of 20 years for establishing a Patrol Pump; on his request, Indumati executed a deed of lease on 07.06.1988 in favour of the Plaintiff on agreed yearly rent of Rs.500/- to be paid by the Plaintiff to her. It was stated that the plaintiff on the basis of said lease being the lessee, would raise necessary structures for running his business but would not part with the possession of the same to any other persons without the prior consent of Indumati in writing. Thereafter on expiry of the period of lease, the Plaintiff would remove the constructions thereon at his own cost. As per the said lease, the Plaintiff was allowed to quietly enjoy the premises without any interruption of Indumati (lessor) or any person claiming through Indumati (lessor).

(C) The said lease-deed was registered on 08.06.1988. In pursuance of the said lease; the Plaintiff entered into and occupied the land. It is stated that as per the terms and conditions of the said lease-deed dated 07.06.1988, as the Plaintiff could not get the No objection Certificate from the Collectorate Office, Phulbani, he failed to establish the Patrol Pump over there and therefore, started cultivating the said land by raising different varieties of crops over there and as such continuing.

(D) The Patta of the said suit land could not be obtained by Indumati for various reasons and intervention of several factors. Therefore, Indumati in order to meet her legal necessity to repay her hand loans executed another agreement dated 19.11.2003 on a stamp papers of a denomination of Rs.10/- for sale of her entire 25 bharanas of land (suit land) in favour of the Plaintiff for a total consideration of Rs.1,70,000/-. It is stated prior to said agreement, Nityananda, the second son of Indumati had taken a sum of Rs.20,000/- and Kailash Chandra, the elder son of Indumati had taken Rs.90,000/- from the Plaintiff. Thus in total, the Plaintiff having paid a sum of Rs.1,10,000/- to both sons of Indumati, Indumati was to receive the balance consideration of Rs.60,000/- form the Plaintiff while registering the sale-deed. In that agreement for sale dated 19.11.2003, the entire suit land including land under plot no.2250 was the subject matter. Indumati is stated to have recited in the said agreement that by the concurrence as all the family members, the 25 bharanas of land were sold to the Plaintiff with delivery of possession to him who is in enjoyment of the same by remaining in exclusive possession and the Plaintiff would make all endeavour to obtain the Patta of the suit land whereafter Indumati would execute and register the sale-deed in favour of the Plaintiff. Bhanjanagar the agreement was written and executed in presence of Indumati's two sons, Kailash and Nityananda as well as their spouses, who all stood as witnesses to the said agreement. The said deed is said to be binding on Indumati and all her family members.

(E) In the agreement dated 19.11.2003, as all the plot numbers for 25 bharanas of land was not mentioned in figures as well as the Khata numbers due to mutual mistake, the Plaintiff in the present Suit has prayed for necessary rectification of said defects in sacking its specific performance.

After a long lapse of time, the Plaintiff finally obtained Patta of the entire suit land in favour of Indumati from Tahasildar, Balliguda; Plaintiff then paid the land revenue. Husband of Indumati namely, Haripal being a member of Scheduled Caste was a land less person. He was working in Army. On his application dated 12.09.1959, the Government of Odisha was pleased to grant 5 acres of land on lease. Later on, Indumati was impleaded in place of Haripal being his widow in that lease case number MT No.02 of 1977. The ADM, Phulbani thereafter initiated the suo-moto proceeding under the provisions of Odisha Government Land Settlement Act, 1962 vide RMA No.78 of 1988. Notice was issued to Indumati as to why the said lease should not be cancelled. It was finally cancelled by order dated 30.07.1979.

The Plaintiff then filed Title Suit No.15 of 1997 in the Court of Sub-Judge, Phulbani against the State and others challenging the said cancellation of Patta. That suit was ultimately decreed and direction was given to the State to record the suit land in favour of Indumati. The State having challenged the said judgment and decree finally became unsuccessful.

After that, Indumati filed Mutation Case No.207 of 1999 and that proceeding continued for long time, whereafter Indumati got the Patta in her favour.

The Plaintiff is a businessman; he wanted to set up a Patrol Pump at Balliguda. Finding the suit land to be the ideal for locating a Patrol Pump, he approached Indumati and there was an agreement for sale of the said land which had come into being on 28.05.1988 and thereafter, registered deed of lease was executed by Indumati in favour of the Plaintiff leasing out the said land for 20 years. Finally, the Plaintiff could not establish his Patrol Pump despite all his efforts.

Then the second agreement dated 19.11.2003 came into being and in the meantime, the final Patta was obtained in the name of Defendant no.1.

The Plaintiff then went to the Sub-Registrar Office, Balliguda and learnt that for sale of 5 acres of land, stamp worth of Rs.60,50,000/- would be required to be purchased and the registration fees and other miscellaneous expenses would come around Rs.50,000/-. The Plaintiff then learnt that he was to arrange a sum of about Rs.7,00,000/- for registration as the value of suit land has in the meantime sky rocketed.

The Plaintiff in the meantime having paid advance consideration of Rs.1,10,000/- out of agreed consideration of Rs.1,70,000/- to Indumati and having taken possession of the same as part performance of contract and thereafter, having also paid Rs. 45,000/-, was then only requires to pay Rs. 15,000/- to Indumati for

purchasing the suit land by obtaining the sale-deed from Indumati followed by its registration. The Plaintiff claims to be ready and willing to perform his part of the contract as per the terms of the said consideration till the suit. He says to be never been incapable to perform his part of the contract nor has ever failed in performing all such essential terms of agreement.

The Plaintiff states to have been running after the suit land since 1988 to 2008 for getting Patta of the suit land in favour of Indumati. It is stated that the Plaintiff has spent around Rs.5,00,000/- in that exercise so undertaken.

On 04.12.2008, the Plaintiff had been to the Sub-Registrar Office, Balliguda to obtain Non-Encumbrance Certificate of the suit land and there he found the Defendants with witnesses to be present and engaged in some registration activities. It is stated that the registration of same document was made in favour of the Defendant No.3 and power of attorney in favour of the Defendant no.2 for the suit land. Indumati was pressurized to register those deeds against her will and consent. The Plaintiff orally protested and submitted in writing to the Sub-Registrar through his Advocate and also sent notice to Indumati to execute and register the sale deed for the suit land in his favour.

The Defendant no.2 hails from a village located at a distance of 15 kms. from Balliguda. She being deserted by her husband had taken shelter in the house of Indumati. The Defendant No.3 is the permanent resident of Nuasahi, Balliguda. It is stated that both joined together and made a unholy alliance to grab the suit land by hook or crook and in that mission, they created a sale-deed and a power of attorney purported to have been executed by Indumati by pressurizing her against her will and consent without written permission from the Competent Authority and behind the back of the Plaintiff. The Defendant no.3 was very much aware of all these agreements between the Plaintiff and Indumati and the lease etc.

Indumati out of love and affection had voluntarily executed a Will and registered the same on 15.07.2004 in bequeathing the properties in suit in favour of the Plaintiff. The Will was said to have been executed by Indumati out of her free-will and volition and it was duly attested and then registered. Indumati and her sons having already received major part of the consideration amount and as there was long delay to obtain Patta to execute the sale deed for the Suit land by Indumati to the Plaintiff. Therefore, to safeguard the full interest of the Plaintiff, the interest over the suit land and his possession over the same by virtue of the agreements for sale and registered lease-deed, Indumati voluntarily executed the Will.

After the institution of the suit, a unregistered Will purported to have been executed by Indumati was created in showing that Indumati had bequeathed her property in favour of Defendant no.2 which is said to be having no value in the eye of law. The recitals in the Will are all false.

5. The Defendant no.2 joined by other two Defendants, who were legal representatives of Indumati, in their written statement had stated that the properties in suit was the property of Haripal, husband of Indumati who had obtained on lease being an Ex-Army man. It was succeeded by Indumati who died on 07.07.2009. The Defendant no.2 is the granddaughter (daughter's daughter) of Haripal and Indumati. It is stated that after death of Haripal, all his successors succeeded to the property with equal share. It is said that the Plaintiff had created several false documents. When the fact remains that Indumati had paid a sum of Rs.4,00,000/- to the Plaintiff for fighting out the litigation with the State in relation to the said land which she bequeathed in favour of Defendant No.2 by executing a will on 14.01.2009 after revoking all other Will on 08.12.2008. So Defendant no.2 claims to be having right, title and interest over the property involved in the suit. She also states that as it is she is entitled to the share of her mother from the property of Indumati and Haripal.

6. The Defendant No.2 lodged a counter claim and sought for the following reliefs:-

> "a. Declare the Will dated 14.01.2009 along with dated 12.08.2008 as genuine and binding on the Plaintiff and defendants of this suit and accordingly the defendant no.2 is entitled to get the suit lands as its absolute owner.
>
> b. To permanently restrain the other parties of this suit to enter into the suit lands.
>
> c. To declare right, title and interest over the suit properties in favour of the Defendant No.2 as per the last WILL of Late Indumati Naik (D.1) dated 14.01.2009.
>
> d. For such other relief or reliefs in favour of the defendant No.2 as the Hon'ble Court deems just and proper."

7. The Trial Court on the above rival pleadings framed the following issues:-

> "I) Is there any cause of action for filing the suit?
>
> II) Whether the suit is bad for non-joinder of necessary parties?
>
> III) Whether the plaintiff is entitled to a Decree for specific performance of contract in respect of the sale of the suit lands?
>
> IV) Can the Agreement of sale dated 19.11.2003 be rectified by mentioning all the suit plots and Khata No.771?
>
> V) Whether the Sale deed dtd. 03.12.2008 in respect of Plot No.2250 in Khata No.769/1586 executed in favour of Defendant No.3 and the Power of attorney Dtd.03.12.2008 executed by Indumati Nayak in favour of the Defendant No.2 are illegal and void?
>
> VI) Whether the Plaintiff is entitled to the relief of permanent prohibitory injunction by restraining the Defendants from making any other sale transaction relating to the suit plots?
>
> VII) What other relief/reliefs the plaintiff is entitled to?
>
> VIII) Whether the Registered Will vide Document No.33/2004 dated 15.07.2004 is genuine and basing on the said Will the Plaintiff has become absolute owner of the suit lands?

IX) Is there any cause of action for filing the Counter-claim by the Defendant No.2?

X) Whether the Counter-claim is barred by time?

XI) Whether the Counter-claim has been properly valued?

XII) Is the Counter-claim filed by the Defendant No.2 is maintainable?

XIII) Whether the Will dated 14.01.2009 along with dated 12.08.2008 is genuine and basing on the said Will the Defendant No.2 has become absolute owner of the suit lands?

XIV) Whether the Defendant No.2 is entitled to the relief of permanent prohibitory injuction by restraining the other parties from entering into the suit lands?

XV) Whether the Defnedant No.2 has perfected her right, title and interest over the suit lands?

XVI) What other relief/ reliefs the Defendant No.2 is entitled to? ”

8. Taking up issue no.(VIII) first for decision, upon examination of the evidence and their evaluation, the Trial Court has held that Ext.1 was not the last Will of Indumati. Having said so, it has also been stated that by the time Indumati executed the Will, Ext.1, the record of right had not been issued in her name and therefore, the Plaintiff has been acquired the ownership over the suit land. Thereafter, the Plaintiff has been held not entitled to get the relief of Specific Performance of Contract. Then coming to the other issue no.(V) as to the validity of the sale-deed dated 03.12.2008 in favour of Defendant No.3 and power of attorney dated 03.12.2008 executed by Indumati in favour of Defendant no.2; the Trial Court has refused to declare those void and illegal. Lastly, coming to issue no.(XIII) and (XV) concerning the Will dated 14.01.2009, in favour of Defendant no.1, the final conclusion has been that said Will, Ext.C is genuine and the Defendant no.2 has become the absolute owner of the suit land by virtue of the same.

With these finding, the Trial Court dismissed the Suit and decreed the Counter Claim. In the First Appeal filed by the unsuccessful and aggrieved Plaintiff, the First Appellate Court has accepted the Will, Ext.1 standing in favour of the Plaintiff and rejected the Will, Ext.C in favour of the Defendant no.3. It has of course upheld the findings of the Trial Court that the Plaintiff is not entitled to the relief of Specific Performance of Contract as prayed for. The First Appellate Court’s order is as under:-

> “The Will vide Ext.1 is declared valid. The right, title and interest of the Plaintiff Ramesh Chandra Behera over the suit plot vide Ext.1 (WILL) vide Khata No.771 under Balliguda Tahasil is hereby declared. The prayer of the Plaintiff relating to permanent prohibited injunction is allowed against the Defendants over the suit plots for creating any disturbances. Rest of the properties of Indumati Nayak shall be dealt as per line of succession.”

9. These Appeals have been admitted to answer the following substantial question of law:-

> "Whether the First Appellate Court is right in holding the Will Exhibit-1 standing in favour of the Plaintiff to be valid and genuine by rejecting the Will, Ext.6 standing in favour of the Defendant No.2 as having no value in the eye of law and in doing so, the First Appellate Court if has rectified the mistake committed by the Trial Court in appreciating the evidence in touchstone of the settled principle of law holding the field or has itself fallen in error?"

10. Mr. A.P. Bose, learned Counsel for the Appellant (Defendant no.2) submitted that the Plaintiff while filing the suit on 26.12.2008 had no prayer for declaring that he is the absolute owner of the suit property by virtue of Will dated 15.07.2004 (Ext.1) purported to have been executed by Indumati in his favour bequeathing the said suit property and that prayer was introduced by way of amendment only in the year, 2014 by filing the consolidated plaint being verified on 31.03.2014 which is almost five years after the death of Indumati. He further submitted that when the suit was filed, Indumati was very much alive and she died only on 07.07.2009; whereafter her LRs were brought on record during the suit. He further submitted that when in the suit the Plaintiff was essentially seeking a decree for specific performance of the agreement said to have been executed by Indumati in favour of the Plaintiff for sale of the suit land by receiving advance consideration, the Plaintiff all of a sudden having come to plead regarding the Will purported to have executed by Indumati, ought not have been granted with such relief as according to him, the foundation for a suit seeking specific performance of Contract and a Suit seeking Declaration of Title basing upon the Will are completely different and run almost on left and right in every respect, essentially their scope of adjudication. It was further submitted that the Plaintiff having asserted allthrough to be proposed vendee of the suit land, his very claim of title over the suit property on the strength of the Will which was created much prior to the institution of the suit but was not pressed into service nor even disclosed for five years and more so during Indumati's lifetime ought to have been repelled at the threshold and that being taken as the suspicious circumstance of gravest degree, the First Appellate Court has completely failed to look into such important defect both on fact and law in feature of the claim/case of the Plaintiff. He further submitted that the Plaintiff is a stranger to the family of Indumati and his pleadings would reveal that having obtained first agreement for sale deed on 28.05.1988, he obtained another agreement for sale on 19.11.2003 and then after filing the suit in the year, 2008 is producing a Will said to have been executed by that Indumati in the year, 2004 and staking his claim on the basis of that in side by side, pleading that Indumati was treating him as his son, when the fact remains that Indumati had her children including sons.

Inviting the attention of the Court to the pleading in the plaint and the evidence let in by the Plaintiff which would be discussed hereinafter as and when necessary, he contended that the First Appellate Court has fallen in error by accepting the Will, Ext.1 and declaring the title of the Plaintiff over the suit land by virtue of the same to the deprivation of the Defendants. He next submitted that the

First Appellate Court ought to have rejected the Will, Ext.1 as not valid and genuine document being not duly executed by Indumati and attested as required under law for the very reason as to why the Plaintiff did not give any hint about it in the suit that he filed against Indumati with the prayer that she be directed to execute the sale deed and register. His submission was that the Trial Court when with the available evidence on record and upon their detail discussion had held the Will, Ext.C executed by Indumati in favour of the Defendant no.3 to be valid, the First Appellate Court ought not to have set it at naught and that according to him is based on total erroneous appreciation of evidence on record and contrary to the settled legal position of law holding the field.

11. Mr. Manoj Mishra, learned Senior Counsel for the Respondent No.1 (Plaintiff) submitted that the First Appellate Court upon detail discussion on evidence on record and testing the same in the backdrop of the settled principles of law in that regard holding the field has rightly accepted the Will (Ext.1) to be the document by which the Plaintiff has been clothed with the title in respect of the suit property. Therefore, when Ext.1 has been accepted, the First Appellate Court according to him very rightly taking up the next issue with regard to the other Will, Ext.C in favour of Defendant no.3 has repelled the same.

12. Keeping in view the submissions made, I have gone through the judgments passed by the Courts below. I have read the plaint both filed at the initial stage and the consolidated one filed after amendment. I have also travelled through the written statement filed at different times and the counter claim and have perused the depositions of the witnesses examined by the parties and the documents admitted in evidence and marked exhibits. It be stated here that all those documents were furnished by the learned Counsels for the parties at the time of hearing, which have been tagged with the case record.

13. Admittedly the Plaintiff while filing the suit on 26.12.2008 in the entire plaint had not whispered a word about the Will (Ext.1), which is dated 15.07.2004 which as per his case had come into existence about four years before the institution of the suit. The suit was thus by the beneficiary of that Will which was with him by the time of filing of the suit, yet the suit was initially with the principal prayer of Specific Performance of Contract seeking a direction to Indumati, the testatrix of the Will and then her legal representatives coming on record as Defendants to execute the sale-deed in respect of the suit land in performing their part of the contract under the agreement dated 19.11.2003 for which there was part payment of consideration and delivery of possession as stated by the Plaintiff.

The plaint was amended in the year, 2014 which is six years after the suit and ten years after the Will and then with all existing pleadings, the following important paragraphs have been inserted:-

"28) That, out of love and affection, Smt. Indumati Nayak has voluntarily executed and registered a will document No.33/2004 dated 15.07.2004 before the Sub-Registrar Office, Bhanjanagar, District Ganjam out of her free will and consent and volition in her sound disposing mind in favour of Ramesh Chandra behera to enjoy the suit lands as absolute owner thereof after her death in presence of her two sons Kailash Chandra Naik & Nityananda Naik and another independent witnesses of Bhanjanagar Sri Bansidhara Panda, scribed by one Bibhudatta Panda, a deed writer of S.R.O. Bhanjanagar. That as per the instructions of said executants Smt. Indumati Nayak, the above deed writer, wrote down the will in presence of herself and the above named three attesting witnessed at S.R.O. Office, Bhanjanagar and after completion of the writing, he readout and explained the contents of the same to the said exeuctant in presence of all three attesting witnesses, and after understanding the contents of the said WILL as all true and correct, she signed the said WILL in the presence of those three attesting witnesses as well as the said deed writer and thereafter all the three attesting witnesses also signed the said WILL in the presence of the said executants Smt. Indumati Nayak and the deed writer and at last the said deed writer put his signature in presence of said executants and the above said three attesting witnesses and all these happened at one sitting and thereafter she submitted the said will before the Sub-Registrar, Bhanjanagar for registration, who again went through the contents of the said WILL and asked to the executants Smt. Indumati about the truthfulness of the contents in presence of all the three attesting witnesses and the scribe and after being fully satisfied about the deed, he registered the said WILL on 15.07.2004 itself which is numbered as document No.33/2004 dated 27.07.2004. And the Plaintiff is producing her said original WILL from his custody and filed in this suit. And it is further submitted, by virtue of this WILL, the Plaintiff became the absolute owner of the suit land ater the death of executants Smt. Indumati Nayak on 07.07.2009 who was the absolute owner thereof before executing the WILL. From various letters it comes to light that Indumati Nayak had treated the Plaintiff as her own son and thus had all love and affection towards him like a natural son.

29) That as Indumati Nayak and her two sons had already received almost all the full consideration of the suit lands apart from other services from the Plaintiff, and as there was long delay to obtain Patta of the suit lands to execute the registered sale deed for the suit lands in favour of the Plaintiff, and hence to safeguard the full interest of the Plaintiff over the suit lands who was already in possession of the suit lands by virtue of agreement deeds and registered lease deed. She voluntarily executed this WILL, thus this WILL is a genuine one and was the last WILL of her and thus this WILL remained binding on the Defendants. She has never conceal the same during her life time till her death with intimation to the Plaintiff."

14. Consequent upon the aforesaid, the prayer as noted towards the end of above paragraph (3) came to the introduced as (d). In this suit for Specific Performance of Contract, the followings are the requirements to the pleaded and proved in order to be entitled to the said relief:-

a) there was the contract for transfer of the suit property for agreed consideration between Indumati and the Plaintiff;

b) that the Plaintiff has in part performance of the contract taken possession of the property;

c) that the Plaintiff has done some act in furtherance of the contract; and

d) the Plaintiff is ready and willing to perform his part of the contract.

So, in the particular case, the Plaintiff was required to prove (a) the agreement dated 19.11.2003; (b) that he was/is all along in readiness and willing to perform his part of the contract till the suit; and (c) that the failure was on the part of the proposed vendor-Indumati to perform her part of the contract in coming forward to execute the sale-deed as agreed upon on receipt of balance consideration even though the Plaintiff was always ready for the same. Thus, the Plaintiff has stated in the plaint, that he was/is all along ready and willing to perform his part of the contract by paying balance consideration. Having once so pleaded, to come forward to say that said proposed vendor has executed a Will four years prior to the institution of the suit for Specific Performance of Contract by him and that too bringing that fact into light six years after the institution of the suit in advancing a prayer declaring title over the property in suit based on that Will itself in my considered view is wholly impermissible in the eye of law. The introduction of such a prayer is found to have completely changed the nature and character of the suit. This itself projects a circumstance of grave suspicion to view the Will as a suspicious document. Despite the factum of execution of Will by the testatrix bequeathing the property to the Plaintiff; filing of the suit for specific performance of same property against the testatrix also leads the Court to view the agreement for sale with suspicion.

But then here when it is seen that such a prayer of title has been permitted by amendment of the plaint to be introduced. The question comes up as to whether at this stage, said order of amendment if can be said to be illegal which cuts the root of the suit which after amendment stands with two highly contradictory and conflicting prayers.

When section-104 of the Code provides the orders which are appealable; section-105 of the Code reads as under:-

> "105. Other orders- (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.
>
> (2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeals lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

This order of amendment of the plaint to introduce the factum of execution of the Will (Ext.1) by Indumati in favour of the Plaintiff and consequent prayer of declaration of title based on that in my considered view is illegal being totally beyond the scope for adjudication in the suit for Specific Performance of Contract by wholly changing its nature and character. That apart, as already indicated with the principal prayer of specific performance of contract; a prayer for declaration of title over the said property basing on Will being projected as the document of title cannot stand as an alternative prayer. The Courts below as would be seen under the circumstance could not have at all gone to decide the title of the Plaintiff based upon that Will (Ext.1) within the framework of the suit.

15. Be that as it may, even coming to the merit of the claim of title by the Plaintiff based on that Will purported to have been executed four years prior to suit and for the first time being brought to light after six years of pendency of that suit is a suspicious circumstance of gravest nature and form and that having brought into being under the circumstances described by the Plaintiff is enough to reject the Will to be taken cognizance of for any purpose whatsoever and that is sufficient to ignore the Will much less to even take up for consideration in the suit which had been founded upon completely on different factual settings, for different reliefs whose entitlements are dependent upon proof of completely different factual settings. With the original prayer in the suit, where the Plaintiff when had sought to be only clothed with the title of the land in suit by in future point of time on passing of the decree; for the newly introduced prayer, the claim has come to declare that title being said to have been derived upon the death of the testatrix who was the proposed vendor based upon the Will (Ext.1). The Plaintiff in introducing this prayer has not abandoned the earlier prayer but the prayer for declaration of title by virtue of Will (Ext.1) has been set up as an alternative one. The first prayer being against the proposed vendor; the second prayer is against the legal representatives of said very vendor on account of that proposed vendor's action /deed in executing one Will is saying that thereby the property has come to the hands of the Plaintiff on the death of the proposed vendor and most significantly that is not for any consideration when earlier agreement was for consideration and balance consideration to be paid in future had the proposed vendor would have been ordained to execute a particular document or her legal representatives. This Court feels that with such pleadings and reliefs claimed, the plaint as it stood after amendment was even straightway liable to be rejected under Order-7 Rule-11 of the Code.

For all these aforesaid, the First Appellate Court has thus in the suit fallen in grave error in proceeding to declare Ext.1 as a valid and genuine document in saying that by virtue of the same, the Plaintiff is getting clothed with the title in respect of the suit land after death of Indumati when that document's foundation is wholly doubtful and its execution and attestation accordingly stand suspicious and the document under the circumstances narrated does not have the trappings of a Will.

16. Now moving on to the Will Ext.C, which is dated 08.12.2008, it is found that this Will in favour of the Defendant no.2 has come into being during pendency of the suit. The Defendant No.1 was alive at the time of institution of the suit and died on 07.07.2009. The Defendant No.3 basing upon this Will (Ext.C) has lodged the counter claim on 30.07.2014, which in my considered view is not entertainable in the eye of law. The Trial Court perhaps in view of the amendment of the plaint appears to have accepted this as the counter claim. Said amendment of the plaint having been held to have been made by an order which is wholly illegal; now this counter claim based on the Will (Ext.C) is held not entertainable in the suit for Specific Performance of the Contract filed against the proposed vendor.

It has to be kept in mind that when by the amendment made in the plaint, the Plaintiff projected a document which was in existence much before suit and the prayer basing upon that was introduced therein much later; the present Will (Ext.C) in favour of the Defendant no.2 has come into being six years after the institution of the suit. Although, that could have been projected as a document to non-suit the Plaintiff by proving the same in accordance with law; the same could not have been the basis of a claim of title over the property covered under that Will in the suit instituted by the Plaintiff for suit for Specific Performance of the Contract when the Defendant no.2 herself at para-5 of the written statement has averred that the Plaintiff being familiar with the Defendants family has cunningly made Defendant no.2 as a party and ignored other successors of the suit property in his initial plaint to grab the suit land.

Secondly, in so far as the independent claim of title of Defendant No.3 by virtue of this Will, Ext.C is concerned, a decree in the counter claim lodged by her is certainly standing to affect all the legal heirs and successors of Indumati. In the present suit filed by the Plaintiff, the Defendant No.3 could not have sought for the relief of right, title and interest over the suit property based on that Will, Ext.C coming into being only on 14.01.2009. In fact in a suit for Specific Performance of Agreement; filed by a stranger to the family of Indumati, wherein his claim of title subsequently advanced has been held as not so permissible in the eye of law to be introduced and as such be granted; the Counter Claim of one of the legal heirs of Indumati to the deprivation of all the legal heirs and successors of Indumati is not permissible as that is not adjudicable within the scope, ambit and the suit when the very cause of action for the Counter Claim has arisen after the defence was tendered.

17. For all these aforesaid discussion, the substantial questions of law is answered as follows:-

The First Appellate Court has fallen in grave error by declaring the right, title and interest of the Plaintiff over the suit land by virtue of the Will, Ext.1 and the Courts below ought not to have proceeded to consider and decide the validity of the Will, Ext.C projected by the Defendant no.2 stated to have been executed by Indumati in her favour in bequeathing the suit property in the present suit filed by the Plaintiff; and it should have been left open to the Defendant no.2 to assert her claim based on that Will, Ext.C in a duly constituted suit arraigning all the legal heirs and successors of Indumati as the Defendants in seeking the relief of declaration of her right, title and interest over the property covered under the Will (C) for being decided on its own merit and in accordance with law.

18. Resultantly, the Appeals are allowed to the extent as stated above. Consequently, the suit filed by the Plaintiff stands dismissed and the counter claim is also dismissed with the above observations being not entertainable and adjudicable as such in the present suit. There shall however be no order as to cost.

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2023 (III) ILR-CUT-1067

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

JCRLA NO. 95 OF 2006

SAMA MUNDA .....Appellant

-V-

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Section 201 – Whether mere carrying a body from the place of occurrence to another place would come under the purview of Section 201? – Held, No – Necessary ingredients to attract the offence U/s. 201 enumerated with reference to case law.

(Para-9)

Case Law Relied on and Referred to :-

1. (2007) 7 Supreme Court Cases 502 : Sukhram Vs. State of Maharashtra.

For Appellant : Mr. Satyanarayan Mishra

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

JUDGMENT Date of Hearing &Judgment: 20.11.2023

BY THE BENCH:

The appellant Sama Munda faced trial in the Court of learned Adhoc Addl. Sessions Judge (FTC-II), Keonjhar in S.T. Case No.33/68 of 2006 for offences punishable under sections 302 and 201 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that on 28.12.2005 at about 5.00 p.m., he committed murder of one Sankri Munda (hereafter 'the deceased') and having knowledge or reason to believe that such offence has been committed, he caused the evidence connected with the said offence to disappear by throwing the dead body of the deceased in the backyard of Suna Munda (P.W.3) with intention to screen himself from legal punishment.

The learned trial Court vide judgment and order dated 02.09.2006 found the appellant guilty of the aforesaid charges and sentenced him to undergo imprisonment for life and to pay a fine of Rs.5,000/-(rupees five thousand), in default, to undergo R.I. for one year under section 302 of the I.P.C. and to undergo R.I. for three years and to pay a fine of Rs.1000/-(rupees one thousand), in default, to undergo R.I. for three months under section 201 of I.P.C. and both the substantive sentences were directed to run concurrently.

Prosecution Case:

2. The prosecution case, as per the oral report submitted by Gopal Munda (P.W.1) before the officer in-charge of Nayakote Police Station on 30.12.2005, is that on 29.12.2005 in the afternoon at about 05.00 p.m., while he was searching for his bullock, he noticed the dead body of a lady was lying in the backyard of Suna Munda (P.W.3) and when he reached near the dead body, he could find that it was

the body of the deceased and there was bleeding injury on her person. P.W.1 immediately intimated the same to the ward member and others and subsequently he came to know that on 28.12.2005 at about 05.00 p.m., the appellant had come to the house of his brother-in-law for attending *sudhi kriya* and was confronted by the deceased as to why the appellant was calling her a 'witch'. Over such issue, there was a quarrel between the appellant and the deceased and during such quarrel, the deceased was assaulted by a lathi so also by means of a tangia inside the house of the brother-in-law of the appellant and after commission of the murder, the dead body of the deceased was thrown in the backyard of the house of the P.W.3. Since, there was no proper communication from the place of occurrence to the police station and it was a hilly area and there was fear of wild animals, the matter could not be reported in the police station immediately for which the dead body was guarded.

On the basis of the oral report given by P.W.1, P.W.9 Trilochan Nayak, A.S.I. of Banspal outpost under Nayakote police station reduced the report into writing and on the basis of such report, in the absence of officer in-charge of Nayakote police station, Nayakote P.S. Case No.31 dated 30.12.2005 and P.W.9 took up investigation of the case. During the course of investigation, P.W.9 examined the informant, visited the spot, prepared the spot map (Ext.4), examined the other witnesses and tried to find out the whereabouts of the appellant but was unsuccessful on that day. On 31.10.2005, P.W.9 again visited the spot and examined some more witnesses, conducted inquest over the dead body and prepared the inquest report as per Ext.5 and sent the dead body for post mortem examination. The appellant was arrested on that day and from the house of one Samara Munda, who was the brother-in-law of the appellant, one bamboo lathi and one axe was seized on production by the appellant as per seizure list Ext.8. On that day, at about 01.45 p.m., the blood stained earth and sample earth were seized from the spot as per seizure list Ext.9. The white colour full shirt of the appellant was also seized as per seizure list Ext.10. The appellant was sent to C.H.C., Banspal for collection of his blood sample and nail clippings through constable. The appellant was forwarded to the Court and the wearing apparels of the deceased were seized on the production by the constable after the post mortem examination as per seizure list Ext.12. P.W.9 also made query to the doctor (P.W.8), who conducted the post mortem examination, about the possibility of the injuries caused to the deceased by such weapons and he received the query report vide Ext.3. P.W.9 subsequently received the P.M. report (Ext.2) and made prayer before the S.D.J.M., Keonjhar for sending the exhibits to S.F.S.L., Rasulgarh, Bhubaneswar for examination and received the C.E. report vide Ext.15. On 27.02.2006, the officer in-charge of Nayakote Police Station took charge of investigation and on completion of investigation on 17.03.2006, he submitted charge sheet against the appellant under sections 302 and 201 of the Indian Penal Code.

The case was committed to the Court of Session after compliance of due procedure, where the appellant was charged as aforesaid and since he refuted the charges and pleaded not guilty, the sessions trial procedure was resorted to establish his guilt.

Prosecution Witnesses & Exhibits:

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

P.W.1 Gopal Munda is the nephew of the deceased and informant in the case. He stated that at about 04.00 p.m. on a Thursday towards the end of December 2005, when he was searching for two of his bullocks, he saw the deceased lying dead on the land of P.W.3.

P.W.2 Gora Munda is the brother-in-law of the appellant who stated that the appellant had come to his house to attend the Sudhi ceremony of his deceased daughter towards the last part of December, 2005. However, he expressed his inability to answer as to whether any weapon of offence was seized in his presence.

P.W.3 Suna Munda stated to have found the dead body of the deceased lying on his land and he along with others guarded the dead body. He further stated that during the investigation, the appellant confessed before the police to have killed the deceased and also led the police to the place where he had concealed the weapon of offence, i.e. bamboo lathi (M.O.I).

P.W.4 Pala Munda is the elder sister of the appellant who expressed her ignorance about the manner and circumstances under which the deceased died. She was declared hostile by the prosecution.

P.W.5 Krushna Munda stated that the police seized one bamboo lathi (M.O.I) and one axe (M.O.II) from the house of P.W.2 in his presence and thus, he is a witness to the seizure of weapons of offence.

P.W.6 Guna Munda is the son of the deceased who stated that on the day of occurrence at about 6 to 7 p.m., the appellant assaulted his mother on her head by means of an axe in the house of P.W.2 and killed her. He further stated that out of fear he fled away from the spot of occurrence when the appellant was killing his mother.

P.W.7 Ballav Munda is a co-villager who stated to have seen the dead body of the deceased lying on a land near the jungle. He further stated that the appellant carried the body of the deceased to that place being armed with a bamboo lathi.

P.W.8 Dr. Bijaya Kumar Behera was working as an Assistant Surgeon in the District Headquarters Hospital, Keonjhar and he conducted post-mortem examination over the dead body of the deceased on police requisition. He proved his report vide Ext.2.

P.W.9 Trilochan Nayak was working as the A.S.I. at the Banspal outpost under Nayakote police station and he is the Investigating Officer of the case.

The prosecution exhibited fifteen documents. Ext.1 is the F.I.R., Ext.2 is the post mortem report, Ext.3 is the query report furnished by P.W.8, Ext.4 is the crime detailed report, Ext.5 is the inquest report, Exts.6 and 11 are the command certificates, Ext.7 is the dead body challan, Exts.8, 9, 10 and 12 are the seizure lists, Ext.13 is the statement of P.W.4 recorded under section 164 Cr.P.C. by the learned J.M.S.C., Keonjhar, Ext.14 is the forwarding report of S.D.J.M., Keonjhar addressed to Director of S.F.S.L., Rasulgarh for chemical examination and Ext.15 is the chemical examination report.

The prosecution proved two numbers of material objects (M.O.). M.O.I is the bamboo lathi and M.O.II is the axe.

Defence Plea:

4. The defence plea of the appellant is one of denial. The defence neither examined any witness nor exhibited any document.

Findings of the Trial Court:

5. The learned trial Court after assessing the oral as well as documentary evidence on record came to the conclusion that the death of the deceased was homicidal in nature. The version of P.W.6 as an eye-witness to the occurrence was accepted and it was held that the evidence is clear, cogent and trustworthy. The learned trial Court has also accepted the version of the P.W.3 and P.W.4 so also P.W.7. The evidence of the I.O. regarding seizure of the weapon of offence at the instance of the appellant was also accepted and taking into the account the chemical examination report (Ext.15), the learned trial Court came to the conclusion that not only there was motive for commission of offence, which is apparent from the F.I.R. (Ext.1), but also from the evidence of the witnesses, it appears that the appellant carried the dead body and disposed of the same on the land of P.W.3 with the intention to cause disappearance of the evidence so also to screen himself from legal punishment and therefore, the charges under sections 302 and 201 of the I.P.C. was held to have been established by the prosecution.

Contentions of the Parties:

6. Mr. Satyanarayan Mishra (4), learned counsel appearing for the appellant contended that though the evidence of P.W.6 has been accepted to be an eye witness to the occurrence, but in view of the material contradictions in his evidence which have been duly proved through the Investigating Officer, it would be apparent that he was not an eye witness to the occurrence and that for the first time, he stated so in the Court and therefore, the learned trial Court should not have placed reliance on his evidence. Neither P.W.1 nor P.W.2 stated anything as to where the occurrence

took place and their evidence is also silent about the presence of P.W.6 in the house of P.W.2 at the time of occurrence. The learned counsel further argued that even though P.W.7 has stated that he had seen the appellant carrying the dead body of the deceased holding a bamboo lathi, but he has not stated to have seen the appellant carrying the dead body from the house of P.W.2 and merely because blood stained earth was seized from the house of P.W.2 by the Investigating Officer and the appellant was seen carrying the dead body of the deceased holding a bamboo lathi and the bamboo lathi seized was containing human blood of group 'B', it cannot be said that the prosecution has been able to establish the charge under 302 of the I.P.C. against the appellant and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Sonak Mishra, learned Additional Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and argued that even if in view of the contradictions appearing in the evidence of P.W.6, it is accepted that he was not an eye witness to the occurrence, still the prosecution case cannot be discarded in view of a series of circumstances and materials available against the appellant. The learned counsel argued that the presence of P.W.6 at the spot coupled with the seizure of blood stained earth from the spot i.e. the house of P.W.2, the version of P.W.7, who had seen the deceased being carried by the appellant holding a lathi, the finding of the chemical examination report about the detection of human blood of group 'B' from the bamboo lathi (M.O.I) matching with that of the deceased and moreover, the seizure of the lathi (M.O.I) and axe (M.O.II) at the instance of the appellant through which the injuries were possible as per the opinion of the doctor (P.W.8), it can be said that the chain of the circumstances is so complete that it unerringly points towards the guilt of the appellant and therefore, the learned trial Court is quite justified in convicting the appellant under sections 302 as well as 201 of the I.P.C. and therefore, the JCRLA should be dismissed.

Whether the deceased met with a homicidal death?:

7. Adverting to the contentions raised by the learned counsel for both the parties, let us first analyze the evidence adduced by the prosecution regarding the homicidal death of the deceased. We find that apart from the inquest report (Ext.5), the doctor (P.W.8), who conducted the post mortem examination over the dead body of the deceased on 01.01.2006, has noticed the following injuries:-

i) Incised injury $2^{1/2''}$ x ½" bone deep present over the left temporal region half inch above the left ear;

ii) Incised injury of size 2"x$^{1/2"}$ x ½" present on the left side of face extending from left angle of mouth to left mandibular region;

iii) Incised injury of size ¾'' x ¼'' x ¼'' present over the left ear pinna;

iv) Lacerated injury of size 1'' x ½'' x ½'' present on the left side of neck just above the thyroid region.

On dissection, he found a depressed facture on the left temporal bone. Brain membranes were soft, stained with blood corresponding to the fracture on temporal region. Brain matter was soft, blood stained corresponding to the fracture side and he specifically opined that the cause of death was on account of the head injury and all the injuries were ante mortem in nature and injuries nos.1 to 3 might have been caused by a weapon having cutting edge and injury no.4 being caused by a blunt object. In the cross-examination, he has stated that injury no.1 was sufficient to cause death of the deceased. The evidence of the doctor has not at all being shattered in the cross-examination and the learned counsel for the appellant has also not challenged the same and therefore, on the basis of the evidence adduced by the doctor (P.W.8) and the post mortem report (Ext.3), we are of the view that the learned trial Court has rightly come to the conclusion that the deceased met with a homicidal death.

Whether the appellant committed murder of the deceased?:

8. Now, coming to the evidence of the star witness examined on behalf of the prosecution i.e. P.W.6, we find that he has stated that the deceased was his mother and the house of P.W.2 was situated near to his house and on the day of occurrence at about 6 to 7 p.m., the appellant assaulted the deceased on her head by means of an axe in the house of P.W.2 and killed her. He has further stated that P.W.2 was his friend and P.W.1 called the deceased to the house of the P.W.2 where the appellant killed the deceased and he further stated that apprehending danger to his own life, he fled away from the spot. In the cross-examination, P.W.6 has stated that the appellant had no previous enmity with the deceased and sometime the deceased used to take liquor. It was further elicited from the cross-examination of P.W.6 that he had gone inside the house of P.W.2 when the appellant assaulted the deceased by means of an axe. However, it has been confronted to the P.W.6 and proved through the I.O. (P.W.9) that he had not stated that P.W.1 called the deceased to the house of P.W.2 and that the appellant assaulted the deceased there by means of an axe and killed her. Therefore, the material part of the evidence of P.W.6 that he had seen the appellant assaulting the deceased on his head by an axe and killing her is not there in the previous statement of P.W.6 recorded under section 161 Cr.P.C. Moreover, P.W.1 has not stated to have called the deceased to the house of P.W.2. Similarly, P.W.2 has not stated that P.W.1 called the deceased to his house. Neither P.W.1 nor P.W.2 has stated about the deceased or deceased being called to the house of P.W.2 or about the presence of the appellant in the house of P.W.2.

Therefore, there is no material to corroborate the evidence of P.W.6. In view of the material contradictions in the evidence of P.W.6, his version as an eye witness to the occurrence becomes doubtful. It is correct that from the house of P.W.2, the I.O. (P.W.9) seized blood stained earth and sample earth as per seizure list Ext.9 and the evidence of P.W.7 to have seen the appellant carrying the dead body of the deceased holding one bamboo lathi has remained unshaken and it has also been established from the chemical examination report that from the lathi (M.O.I), human

blood was found having blood group 'B' and the doctor has also opined that the injuries sustained by the deceased were possible by the lathi (M.O.I) and axe (M.O.II), but when the evidence is silent that P.W.7 had seen the dead body being removed from the house of P.W.2, it is very difficult to hold that the prosecution has successfully established the charge under section 302 of the I.P.C. against the appellant. Therefore, the finding of the learned trial Court that the prosecution has successfully established the charge under section 302 of the I.P.C. against the appellant is not acceptable.

Whether the appellant is liable under section 201 of the I.P.C.?:

9. Now, coming to the charge under section 201 of the I.P.C. against the appellant, it is apposite for us to reproduce the provision which reads as follows:

> "Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false."

In the case of **Sukhram -Vrs.- State of Maharashtra reported in (2007) 7 Supreme Court Cases 502**, the Hon'ble Supreme Court has elaborately discussed the necessary ingredients of offence under section 201 of the I.P.C in the following words:

> "The first paragraph of the section contains the postulates for constituting the offence while the remaining three paragraphs prescribe three different tiers of punishments depending upon the degree of offence in each situation. To bring home an offence under Section 201 IPC, the ingredients to be established are: (i) committal of an offence; (ii) person charged with the offence under Section 201 must have the knowledge or reason to believe that an offence has been committed; (iii) person charged with the said offence should have caused disappearance of evidence; and (iv) the act should have been done with the intention of screening the offender from legal punishment or with that intention he should have given information respecting the offence, which he knew or believed to be false. It is plain that the intent to screen the offender committing an offence must be the primary and sole aim of the accused. It hardly needs any emphasis that in order to bring home an offence under Section 201 IPC, a mere suspicion is not sufficient. There must be on record cogent evidence to prove that the accused knew or had information sufficient to lead him to believe that the offence had been committed and that the accused has caused the evidence to disappear in order to screen the offender, known or unknown."

This Court is well cognizant of the position of law that merely carrying a body from the place of occurrence to another place may not come under the purview of section 201 of the I.P.C. In such circumstances, the intention of the person must be ascertained as why he was carrying the body and whether he had knowledge or reason to believe that the body is of a dead person who died a homicidal death. If a person is found to have the intention to cause disappearance of material evidence in order to screen himself or someone else from legal punishment, then it can be aptly concluded that his act attracts culpability under section 201 of the I.P.C.

While examining the evidence on record as to liability of the appellant under section 201 of the I.P.C., it is immaterial whether he has committed the offence punishable under section 302 of the I.P.C., rather he must have the knowledge that the offence has been committed, no matter if it done by him or by someone else. In other words, even if the appellant is found to be innocent under section 302 of the I.P.C., still he can be made liable for the offence under section 201 of the I.P.C. if it is found that he was instrumental in causing disappearance of the dead body with an intention to shield himself from the legal punishment.

In the present case, P.W.7 has stated to have seen the appellant carrying the dead body of the deceased being armed with a bamboo lathi and the corpse was discovered by P.W.1 only on the next day during the afternoon hours. The evidence of P.W.7 has remained unshaken and the appellant was seen carrying the dead body of the deceased being armed with bamboo lathi and the dead body was found from the backyard of the house of P.W.3 and P.W.9, the I.O. has also stated in that respect. In the accused statement, when the learned trial Court put the question to the appellant in connection with the evidence of P.W.7, the appellant simply replied that it was false. Since the deceased had met homicidal death and the appellant was seen carrying the dead body being armed with a lathi as per the version of P.W.7 and the dead body was found in the backyard of P.W.3, the appellant was supposed to explain such circumstance appearing against him which he has failed. Therefore, it is proved that the appellant tried to dispose of the dead body of the deceased in order to screen himself from the ensuing liability and therefore, the prosecution has established the charge under section 201 of the I.P.C. against the appellant beyond all reasonable doubt.

Conclusion:

10. In view of the foregoing discussions, the conviction of the appellant under section 302 of the I.P.C. is hereby set aside, however, his conviction under section 201 of the I.P.C. is found to be apt and justified and stands confirmed.

It appears from the records that the appellant was taken into judicial custody in connection with this case since 31.12.2005 and he was not released on bail during the trial but during pendency of the appeal, he was granted bail by this Court on 08.02.2012 and therefore, he had already undergone the sentence which has been imposed by the learned trial Court for the offence under section 201 of the I.P.C. Therefore, the appellant shall not be further taken into custody.

Accordingly, the JCRLA is partly allowed

Before parting with the case, we would like to put on record our appreciation to Mr. Satyanarayan Mishra, learned counsel who was engaged by the OHCLSC as the counsel for the appellant for rendering his assistance towards arriving at the decision above mentioned. This Court also appreciates the valuable assistance provided by Mr. Sonak Mishra, learned Additional Standing Counsel.

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2023 (III) ILR-CUT-1075

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

JCRLA NO. 74 OF 2008

CHANDRA GURU & ANR. .....Appellants

-V-

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Section 34 – "common intention" – Meaning & implication – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. 2014(2) Supreme 585 : Birendra Das Vs. State of Assam.
2. 2004 SCC (Cri) 2003 : State of Maharashtra Vs. Jagmohan Singh Kuldip Anand.
3. Criminal Appeal No. 1053 of 2015 : Shishpal @ Shishu Vs. State (NCT of Delhi).
4. Criminal Appeal No. 81 of 2018 : Roshan Vs. State (NCT of Delhi).
5. (2022) 2 SCC 545 : Jasdeep Singh alias Jassu Vs. State of Punjab.

For Appellants : Ms. Mina Kumari Das

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

JUDGMENT Date of Judgment : 28.11.2023

CHITTARANJAN DASH, J.

1. The Appellants having faced trial in the offence under Section 302/34 of the Indian Penal Code (herein after in short called "IPC") found guilty and convicted there under and sentenced to undergo Imprisonment for life and to pay fine of Rs.10,000/- (Rupees Ten Thousand), in default, to undergo R.I. for two years more.

2. The case of the prosecution as reveals from the F.I.R. and the case record is that, on 04.03.2007 one Manu Naik (P.W.1), son of Madan Naik of village Baidyanathpur under Baunsuni P.S. in the district of Boudh lodged a written report alleging that in the afternoon on that very day while he was returning to his home after taking bath in the village pond, his sister-in-law namely Rajani Naik (P.W.2), wife of Nila Naik (the deceased) informed that at about 4:00 PM in the afternoon, while his brother (deceased) being the son of his maternal uncle had been to the house of the Appellants Chandra Guru and Jarasingh Guru asking for return of the sum of Rs.500/- (Rupees Five Hundred) borrowed by them, they got furious and entered into quarrel with the deceased. Thereafter, while the deceased was returning to his home, on the paddy field of Raju Panda, Appellant No.1 - Chandra Guru dealt a blow to his belly by means of a stick, whereupon the deceased fell down on the ground. Seeing this, Appellant No.2 - Jarasingh Guru dealt blows to the deceased by means of 'tangia' (axe) and severed his neck from his body, for which the deceased died at the spot. Seeing the incident, P.W.2 got frightened and raised outcry that the deceased has been hacked to death and she ran towards the house being fear of life. On being informed so, P.W.1 proceeded to the spot and saw the deceased lying dead

and his neck found severed from the body by means of a sharp weapon. The villagers, namely Balabhadra Naik (P.W.7), Srikanta Naik (P.W.3) and Ranka Behera also witnessed the incident. As the report revealed a cognizable offence, the O.I.C. Baunsuni P.S. registered the same vide Baunsuni P.S. Case No.22 of 2007 and took up investigation.

3. In course of the investigation, the I.O. examined the complainant; deputed a Constable to guard the spot; issued Command Certificate to that effect; sent requisition to the photographer to take the photograph of the dead body along with the spot; and examined other witnesses. On 05.03.2007 he went to the spot; prepared the Spot Map under Ext.14; seized the sample earth and blood stain earth and one split wooden lathi stained with blood in presence of the witnesses under Ext.15; held inquest over the dead body of the deceased with the severed head, without head and the severed head jointly with the body under Exts. 2, 3 and 4. The I.O then dispatched the severed body and head to the District Headquarters Hospital Boudh for post mortem examination and issued Dead Body Challan to that effect under Ext.6; arrested the accused persons Jarasingh Guru and Chandra Guru. While in police custody, as accused Jarasingh Guru volunteered to confess the guilt and disclosed the place of concealment of the weapon of offence at Dungi Bandha (tank) in presence of witnesses, he reduced the statement of Jarasingh in writing in presence of the witnesses under Ext.15, as required under Section 27 of the Evidence Act. On being led to the police and the witnesses, the accused brought out the axe from the under-water of Dungi Bandha, which he seized in presence of witnesses under Ext.17; kept the axe (M.O.-I) with paper seal; seized the lathi and black check colour lungi suspected to have been stained with blood on production by the accused Chandra, who expressed to have worn at the time of committing murder of the deceased so also one jacket of accused Chandra suspected to have stained with blood under Ext.8; seized one chocolate colour check lungi and one green colour full-neck banian under Ext.9 suspected to have stained with blood worn by accused Jarasingh at the time of commission of offence; sent the requisition for medical examination of accused Chandra Guru who sustained injury on his person as well as for collection of his nail clipping and scrapping of the accused Chandra under Ext.18; seized the said nail clipping and scrapping under Ext.19; seized the wearing apparels of the deceased under Ext.7; re-examined the complainant; forwarded the accused persons to the court; received the Post-Mortem Report and made query to the doctor relating to the probable cause of death by the weapon of offence. On 15.05.2007 the I.O. dispatched the seized incriminating articles to the SFSL, Bhubaneswar through the SDJM, Boudh and obtained the Chemical Examination Report under Ext.21; seized the photograph under Ext.22; arrested the accused Maniratha on 16.06.2007 and forwarded him to the court on 29.06.2007; received the Injury Report in respect of Chandra Guru under Ext.23 and on completion of the investigation, submitted the Charge-Sheet.

4. The case of the defence is one of complete denial and false implication. The further case of the accused Chandra Guru is that on the day of Falguna Purnima, the deceased in an inebriated condition came to their house and shouted at them. Since the deceased happened to be their elder brother, they did not react to his activities. On the next day, on the occasion of Holi festival, the deceased once again came to their house being drunk and demanded Rs.500/- (Rupees five hundred). As the Appellants refused, the deceased dealt a blow to Chandra Guru by means of the butt of the gun held by him, with which Chandra sustained bleeding injury on his head and fell down being senseless. After he regained his senses, he went to the police station to lodge F.I.R. As far as the co-accused Jarasingh Guru is concerned, he feigned his ignorance except to the effect that on the day of Falguna Purnima, on the festival of Holi the deceased had been to their house and entered into quarrel. He, however, could not say what happened thereafter, since he fell asleep in his house.

5. To prove the culpability of the accused persons, the prosecution examined 10 witnesses in all. The prosecution also proved 25 documents under Exts.1 to 25 and 6 Material Objects under M.O.-I to M.O.-VI. The defence on the other hand examined 3 witnesses, but did not adduce any documentary evidence.

6. P.W.1 is the Informant who deposed on oath akin to the narration made in the F.I.R. to the effect that on 04.03.2007, on the day of Holi festival at about 4:00 PM when he returned from Gadtiamunda tank after taking bath, his sister-in-law Rajani Naik intimated him that when his brother Nila Naik had been to the house of the accused Chandra Guru and demanded Rs.500/- which he had paid on credit, there was exchange of hot words between Chandra Guru and his brother Nila Naik and thereafter all the three accused persons who are the brothers, namely Chandra Guru, Jarasingh Guru, the full blooded brother and Maniratha who is the cousin father's brother chased him, accused Chandra dealt a lathi blow on the belly of Nila Naik (deceased), whereupon Nila Naik fell down, Maniratha handed over a tangia (axe) to Jarasingh who repeatedly dealt blows by means of that tangia on the neck of Nila Naik, beheading him and thereafter he went to the spot and found the head of his brother Nila was severed from his body and lying drenched with blood. He lodged the report with the police under Ext.1.

7. After lodging of the report, the police visited the spot. Since it was already night, the police could not hold inquest over the dead body of the deceased and therefore deputed the Constable to guard the site. On the next day at about 8:30 AM the police again visited the spot, held inquest over the severed portion of the body and head separately and jointly and took snaps of photographs. He also stated to be a witness to the inquest under Exts. 2, 3 & 4 and proved his signature under Ext.2/1, 3/1 & 4/1 respectively. In course of the cross-examination, he stated that Ananda and Bhetikhai are his maternal uncle. Chandra and Jarasingh are sons of Ananda and Maniratha is the son of Bhetikhai. He further admitted that Maniratha is youngest of the four sons of Bhetikhai and had married about 4 to 5 years prior to the incident,

and after marriage Maniratha is living at Sahajpal in his in-law's place as illatum-son. He also stated that they are six brothers including the deceased and Nila Naik had two wives. Rajani is the second wife of Nila. He also replied that his deceased brother Nila was in defence service for about 20 to 24 years and had returned to the village about 8 to 10 years back and was staying in village Baidyanathpur. He denied the suggestion of the defence to the effect that his brother Nila has got two guns, one is having license and another is without license. He admitted that prior to the incident there was no hostile attitude between his deceased brother Nila and the Appellants. He too admitted that as per their customary practice they used to take country-made liquor. According to the witnesses, the place of incident is about 100 meters from his house and the incident was narrated to him by his sister-in-law in their house. According to the witness, while he visited the spot, 10 to 12 persons were present there including Ranka Behera, Bhima Behera and Balabhadra Behera. As per the narration of his sister-in-law, he scribed the report and admitted that he did not mention the name of Maniratha either in the F.I.R. or in his statement before the police to the effect that Maniratha was also present at the time of incident.

8. P.W.2 - Rajani Naik is the wife of the deceased Nila. In her evidence on oath she stated that the deceased is her husband. About 10 months back on the day of Holi festival, after taking his lunch, her husband at about 4:30 PM went to the house of Chandra to demand the sum of Rs.500/- (Rupees five hundred) which her husband had given on credit to the Appellants. After some time, on hearing the hot exchange of words, when she went there she saw all the Appellants along with Maniratha were chasing her husband and then on the field of Raju Panda, Chandra dealt a blow with lathi on the belly of her husband whereupon Maniratha handed over one axe to the Appellant Jarasingh who dealt repeated blows with the axe on the neck of her husband severing his head from body. All through the incident, she was crying for help. On hearing her cry, Bhadra, Srikanta, Ranka, Bhima and Mana came there. Seeing them, all the accused persons left the lathi at the spot and fled away with axe towards Baunsuni. The witness also stated that she can identify the axe with which the accused persons dealt blow to her husband and also can identify the same as M.O.-I.

9. During her cross-examination, she denied any ill-feeling was between her husband and the accused persons. On the contrary, she stated that the accused persons were under intoxication, for which, on demand of money by her husband, the incident took place and she was present at a little distance from the site of the incident, which was about 8 to 10 feet. She also stated that, on hearing the outcry raised by her husband, she along with her son went there. She denied the suggestion of the defence to the effect that her husband being in the state of intoxication, went to the house of Chandra and demanded Rs.500/- (Rupees Five Hundred) as Holi expenses, and when the accused refused, her husband dealt blows with butt of gun and that Chandra sustained bleeding injury and fell down senseless and then on the

arrival of Jarasingh there were quarrel between her husband and Jarasingh, and Jarasingh threatened to kill him and during the said tussle her husband sustained injuries and succumbed to death.

10. P.W.3 - Srikanta Naik, a co-villager, in his evidence on oath stated that the deceased Nila Naik is his father's elder brother. About 9 months back on the day of Holi festival, after playing Holi and taking meals, when he came out, he heard hulla. By that time Rajani Naik (the elder father's wife) was also present behind him. On hearing that hulla, he and Rajani rushed there and saw that the accused persons namely Jara, Chandra and Maniratha were chasing Nilamani with Lathi and tangia in their hands. All of a sudden when Nilamani turned back, Chandra dealt a lathi blow on his belly, and as he fell down, Mani handed over a taniga to Jara who exhorted blows to kill Nila. Jara dealt 3 to 4 blows on the neck of Nilamani, as a result the head of Nilamani got severed from his body, with which he raised outcry. According to the witness, the accused persons leaving the lathi at the spot fled away with the tangia towards Baunsuni.

11. In course of the cross-examination P.W.3 replied that when he saw the incident, the accused persons were chasing Nilamani from their house and while running away, Nilamani stumbled down. He further replied that it might be the fact that while chasing the deceased he turned back with a hope of getting courage seeing them at the sight. Accused Jara dealt 3 to 4 blows with Taniga on Nilamani at his neck. All the said Tangia blows were dealt after he fell down on the ground.

12. P.W.4 is also a co-villager, who simply stated that in connection with the case the police came to his village and in his presence seized the blood stained earth and sample earth from the spot and one lathi lying at the spot and prepared the Seizure List wherein he put his L.T.I. He also identified the lathi under M.O.-II. This witness was declared hostile. During the course of cross-examination, this witness stated that the tangia was brought out from the deep water. At that time the co-villagers, namely Pratap Naik, Jaya Naik and others of his village as well as the villagers of the village Tikarpada were also present. The lathi brought out from the water was seized by the police at the spot where the blood stained sample earth were seized in front of the house of the accused.

13. P.W.5 is an official witness to the seizure. P.W.6 too is a witness to the seizure being the Constable.

14. P.W.7 - Balabhadra Naik is another eye-witness to the occurrence. He stated on oath that on the last Holi festival between 3:30 to 4:00 PM, while he was in the village street, heard some hulla from the land of Raju Panda, which is about 30 to 40 cubits away from the place where he was present. Chandra, Jarasing and Maniratha while were chasing Nila Naik, Chandra dealt a lathi blow to his stomach, as a result Nila fell down. He further stated that Maniratha with an intention to kill Nila handed over a tangia to Jara, who then dealt 3 to 4 blows by means of tangia on

the neck of Nila thereby severing the head from his body in spite of his protest all through the incident. Then Chandra leaving the lathi with which he had assaulted Nila at the spot, fled away with the tangia. Nothing material could be elicited from the witness during his cross-examination except that the witness replied he cannot say any injury on the accused person at the time of attack on Nila. He so denied his knowledge if the accused Chandra on the same day sustained head injury and was hospitalized for the same.

15. P.W.8 is the photographer. P.W.9 is the Assistant Surgeon who conducted the autopsy over the dead body of the deceased. P.W.10 is the Investigating Officer.

16. Dr. Lily Begum is the doctor who deposed on oath that on 05.03.2007 he was the Asst. Surgeon in the Dist. Headquarters Hospital, Boudh. On that day on police requisition, he conducted Post Mortem examination on the dead body of Nila Naik, son of Madan Naik of Baidyanathpur, under Baunsuni PS. in connection with Baunsuni PS Case No.22 of 4.3.2007 being identified by Constable No. 111 - Sri P. N. Majhi, Constable No. 130 - Sri K. S. Pradhan and Home Guard Manu Naik of Baunsuni PS at 1.30 PM and found as follows:

> **EXTERNAL APPEARANCE**
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> Decapitated dead body of a male of 48 years of age was brought for PM examination. There was rigor mortis present in all four limbs.
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> **INJURIES:**
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> Abrasion on the left side of the abdomen of size 4 cm x 1/4 cm. The head was completely separated from the trunk. The neck muscles were found cut. The neck vessels like internal carotid jugular veins of both sides were found cut in two pieces. Blood clots were found on trachea (wind pipe- food pipe) were found cut in two pieces. The vertebrate was found cut at C/4 level with laceration of vertebral artery. The skin over and around the neck was found cut. The margins were sharp and inverted. All the other vital organs were intact.
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> **OPINION**
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> Cause of death was due to decapitation of head from the trunk leading to profuse bleeding and shock which is ante-mortem in nature. The time since death was around 20 hours at the time of PM Examination. She proved the Post Mortem Examination Report vide Ext.12 and her signature on the same vide Ext. 12/1.

It is further stated by the doctor that on 26.04.07 she received a requisition regarding the probable cause of the injuries by the weapons seized in the case, which were produced before her by the O.I.C, Baunsuni PS in connection with Baunsuni PS Case No.22 dt. 4.3.2007, and on examination of the weapons of offence, i.e. one Tangia and a wooden Lathi in connection with her P.M. Report, she opined that the said injuries on the deceased could have been caused by such weapons of offence. She proved the opinion vide Ext. 13 and her signature vide Ext. 13/1 on the said report. The doctor also identified M.O.-I already marked to be the said Tangia and M.O.-II is that Lathi, she had examined as produced before her for her opinion.

17. Three witnesses were examined on behalf of the Defence, who stated with regard to the fact that, after his marriage, the accused Maniratha Guru to have resided in his in-laws' house at Sahajpal as illatum son-in-law and blessed with two children. D.W.1 is the wife of Maniratha. She deposed that the deceased Nila being the cousin brother of her husband was elder to him. Nila had two wives, namely Shubhra and Rajani. Police arrested her husband from her parental house at Sahajpal. Prior to the marriage, her husband was staying at Baidyanathpur along with her father-in-law and earning their livelihood from cultivation and bamboo crafts. According to the witnesses, at times he used to visit Baidyanathpur to see his father. She denied the suggestion of the prosecution to the effect that during festive occasion her husband used to visit Baidyanathpur. She denied any enmity with Balabhadra Naik, Rajani Naik, Srikanta Naik, Pradhan Naik, etc. She denied the suggestion of the prosecution that in the year 2007 on the day of Holi festival her husband was present in village Baidyanathpur and he along with other two accused persons namely Chandra and Jara chased the deceased Nila and that he was holding one tangia which he handed over to Jarasingh to exhort blows on Nila to kill him.

18. D.W.2 also knows the place of residence of the accused Maniratha and stated that he usually resides in village Sahajpal in the house of his father-in-law as a domesticated son-in-law.

19. D.W.3 too stated on the same manner as that of P.Ws.1 & 2 regarding the place of stay of Maniratha and denied the suggestion of the prosecution that he had visited Baidyanathpur on the day of Holi festival.

20. The learned trial court believing the evidence of the eye-witness account, namely P.Ws 2, 3 & 7 and the post-occurrence witness P.W.1 coupled with the medical evidence adduced through P.W.9, found the prosecution case to be cogent and beyond reproach.The learned trial court also found that Nila Naik was murdered by means of sharp cutting weapon for the decapitation of the body from the head, which is homicidal in nature. The learned court also held that the versions of eye-witness are consistent and coherent to each other. It also held the presence of the witnesses at the scene of occurrence being credible found their evidence unimpeachable and further, the opinion of the doctor to the effect that the death to have occurred by the blows being exhorted on the neck of the deceased, by which the neck got completely severed from the body, conclusive to hold the death to be homicidal in nature. The court further held that the evidence as to the recovery of weapon of offence at the instance of the accused Jarasingh being contemporaneous to the statement recorded in that behalf under Section 27 of the Evidence Act, well proves the recovery and the opinion of the doctor that the injuries could be out of the said weapon of offence coupled with the evidence discussed herein before cumulatively establishes the accused Chandra Guru and Jarasingh Guru to be the author of the murder, held the evidence insufficient as to the presence of the accused Maniratha and doubtful and holding Chandra Guru and Jarasingh Guru guilty of the

offence under Section 302/34 of IPC extended the benefit of doubt to Maniratha and acquitted him there under and sentenced Chandra Guru and Jarasingh Guru in the offence under Section 302/34 of IPC and sentenced them as stated above.

21. It is submitted by learned counsel for the Appellants that the finding of the learned court below showing nexus between crime and the criminal has not been proved. This is because the earlier statement of the witnesses recorded under Section 161 CrPC being discrepant to the substantive evidence forthcoming from the witnesses, raises an eyebrow to the prosecution case. He further argued that the deceased being aggressor in the incident, who entered quarrel with the accused Chandra Guru and Jarasingh demanding money to be spent on the occasion of Holi and on being refused, assaulted Chandra Guru by which the Appellant sustained bleeding injury to his head and became senseless and to that effect Chandra Guru lodged report well probabilises a case of sudden provocation and the incident to be an outcome of heat of passion. The learned counsel also argued that the evidence to the effect that the Appellant Chandra Guru chased the deceased and dealt lathi blow is far from truth and is an afterthought. According to the learned counsel for the Appellants, even for the sake of argument if it is accepted for a moment that Chandra Guru chased the deceased and dealt a lathi blow, the injury caused to him by the deceased by means of the butt of the gun carried by him might be an act just to dissuade the deceased from continuing the quarrel but cannot be said to have had any intention whatsoever in the murder of the deceased. The statement made by the witnesses nowhere reveals the accused Chandra Guru to have shared intention with Jarasingh Guru either in exhorting blow or helping him in any manner at the time Nila was being assaulted. The act alleged against the Appellants, as forthcoming from the evidence, leads only to the conclusion that in retaliation to the injury caused to him, the accused chased to see him away and not beyond it. Consequently, the findings recorded by the learned trial court as to the murder to have taken place in furtherance of the common intention allegedly shared by accused Chandra Guru with Jarasingh, cannot be sustained in the eye of law. He also submitted that the evidence with regard to the disclosure statement and the recovery of weapon of offence pursuant to such disclosure has not been proved to its hilt and it cannot be said that the accused pursuant to his disclosure statement gave recovery of the weapon of offence and further the version of the witnesses being contradictory to each other, their presence at the scene of occurrence cannot be believed and in absence of any other circumstance, the findings recorded by the learned trial court holding the accused persons to have authored the death of the deceased, cannot sustain in the eyes of law and judgment is necessarily to be set aside.

22. Learned Additional Standing Counsel on the contrary held the impugned judgment to be absolutely correct and legal in all respect. Elaborating his submission, Mr. Mishra, learned Additional Standing Counsel submitted that the evidence of the eye-witness account is consistent not only to the effect that the accused shared the common intention in causing the death of the deceased by

exhorting blows by means of tangia with decapitation but also the fact that the circumstances establishing the fact that the accused persons chased the deceased on the blow being exhorted by Appellant No.1 Chandra Guru by means of lathi, that the deceased fell down where upon the Appellant No.2 - Jarasingh Guru gave blows on his neck severing the head from the body causing instantaneous death proved beyond any reasonable doubt and the evidence led by the witnesses being credible and the testimonies being not shaken in any manner, the same stands the test of a robust quality to inspire confidence to have implicit reliance on it. According to the learned counsel, the disclosure statement which has consistently been proved through the witnesses and documents coupled with the production of the weapon of offence well identified by the doctor overwhelmingly proves the case of the prosecution to deduce the Appellants to be its author and the ghastly murder squarely makes them liable for the punishment awarded by the trial court and requires no interference.

23. Admittedly, the case of the prosecution is based on direct evidence of the eye witness account besides the circumstance with regard to the discovery of the weapon of offence pursuant to the disclosure statement made by Appellant No.2 - Jarasingh Guru who led the police along with the witnesses to the place of concealment and gave recovery of the weapon of offence.

24. The first and foremost point that needs evaluation is the findings of the learned court as to the nature of death. In this regard, of course the evidence of the Doctor (P.W.9) who categorically opined the death of the deceased to be out of injuries caused to the deceased due to decapitation, goes unchallenged and any person with little prudence would also come to the conclusion that the decapitation would under no circumstances possible without a human interference when the case of neither party that the deceased had been to such place where there is chance of being attacked by any other source other than human. The evidence of the witnesses, viz. P.Ws. 2, 3 & 7 coupled with the immediate cause of the death enumerated in the Inquest Report proved under Exhibit vouchsafe the above reasoning and well establishes the death of the deceased to be one of homicidal in nature and we are of the humble view that the learned trial court has correctly assessed the same.

25. Next point that requires evaluation is whether the death of the decease is one within the ambit of section 300 IPC to adjudge the same as “murder” as held by the learned court below. Learned counsel for the Appellants, as discussed above, contended that the death is not “murder” but culpable homicide not amounting to murder and, as such, the conviction of the Appellants under Section 302 IPC is not sustainable in the eye of law.

26. As discussed above, the three eye-witnesses, viz. P.Ws. 2, 3 & 7 have clearly and unambiguously narrated the manner in which the Appellants caused assault on the deceased. The intensity and the gravity with which the blow exhorted on the deceased by use of heavy weapon like “taniga” severing the head from the

body, leaves no room to believe that the assailant had a very clear intention to do away with the life of the deceased instantaneously. The Doctor (P.W.9) in his evidence described the nature of injuries sustained is ghastly and fatal for being decapitated. The incisive cross-examination faced by the eye witnesses and the doctor from the side of the defence in respect to the manner of assault, intention in exhorting the assault and above all the circumstances enabling the witnesses to be at the scene of occurrence corroborating the prosecution case in minute detail could not be demolished in any manner. Rather the reply of the witnesses during cross examination reinforced their statements made on oath, which is so consistent and coherent that the credibility and worthiness of the witnesses cannot be questioned. The evidence brought by the prosecution to the effect that the deceased having entered hot exchange of words with Chandra Guru while was returning to his home had to bite the dust in the paddy filed of Raju Panda on being attacked by the Appellants, might be on a trivial issue but the motive appears to be clear that in retaliation to the demand of the deceased for the sum of Rs.500/- (Rupees five hundred) that the assailants got enraged and in order to wreak their vengeance decided to see him dead by any means. In all probabilities, the ocular version of the witnesses coupled with the medical evidence which firmly opined the death to be one of homicidal in nature resulting from decapitation, found conclusive to the fact that the Appellants had absolute intention and knowledge that the deceased would have no escape but to have the death instantaneously. On the face of such prolific evidence there is no evidence whatsoever to deduce anything contrary that the act of assault is the result of a sudden provocation and the amount of cruelty shown in the assault is so ghastly that it cannot be termed under any stretch of imagination to be an assault under heat of passion. The death of the deceased is, therefore, a "murder" within the meaning of Section 300 IPC as correctly held by the learned court below.

27. The next submission of the learned counsel for the Appellant is that, Chandra Guru - Appellant No. 1 has not shared intention with Appellant No.2 - Jarasingh Guru and, as such, is not liable for the death of the deceased. We are anxious to deal with this issue too to ascertain if the learned court below has reached a just decision.

28. In the matter of ***Birendra Das v. State of Assam reported in 2014(2) Supreme 585*** the Apex Court held that the essence of Section 34 IPC is simultaneous consensus of mind of persons participating in the criminal action to achieve a particular result. Further in the matter of ***State of Maharashtra vs. Jagmohan Singh Kuldip Anand reported in 2004 SCC (cri) 2003*** the Apex Court held that, for establishing "common intention" in every case, it is not required for the prosecution to prove pre-arranged plot or prior concert.

29. In ***Shishpal @*** **Shishu Vs. State (NCT of Delhi) [Criminal Appeal No. 1053 of 2015] and Roshan Vs. State (NCT of Delhi) [Criminal Appeal No. 81 of 2018]** the Apex Court referring to the case in the matter of ***Jasdeep Singh alias***

Jassu v. State of Punjab, (2022) 2 SCC 545 considered the scope of Section 34 IPC as follows:

> "17. We shall first go back into the history to understand Section 34 IPC as it stood at the inception and as it exists now.
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> | Old Section 34 IPC | New Section 34 IPC |
> |---|---|
> | "34. Each of several persons liable for an act done by all, in like manner as if done by him alone.-When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act were done by him alone" | "34. Acts done by several persons in furtherance of common intention.-When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." |
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> 18. On a comparison, one could decipher that the phrase "in furtherance of the common intention" was added into the statute book subsequently. It was first coined by Barnes Peacock, C.J. presiding over a Bench of the Calcutta High Court, while delivering its decision in R. v. Gorachand Gope [R. v. Gorachand Gope, 1866 SCC OnLine Cal 16] which would have probably inspired and hastened the amendment to Section 34 IPC, made in 1870. The following passage may lend credence to the aforesaid possible view : (SCC OnLine Cal) "It does not follow that, because they were present with the intention of taking him away, that they assisted by their presence in the beating of him to such an extent as to cause death.
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> If the object and design of those who seized Amordi was merely to take him to the thannah on a charge of theft, and it was no part of the common design to beat him, they would not all be liable for the consequence of the beating merely because they were present. It is laid down that, when several persons are in company together engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention.
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> It is also said, although a man is present when a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it or to apprehend the felon. But if several persons go out together for the purpose of apprehending a man and taking him to the thannah on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, it appears to me that those who have to deal with the facts might very properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design. I do not know what the evidence was, all that I wish to point out is, that all who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals."
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> 19. Before we deal further with Section 34 IPC, a peep at Section 33 IPC may give a better understanding. Section 33 IPC brings into its fold a series of acts as that of a single one. Therefore, in order to attract Sections 34 to 39 IPC, a series of acts done by several persons would be related to a single act which constitutes a criminal offence. A

similar meaning is also given to the word "omission", meaning thereby, a series of omissions would also mean a single omission. This provision would thus make it clear that an act would mean and include other acts along with it.

20. Section 34 IPC creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one, into others, in pursuance to a common intention. Onus is on the prosecution to prove the common intention to the satisfaction of the court. The quality of evidence will have to be substantial, concrete, definite and clear. When a part of evidence produced by the prosecution to bring the accused within the fold of Section 34 IPC is disbelieved, the remaining part will have to be examined with adequate care and caution, as we are dealing with a case of vicarious liability fastened on the accused by treating him on a par with the one who actually committed the offence.

21. What is required is the proof of common intention. Thus, there may be an offence without common intention, in which case Section 34 IPC does not get attracted.

22. It is a team effort akin to a game of football involving several positions manned by many, such as defender, mid-fielder, striker, and a keeper. A striker may hit the target, while a keeper may stop an attack. The consequence of the match, either a win or a loss, is borne by all the players, though they may have their distinct roles. A goal scored or saved may be the final act, but the result is what matters. As against the specific individuals who had impacted more, the result is shared between the players. The same logic is the foundation of Section 34 IPC which creates shared liability on those who shared the common intention to commit the crime.

23. The intendment of Section 34 IPC is to remove the difficulties in distinguishing the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention qua its existence is a question of fact and also requires an act "in furtherance of the said intention". One need not search for a concrete evidence, as it is for the court to come to a conclusion on a cumulative assessment. It is only a rule of evidence and thus does not create any substantive offence.

24. Normally, in an offence committed physically, the presence of an accused charged under Section 34 IPC is required, especially in a case where the act attributed to the accused is one of instigation/exhortation. However, there are exceptions, in particular, when an offence consists of diverse acts done at different times and places. Therefore, it has to be seen on a case-to-case basis.

25. The word "furtherance" indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion.

26. There may be cases where all acts, in general, would not come under the purview of Section 34 IPC, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention it has to be one of criminality with adequacy of knowledge of any existing fact necessary for the proposed offence. Such an intention is meant to assist, encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid.

27. The existence of common intention is obviously the duty of the prosecution to prove. However, a court has to analyse and assess the evidence before implicating a person under Section 34 IPC. A mere common intention per se may not attract Section

> 34 IPC, sans an action in furtherance. There may also be cases where a person despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later. Of course, this is also one of the facts for the consideration of the court. Further, the fact that all accused charged with an offence read with Section 34 IPC are present at the commission of the crime, without dissuading themselves or others might well be a relevant circumstance, provided a prior common intention is duly proved. Once again, this is an aspect which is required to be looked into by the court on the evidence placed before it. It may not be required on the part of the defence to specifically raise such a plea in a case where adequate evidence is available before the court."

30. Taking a cue from the principles discussed above, when the case in hand is examined, it emerges that in his evidence, P.W.10, the I.O. has stated that Appellant No.1 - Chandra Guru received injury and he had sent requisition to that effect for his treatment and also obtained injury report under Ext.23, but the investigation was not directed to explain the cause of the injury, although the evidence is forthcoming that the deceased having proceeded to the house of Chandra Guru, entered into quarrel with him demanding a sum of Rs.500/- (rupees five hundred). The requisition sent by the I.O. under Ext.18 however proves the injury sustained by Appellant No.1 was on 04.03.2007 at 4.30 P.M. During cross-examination also the I.O. (P.W.10) reiterated that Appellant No.1 - Chandra Guru sustained injuries due to pelting of stone by the deceased and he had sent requisition for his treatment.

31. It is the further case of the prosecution that Appellant No.1 Chandra Guru chased the deceased and dealt a lathi blow to his belly, whereupon he fell down. There is absolutely nothing in the evidence to bring about a nexus between the blows exhorted by Chandra Guru and the death caused to the deceased, which is proved to be out of the assault by means heavy weapon like tangia. Considering the evidence of the I.O, there is clear absence of evidence with regard to the time by which Chandra Guru sustained injury, got his treatment in the hospital and the chase made on the deceased by him. Accepting the evidence of the prosecution witnesses that Appellant No.1 - Chandra Guru chased the deceased and dealt a lathi blow, nothing can be inferred that he had an intention to cause the death of the deceased. Even otherwise, there is no specific evidence from any source that Appellant No.1 – Chandra Guru was present at the scene of occurrence when the Appellant No.2 was assaulting the deceased. The stray sentence in the evidence of P.W.7 that after the assault, Appellant No.1 - Chandra Guru left the place with tangia stands not corroborated by the evidence of other witnesses, and further on the face of the evidence of the prosecution that Appellant No.2 gave recovery of the tangia pursuant to his disclosure statement makes such statement of P.W.7 not acceptable. In the background facts as emerged in the evidence, the overt act of Appellant No.1 could at best be taken that he chased the deceased to see that the deceased does not take further attempt to injure him in any manner. This is because neither Appellant No.1 Chandra Guru nor Appellant No.2 was armed with any other weapon while the witnesses stated to have seen them chasing. The assault proved to have been made

by Appellant No.2 at the spot is absolutely an act solely attributable to him alone and there is nothing to ascribe a liability of sharing intention by Appellant No.1 with that of Appellant No.2 to fasten him in the murder of the deceased. In essence, the act of assault by which the death occurred to the deceased, cannot be attributed to Appellant No.1 on the ground that he shared the intention with Jarasingh Guru. We are, therefore, of the humble view that Appellant No.1 having not shared common intention with Appellant No.2 in the murder of the deceased, cannot be held guilty under section 302 with aid of section 34 IPC.

32. The impugned judgment convicting the Appellant No.1 - Chandra Guru is accordingly set aside. He be set at liberty forthwith. His bail bond be cancelled.

33. We are, however, of the considered view that the prosecution has been able to prove its case beyond all reasonable doubt to hold the Appellant No.2 - Jarasing Guru to have assaulted the deceased intentionally to cause his death and the learned trial court has rightly held him guilty under Section 302 of the I.P.C. and sentenced him to undergo imprisonment for life and to pay a fine of Rs.10,000/-(Rupees ten thousand), in default, to undergo further period of R.I for two years. The impugned Judgment and order of conviction to this effect is confirmed.

34. In the result, the JCRLA is allowed in part.

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2023 (III) ILR-CUT-1088

S.K. SAHOO, J.

CRLREV NO. 625 OF 2022

K.RABINDRA KUMAR PATRA ….....Petitioner

-V-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 239 – Whether detailed evaluation of the materials or meticulous consideration of possible defense should be undertaken at the stage of consideration of the discharge petition? – Held, No – This is not the stage for weighing the pros and cons of all the implications of the materials presented by the prosecution – The exercise at the stage should be continued considering the police report and the documents, to decide whether the allegation against the accused are "groundless" or whether there is ground for presuming that the accused has committed the offence.

(Para 7)

For Petitioner : Mr. S.S.Rao, Sr. Adv.

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

ORDER Date of Hearing & Order : 01.12.2023

S.K. SAHOO, J.

This revision petition has been filed by the petitioner K. Rabindra Kumar Patra challenging the order dated 30.11.2022 passed by the learned Special Judge (Vigilance), Berhampur in G.R. Case No.06 of 2016(V) in rejecting the petition under section 239 Cr.P.C. filed by the petitioner for his discharge.

2. The prosecution case, as per the first information report lodged by Suresh Kumar Tripathy, the Inspector in-charge of Badabazar police station on 16.02.2016 before the Superintendent of Police, Vigilance, Berhampur, is that he received information regarding illegal manufacturing and hoarding of Gutkha at Phulasundari Sahi under Badabazar police station and Haladiapadar under Gosani Nuagaon police station by the petitioner, the proprietor of Maa Biraja Products and accordingly, he along with the police staff conducted raids in the godowns on 16.02.2016 and during raid, the police team detected huge quantities of Gutkha and Zarda Gutkha along with manufacturing machines in both the places. Some documents were produced by the petitioner relating to the storage and production of such materials. However, in order to ascertain the genuineness of the documents and available materials, the informant made arrangement for guarding both the godowns by deploying P.S. staff and directed the petitioner to produce the original documents in support of his business. It is the further prosecution case that at 2.00 p.m., while the informant was present in his office chamber situated at Badabazar police station premises, the petitioner came to his room and offered him bribe of Rs.2,00,000/- (rupees two lakhs) with a request to release the Gutkha and not to take any legal action either against him or his staff. The informant vehemently opposed to the same and warned the petitioner not to offer any bribe to him otherwise he would be constrained to take legal action against him (petitioner). In spite of repeated warning, the petitioner insisted the informant to receive the bribe money and thereafter, the petitioner left the place telling that he would come to the Badabazar police station at 10.00 p.m. to give bribe money. Apprehending that the petitioner would come again to the police station to offer bribe to him, the written report was presented before the Superintendent of Police, Vigilance, Berhampur by the informant and accordingly, the Superintendent of Police treated it as an F.I.R. and directed the O.I.C., Vigilance police station to register a case under section 12 of the Prevention of Corruption Act, 1988 (hereafter 'P.C. Act') and accordingly, the investigation of the case was handed over to one D.N. Das, Deputy Superintendent of Police, Vigilance, Berhampur.

During course of investigation, a trap team was formed and it is the prosecution case that the petitioner came to the Badabazar police station carrying a cotton bag in his hand and came to the chamber of the informant and requested the informant not to take any legal action either against him or his staff and offered Rs. 2,00,000/- (rupees two lakhs) to the informant. The informant denied receiving the

same for which the petitioner brought out four bundles of G.C. notes, having five hundred rupees denominations and kept the same on the office table of the informant and again requested the informant to help him. One Dayasagar Sahu, who was the overhearing witness, after hearing the conversation between the petitioner and the informant passed the prearranged signal to the trap party members and accordingly, the trap party members rushed to the chamber of the informant and they found four bundles of G.C. notes on the office table of the informant. After the trap was made successful, the investigation carried out and ultimately finding prima facie case against the petitioner that he was offering forcibly bribe amount of Rs.2,00,000/- (rupees two lakhs) to the Inspector in-charge of Badabazar police station, Berhampur, who is the informant in the case in order to release the Gutkha and not to take any legal action either against him or his staff, charge sheet was placed against him under section 12 of the P.C. Act.

3. The petitioner filed a petition under section 239 Cr.P.C. before the learned trial Court for discharge and it is stated in the discharge petition that the petitioner is a licensed dealer and holder of registration for dealers under the Value Added Tax under the name and style of M/s. Maa Biraja Products and he was dealing in manufacturing chewing tobacco, pan masala, mouth freshener and using the products such as betel nuts, lime, menthol, cardamom etc. and it is further stated that for the purpose of manufacturing and taking the products such as packing of pan masala, he was paying the excise duty. It is further stated that there was absolutely no reason as to why the petitioner would offer bribe to the informant a sum of Rs.2,00,000/- (rupees two lakhs) and there was no occasion for the petitioner to offer and pay the bribe as he needed no benefit from the I.I.C. and the story was created and concocted and the same is not to be accepted.

4. The learned trial Court vide impugned order dated 30.11.2022 has been pleased to hold that from the allegation levelled against the petitioner, there is strong suspicion of his involvement in the alleged crime and therefore, the Court rejected the petition being devoid of merit.

5. Mr. S.S. Rao, learned Senior Advocate appearing for the petitioner reiterated the averments taken in the 239 Cr.P.C. petition and submitted that there is absolutely no clinching evidence on record to substantiate the accusation levelled against the petitioner and to file charge sheet against him under section 12 of the P.C. Act and therefore, the learned trial Court has committed illegality in rejecting the petition filed under section 239 Cr.P.C.

6. Mr. Sangram Das, learned Standing Counsel for the Vigilance Department, on the other hand, submitted that the learned trial Court has rightly held that even on the basis of strong suspicion, the charge can be framed and when the materials are available on record, particularly, the statement of Dayasagar Sahu, the overhearing witness and the seizure of cash of Rs.2,00,000/- (rupees two lakhs) from the office table of the informant, it is apparent that the petitioner had tried to offer bribe to the

informant and therefore, prima facie the ingredients of the offences are made out and there is no illegality or impropriety of the impugned order and therefore, the revision petition is dismissed.

7. Section 239 Cr.P.C. deals with the discharge of an accused. It is stated that if, upon considering the police report and the documents sent with it under section 173 Cr.P.C. and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing.

Law is well settled that no detailed evaluation of the materials or meticulous consideration of possible defence need be undertaken at the stage of consideration of the discharge petition. The exercise of weighing the materials in golden scales is certainly to be avoided at the stage and it is to be postponed to a later date. 'Groundless' the word which is appearing under section 239 Cr.P.C. means without basis or foundation. Even very strong suspicion founded on materials before Magistrate is sufficient for framing of charge. Where there is a prima facie material to frame charge against the accused, charge cannot be said to be groundless and the accused cannot be discharged under section 239 Cr.P.C. This is not the stage for weighing the pros and cons of all the implications of the materials, not for sifting the materials presented by the prosecution. The exercise at the stage should be confined to considering the police report and the documents to decide whether the allegations against the accused are 'groundless' or whether there is ground for presuming that the accused has committed the offence.

After going through the materials available on record, particularly, the statement of the overhearing witness Dayasagar Sahu and the seizure of cash of Rs.2,00,000/- (rupees two lakhs), which is stated to have been produced by the petitioner before the informant, I am of the view that there is prima facie material on record against the petitioner for the commission of offence under section 12 of the P.C. Act. Therefore, the learned trial Court is quite justified in rejecting the petition under section 239 Cr.P.C.

In view of the foregoing discussions, the CRLREV being devoid of merits stands dismissed.

Before parting, I would like to place it on record by way of abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for discharge made by the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial Court at the appropriate stage of the trial. A copy of the order be communicated to the learned trial Court.

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2023 (III) ILR-CUT-1092

K.R. MOHAPATRA, J.

CMP NO. 804 OF 2023

CHINMAYA SAHU & ANR. ……....Petitioners

-V-

AMIT KUMAR SAHU ……....Opp.Party

CODE OF CIVIL PROCEDURE, 1908 – Order IX Rule 13 r/w Section 5 of Limitation Act – Plaintiff filed suit for eviction, mandatory and prohibitory injunction – Petitioner/defendant appeared in the suit through advocate but did not file the written statement, the defendant were set exparte – Petition filed U/o. IX Rule 13, without application for condonation of delay – The Learned Trial Court rejected the petition – Whether rejection petition is sustainable? – Held, Yes.

Case Law Relied on and Referred to :-

1. 2022 SCC OnLine Ori 576 : Himansu Sekhar Srichandan Vs. Sudhir Ranjan Patra (since dead) Jully Patra & Ors.

For Petitioners : Mr. Chitta Ranjan Nanda

For Opp.Party : Mr. Swarup Kumar Patnaik

JUDGMENT Heard & Disposed of :14.11.2023

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Judgment dated 11th May, 2023 (Annexure-4) passed by learned 1st Additional District & Sessions Judge, Baripada, Mayurbhanj in F.A.O. No.5 of 2023 is under challenge in this CMP, whereby dismissing the appeal, learned appellate Court confirmed the order dated 14th October, 2022 (Annexure-3) passed by learned Additional Senior Civil Judge, Baripada in C.M.A. No.10 of 2022 (arising out of C.S. No.535 of 2015) dismissing an application under Order IX Rule 13 CPC.

3. Mr. Nanda, learned counsel for the Petitioners submits that the Plaintiff-Opposite Party filed the suit for eviction, mandatory and prohibitory injunction. The Defendants-Petitioners though appeared in the suit through their learned Advocate, but did not file the written statement and contest the suit. Accordingly, they were set ex parte and subsequently, ex parte judgment was passed on 24th February, 2022. The Defendants-Petitioners could not know about the ex parte judgment passed against them, as learned Advocate appearing on their behalf did not intimate the same. When the Defendants-Petitioners came to know about the ex parte judgment passed in the suit, they filed an application in C.M.A. No.10 of 2022 on 26th April, 2022. Although there was a delay in filing the petition under Order IX Rule 13

CPC, but learned Advocate appearing for the Petitioners on a bona fide impression that the period of limitation will reckon from the date of knowledge of the ex parte judgment by the Defendants-Petitioners, did not file any application under Section 5 of the Limitation Act for condonation of delay. Objections were filed stating that petition for condonation of delay was not filed. Taking note of the objection, learned trial Court dismissed the petition under Order IX Rule 13 CPC vide judgment dated 14th October, 2022 under Annexure-3. The sole ground of rejection of the petition under Order IX Rule 13 CPC was that the petition under Order IX Rule 13 CPC was not accompanied with an application for condonation of delay. Learned appellate Court also dismissed the appeal vide judgment under Annexure-4 on the same ground. Hence, this CMP has been filed.

4. It is his submission that for the latches of the Advocate, the party should not suffer. He further submits that there was a meager delay in filing the petition under Order IX Rule 13 CPC. As such, learned Courts below should not have adopted hyper technicality in rejecting the petition under Order IX Rule 13 CPC. The Defendants-Petitioners should have been given an opportunity to file an application under Section 5 of the Limitation Act for condonation of delay in filing the petition under Order IX Rule 13 CPC. This aspect was not taken into consideration by either of the Courts. He, therefore, prays for setting aside the impugned orders under Annexures-3 and 4 and to set aside the ex parte decree permitting the Petitioners to contest the suit.

5. Mr. Patnaik, learned counsel for the Opposite Party by filing a date chart submits that summons were issued to the Defendants on 14th October, 2015. They entered appearance on 18th February, 2016. Although they sought for adjournment to file written statement, but for the reasons best known, no written statement was filed by the Defendants. As such, vide order dated 22nd June, 2016, the Defendants were precluded from filing the written statement. The Defendants were set ex parte vide order dated 3rd April, 2019 and ex parte evidence was recorded. Argument of the suit was closed on 22nd February, 2022 and on 24th February, 2022, ex parte judgment was pronounced in the suit. Decree was drawn up on 10th March, 2022. In their application under Order IX Rule 13 CPC, which was filed on 26th April, 2022, the Defendants asserted that they came to know about the ex parte judgment and decree on 5th April, 2022. Thus, the application under Order IX Rule 13 CPC was filed without an application for condonation of delay.

6. Mr. Patnaik, learned counsel further submits that since the petition under Order IX Rule 13 CPC was filed beyond the statutory period of thirty days, as provided under Article 123 of the Limitation Act, the petition should have accompanied with the petition for condonation of delay. In absence of any application for condonation of delay, learned Courts have committed no error in rejecting the petition under Order IX Rule 13 CPC, as it could not have been entertained beyond the statutory period without condoning the delay. In support of

his case, Mr. Patnaik, learned counsel for the Opposite Party relied upon the decision in the case of ***Himansu Sekhar Srichandan –v- Sudhir Ranjan Patra (since dead) Jully Patra and others,*** *reported in* ***2022 SCC OnLine Ori 576***, wherein at Paragraph-8, it is stated as under:

> *"8. Before delving into the rival contentions of the parties, it is to be kept in mind that Order IX CPC deals with appearance of parties and consequences of their non-appearance in the suit. Rule 13 of Order IX CPC deals with setting aside the decree passed ex parte. It provides that if the Court is satisfied that either the summons was not duly served on the Defendant or that the Defendant was prevented by sufficient cause from appearing in the Court when the suit was called on for hearing, the Court shall make an order for setting aside the decree as against him on such terms as to cost as it thinks fit. Thus, it essentially provides two contingencies under which an ex parte decree can be set aside. The first contingency is when the summons is not duly served on the Defendant. The second one is, if summon is duly served, then the Defendant has to show sufficient cause to the satisfaction of the Court for his nonappearance on the date when the suit was called on for hearing. In the instant case, the situation falls under second category. Admittedly, the Defendant Nos.2 and 3 were duly served with the summons; they appeared through learned counsel and sought for adjournment on several occasions to file written statement. They were admittedly set ex parte on 4th July, 2017 on which date the suit was called on for hearing. Although learned counsel for Defendant Nos.2 and 3 subsequently filed petitions for adjournment dated 7th July, 2017 and 15th July, 2017, but no prayer to set aside the ex parte order was made nor the written statement was filed on their behalf. Admittedly, the ex parte judgment was pronounced on 19th July, 2017 and the decree was drawn up on 24th July, 2017 and was sealed and signed on 27th July, 2017. Article 123 of the Limitation Act provides that when summons were duly served on the Defendants, the limitation for filing of petition under Order IX Rule 13 CPC commences from the date of passing of the ex parte decree. The period of limitation for filing of such application, as provided under Article 123 of the Limitation Act, is thirty days. Admittedly, the petition under Order IX Rule 13 CPC was filed on 13th March, 2018 along with a petition under Section 5 of the Limitation Act. Materials available on record reveal that Defendant Nos.2 and 3 have made an endeavour to explain the delay in filing the petition under Order IX Rule 13 CPC stating that on 4th January, 2018 they came to know about the ex parte decree from their learned Advocate and thereafter from the Advocate's Clerk. Immediately thereafter, steps were taken to obtain certified copy of the judgment and decree, and after obtaining the same on 17th February, 2018, the petition for setting aside ex parte decree was filed, within thirty days, i.e., 13th March, 2018."*

It is his submission that no prayer was also made at any point of time for condonation of delay. Hence, the CMP does not merit consideration and should be dismissed.

7. Considering the submissions made by learned counsel for the parties and on perusal of the record, it is apparent that the ex parte judgment was passed on 24th February, 2022 and the decree was drawn up on 10th March, 2022. The application for setting aside the ex parte decree was filed on 26th April, 2022. As such, the petition under Order IX Rule 13 CPC in C.M.A. No.10 of 2022 was filed beyond the

statutory period. Thus, it should have accompanied with an application for condonation of delay.

8. It is submitted by Mr. Nanda, learned counsel for the Petitioners that learned Advocate was under a bona fide impression that the period of limitation would commence from the date of knowledge. Since the ex parte judgment and decree came to the knowledge of the Defendants-Petitioners on 5th April, 2022, the application under Order IX Rule 13 CPC was filed without accompanying an application for condonation of delay. He also relied upon the decision in the case of ***Albert Morris -v- J.B. Simons,*** reported in 2017 (I) CLR (SC) 1047.

9. The contention raised by Mr. Nanda, learned counsel for the Petitioners cannot be accepted, as learned Advocate appearing for the Defendants had ample opportunity either to file an application for condonation of delay or to make an oral prayer in that regard. Although specific objection was raised with regard to the limitation, the Defendants did not take care to make a prayer for condonation of delay. Admittedly, the summons were duly served on the Defendants and they had entered appearance.

10. Vide order dated 22nd June, 2016, they were precluded from filing the written statement. But, they were allowed to participate in the proceeding of the suit. Accepting the same, the Defendants participated in the suit. But, for the reasons best known they did not appear subsequently when the matter was called for hearing. Hence, they were set ex parte on 3rd April, 2019 and hearing of the suit proceeded. From the conduct of the Defendants, it appears that they were thoroughly negligent in asserting their right, if any, in the suit. Only by alleging that they should not suffer for the latches of the Advocate is not sufficient to take away the valuable right accrued in the favour of the Plaintiff by the judgment and decree. In the instant case, the Defendants-Petitioners have not made out any ground to interfere with the impugned orders under Annexures-3 and 4.

11. Accordingly, the CMP being devoid of any merit stands dismissed.

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2023 (III) ILR-CUT-1095

K. R. MOHAPATRA, J.

CMP NO. 861 OF 2023

SATYANARAYAN AGARWAL .....Petitioner

-V-

S.VIJAYA LAXMI .....Opp.Party

CODE OF CIVIL PROCEDURE, 1908 – Order VI Rule 17 – Whether Order VI Rule 17 is applicable to execution proceeding ? – Held, Yes – Reason explained with reference to case laws.

Case Laws Relied on and Referred to :-

1. 1971 SCC Online AP 104 (AIR 1972 AP 134) : Bhoganadham Seshaiah Vs. Bhddhi Veerabhadrayya & Ors.
2. (2004) 12 S.C.C. 469 : Akkayanaicker Vs. A.A.A. Kotchadainaidu & Anr.
3. 2019 (II) ILR-Cuttack-519 : M/s. Bharat Motors, Cantonment road & Ors. Vs. Savitri @ Savitri Devi Bhawsinka & Ors.

For Petitioner : Mr. Soumya Mishra
For Opp. Party : --

ORDER Date of Order :14.11.2023

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 13th July, 2023 (Annexure-6) passed by learned Civil Judge (Junior Division), Bargarh in Execution Case No.02 of 2010 is under challenge in this CMP, whereby an application filed by the Opposite Party-DHr. under Order VI Rule 17 CPC for amendment of the execution petition, has been allowed.

3. Shorn of unnecessary details, TS No.25 of 2001 was filed by the Opposite Party-DHr. for eviction of Defendant No.1 and for recovery of arrear rent. The suit was allowed vide judgment dated 18th April, 2007 (Annexure-1) with the following order:

> *"The suit of the Plaintiff is decreed on contest against the defendant no.1 and on ex parte against Defendant No.2 (Proforma defendant) without any cost and defendant no.1 is directed to vacate the suit house within two months from the date of decree and if he will fail to vacate the suit house within that period then, the Plaintiff may take step according to law for eviction of defendant no.1 from the suit shop house and the defendant no.1 is directed to pay Rs.400/- (Rupees four hundred) per month as damage to Plaintiff since 7.12.2000, till the date of decree and he has to pay that amount within two months from the date of decree and if he will fail to pay the damage within the stipulated period, then the plaintiff may take step as per law for recovery that damage from defendant no.1."*

4. Assailing the same, the Petitioner filed RFA No. 42 of 2007, which was dismissed by learned Additional District Judge, Bargarh.

5. Ultimately, in RSA No.200 of 2009, this Court, vide judgment dated 25th April, 2022 (Annexure-3), modified the judgment and decree passed in TS No.25 of 2001 holding as under :

> *"10. In that view of the matter, this Court finds that the substantial questions of law as framed do not survive for being answered. The judgments and decrees passed by the Courts below as to eviction of the Defendant No.1 from the suit shop room would thus hold the field.*

However, viewing the facts and circumstances as those emerge from the pleadings and evidence and especially, the conduct of the Plaintiff in not explaining the manipulation of the documents placed as also the age of the litigation with the prevalence of Pandemic Covid-19 situation for quite a long period bringing the commercial world and activity in the country to halt; the Defendant No.1 allowed time till the end of December, 2022 to vacate the suit shop room by paying the damages @ Rs.400/- per month with effect from 07.12.2000 till 07.12.2005; @ Rs.800/- per month with effect from 08.12.2005 till 08.12.2010; @ Rs.1500/- per month with effect from 09.12.2010 till 09.12.2015; @ Rs.2000/- per month with effect from 10.12.2015 till 31.12.2022.

In the event of failure on the part of the Defendant No.1 to vacate the suit shop room as afore-directed, the Plaintiff would be at liberty to levy the execution proceeding for obtaining possession and recovering the damage as directed above from the Defendant No 2. who would then be liable to pay further damage @ Rs.2500/- for the period from 01.01.2023 till recovery of possession through the process of the Court."

6. By the date the RSA was disposed of, the DHr.-Opposite Party had already initiated Execution Case No.02 of 2010, which is at present pending in the Court of learned Civil Judge (Junior Division), Bargarh. Due to modification/amendment of the decree passed in TS No.25 of 2001, the Opposite Party filed an application under Order VI Rule 17 CPC for amendment of the execution petition, which was allowed vide order under Annexure-6. Hence, this CMP has been filed assailing the said order.

7. It is submitted by Mr. Mishra, learned counsel for the Petitioner that the provision under Order VI Rule 17 CPC is not applicable to the execution proceeding. It only applies to the amendment of the pleadings in a suit. Since the provision itself is not applicable, learned executing Court misdirected itself by entertaining an application under the aforesaid provision. It is his submission that although Order XXI Rule 17 CPC deals with amendment of the execution petition, but it operates in a different field, as it contemplates amendment of defects in the execution petition before admission and does not clothe a situation as the instant one. Thus, the impugned order under Annexure-6 is vitiated. He, therefore, prays for setting aside the impugned order under Annexure-6.

8. Heard Mr. Mishra, learned counsel for the Petitioner and perused the case record. The sole question for determination in this CMP is whether an application under Order VI Rule 17 CPC for amendment of the execution petition is maintainable, if not, what would be the procedure to amend an execution petition?

8.1 Admittedly, the provision under Order VI Rule 17 CPC has no application to the execution proceeding. But, the DHr.-Opposite Party filed the application for amendment of the execution petition under the aforesaid provision. The nomenclature of a petition is only indicative of the nature of the petition. It is the substance of the petition along with the prayer made, which is determinative for its adjudication. Hence, answering the question regarding applicability of Order VI Rule 17 CPC to an execution proceeding in the negative, this Court proceeds to consider the procedure for amendment of the execution petition.

9. In the case of ***Bhoganadham Seshaiah vrs. Bhddhi Veerabhadrayya and others***, reported in 1971 SCC Online AP 104 (AIR 1972 AP 134), the Andhra Pradesh High Court held as under:

> *"39. Now except Order XXI Rule 17(2), C.P.C. there is no other provision in order XXI under which amendment in execution proceedings can be allowed. And rule 17(2) contemplates the amendment of defects in the execution petition before admission and registration. Consequently the said Rule does not apply where the defect in the execution application is one which has no reference to Rules 11 to 14 of Order XXI, C.P.C.*
>
> *40. Order VI Rule 17, C.P.C. admittedly in terms does not apply to execution proceedings. According to its terms, it applies to alteration or amendment of pleadings and the expression "pleadings" according to Order VI Rule 1 means "plaint" or "written statement".*
>
> *41. There is however a general provision in Sec. 153, C.P.C. which enacts that the court may "amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding".*
>
> *42. Thus apart from Order XXI Rule 17 C.P.C. this section confers very wide powers on the courts in matters relating to amendments. Obviously the object of the section in allowing amendments is to minimise litigation and avoid multiplicity of proceedings and also to see tha t the merest technicality may not be allowed to stand in the way of substantial justice. Hence the court has power to allow all necessary amendments for deciding the real question at issue between the parties provided of course that no injury or injustice is caused to the opposite party or the injury, if any, is such as can be sufficiently compensated for by costs or otherwise.*
>
> *xxxx xxxx xxxxx*
>
> *44. It was not doubted that execution of a decree is a proceeding in a suit and consequently section 153, C.P.C. Would apply to such execution proceedings. There is abundant authority to hold that section 153, C.P.C. is applicable to execution proceedings.*
>
> *xxxx xxxx xxxx*
>
> *47. Thus both the terms 'proceeding' as well as 'suit' are of wide amplitude and between them cover even the execution petitions. The principles laid down in the following cases therefore will apply to this case also. See Muhammad Habibulla v. Tikam Chand [AIR 1925 All 276.] Bhulji Bebhar v. Bawaji Daji [I.L.R. 5 Bom. 448.] and Gokul Kisto Chnader v. Aukhil Chunder Chatterjee [I.L.R. 16 Cal. 457.]."*

9.1 On a close reading of the case law (supra), it is apparent that Section 153 read with Order XXI Rule 17 CPC confers ample power on the executing Court to exercise its discretion to amend an execution petition for substantial justice.

10. In the case of ***Akkayanaicker vrs. A.A.A. Kotchadainaidu and another***, reported in (2004) 12 Supreme Court Cases 469, Hon'ble Supreme Court held as under:

> *"10. On the above contentions, it has to be determined whether the execution application filed by the decree-holder was within the prescribed period of limitation. We*

shall commence the determination of the question by first reading Article 136 of the Schedule to the Act which is as follows:

"Description of suit	*Period of limitation*	*Time from which period begins to run*
136. For the execution of any decree (other than a decree granting a mandatory injunction) Or order of any civil court.	*Twelve years*	*When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any of any property to be made at a certain date or at recurring periods when default in making the payment or delivery in respect of which execution is sought, takes place:* *Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.*

15. Section 48 CPC which provided for a limitation of 12 years for the execution of a decree has been replaced by Article 136 of the Act. The words "when the decree becomes enforceable" which find place in Article 136 were not there in Section 48 CPC. Because of the change brought about by the legislature the starting point of limitation would be the date on which the decree becomes capable of execution. The amendment carried out in the decree in the present case was substantial and not inconsequential like correction of clerical or arithmetical mistake under Section 152 CPC. The decretal amount was substantially reduced because of the scaling down of the decree in terms of Act 40 of 1978. A learned Single Judge in Fatimunnisa Begum v. Mohd. Zainulabuddin Saheb [AIR 1986 AP 355 : (1985) 2 An LT 473] relying upon the expression in Article 136 of the Act "when the decree becomes enforceable" which is not there in Section 48 CPC concluded that the decree which was subjected to an amendment can be enforced only as amended and the period of limitation would start only from the date of the amendment of the decree. The learned Single Judge held as follows: (AIR pp. 357-58, para 13)

"13. The next decision on which reliance was placed was Ouseph v. Lona [AIR 1979 Ker 14 :1978 KLT 624]. This decision undoubtedly supports the case of the respondents. But I am unable to agree with the principle enunciated in this decision. No doubt, the principle of Section 48 is now embodied in Article 136 which provided for 12 years' period of limitation for the execution of a decree, but the starting point must be determined with reference to the express language of Article 136 which says 'when the decree becomes enforceable'. These words were not there in Section 48. In my opinion, the proper interpretation would be, to reckon the period from the date of the decree that is sought to be enforced i.e. if there is an appeal, it is the appellate decree and if there is an amendment, it is from the date of the amended decree. As I said earlier, even in a case of affirmance, if time begins to run from the date of the appellate decree and not the original decree, much more so in the case of a decree which is amended as the original decree no longer retains its form. The amendment gives a fresh starting point of limitation. Even though Article 136 does not contain the words 'in case of an appeal', the courts have construed that it is the appellate decree that is relevant as ultimately it is that decree which becomes capable of execution. In the case of an amendment, the original decree no longer retains its form and what is sought to be executed is the amended decree. Therefore, the words 'enforceable' must be construed with reference to the decree that is sought to be enforced. Reckoned from the date of the amendment, the execution petition filed is within time."

10.1 In the aforesaid case law, Hon'ble Supreme Court laid down the law regarding commencement of period of limitation to levy an execution proceeding. In view of the provision under Article 136 of the Limitation Act, the period of limitation for filing of an execution proceeding would start from the date when the decree becomes enforceable. It is also held that when there is an appeal it is the appellate decree, which becomes enforceable, even in the case when it is affirmed or amended. In the instant case, the decree has been amended by this Court. Hence, the decree passed in RSA No. 200 of 2009 is enforceable and not the decree in TS No. 25 of 2001.

11. Further this Court in the case of ***M/s. Bharat Motors, Cantonment road, & ors. vs Savitri @ Savitri Devi Bhawsinka & ors.*** reported in 2019(II) ILR Cuttack 519 observed as under:

> *"7. Before proceeding further, it is necessary to refer to the provision contained in Order 21 Rule 17 CPC. Sub-rule 1 of Rule 17 of Order 21 CPC provides:*
>
> *"(1) On receiving an application for the execution of a decree as provided by Rule 11, Sub-rule(2), the Court shall ascertain whether such of the requirements of Rules 11 to 14 as may be applicable to the case have been complied with ; and , if they have not been complied with [the Court shall] the defect to be remedied then and there or within a time to be fixed by it.*
>
> *xxxx xxxxx xxxxxx xxxxxxx*
>
> *9. Taking a cue from Bhabatosh Sinha (supra), this Court in the case of Ajit Singh @ Arit Singh Chhabra (supra) held that if the court has power only by use of wrong nomenclature in the petition, such power cannot be taken away. The duty of the court is to impart justice. The substance of the petition matters, not nomenclature. Thus, in all intents and purposes, the petition for amendment has been filed under Order 21 Rule 17 CPC.*

12. In view of the ratio decided in ***Bhoganadham Seshaiah (supra), Akkayanaicker (supra) and M/s. Bharat Motors, Cantonment road, & ors. (supra)*** as well as discussions made above, this Court is of the considered opinion that although learned Executing Court has applied the provision under Order VI Rule 17 CPC for amendment of the execution petition, but in view of the amendment of the decree by this Court, the amendment sought for should be allowed and it has been rightly done so by the Executing Court.

13. Accordingly, the impugned order warrants no interference. Hence, this CMP, being devoid of any merit stands dismissed.

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2023 (III) ILR-CUT-1100

K.R. MOHAPATRA, J.

CMP NO. 1094 OF 2022

RENUBALA SAMANTRAY & ANR. .....Petitioners

-V-

MANASH RANJAN MOHAPATRA .....Opp.Party

CODE OF CIVIL PROCEDURE, 1908 – Order VII Rule 11(b) r/w Section 7(IV)(C) of Court Fees Act, 1870 – The plaintiff filed the suit for declaration of the sale-deed as illegal and also prayed for consequential relief of permanent injunction – The plaintiff has admitted the market value of the property to be 2.00 crore but the suit has been valued at Rs. 1000/- only for the relief of declaration and Rs. 100/- for the relief of injunction – The Learned Trial Court rejected the objection filed by the petitioner – Whether the rejection is sustainable? – Held, No – The valuation must have some nexus or relation with the market value of the property or subject matter in dispute at the time of institution of the suit. (Para -11)

Case Laws Relied on and Referred to :-

1. 2011 SCC OnLine Ori 170 : Sk. Majnu and another Vs. Lochan Sahoo & Ors.
2. (1987) 4 SCC 69 : Tara Devi Vs. Sri Thakur Radha Krishna Maharaj, through Sebaits Chandeshwar Prasad and Meshwar Prasad and Anr.
3. (2020) 7 SCC 366 : Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) (dead) through LRs.& Ors.
4. AIR 2010 SC 2807 : Suhrid Singh @ Sardool Singh Vs. Randhir Singh & Ors.
5. 2017 (II) CLR 422 : Rinarani Biswal Vs. Pradeep Chauhan and Anr.
6. 2009 (I) OLR 188 : Aruna Kumar Acharya Vs. Nagendra Kumari Dwibedy & Ors.

For Petitioners : Mr. Banshidhar Baug

For Opp. Party : Mr. Kshetrabasi Mohanty

JUDGMENT Heard & Disposed of on : 17.11.2023

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 2nd September, 2022 (Annexure-4) passed by learned Civil Judge (Junior Division), Bhubaneswar in C.S. No.1211 of 2019 is under challenge in this CMP, whereby an application under Order VII Rule 11(b) CPC filed by the Defendants-Petitioners, has been rejected.

3. Mr. Baug, learned counsel for the Petitioners submits that the suit has been filed by the Plaintiff-Opposite Party for a declaration that the sale deed bearing ID No. 1131904158 dated 21st May, 2019 executed by the Defendant No.1 in favour of Defendant No.2 is illegal and not binding on the Plaintiff. The Plaintiff also prayed for a consequential relief of permanent injunction. In Paragraph-4 of the plaint, the Plaintiff has specifically stated that Defendant No.1 being the owner of the suit property entered into an agreement with him (Plaintiff) to sale the suit land for a total consideration of Rs.2.00 crore and pursuant to that, the Plaintiff has already paid a sum of Rs.5.00 lakh. However, without respecting such registered agreement, sale deed in question has been executed in favour of Defendant No.2. Thus, the suit

has been filed for the aforesaid relief. The Defendants-Petitioners,on their appearance, filed an application under Order VII Rule 11 (b) CPC stating that in a suit for declaration of a sale deed to be void, where the Plaintiff is not a party, he is free to value the suit as per his choice. But, it should not be palpably low and arbitrary. The valuation put by the Plaintiff must have some nexus with the market value of the land/subject matter at the time of institution of the suit. If the valuation put by the Plaintiff has no nexus with the market value of the property, the Court has the discretion to direct the Plaintiff to value the suit accordingly and pay the court fee. The Plaintiff having admitted in his plaint that an agreement was executed with him for Rs.2.00 crore, he should have valued the suit accordingly. But, the suit has been valued at Rs.1,000/- for the relief of declaration and Rs.100/- for the relief of injunction.

4. It is his submission that had it been a suit for declaration simpliciter, then he would have no objection to the valuation of the suit. But, since a consequential relief of permanent injunction is sought for, the suit should have been valued as per Section 7(iv)(c) of Court Fees Act, 1870 (for short 'the Act'). He also relied upon the decision in the case of ***Sk. Majnu and another –v- Lochan Sahoo and others***, reported in 2011 SCC OnLine Ori 170, wherein at Paragraph-15, it is held as under:

> *"15. Also, even though provision under Section 7(iv)(c) of the Court Fees Act provides for determination of valuation of the suit by the Plaintiffs at his option but such valuation cannot be arbitrary & must have some relation with the real market value of the property at the time of institution of the suit. Referring to a number of authoritative judicial Biswal v. Budhanath Jena : 106 (2008) C.L.T. 595.*
>
> *"6. On a close & composite reading of the provisions of Section 7(iv)(c) of the Court Fees Act along with the above noted case laws, one can comfortably infer that in a suit for declaration coupled with the consequential reliefs, the Plaintiffs as per the provisions of Section 7(iv)(c) of the Court Fees Act can value the suit at his option, but such valuation cannot be arbitrary & must have some relation with the real market value of the property at the time of institution of the suit."*

5. He also relied upon the decision of Hon'ble Supreme Court in the case of ***Tara Devi –v- Sri Thakur Radha Krishna Maharaj, through Sebaits Chandeshwar Prasad and Meshwar Prasad and another***, reported in (1987) 4 SCC 69, wherein it is held as under:

> *"4. The instant special leave petition has been filed against the said order. We have heard the learned Counsel and in our considered opinion we do not find any merit in the arguments made on behalf of the petitioner. It is now well-settled by the decisions in this Court in Sathappa Chettiar v. Ramanathan Chettiar (supra) and Meenakshisundaram Chettiar v. Venkatachalam Chettiar (supra) that in a suit for declaration with consequential relief falling under Section 7(iv)(c) of the Court Fees Act, 1870, the plaintiff is free to make his own estimation of the reliefs sought in the plaint and such valuation both for the purposes of court fee and jurisdiction has to be ordinarily accepted. It is only in cases where it appears to the Court on a consideration of the facts and circumstances of the case that the valuation is arbitrary, unreasonable and the*

> *plaint has been demonstratively undervalued, the Court can examine the valuation and can revise the same. The plaintiff has valued the lease hold interest on the basis of the rent. Such a valuation, as has been rightly held by the Courts below, is reasonable and the same is not demonstratively arbitrary nor there has been any deliberate underestimation of the reliefs. We, therefore, do not find any reason to grant special leave to appeal asked for in the petition as the order passed in the said Revision is unexceptional. The special leave petition is therefore dismissed. There wilt however be no order as to costs."*

6. It is also submitted that in the case of ***Dahiben –v- Arvindbhai Kalyanji Bhanusali (Gajra) (dead) through Lrs. and others***, reported in (2020) 7 SCC 366, the Hon'ble Supreme Court has held that the provision under Order VII Rule 11 CPC is mandatory in nature. If the ingredients are satisfied, the Court has no other option than to reject the same. It is further submitted that learned trial Court has erroneously referred to the provision of Article 17 (iii) of the second schedule of the Act, which does not relate to suit for declaration and consequential relief. He, therefore, submits that the impugned order under Annexure-4 is not sustainable and is liable to be set aside. Learned trial Court should be directed to consider the petition under Order VII Rule 11 (b) CPC afresh taking note of the aforesaid provision as well as position of law.

7. Mr. Mohanty, learned counsel for the Opposite Party vehemently objects to the same and submits that the Plaintiff is not a party to the sale deed. Hence, he is free to value the suit as per his choice. Paragraph-4 of the plaint relates to the registered agreement between the Plaintiff and Defendant No.1, which is not challenged in the suit. Hence, the consideration money put in the agreement cannot be the basis to value the suit. It is his submission that in the case of ***Suhrid Singh @ Sardool Singh-v- Randhir Singh and Ors***, reported in AIR 2010 SC 2807, wherein it is held as under:

> *"5. Court-fee in the State of Punjab is governed by the Court-fees Act, 1870 as amended in Punjab ('Act' for short). Section 6 requires that no document of the kind specified as chargeable in the First and Second Schedules to the Act shall be filed in any court, unless the fee indicated therein is paid. Entry 17(iii) of Second Schedule requires payment of a court-fee of Rs.19.50 on plaints in suits to obtain a declaratory decree where no consequential relief is prayed for. But where the suit is for a declaration and consequential relief of possession and injunction, court-fee thereon is governed by section 7(iv)(c) of the Act which provides :*
>
> *"7. Computation of fees payable in certain suits:- The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :*
>
> *(iv) in suits - x x x x (c) for a declaratory decree and consequential relief.- To obtain a declaratory decree or order, where consequential relief is prayed, x x x x x according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.*
>
> *In all such suits the plaintiff shall state the amount at which he values the relief sought :*
>
> *Provided that minimum court-fee in each shall be thirteen rupees :*

Provided further that in suits coming under sub-clause (c), in cases where the relief sought is with reference to any property such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of this section."

The second proviso to section 7(iv) of the Act will apply in this case and the valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of the said section. Clause (v) provides that where the relief is in regard to agricultural lands, court-fee should be reckoned with reference to the revenue payable under clauses (a) to (d) thereof; and where the relief is in regard to the houses, court-fee shall be on the market value of the houses, under clause (e) thereof."

8. Relying upon the said case law, this Court in the case of ***Rinarani Biswal –v- Pradeep Chauhan and another***, reported in 2017 (II) CLR 422, held as under:-

"7. In Tara Devi v. Sri. Thakur Radha Krishna Maharaj through Sebaits Chandeshwar Prasad and Meshwar Prasad, AIR 1987 SC 2085, the apex Court held that in a suit for declaration with consequential relief failing under Sec.7(iv)(c) of the Court-fees Act, 1870, the plaintiff is free to make his own estimation of the reliefs sought in the plaint and such valuation both for the purposes of court-fee and jurisdiction has to be ordinarily accepted. It is only in cases where it appears to the Court on a consideration of the facts and circumstances of the case that the valuation is arbitrary, unreasonable and the plaint has been demonstratively undervalued, the Court can examine the valuation and can revise the same.

8. In view of the authoritative pronouncement of the decisions cited supra, the inescapable conclusion is that when a non-executant is in possession and seeks a declaration that deed is null and void and is not binding on him, he has to pay the court fee under Sec.7(iv)(c) of the Court Fees Act. The plaintiff is free to make his own estimation of the reliefs sought in the plaint and such valuation both for the purposes of court-fee and jurisdiction has to be ordinarily accepted. It is only in cases where it appears to the Court on a consideration of the facts and circumstances of the case that the valuation is arbitrary, unreasonable and the plaint has been demonstratively undervalued, the Court can examine the valuation and can revise the same."

9. He also relied upon the case of ***Aruna Kumar Acharya –v- Nagendra Kumari Dwibedy and others***, reported in 2009 (I) OLR 188, wherein it is held that the Plaintiff is free to make his own estimation of the relief sought in the plaint and such valuation both for the purposes of Court-fee and jurisdiction has to be ordinarily accepted. It is held therein that in case, it appears to the Court that the valuation is arbitrary or unreasonable and the plaint has been demonstratively undervalued, the Court can examine the valuation and can revise the same. In the case at hand, learned trial Court has never opined that the suit is demonstratively undervalued. In that view of the matter, the impugned order should not be interfered with. The valuation of the suit can be adjudicated at the time of final adjudication of the suit by framing an issue to that effect. Hence, he prays for dismissal of the CMP.

10. Considering the submissions made by learned counsel for the parties and on perusal of the record, it appears that the Plaintiff himself stated at Paragraph-4 of the plaint that an agreement was executed between him and Defendant No.1 for alienation

of the property at Rs.2.00 crore. Thus, it prima facie appears that the Plaintiff has admitted the market value of the property to be Rs.2.00 crore. But, surprisingly, the suit has been valued at Rs.1000/- only for the relief of declaration and Rs.100/- for the relief of injunction.

11. No doubt, in view of the authoritative pronouncement of the Hon'ble Supreme Court and this Court, the Plaintiff is at liberty to value the suit as per his choice for the purpose of court fee and jurisdiction when he seeks for declaratory relief in respect of the sale deed, in which he is not a party. But, it must have some nexus or relation with the market value of the property or subject matter in dispute at the time of institution of the suit. It should not be demonstratively low or arbitrary. When a consequential relief is sought for along with declaration, the provision under Section 7(iv)(c) of the Act is applicable for the purpose of valuation and payment of court fee. It appears that learned trial Court has not taken the same into consideration while adjudicating the matter. Learned trial Court has referred to Article 17 (iii) of second schedule of the Act, which may not be applicable to the instant case. These material aspects were required to be considered by learned trial Court while adjudicating the matter, more particularly when, the same was raised in the petition filed by the Defendants under Order VII Rule 11(b) CPC. But, the impugned order is silent about these material aspects.

12. Thus, the impugned order under Annexure-4 is not sustainable in the eye of law and is accordingly, set aside. The matter is remitted to learned trial Court for fresh adjudication of the petition filed by the Defendants-Petitioners under Order VII Rule 11(b) CPC giving opportunity of hearing to the parties concerned. Since the suit is of the year, 2009, the said application shall be adjudicated at the earliest.

13. With the aforesaid observation and direction, the CMP is accordingly disposed of.

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2023 (III) ILR-CUT-1105

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

CRIMINAL APPEAL NO. 717 OF 2016

MADHAB DIGAL & ORS. …….Appellants

-V-

STATE OF ORISSA …….Respondent

CRIMINAL TRIAL – The charge was framed on 6th may 2016 for Commission of Offences under Sections 302,307,326/34 of the IPC against the appellants – On the date of framing of charges one of the deceased was alive – Subsequently he died on 26th June 2016 – The

Trial Court proceeded to convict the appellants U/s 307/326 of IPC without modify the charge – Effect of – Held, the charge under Sections 307,326/34 became invalid upon death of one of the accused – Therefore the appellants cannot be convicted U/ss. 307/326/34 and they are bound to be acquitted. (Para 9)

For Appellants : Mr. H.B. Dash
For Respondent : Mr. Sonak Mishra,Addl. Standing Counsel

JUDGMENT Date of Judgment : 31.10.2023

B.P. ROUTRAY,J.

1. Three Appellants, namely, Madhab Digal, Bipin Digal and Kishore @Narendra Digal have been convicted for commission of offences under Sections 302, 307, 326 read with Section 34, I.P.C. and are sentenced to life imprisonment along with other sentences for offences of attempt to murder and grievous hurt.

2. Two persons namely, Sukru Digal and Sunarjya Digal died in the occurrence. Sukru died at the spot instantaneously and Sunarjya died in the hospital around nine months after the occurrence.

3. Prosecution case sans unnecessary details discloses that on 10.09.2015 when the deceased Sukru had been to attend the call of nature was chased by all the Appellants, who are the three brothers, by means of Tangia carried by each. Sukru ran out of fear and on the way in the oil mill of the other deceased Sunarjya, who happened to be the paternal uncle of Sukru, protested the Appellants to save Sukru. The Appellants also assaulted Sunarjya and he sustained two injuries on his back scapular area. He fell on the ground. Sukru could not be able to escape and fell victim to the hands of the Appellants. The Appellants dealt number of blows on his person resulting his instantaneous death at the spot. The occurrence took place during the evening hour on the village road and the villagers remained silent watchers. After the Appellants left the spot, Sunarjya was taken to his house while the dead-body of Sukru was kept on the village Mandap. But the thirst of Appellants was not quenched by then. They returned after 10 to 15 minutes to the Mandap where the dead-body of Sukru was kept. They danced, confirmed the death and applied blood of Sukru on their forehead and other parts and this time also the villagers watched everything being mute spectators of the scene.

4. The wife of Sukru lodged the FIR under Ext.1, which was registered by P.W.13, the then Officer-in-charge of Phulbani Sadar Police Station. The police took action without delay and in course of investigation, the dead-body of Sukru was sent for post-mortem examination and the injured was referred to District Headquarter Hospital for treatment. P.W.13 prepared the spot map under Ext.10,seized one bloodstained axe lying on the spot along with sample earth and bloodstained earth and prepared the seizure list under Ext.2. The inquest report in respect of the deceased-

Sukru was prepared under Ext.3. The Appellants were arrested on 14.9.2015, i.e. four days after the occurrence. The injured-Sunarjya was examined by the Police on the same day, i.e. on 10.9.2015 under Section 161 of the Cr.P.C. His statement so recorded by the Police has been marked under Ext.18. Other two axes used in commission of offences were seized on production by the Appellants-
Bipin and Kishore kept concealed at the back-side of house of one Baikuntha as per discovery lead under Section 27 of the Indian Evidence Act.

5. Upon completion of investigation, charge-sheet was submitted by P.W.14, who took charge of investigation from P.W.13 upon his transfer.

6. The charge was framed on 6th May, 2016 for commission of offences under Sections 302/34, 307/34 and 326/34 of the Indian Penal Code. On the date of framing of charge, deceased Sunarjya was alive. Subsequently he died on 26th June 2016. He died out of injuries sustained in the assault by the Appellants on the occurrence date. But the charge was not altered or modified for death of Sunarjya in the assault. Though the death certificate was produced before the trial court, but the dead body was never subjected to postmortem examination nor did the I.O. proceed to held inquest and to prepare dead body Chalan. The trial court also continued to proceed against the Appellants for such offences they were charged for on 6th may 2016.

7. The prosecution examined fourteen witnesses and amongst them, P.W.1 is the wife of deceased Sukru and P.W.3 to 8 are some of the villagers. They are the eyewitnesses to the occurrence. Furthermore, P.W.12 is the son of deceased Sunarjya, who is also an eyewitness to the occurrence. P.W.10 is the doctor who conducted postmortem examination over the dead-body of Sukru and P.W.11 is the doctor who examined the injuries of Sunarjya. P.W.13 is the initial I.O. who conducted major part of investigation. P.W.14 took charge of investigation subsequently and submitted the charge-sheet.

In addition to oral evidence, prosecution marked several documents under Ext.1 to 22. Ext.1 is the F.I.R., Ext.3 is the Inquest Report, Ext.6 is the Postmortem Report, Ext.8 is the Injury Report, Ext.10 & 19 are Spot Maps and Ext.22 is the Chemical Examination Report.

8. One of the Appellants namely, Kishore Diggal was examined as D.W.1 for defence. Besides the evidence of said D.W.1, no other evidence was adduced in support of defence case.

9. Before delving further, it needs to be mentioned at the outset about a glaring defect committed by the trial court. As stated earlier, two deceased persons were there. Deceased Sukru while died at the spot, deceased Sunarjya survived for nine months after the occurrence and finally succumbed to the injuries on 26th June 2016. It is seen from the body of the judgment of the trial court as well as statements of Appellants recorded under Section 313 Cr.P.C., that, the trial court had complete

knowledge of death of Sunarjya subsequent to framing of charge. It is not that the trial court was unaware of the fact of death of deceased Sunarjya till pronouncement of judgment. As observed in the judgment at para-7, the death certificate of Sunarjya was produced before the trial court and P.W.6, 7 and 12 have categorically stated in their evidences that deceased Sunarjya succumbed to the injuries on 26th June 2016 while undergoing treatment. At question no.8, death of Sunarjya for such injuries sustained by him in the occurrence was also confronted to the Appellants (accused persons) in course of their examination under Section 313 Cr.P.C. But the trial court despite all such materials brought before it did not attempt to modify the charge and rather proceeded in trial for same charges framed on 6th May 2016, which were regarding murder of Sukru and attempt to murder/grievous hurt to Sunarjya. Not only this, but the trial court also proceeded to convict the Appellants under Section 307/326 of the I.P.C. despite knowing that Sunarjya succumbed to the injuries in the meantime. This is a serious mistake committed on the part of the trial court, which cannot be cured by operation of Section 464 & 465 of the Cr.P.C. The charges under Sections 307 and 326 of the I.P.C., which ought to have been altered for murder upon knowledge of the trial court regarding death of Sunarjya, cannot be said to be in conformity with the provision under Section 228 on such subsequent dates after death of Sunarjya without prejudicing the right of the Appellants (accused persons). In the opinion of this Court such error and irregularity in the charge has occasioned failure of justice thereby and in respect of the right of the Appellants for the charges under Section 307/34 and 326/34 IPC. We are therefore of the opinion that the charge under Section 307/34 and 326/34 became invalid upon death of Sunarjya to cause failure of justice. Therefore, the Appellants cannot be convicted under Section 307/326/34 of the I.P.C. and they are bound to be acquitted therefrom.

10. The rest part of discussion is in respect of charge under Section 302 of the I.P.C. for death of Sukru. In this regard, the point falls for determination is that, whether the Appellants committed death of the deceased in furtherance of their common intention on 10th September 2015 by dealing Tangia (axe) blows.

11. First coming to see the nature of death, he (Sukru) sustained axe injuries on his person as per the opinion of P.W.10- the Postmortem doctor. Out of such injuries, four are incised wounds, i.e. one each on the right forearm and right thigh and two injuries on the right scapula. There are two fracture injuries on right clavicular line and right ulna bone. In the opinion of P.W.10, the death is instantaneous for heavy loss of blood and cutting of large blood vessels. As such, keeping in view such nature of injuries, cause of death and the circumstances narrated by eyewitnesses, it can safely be concluded that deceased Sukuru died homicidal nature of death.

12. With regard to complicity of the Appellants, as per the prosecution case, the Appellants chased Sukru from a point away from the Oil Mill, who ran towards village out of fear. On the way the Oil Mill (Tela Ghana) falls where Sunarjya (other

deceased) was present and he protested the Appellants from assaulting Sukru. He was not spared too. P.W.1, the wife of Sukru was present in the Oil Mill as the same belongs to their family. She saw the Appellants assaulted Sukuru jointly by means of tangia on different parts of his body. She has stated specifically that all the Appellants were holding one axe each and assaulted Sukru on the right side of his person including leg, waist, neck, shoulder etc. Her husband succumbed to the injuries on the spot. The Appellants then left the spot and after dead body of Sukru was removed to village Mandap nearby to the spot, they again came back. This time the Appellants confirmed the death of Sukru and danced there in a barbaric manner to apply the blood of Sukru on their forehead and other body parts inhumanly. Such conduct of the Appellants to confirm death of Sukru by returning to the spot and applied blood of a dead man on their own body parts in dancing posture speaks itself of their intention to commit murder of deceased Sukru.

13. The evidence of P.W.1 is not only corroborated by the evidence of other fellow villagers as eyewitnesses to the occurrences but also was confirmed by presence of blood smears on the wooden handle of the axe and wearing apparels. The villagers Viz. P.W.3, 4, 5, 6, 7 & 8 have stated in a consistent and unequivocal way that all the Appellants chased Sukru on village road and committed his murder by dealing tangia blows. Such evidences of the witnesses including P.W.1 are found unimpeachable during their cross-examination. Further, P.W.12 – the son of Sunarjya, has also added his voice to the versions of such witnesses to speak against the criminality of the Appellants regarding their assault on Sukru and Sunarjya and such inhuman conduct of theirs at village Mandap with the dead-body of Sukru.

14. One of the axes carried by Madhab (Appellant No.1) was left at the spot and recovered as per the seizure list under Ext.4. The other two axes carried by Bipin and Kishore were also recovered upon leading to discovery given by them while in police custody. The same were kept concealed in the backyard of the house of one Baikuntha. All such weapons of offence were examined by P.W.10 and as per his opinion, the same are sufficiently possible to cause such injuries found on the person of Sukru resultig his death. The opinion of P.W.10 as stated by him in evidence and recorded in the report under Ext.7 has never been rebutted. The chemical examination report under Ext.22 also confirms presence of human blood on all such materials including wooden handle of axe and banyan of Kishore (Appellant No.3).

15. In view of such clear, clinching and unimpeachable evidences of the eyewitnesses and supported by other evidences as stated above inasmuch as the conduct of the Appellants with dead-body of Sukru establishes clear intention of the Appellants to commit murder of Sukru on 10th September 2015 on village road and the Oil Mill. Accordingly, it is confirmed that the prosecution has successfully established the charge of murder of Sukru against all the Appellants beyond all reasonable doubts. Accordingly, the conviction of the Appellants under Section 302

of the I.P.C. and their sentences to life imprisonment with fine of Rs.5,000/- as directed by the trial court is confirmed.

16. Resultantly, the Appeal is disposed of as discussed above.

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2023 (III) ILR-CUT-1110

B.P. ROUTRAY, J.

W.P.(C) NO.16454 OF 2015

BIMALENDU CHATTERJEE & ORS. .....Petitioners

-V-

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

(A) LAND LAWS – Status of khasmahal lease hold property – Discussed with reference to case laws. (Para 11)

(B) ODISHA GOVERNMENT LAND SETTLEMENT RULES, 1983 – Schedule-V, Clause 1(b) – The khasmahal lease in respect of property granted in 1934 for 15 years – Same was renewed from time to time – The original lease holder expired – His legal representative applied for renewal – The land in question was recorded in government Khata during the pendency of lease proceeding, subsequently proceeding dropped – Effect of – Held, refusal of the authorities to record the land in favour of petitioner is bad in the eyes of law – A person including his lawful predecessors-in-interest, who was in possession of a khasmahal land on the basis of lease granted by the government, whether renewed or expired, shall be eligible for settlement of land in his favour for homestead purpose. (Para 14)

Case Laws Relied on and Referred to :-

1. 2008 (I) OLR–530 : Sunil Kumar Dass (dead) by L.Rs. & Ors. Vs. The Revenue Divisional Commissioner, Central Division, Cuttack & Ors.
2. I.L.R. 1976 Cuttack 1392 : Republic of India Vs. Prafulla Kumar Samal.
3. 2008 (I) CLR–171 : Dinesh Chhapolia & Anr. Vs. State of Orissa & Ors.
4. 2013 (II) CLR–102 : Jyoti Ranjan Mohanty Vs. Alok Ranjan Mohanty & Ors.

For Petitioners : Mr. D.P. Mohanty

For Opp. Parties : Mr. U.K. Sahoo, A.S.C

JUDGMENT Date of Judgment : 20.11.2023

B.P. ROUTRAY, J.

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

2. The impugned order dated 27.02.2015 passed in Settlement Revision No.145 of 2012 of Additional Commissioner of Settlement and Consolidation, Balasore under Annexure-11 is challenged in present writ petition.

3. The Petitioners are the LRs of one Surama Sundari Chatterjee.

4. The property in question is pertaining to Sabik Settlement Khata No.410 having Plots No.38/2, 1588/2, 38/3, 1588/3 and 1589/1 corresponding to Hal Khata No.579 with Plots No.762, 763, 1067 and 1068 of mouza-Srikanthapur in the district of Balasore.

5. Initially Khasmahal lease in respect of the property in question was granted in favour of Surama Sundari Chatterjee in the year 1934 for a period of 15 years. In the year 1949, the same was renewed for a further period of 15 years till 1964 and again renewed for another period of 15 years till 1979. In the meantime, said Surama Sundari Chatterjee died and her LRs (present Petitioners) applied for renewal of said Khasmahal lease in the year 1982 vide Khasmahal Lease Case No.2/1982. But said application of the year 1982 was lost and could not be traced out. In this regard, information was supplied under the RTI Act to the Petitioners on 6.1.2007. Thereafter the Petitioners applied afresh before the Tahasildar vide Lease Case No.9/2007.

6. Pending said lease proceeding, the land in question was recorded in Government Khata in favour of P.W.D. Department in the year 1987 during Hal settlement. So Lease Case No.9/2007 filed by the Petitioners was dropped by the Tahasildar since the land was recorded in favour of Government in the meantime. The Petitioners again approached the Collector, Balaosre in his original jurisdiction to settle the land in their favour which was also rejected and thereafter it was carried in appeal and revision. The revisional order dated 27.02.2015 is the subject of matter of challenge in the present writ petition.

7. Mr. D.P. Mohanty, learned counsel for the Petitioners submits that the Khasmahal lease being permanent in nature, the recording of the land in Hal settlement operation in favour of the Government is not permissible and therefore, their application for settlement should be allowed.

8. State has filed their counter taking the same stand that in the meantime the land has been recorded in Government Khata in the Hal settlement and the application filed thereafter by the Petitioners for settlement is therefore not maintainable.

9. On the backdrop of such rival contentions stated above, the grant of Khasmahal lease in favour of Surama Sundari Chatterjee in the year 1934 and subsequent renewal thereafter remains admitted. It is further seen from the copy of the Yadast under Annexure-3 that during the Hal settlement operation upon field enquiry said Surama Sundari Chatterjee was found in possession of the land and therefore, the order was passed on 28.6.1973 in the Hal settlement, as recorded in the Yadast, to prepare the ROR in favour of said Surama Sundari Chatterjee.

10. When it remains undisputed about the initial status of the land as Khasmahal property granted in favour of the predecessor-in-interest of the Petitioners, the question falls for determination here is that, whether the Khasmahal lease granted in favour of Surama Sundari Chatterjee can be treated as permanent lease and subsequent recording of the land in Government khata is liable to be set aside ?

11. Law is no more res integra on the status of the land in respect of a Khasmahal lease. In ***Sunil Kumar Dass (dead) by L.Rs. and others vs. The Revenue Divisional Commissioner, Central Division, Cuttack and others***, 2008 (I) OLR – 530, this Court have narrated the principles as follows:

> "21. The question emerges now is – What is the status of Khasmahal lease hold property ?
>
> Law is well settled regarding the principles of resumption of Khasmahal land and renewal of lease of such land. In this regard, we may refer to a decision of this Court in **Republic of India v. Prafulla Kumar Samal,** I.L.R. 1976 Cuttack 1392, in paragraph 4 of whereof it was held:
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> "…….Rights of a lessee in Khasmahal lands are in no way different from those which one has in his own private land. Clause (15) of the lease-deed confers a right of renewal on the lessee, and as has been pointed out earlier, the said right cannot be denied by the lessor. Besides the lessee's right in the Khasmahal land being heritable and transferable the lessee can create a permanent right of tenancy in his holding. Thus, in all respect the rights of a lessee are just similar to those of an owner of a private land. (See 1935 CLT 34 : Munshi Abdul Kadir Khan v. Munshi Abdul Latif Khan and 1937 CLT 67 : Madhusudan Swain v. Durga Prasad Bhagat)"
>
> The decisions rendered by this Court in the cases of **Sankarlal Verma v. Smt. Uma Sahu**, 1993 (I) OLR 187, and **Satyapriya Mohapatra v. Ashok Pandit**, 59 (1985) CLT 407, make it crystal clear that Khasmahal land is heritable and transferable with a right of renewal and right of lessee in respect of such land is in no way different from that which one has in his own private land.
>
> In **Abhimanyu Sahu v. Narayan Chandra Sahu**, 2000 (I) OLR 85, this Court while dealing with a case in which the trial Court had rejected the prayer of the plaintiff for partition on the ground that the property being Khasmahal Property and the lease having expired and having not been renewed, the parties could not claim any right for partition, took the aid of the decisions rendered in Prafulla Kumar Samal (supra) as well as **Braja Kishore Sahu v. Smt. Sailabala Sahu**, 1995 (II) OLR 348, and did not accept the plea of the trial Court.

Looking at the above judicial pronouncements, it is clear that impletion of the Collector as a party to the claim for partition of Khasmahal property is not necessary. In all respect the rights of a lessees are similar to those of an owner of a private land."

12. In ***Dinesh Chhapolia & Another vs. State of Orissa and others, 2008 (I) CLR – 171***, it has been decided as follows:

"14. The State in its wisdom has issued a circular on 19th June, 1970 in respect of Khasmahal leases of Puri Town that in case of unauthorized transfers, transfer fees at the rate of twelve times the annual rent would be chargeable. The said circular would also to be put in services so far as other Khasmahal lands are concerned lest there would be discrimination.

Apart from the aforesaid provision, Rule 20 of the Bihar and Orissa Government Estate Manual clearly stipulates that in case of contingencies like Clause 2, resumption can be made and possession can be recovered only through Civil Court. For the sake of brevity Rule 20 of the said Manual is quoted herein below:

"When a tenant holds land from Government under a lease containing a clause which authorizes the lesser to resume possession of the whole or part of the lands of the tenancy, this power of resumption shall only be exercised if the land is required for a public purpose, and the power of resumption shall not be exercised without the sanction of the Board of Revenue."

15. In the case of **Sourindra Narayan Bhanja Deo v. Member, Board of Revenue** (supra) this Court held that resumption of a land without taking recourse to Civil Court was not justified.

16. Added to it, the Orissa Government Land Settlement Act has been amended by Orissa Act 1 of 1991 which came into force in the year 1993. In consonance with the amended provisions, a lessee of a Khasmahal land is conferred with permanent and heritable right. Clause (c) of Amended Act Sub-section (4-a) of Section 3 of the Amended Act reads as follows:

"Any Khasmahal land, Nazul land, Gramakantha Parambok land or Abadi land which is used and in occupation by any person as homestead in any urban area for not less than five years as on the appointed date, shall subject to the payment of compensation in the case of Khasmahal and Nazul land as mentioned in the proviso to Clause (a), be settled—

(i) in the case of Khasmahal or Nazul land, with the person lawfully holding such land on and from the date the compensation is paid; and

(ii) in the case of Gramakantha Paramokand Abadi land, with the person in occupation of such land on and from the appointed date, on permanent basis with heritable and transferable rights."

The intention of the Legislature is thus very clear that a lessee of Khasmahal land has a permanent right over the leasehold and he/she is entitled to a permanent settlement of the leasehold."

13. In ***Jyoti Ranjan Mohanty vs. Alok Ranjan Mohanty and others,2013 (II) CLR – 102***, this Court held as follows:

> "8. Considering the rival submission of the parties, the question is to be determined in this appeal as to whether Ac.0.100 decimals as shown in Schedule-A property being Khasmahal property is liable to be partitioned or not and whether respondent 13 is a necessary party to the appeal ?The second question is taken up first for consideration.
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> Admittedly, respondent No.13 is not a party to the suit and she has also not filed any appeal against the judgment and decree passed by the Court below. If she is aggrieved by the said judgment and decree in any manner, she is at liberty to prefer a separate appeal and her claim cannot be decided in this appeal. Accordingly she has been deleted as respondent No.13.
>
> Admittedly, Schedule-A property under plot No.2254, Khata No.1498 area Ac.0.100 decimals is khasmahal property, which was leased out to be predecessor in interest of defendant No.1 and he is continuing in possession of the same till date. In view of the decision rendered in the cases of Abhimanyu Sahu, Sourindra Narayan Bhanj Deo and Sunil Kumar Dass (Supra) where their Lordships have held that Khasmahal lease-hold property is partible and transferable and right of renewal is inherent with the lessee."

14. Schedule-V of Odisha Government Land Settlement Rules, 1983 was replaced on 11.2.2010, wherein it has been provided in Clause 1(b) that a person including his lawful predecessors-in-interest, who was in possession of a Khasmahal land on the basis of lease granted by the Government, whether renewed or expired, shall be eligible for settlement of land in his favour for homestead purpose. In the case at hand, it remains undisputed that the land in question has been used for homestead purpose and Pucca building has been constructed thereon by Surama Sundari Chatterjee since long. As stated earlier, the order was passed in the Yadast during the Hal settlement operation to record the land in favour of said Surama Sundari Chatterjee. Despite this, the land was recorded in 1987 during Hal settlement operation in Government khata in favour of P.W.D. Department. Therefore, applying the principles discussed above as settled in several decisions of this Court, the conclusion deduced is that such recording of the land in favour of Government during Hal settlement is impermissible and illegal as such. Accordingly, the refusal of the authorities to record the land in favour of the Petitioners, who are the successors-in-interest of Surama Sundari Chatterjee, is held bad in the eye of law.

15. In the result, the impugned order is set aside and the status of the Petitioners as tenants in respect of the land in question is settled. The Record of Rights shall be corrected within a period of four months from today.

16. The writ petition is disposed of as allowed.

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2023 (III) ILR-CUT-1115

Dr. S.K.PANIGRAHI, J.

W.P.(C) NO. 23169 OF 2023

MEENA KUMARI @ MEENA KUMARI ROUT ……...Petitioner

-V-

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

SERVICE LAW – Correction of date of birth – Petitioner was regularized in service with effect from 17.07.2009 vide letter dated 15.02.2010 – Petitioner made representation on 10.07.2012 to correct the date of birth in the service book – BEO rejected the representation on the ground of limitation – Whether the impugned order sustainable? – Held, No – After regularization petitioner approach to the authority several times for correction without any unreasonable delay within five years of opening of service book – The rules of service Jurisprudence cannot be given go by in such a light and casual manner, rather, those call for due compliance.

Case Law Relied on and Referred to :-

1. 1971 2 SCR 687 : State of Assam & Anr. Vs. Daksha Prasad Deka & Ors.

For Petitioner : Ms. Susmita Pattnaik

For Opp.Parties : Mr. D. Mund, AGA

JUDGMENT Date of Hearing:11.10.2023 & Date of Judgment: 18.10.2023

Dr. S.K. PANIGRAHI, J.

1. The Petitioner through this Writ Petition has challenged the order dated 27.12.2022 with respect to her retirement from the service on attaining the age of superannuation on 10.10.2023.

I. FACTUAL MATRIX OF THE CASE:

2. The petitioner joined in the service with effect from 15.07.2002 as "Swechhasevi Sikhya Sahayak" on ad hoc basis in Badabasta UGME School in Block of Bhandaripokhari District, Bhadrak. After serving a long period of 8 years in the service, the petitioner was regularized with effect from 17.07.2009 vide letter No. 47/ZP dated 15.02.2010.

3. Herein, the date of birth was entered wrongly as “10.10.1963” instead of “10.10.1965” in the service book. Hence, the service period was counted from 10.10.1963 instead of 10.10.1965 by the Opp. parties. Owing to the wrong entry, the petitioner sent six representations to the B.E.O, Bhandari Pokhari and six representations to B.E.O, Bhandari Pokhari on 10.07.2012, 23.07.2013, 17.06.2014,

16.05.2015, 13.07.2016 and 08.09.2016 for correction of date of birth. However, no action has been taken by the Opposite parties till date.

4. Some of the important documents indicating the proof of age such as School Register of D.M. Madan Girls' High School, Jameshedpur, Bihar, Matric Certificate of Bihar Bidyalaya Parikhya Samiti, Marksheet of Teacher's Certificate Examination, Odisha, PAN Card and Aadhaar Card have been filed along with the present petition as supportive documents for the proof of age.

5. After due verification of the date of birth of the petitioner, the Vigilance Officer of Bihar School Examination Board intimated a letter to B.E.O., Bhandarpokhari, Bhadrak, Odisha that the date of birth was verified as 10.10.1965 vide letter No.7728 dated 10.08.2022. The petitioner is going to retire on 10.10.2023 vide order No. 3147 dated 27.12.2022 relying on the wrong entry of DOB in the service book.

6. The petitioner approached this Court in W.P.(C) No. 15640 of 2023 for correction of DOB (Date of Birth) in service book and this Court passed the order to file a representation before the Opp. Party No.4 within a period of 7 days to take a lawful decision with respect to the date of birth issue.

7. After receiving the representation, the B.E.O. rejected it on the ground that the petitioner had not approached the authority within 5 years of opening of service book. However, the petitioner had filed a representation to the B.E.O., Bhandaripokhari within the stipulated time for correction of a clerical error on 10.07.2012.

8. In the meantime, the B.E.O., Bhandaripokhari took up the investigation. The Bihar Board of Secondary Education was contacted officially and all the requisite payment was made through Bank draft as per rule. All documents like matriculation certificate, extract of the school admission register verification of the matriculation certificate vide letter No. 7728 dated 10.08.2022 by vigilance officer, Bihar School Examination Board, main building, Sinha Library Road, Patna were not considered in her favour. All papers obtained by official investigation exhibited ir-rebuttable evidence showing that date of birth recorded in the service book is correct. The head master of Kanti Government High School where the petitioner is serving gave a letter in favour of the petitioner's actual date of birth. Aggrieved by the same, the petitioner has filed this writ petition.

II. COURT'S REASONING AND ANALYSIS:

9. In this aspect, a Government servant, after entry into service, acquires the right to continue in service till the age of retirement, as fixed by the State, in exercise of its powers regulating conditions of service, unless the services are dispersed with on other grounds contained in the relevant service rules after following the procedure prescribed therein. The date of birth entered in the service

records of a civil servant is, thus of utmost importance for the reason that right to continue in service stands decided by its entry in the service record. A Government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age.

10. It is open to a civil servant to claim correction of his date of birth, if he is in possession of the irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any unreasonable delay. In the absence of any provision in the rules for correction of date of birth, the general principle of refusing relief on the grounds of latches or stale claims, is generally applied to by the courts and tribunals. It is, nonetheless, competent for the Government to fix a time limit, in the service rules, after which no application for correction of date of birth of a Government servant can be entertained.

11. A Government servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous.The law of limitation may operate harshly but it has to be applied with all its rigour and the courts or tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire. Unless altered, his date of birth as recorded would determine his date of superannuation even if it amounts to abridging his right to continue in service on the basis of his actual age. Indeed, as held by the Apex Court in State of ***Assam & Anr. v. Daksha Prasad Deka & Ors***[1]., a public servant may dispute the date of birth as entered in the service record and apply for its correction but till the record is corrected he cannot claim to continue in service on the basis of the date of birth claimed by him. In the present case, even if the Petitioner has approached several times to the authority, the said authority has given deaf ear to such representation.

12. After receiving the representation, the B.E.O. had rejected the representation on the ground that the petitioner had not approached the authority within 5 years of opening of service book. However, the petitioner had filed a representation to B.E.O., Bhandaripokhari within the stipulated time for correction of a clerical error on 10.07.2012.

13. Herein, the date of birth was entered wrongly as “10.10.1963” instead of “10.10.1965” in the service book. Hence, the service period was counted from 10.10.1963 instead of 10.10.1965 by the Opp. Parties. Owing to the wrong entry, the petitioner sent six representations to the B.E.O, Bhandaripokhari on 10.07.2012, 23.07.2013, 17.06.2014, 16.05.2015, 13.07.2016 and 08.09.2016 for correction of date of birth. However, no action has been taken by the Opposite Parties till date.

1. 1971 2 SCR 687

14. The academic records of the petitioner such as School Register of D.M. Madan Girls' High School, Jameshedpur, Bihar, Matric Certificate of Bihar Bidyalaya Parikhya Samiti, Marksheet of Teacher's Certificate Examination, Odisha, PAN Card and Aadhaar Card also provide in favour of the contention of the petitioner.

15. From the conspectus of factual matrix, this Court is inclined to accede to the submission of the petitioner. The rules of service jurisprudence cannot be given go by in such a light and casual manner, rather, those call for due compliance.

16. In light of the aforesaid discussion and having regard to the present position of law, this Court is inclined to quash the order dated 27.12.2022 with respect to the retirement of the Petitioner from her service on attaining the age of superannuation on 10.10.2023. The Opp. Parties are hereby directed to take steps towards the correction of the date of birth of the petitioner and for her continuance in service.

17. Accordingly, this Writ Petition is disposed of.

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2023 (III) ILR-CUT-1118

Dr. S.K. PANIGRAHI, J.

ARBA NO. 27 OF 2011

UNION OF INDIA .....Appellant

-V-

TIRTHA SINGH .....Respondent

LIMITATION ACT, 1963 – Article 137 r/w Section 11 of Arbitration and Conciliation Act, 1996 – Applicability of Art.137 to the application U/s. 11 of the 1996 Act – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. (2022) 3 SCC 237 : Haryana Tourism Ltd. Vs. Kandhari Beverages Ltd.
2. (2015) 3 SCC 49 : Associate Builders Vs. DDA.
3. 2007 (13) SCC 43 : K.N. Sathyapalan (Dead) by Lrs. Vs. State of Kerala.
4. (2015) 2 SCC 189 : Hyder Consulting (UK) Limited Vs. Governor, State of Orissa. through Chief Engineer.
5. 2023 SCC Online SC 657 : M/S B&T AG Vs. Ministry of Defence.
6. AIR 1988 SC 1887: Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority.
7. (2021) 5 SCC 705 : Secunderabad Cantonment Board Vs. B. Ramachandraiah & Sons.
8. (2021) 5 SCC 738: BSNL Vs. Nortel Networks India Private.
9. (2020) 14 SCC 643: Geo Miller and Company Private Limited Vs. Chairman, Rajasthan VidyutUtpadan Nigam Limited.
10. 25 Cal. 2d 226,228-29, 153 P.2d 325,326 (1944) : Pashley Vs. Pacific Elec. Co.

11. 1963 AIR 1356 : S.C.Prashar, Income-Tax Vs. Vasantsen Dwarkadas.
12. AIR 1924 Cal 600 : DwijendraNarain Roy Vs. Joges Chandra De & Ors.

For Appellant : Mr. S.S.Kashyap
For Respondent : Mr. A.Sanganeria

JUDGMENT Date of Hearing: 04.09.2023& Date of Judgment :20.11.2023

Dr. S.K. PANIGRAHI,J.

1. This Appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A&C Act") has been filed against the judgment dated 23.11.2011 passed by the learned District Judge, Khurda at Bhubaneswar in Arbitration Petition No.103 o 2008 rejecting the application under Section 34 of the Arbitration and Conciliation Act to set aside the award dated 30.11.2007 passed by the Arbitral Tribunal on the ground that the judgment and award are illegal, bad in law due to non-application of mind, perverse and contrary to the settled position of law.

I. FACTUAL MATRIX OF THE CASE:

2. Tirtha Singh (the "Respondent"), the contractor, entered into Agreement No.64/EE/BCD-I/1982-83 for the construction of quarters in the Civil Aerodrome, Bhubaneswar, for which a tender was floated in the year 1982-83 at the estimated cost of Rs. 15,20,865/-.

3. The date of commencement of the work was 13.02.1983 and it ought to have been completedin 12 months i.e. 12.02.1984. The necessary documents were handed over to the contractor in time, but he could not complete the work, for which the time was extended up to 09.08.1988. Ergo, the work supposedto be completed within a period of 12 months was completed only after five and half years.

4. Though the work was completed on 09.08.1988, it is alleged that the Appellant failed to pay the final bill to the Respondent and also, did not regularize the extension of time case for a very long time. The Extension case was ultimately regularized on 11.01.1991 i.e. 29 months after the date of actual completion.

5. However, as the final bill was not paid for a long period;the Respondent invoked the Arbitration clause on 02.12.1996 and the First Arbitratorwas appointed on 28.05.1997 i.e. after a lapse of about 9 years from the date of the completion of the work.

6. Initially one B.K.Biswas was appointed as Arbitrator in May, 1997 to August, 1999, who conducted 5 hearings. Then, one A.K. Bhatnagar was appointed in March, 2000 up to July, 2002, who conducted 3 hearings and thereafter one Sri O.P. Gaddhyan was appointed as Arbitrator in the month of August, 2002 up to May, 2006, who also conducted 10 hearings and finally one Sri C. Vaswani was appointed as Arbitrator in the month of November, 2006 up to January, 2008 and

conducted only 3 hearings, who passed the award hurriedly without affording the department any opportunity to put forth their defence.

7. The Arbitrator, who was in seisinover the case, passed the award allowing the claim of the Respondent under the following heads:

(a) ***Claim No.2***, i.e. Work Executed but Not Paid, for an amount of Rs. 25,753/-;

(b) ***Claim No.7***, i.e. compensation for increased cost of material and labour, for an amount of Rs. 77,904/-

(c) ***Claim No.8***, i.e. interest, @ 18% per annum,

(d) ***Claim No.13*** awarded a sum of Rs. 2,28,000/-,

(e) ***Claim No.14*** awarded a sum of Rs. 5,000/- and refund of Rs. 14,428/- to the claimant towards counter claim.

8. In total, an amount of Rs. 11,00,108/- was awarded from 01.02.2008 till the date of payment and further interest @12% per annum.

9. To challenge the aforesaid award, the Appellant/Petitioner filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 wherein the District Judge, Khurda at Bhubaneswar, refused to set aside the award on the grounds that the Arbitrator has assigned sufficient reasons for rejecting the penal recovery of the cost of material and that awarded compensation for increased cost of material and labour was within his competency to allow the claim by taking into account the escalation in the price of material and cost of labour. However, the District Judge reduced the rate of interest from 18% to 12% per annum.

II. APPELLANT'S SUBMISSIONS

10. The counsel for the Appellant assailed the judgment of the learned District Judge mainly on the ground that the District Judge failed to appreciate that the period of limitation for issuing notice invoking arbitration not being specifically prescribed in the Schedule to the Limitation Act, 1963 (for short, 'the Act 1963') shall be covered by the residuary Article i.e., Article 137 of the Schedule to the said Act i.e. limitation of 3 years from the date when the right to apply accrues. In the present case, there has been an undue delay of 9 years. It is submitted that despite the expiry of the limitation period,neither the Arbitrator nor the District Judge made any averment or discussion or decision over the issue and have passed an order which prejudicial to the interest of the Appellant.

11. The counsel for the Appellant relied on the decision of the Supreme Court passed in ***Bharat Sanchar Nigam Ltd. &Anr. v. M/s. Nortel Networks India Pvt. Ltd***.,to argue that the Arbitrator under Section 16 of the A&C Act has to first decide over the jurisdictional issues including limitation so that the judicial intervention at the pre-reference stage can be minimized. Ergo, it is submitted that the act of the Arbitrator as well as the District Judge while entertaining the Section-34 of the Act

lost sight of theirpreliminary endeavor to decide the issue before going to the merit of the case.

12. On 28.05.1997, the CPWD appointed B.K Biswas as the Arbitrator followed by three otherArbitrators in succession. The award was passed by the last Arbitrator. It is alleged, here, that the last Arbitrator passedthe award hurriedly and without affording the Appellant anyopportunity to put forth his defence, rather arbitrarily.

13. Next, the Arbitrator had awardedcompensation for increased cost of material and labour.The grievance of the Appellant is that this claim hasbeen allowed without any evidence; not taking into account the fact that the prolongation of the contract was due to the latchesof the contractor himself; a claim seconded by the Arbitrator himself. Ergo, it is submitted that the Arbitrator is in wrong to allowcost vide escalation in the cost of materialand labour. It is also submitted that the Arbitrator did so since theagreement between the parties did not make anyprovision for such contingency which is normally finds place in construction contracts.

14. The Arbitrator has also awarded interest atdifferent rates for different periods and final interest atthe rate of 12% per annum on the entire awardedamount including the cost from the date of award till actual payment. He has awarded interest at the rate of 18% from 02.11.1996 to 31.05.2007 and at the rate of 12% from 01.06.2007 to 31.01.2008. This rate of interest has been awarded since the petitioner-respondent had delayed the payment of the legitimate dues of the Respondent for years. Plus, the award included Rs. 55,000/- towards cost. The argument of the petitioner is that this award is unreasonable since major claims of the claimant have been rejected. It is submitted that the Arbitrator failed to appreciate that the site Engineers prepared the R/A& final bills and paid the value of work done by the Respondent. There, the Respondent accepted the bill and also payment thereof without any reservation or protest. Now after lapse of more than 9 years from the date of completion of the works, it is alleged that the Respondent fabricated stories in order to substantiate his baseless claims before the Arbitrator to derive undue advantage.

15. Further, it was submitted that the site of work was ready and the site Engineers were always available at the site to render any help to the Respondent to take up the job. However, the Respondent was not ready nor he could muster round required skilled and unskilled labour to take up the work. It is argued that there was practically no hindrance from Department's side. The Respondent delayed the work and did not stick to his own words. He did not take any interest in executionof his part of the promise due to improper planning and lack of resources. He has taken the recourse to put blame in the Department after lapse of more than 9 years and has fabricated false stories to derive undue advantage. Hence, the Respondent is entitled to neither any cost nor interest.

III. RESPONDENT'S SUBMISSIONS:

16. *Per contra*, learned counsel for the Respondent submitted that the scope of interference under Section 37 of the A&C Act, 1996 is very limited. The counsel relied on the judgment of the Supreme Court in ***Haryana Tourism Ltd. v. Kandhari Beverages Ltd.***[1] ***and Associate Builders v. DDA***[2] to argue that the High Court cannot go into the merits of the claim, except for a few conditions,if the view taken by the arbitrator is a possible based on facts.

17. On the question of limitation period, it is submitted that the claim of the Respondent was within time. The Respondent had completed the work by 09.08.1988 and the extension was regularized in 11.01.1991. The Respondent had raised his claim for arbitration on 02.12.1996.It is also submitted that till the date of commencement of arbitration, no final bill was prepared. Only after the arbitration had commenced, the final bill was prepared. It is also submitted that no plea was raised before the Arbitrator about the limitation. Ergo, the District Judge has rightly considered the limitation aspect and held theclaims to be within limitation.

18. It is submitted that the Arbitrator rightly held that the delay could not only be attributed to the Respondent, because of the inaction of the Appellants in not terminating the contract if the work was getting delayed for 4 and a half years. Further, it is also submitted that there was no evidence to show that the delay in executing the work was solely attributable to the Respondent.

19. Further, it is submitted that the Arbitrator had calculated the escalation on the basis of Clause 10(CC) of the GCC, though there was no such escalation clause in the Agreement. The counsel for the Respondents relied on ***K.N. Sathyapalan (Dead) by Lrs. v. State of Kerala***[3] has held that in the absence of an escalation clause, the Arbitrator has the power to award excess amount on account of increase in price and materials if one party fails to fulfil his obligations.Ergo, the District Judge has rightfully upheld the claim by examining the record.

20. Against the claim under the head Work executed but not paid, it is submitted that the Arbitrator had rightly considered the aspects of the work being executed; as reflected in the final bill for the following reasons:

(a) All materials were used and there was no wastage

(b) The issue rates of the materials at the relevant rate were not subsidizedrates

(c) Cement was under the custody of the appellant

(d) The method of measurement of weight of steel is always lower than theactual weights

(e) No loss suffered by the Appellant

(f) The penalty amount levied is so below that it does prove that the delayis not solely attributable to the Respondent. No evidence produced bythe Appellant to justify that the delay was because of the Respondentsolely.

1. (2022) 3 SCC 237, **2**. (2015) 3 SCC 49 **3**. 2007 (13) SCC 43

(g) LD imposed after 2 and half years of work being executed.

The District Judge had considered this aspect and at Page 6 has rightlyheld the award for this claim to be correct.

21. Next, the counsel for the Respondentcited majority decision of the Supreme Court in ***Hyder Consulting (UK) Limited vs. Governor, State of Orissa through Chief Engineer***[4] to argue that that in the absence of the interest clause, the Arbitral Tribunal has discretion to exercise its power under Clause (a) of S. 31 (7) of the A&C Actfrom the date of its award not only on the sum that is found principally due by a party but also on the interest that is payable on such principal sum from the date on which cause of action arose till the date on which the award is made, that is to say, that the arbitral tribunal can grant future interest, i.e. interest from the date of the award, even on the interest which has accrued during the pendency of the arbitration proceedings between the parties.

22. Finally, it is submitted that theArbitrator has rightly considered the delay in the arbitration proceedings that have been caused by the Petitioner. That, the final bill was only issued after the arbitration proceedings had commenced, i.e., on 26.09.1997. This entails that the final bill was prepared after approximately 10 years of completion of work. Further, it is submitted that the arbitration proceedings started from 1997 and ended in 2006, with four arbitrators hearing the matter completely. Therefore, the Arbitrator was correct in awarding costs to the Respondent.

23. Ergo, this appeal under Section37 of the Arbitration Act, 1996 ought to be dismissed.

IV. ISSUES FOR CONSIDERATION:

24. This court has heard the counsels for both the parties at length,and also perused the material available on record.

A. Whether the jurisdiction of the Sole Arbitrator is barred by expiry of limitation period as per the Limitation Act,1963?

B. Whether the order of the District Judge warrants any interference keeping in mind the limitations of this court's powers under section 37 of the A&C Act?

V. ISSUE A: Whether the jurisdiction of the Sole Arbitrator is barred by expiry of limitation period as per the Limitation Act, 1963?

25. Since a petition under Section 11(6) of the Act 1996 for seeking appointment of Arbitral Tribunal is required to be filed before the High Court or the Supreme Court, as the case may be, Article 137 of the Schedule to the Act 1963 would apply vide Section 43 of the A&C Act.

4. (2015) 2 SCC 189

26. Article 137 reads thus:

Description of Suit	Period of Limitation	Time from when period begins to run
Art. 137: Any other applicationfor which no period of limitation is provided elsewhere in this Division.	3 (three) Years	When the right to apply accrues

27. A plain reading of the aforesaid Article would indicate that the period of limitation in cases covered by Article 137 is three years and the said period would begin to run when the right to apply accrues.

28. The starting point of limitation under Article 137 according to third column of the Article is the date when 'the right to apply arises'. This being a residuary Article to be adopted to different classes of applications, the expression 'the right to apply' is an expression of a broad common law principle and should be interpreted according to the circumstances of each case. In ***M/S B&T AG v. Ministry of Defence***[5] has endorsed thatthe 'right to apply' has been interpreted to mean 'the right to apply first arises'.

29. Next, the Apex Court in ***B&T AG*** (supra) also referred to the case of ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority***[6], to hold that the existence of a dispute is essential for the appointment of an Arbitrator under Section 8 and that a dispute can arise only when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference about the existence of a dispute as the expression "dispute" contains a positive element of assertion and in denying and merely an inaction to accede to a claim or a request. With respect to the period of time, inthe light of the facts of that particular case as to when did the dispute actually arise.

30. Three principles of law are discernible from **B&T AG** (supra) and the cases referred to by the Apex Court therein:First, ordinarily on the completion of the work, the right to receive the payment begins. Secondly, a dispute arises when there is a claim on one side and its denial/repudiation by the other and thirdly, a person cannot postpone the accrual of cause of action by repeatedly writing letters or sending reminders. In other words, 'bilateral discussions' for an indefinite period of time would not save the situation so far as the accrual of cause of action and the right to apply for appointment ofarbitrator is concerned.

31. For example, I am here referring to ***Secunderabad Cantonment Board v. B. Ramachandraiah and Sons***[7] to demonstrate the aforesaid principles. Here, the Supreme Court studied ***BSNL v. Nortel Networks India Private***[8], and ***Geo Miller and Company Private Limited v. Chairman, Rajasthan VidyutUtpadan Nigam Limited***[9] and held as under:

5. 2023 SCC Online SC 657, **6**. AIR 1988 SC 1887, **7**. (2021) 5 SCC 705,
8. (2021) 5 SCC 738 **9**. (2020) 14 SCC 643

> *"19. Applying the aforesaid judgments to the facts of this case, so far as the applicability of Article 137 of the Limitation Act to the applications under Section 11 of the Arbitration Act is concerned, it is clear that the demand for arbitration in the present case was made by the letter dated 7-11-2006. This demand was reiterated by a letter dated 13-1-2007, which letter itself informed the appellant that appointment of an arbitrator would have to be made within 30 days. At the very latest, therefore, on the facts of this case, time began to run on and from 12-2-2007. The appellant's laconic letter dated 23-1-2007, which stated that the matter was under consideration, was within the 30-day period.* ***On and from 12-2-2007, when no arbitrator was appointed, the cause of action for appointment of an arbitrator accrued to the respondent and time began running from that day****. Obviously, once time has started running, any final rejection by the appellant by its letter dated 10-11-2010 would not give any fresh start to a limitation period which has already begun running, following the mandate of Section 9 of the Limitation Act. This being the case, the High Court was clearly in error in stating that since the applications under Section 11 of the Arbitration Act were filed on 6-11-2013, they were within the limitation period of three years starting from 10-11-2020. On this count, the applications under Section 11 of the Arbitration Act, themselves being hopelessly time-barred, no arbitrator could have been appointed by the High Court."* *(Emphasis supplied)*

32. At this juncture, this Court would like to add that the limitation period should also take into consideration the reasonable time under which a claim should have been made by one of the parties to trigger the commencement of the limitation cycle. Take a case where one of the parties, which owes a payment to the other, falters in making the due payment for the longest time and the other party, obediently, sits in the eventual hope of payment till the kingdom come. Here, would the Limitation Statute or the Arbitration Act (in this case) wait for this romance to come full circle!? Absolutely not!

33. To understand the true import of the Limitation Act, we must have to first understand the purpose of limitation jurisprudence in courtroom litigation. In ***Pashley v. Pacific Elec. Co.***[10] pronounced by the California Supreme Court, Shenk J. picturesquely described the statute of limitations as a statute of repose, enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. These statutes are declared to be "among the most beneficial to be found in our books." They rest upon sound policy, and tend to the peace and welfare of society. The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution.In ***S. C. Prashar, Income-Tax v. VasantsenDwarkadas***[11], J.L. Kapur, J. also opined that the Statute of Limitation has been devised as a statute of 'repose, peace and justice'.

34. The general principle, which also manifests itself in the Limitation Act, is that every person is presumed to know his own legal right and title in the property,

10. 25 Cal. 2d 226,228-29, 153 P.2d 325,326 (1944), **11**. 1963 AIR 1356

and if he does not take care of his own right and title to the property, the time for filing ofthe suit based on such a right or title to the property is not preventedfrom running against him. Ergo, one must know the time to demand legitimate claims from the parties it is transacting.

35. Here, the facts of the case must be vetted against Article 137 to scrutinize the claim of the expiry of limitation period by the Appellant.

36. Now, regarding the computation of the time frame and in the light of the circumstances of this case, it is unclear when the dispute genuinely materialised and the arbitration provision was triggered. Despite the fact that the contract work in question was completed on 09.08.1988, the Respondent waited for more than two and a half years for the Appellant to regularize the delay in the completion of work. Thereafter, the Respondent waited for almost 9 more years after the completion of work and 5 years after formalization of the delay before invoking the arbitration clause even though final bills were not prepared and payment not made. This casual attitude by the Respondent reeks of irresponsible awareness of his legal rights and towards the procedures of business. A party which is guilty of laches on account of not being vigilant to avail the remedy in the prescribed limitation is, in my opinion, disentitled from making claims at its whims and fancies.

37. In ***Geo Miller*** (supra), the Supreme Court elucidated the concept of "Breaking Point" and the computation of when it arises in a dispute, as under:

> "28. Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. ***The Court upon careful consideration of such history must find out what was the "breaking point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration***. This "breaking point" would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim."

38. It is true that on completion of the contract work, right to get payment would normally arise, but where the final bill had not been prepared and when the assertion of the claim was made much after the completion of the work and there was non-payment, the cause of action should arise from the date when the assertion was made. Herein, a party cannot postpone the accrual of a cause of action by sending reminders to the party delaying the payment. Nonetheless, waiting for an indefinite amount of time for the payment would also not bend the limitation period in the favour of the litigant. In other words, 'bilateral discussions' for an indefinite period

of time would not save the situation so far as the accrual of cause of action and the right to apply for appointment of arbitrator is concerned.

39. In this case, there has been an assertion of claim by the Respondent and silence as well as refusal in respect of the claims made by it against the delay in preparation of bills and final payment against the completed work. This Court is of the opinion that the work was completed in 1988 and, therefore, the Respondent would have become entitled to the payment from that year and the cause of action under Article 137 ought to have arisen from that date. It is also true that final bills were not prepared by the Appellant in due time and when the assertion of the claim was against this non-payment; the cause of action had already exhausted the limitation period prescribed in Article 137 of the Limitation Act.No reasonable person, against the wisdom of business sense and law, would wait for nearly 9 years without making a claim against the other party and seek remedies in case of default.

40. In arbitration, one must always work with time and never against it. The A & C Act has been amended twice in 2015 and 2019, to provide for further time limits to ensure that the arbitration proceedings are conducted and concluded expeditiously. Section 29A mandates that the arbitral tribunal will conclude the proceedings within a period of 18 months. In view of the legislative intent, theperiod of 9 years for filing an application under Section 11 would run contraryto the scheme of the Act.Since it would defeat the very object of the Act, which provides for expeditious resolution of commercial disputes within a time bound period; a delay, such as in the present matter, cannot be condoned.

41. In ***B&TAG*** (supra), the Supreme Court referred to the dictum of Mookerjee, J. in ***DwijendraNarain Roy v. Joges Chandra De and others***[12], wherein the true test to determine when a cause of action could be said to have accrued observing as under:

> *"10.…The substance of the matter is that time runs when the cause of action accrues and a cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed ; Coburn v. Colledge [(1897) 1 Q.B. 702] ; Gelmani v. Morriggia [(1913) 2 K.B. 549].The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief :Whalley v. Whalley [(1816) 1 M.R. 436]. The statute does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result."*

42. The cause of action becomes important for the purposes of calculating the limitation period for bringing an action. It is imperative that a party realises when a cause of action arises. If a party simply delays sending a notice seeking reference

12. AIR 1924 Cal 600

under the A & C Act because they are unclear of when the cause of action arose, the claim can become time-barred even before the party realises the same.

43. In ***B&T AG*** (supra), the Supreme Courthas further held that:

> *"Arbitration implies to charter out timeous commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aid the promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. The question, therefore, as posed earlier is whether the court would be justified to permit a contracting party to rescind the contract or the court can revoke the authority to refer the disputes or differences to arbitration. Justice Bachawat in his Law of Arbitration, at p. 552 stated that 'in an appropriate case leave should be given to revoke the authority of the arbitrator."*

44. On the issue of whether this objection can at all now be allowed to be raised, and the period of limitation for filing petition under Section 34 of the Act having passed, they place reliance on the judgments of the Supreme Court in Hindustan Zinc Limited (HZL) v. Ajmer Vidyut Vitran Nigam Limited, (2019) 17 SCC 82 and Lion Engineering Consultants v. State of Madhya Pradesh and Others, (2018) 16 SCC 758, to submit that a plea of lack of jurisdiction of the Arbitrator can be raised at any stage of the proceedings, including before the Supreme Court. They further submit that the incorporation of additional grounds by way of an amendment can be allowed depending on the facts and circumstances of each case. They submit that in the present case, as the amendment raises an issue of lack of jurisdiction of the learned Arbitrator, the same should be allowed to beraised before this Court.

45. Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time barred by over 5 years, since the Respondent did not take any action whatsoever after the rejection of its claim by BSNL on 04.08.2014. The notice of arbitration was invoked on 29.04.2020.

46. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable Section, and how it extends the limitation from the date on which the cause of action originally arose, therecan be no basis to save the time of limitation.

47. In light of the above deliberations, this Court comes to the conclusion that the Respondent was extremely late in the invocation of the arbitration clause and ergo, the arbitral award is rendered invalid for the claims of the respondent were ex facie time barred in the first place.

VI. ISSUE B: WHETHER THE ORDER OF THE DISTRICT JUDGE WARRANTS ANY INTERFERENCE KEEPING IN MIND THE LIMITATIONS OF THIS COURT'S POWERS UNDER SECTION 37 OF THE A&C ACT?

48. In the facts and circumstances of the case, narrated hereinabove, the District Court has committed grave error in dismissing the application under Section 34 of the 1996 Act on the ground that itis hopelessly barred by limitation and is a stale claim.

VII. CONCLUSION:

49. In the factual matrix, since the Respondent's claim was hopelessly barred by limitation in the first place, this case clearly falls within the purview of Section 34 (2)(iii) of the said Act and as such the impugned order dated 23.11.2011 passed by the District Judge, Khurdain Arbitration Petition No.103 of 2008dismissing the application filed by the Appellant under Section 34 of the said Act is not sustainable.

50. Consequently, the impugned award dated 30.11.2007 passed by the sole Arbitrator and the impugned order dated 23.11.2011 passed by the Learned District Judge, Khurda, in Arbitration Petition No.103 of 2008are set aside. The appeal is allowed in the above terms.

51. Accordingly, this ARBA is disposed of being allowed.

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2023 (III) ILR-CUT-1129

SAVITRI RATHO, J.

CRLMC NO. 830 OF 2023

SUJIT NAIK @ SURYAKANTA NAIK .....Petitioner

-V-

STATE OF ODISHA & ANR. .....Opp.Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Petitioner/ Accused filed an application to quash the P.S. case pending before the special Court under POCSO Act – Accused and victim are married to each other and are leading happy conjugal life since long with their two children – Whether the proceeding should be quashed in the above circumstance? – Held, Yes – It would be in the Interest of Justice to exercise power U/s. 482 of the code and quash the proceeding.

(Paras 12-15)

Case Laws Relied on and Referred to :-

1. S.B.Criminal Misc (Pet.) No. 6323 of 2022 (13.10.2022) : Tarun Vaishnav Vs. State of Rajasthan.
2. Special Leave to Appeal (Crl.) No. 1890 of 2023 (03.03.2023) : State of Rajasthan Vs. Tarun Vaishnav & Anr.
3. (2013) 4 SCC 58 : Jitendra Raghuvanshi Vs. Babita Raghuvanshi.
4. (2003) 4 SCC 675 : B.S. Joshi & Ors. Vs. State of Haryana & Anr.
5. 2023 (II) OLR 488 : (2023) 91 OCR 762 : 2023 (II) ILR-CUT-861 : Bhakta Prasad Swain Vs. State of Orissa & Anr.

For Petitioner : Mr. P.K. Sahoo

For Opp.Parties : Mr. S.S. Mohapatra, A.S.C.

JUDGMENT Date of Judgment : 03.11.2023

SAVITRI RATHO, J.

This application under Section 482 Cr.P.C. has been filed by the petitioner who is the accused in C.T. (Special) Case No. 34 of 2019, arising out of Tumusingha P.S. Case No. 56 of 2019, pending in the Court of the learned Addl. Sessions Judge-cum-Special Court under POCSO Act, Dhenkanal for quashing the criminal proceeding.

2. The prosecution case in brief as per the FIR lodged by opposite party No.2, father of the victim girl is that the petitioner had kidnapped his minor daughter on 25.05.2019 at about 9.00 pm, giving her the enticement of marriage. As he feared that her life was in danger, he searched for her and on 05.06.2019 at 6.00 a.m. learnt that her marriage was going to be solemnized and lodged FIR.

3. The police conducted investigation and examined the victim and other witnesses. The opposite party No.2 in his statement recorded under Section 161 Cr.P.C. had stated that he had lodged FIR as his daughter had gone away from the house on 25.05.2019 around 9.00 pm. As he could not find her, he lodged FIR against the petitioner on 05.06.2019 suspecting him to have kidnapped her daughter. In the same evening, his daughter was rescued from the house of his sister. She stated that on account of quarrel in the house, she had gone to her aunt's house on 25.05.2019. This was corroborated by the statement of his wife and her sister. So final form dated 29.02.2020 had been submitted as FR Mistake of fact under Sections – 363/366 IPC and Section 12 of the POCSO Act.

4. On 24.04.2020, the learned Addl. Sessions Judge-cum- Special Court under POCSO Act, Dhenkanal issued direction for further investigation by an officer not below the rank of Deputy Superintendent of Police observing interalia that the minor victim had stated in her statement recorded under Section 161 Cr.P.C. that the petitioner had taken her giving assurance of marriage and had married her.

5. On 13.05.2023, this CRLMC was listed before 2nd National Lok Adalat. On that day, the petitioner, the opposite party no.2 and the victim were present in Court

and the victim stated that she was a major and was staying with the accused as his legally married wife and leading a happy conjugal life. The opposite party No.2 her father, who is the informant had stated that he does not want to proceed with the case. The matter was directed to be listed before the Regular Bench as the offences were not compoundable.

6. Affidavit dated 05.05.2023 has been filed by opposite party No.2 annexing the marriage certificate dated 24.04.2023 of the petitioner and his daughter, issued by the Marriage Officer, Kamakhyanagar. It has been stated in the affidavit that his daughter has married the petitioner and neither he nor his relatives who are witnesses in the case intend to proceed further in the case and depose against the petitioner.

7. The victim has also filed an affidavit on 09.08.2023 stating that she and the petitioner have got married before the Marriage Officer and both are living happily and she does want to proceed with the case for which the proceedings may be quashed.

8. During pendency of this application, the learned State Counsel has informed that chargesheet dated 16.08.2023 has been filed against the petitioner for commission of offences punishable under Sections 363, 366 of IPC read with Section 12 of POCSO Act. He has filed a copy of the chargesheet alongwith a Memo, which have been taken on record.

9. Mr. Prasanta Kumar Sahoo, learned counsel for the petitioner submits that the petitioner and the victim (daughter of opposite party no.2) are staying together and leading a happy conjugal with their children. Their marriage certificate dated 24.04.2023 has been filed by the informant - opposite party No.2, as Annexure-A to the affidavit filed by him. He further submits that both opposite party No.2 and the victim have submitted that they do not want they do not want to proceed with the case for which the chances of conviction of the petitioner in the case is bleak. He also submits that if the proceedings are not quashed, the petitioner and his wife and their innocent children will suffer irreparable prejudice and ostracism. Mr. Sahoo, learned counsel relies the decision of the High Court of Rajasthan in the case of ***Tarun Vaishnav vs. State of Rajasthan in S.B. Criminal Misc (Pet.) No. 6323 of 2022 decided on 13.10.2022***, where under similar circumstances the Rajasthan High Court has quashed the proceeding under Section 376 of IPC and Section 3 of the POCSO Act. He has also produced the order dated 03.03.2023 of the Hon'ble Supreme Court in the case of ***State of Rajasthan vs. Tarun Vaishnav and another in Special Leave to Appeal (Crl.) No. 1890 of 2023***, where the appeal by the State of Rajasthan challenging the order passed dated 13.10.2022 passed in ***S.B. Criminal Misc (Pet.) No. 6323 of 2022*** has been dismissed.

10. Mr. S.S. Mohapatra, learned Additional Standing Counsel for the State submits that pursuant to the direction of the learned Court below,the police conducted

further investigation and submitted chargesheet against the petitioner for commission of offence punishable under Sections 363/366 of IPC and Section 12 of the POCSO Act. He has further submitted that as the victim was a minor at the time of offence and one of the offences is under the POCSO Act, the proceedings should not be quashed as it will send a wrong signal to the society.

11. Mr. Pradipta Kumar Sahoo, learned counsel has appeared on behalf of the opposite party No.2 informant as well as the victim. He has submitted that the petitioner and the victim are leading a happy conjugal life and have been blessed with children. After the victim attained majority, their marriage has been solemnized before the Marriage Officer. As the victim and her family members have no intentions of deposing against the petitioner, no useful purpose will be served by allowing the proceedings to continue. On the other hand if the proceedings are allowed to continue, the happy conjugal life of the petitioner and victim will be disturbed, resulting in irreparable hardship and distress to them and their children.

12. In the case of ***Jitendra Raghuvanshi vs. Babita Raghuvanshi*** reported in ***(2013) 4 SCC 58***, the Supreme Court after referring to its decision in the case of ***B.S. Joshi and Others vs. State of Haryana and Another*** reported in ***(2003) 4 SCC 675*** has held as follows :

> *"16. There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders."*

In ***Parbatbhai Aahir*** *Alias* ***Parbathbhai Bhimsinhbhai Karmur and Others vs. State of Gujrat and Another***, a three-Judge Bench of the Supreme Court referred to some of its earlier decisions and held as follows :-

> *"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:*
>
> 16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

16.2. The invocation of the jurisdiction of the High Court to quash a first information report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

16.4. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised (i) to secure the ends of justice, or (ii) to prevent an abuse of the process of any court.

16.5. The decision as to whether a complaint or first information report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing insofar as the exercise of the inherent power to quash is concerned.

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.

16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and 16.10. There is yet an exception to the principle set out in propositions 16.8. and 16.9. above. Economic offences involving the financial and economic well-being of the State have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

This Court in the case of ***Bhakta Prasad Swain vs. State of Orissa and another*** reported in ***2023 (II) OLR 488 : (2023) 91 OCR 762 : 2023 (II) ILR-CUT-861***; which was a dispute between husband and wife, this Court quashed the proceedings under Sections 498-A, 307, 323 of the Indian Penal Code as the matter

had been amicably settled between the parties and the wife did not want to proceed further against her husband. It was observed therein as follows:

> *"12. In the decision of the Supreme Court in the case of* ***B.S. Joshi and Others vs. State of Haryana and Another : (2003) 4 SCC 675*** *where the Supreme Court referred to its decisions in the cases of* ***State of Karnataka v. L. Muniswamy & Ors. (1977) 2 SCC 699, Madhu Limaye vs. State of Maharashtra : (1977) 4 SCC 551, State of Haryana vs. Bhajan Lal : (1992) Supp (1) SCC 335 , Pepsi Foods Ltd. & Anr. vs. Special Judicial Magistrate & Ors.: (1998) 5 SCC 749, Surendra Nath Mohanty & Anr. vs. State of Orissa : (1999) 5 SCC 238, and G.V. Rao v. L.H.V. Prasad & Ors. (2000) 3 SCC 693*** *, and held that that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code."...*

In the case of ***Tarun Vaishnav vs. State of Rajasthan in S.B. Criminal Misc (Pet.) No. 6323 of 2022*** (decided on 13.10.2022), the FIR had been registered under Section 376 IPC and Section 3 of the Protection of Children from Sexual Offences Act by the SHO of the local Police Station after the minor victim gave birth to a child in the Government Hospital .The parents of the boy and girl settled the matter and approached the Court for quashing the FIR. Parents of the petitioner (accused) had consented to solemnize their marriage as soon as the victim attained majority The High Court observed as follows:

> *"14. This Court cannot be a silent spectator to or turn its back on the distressed family. If the impugned FIR is not quashed, the petitioner will have to face incarceration for at least 10 years. The mistake or blunder which otherwise constitutes an offence has been committed due to immature act and uncontrolled emotions of two persons, out of whom one is still a minor"*
>
> *15. The petitioner's prosecution and conviction will lead to pain and tears in the eyes of the family members of both the parties and future of two families, and above all, an innocent child will be at stake, whereas, if the impugned FIR is quashed, it would serve the ends of justice."*

The Hon'ble Supreme Court by order dated 03.03.2023 passed in ***Special Leave to Appeal (Crl.) No. 1890 of 2023 (State of Rajasthan vs. Tarun Vaishnav and another)*** has dismissed the SLP filed by the State of Rajasthan challenging the order passed dated 13.10.2022 passed in S.B. Criminal Misc (Pet.) No. 6323 of 2022.

13. In another case, the proceedings against a Government School teacher in Rajasthan who had been accused of outraging the modesty of a minor girl student, had been quashed by the Rajasthan High Court on the ground of compromise. The order was neither challenged by the victim nor the State of Rajasthan. A public spirited person had challenged the order in the Supreme Court. ***Writ Petition(s) (Criminal) No(s). 253/2022 (Ramji Lal Bhairwa vs. State of Rajasthan)*** filed under Article 32 of the Constitution of India. The same was converted into an application under Article 136 of the Constitution of India and notice was issued to the accused as well as the father of the victim in order to decide the certain important issues

highlighted by the Court. In an Appeal by the State of Kerala against a similar order dated 26.08.2019 of the High Court quashing the proceedings against an accused who was a teacher by profession and in the Management of the Institution and had sexually assaulted a minor student studying in the Institution, notice has been issued by the Supreme Court.

14. The present case stands on a different footing as the petitioner and the minor victim were in love and had eloped. They have subsequently got married after the victim attained majority and are leading happy conjugal life alongwith their two children.

15. After considering the submissions of the learned counsel and going through the record, I am convinced that, the possibility of conviction in the case is bleak is bleak. As the petitioner and the victim are married to each other and are leading happy a happy and conjugal life since long with their two children, allowing the proceedings to continue against the petitioner would cause them serious prejudice and harassment. Although the offence under the POCSO Act is non-compoundable and an offence against society, in the facts of the case, I am convinced that it would be in the interest of justice to exercise power under Section 482 of the Cr.P.C. and quash the proceedings in C.T. (Special) Case No. 34 of 2019 in the Court of the learned Addl. Sessions Judge -cum- Special Court under POCSO Act, Dhenkanal arising out of Tumusingha P.S. Case No. 56 of 2019.

16. The proceedings in C.T. (Special) Case No.34 of 2019 in the Court of the learned Addl. Sessions Judge -cum- Special Court under POCSO Act, Dhenkanal arising out of Tumusingha P.S. Case No. 56 of 2019 are accordingly quashed.

17. Urgent certified copy of this order be granted on proper application.

18. Copy of this order be sent to the learned Addl. Sessions Judge -cum- Special Court under POCSO Act, Dhenkanal.

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2023 (III) ILR-CUT-1135

SAVITRI RATHO, J.

CRLMC NO.1783 OF 2023

BAPAN SARKAR .....Petitioner

-V-

STATE OF ORISSA .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 82, 83 & 482 – The Learned special Judge passed order taking cognizance of offences punishable U/ss. 20(b)(ii)(c), 29 of NDPS Act and order issuing NBW

and process U/ss. 82 & 83 of the Cr.P.C – Whether non-appearance before the police in response to notice under 160 of Cr.P.C can be a ground to issue NBW and/or process U/ss. 82 & 83 of the code? – Held, No – NBW should not be issued mechanically – Relevant guideline laid down by the Apex Court regarding issuance of NBW enumerated.

(Paras 11-12)

Case Laws Relied on and Referred to :-

1. (2021) SCC online SC 315 : M/s Neeharika Infrastructure Pvt. Ltd.Vs. State of Maharashtra & Ors.
2. (2007) 12 SCC 1 : Inder Mohan Goswami & Anr. Vs. State of Uttaranchal & Ors.
3. (2012) 9 SCC 791 : Raghuvansh Dewanchand Bhasin Vs. State of Maharastra.
4. (2023) 92 OCR 265 : 2023 (II) ILR 215 : Bimal Kumar Agarwalla Vs. State of Odisha & Anr.
5. 1976) 3 SCC 1 : State of U.P. Vs. Poosu & Anr.
6. 1988) 1 OCR 136 : Raghunath Das Vs. Hari Mohan Pani.
7. (2007) 12 SCC 1 : Inder Mohan Goswami & Anr. Vs. State of Uttaranchal & Ors.
8. (2012) 9 SCC 791 : Raghuvansh Dewanchand Bhasin Vs. State of Maharashtra & Anr.
9. (2014) 3 SCC 321 : Vikas Vs. State of Rajasthan.

For Petitioner : Mr. Haripad Mohanty

For Opp.Party : M/s. Saswata Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Judgment :03.11.2023

SAVITRI RATHO, J.

This application under Section 482 of Cr.P.C. has been filed by the petitioner challenging the order dated 05.03.2021 passed by the learned Special Judge, Baliguda in C.T. Case No.25 of 2020 arising out of K.Nuagaon P.S. Case No.30 dated 10.06.2020, taking cognizance of offences punishable under Sections 20 (b) (ii) (C)/29 of the N.D.P.S. Act and order dated 31.05.2021 issuing N.B.Ws. and process under Sections 82 and 83 of the Code of Criminal Procedure (in short "Cr.P.C") against the petitioner and one Snehasis Sanyal. When the matter was heard on 04.08.2023 , Mr Mohanty learned counsel for the petitioner confined his prayer to order dated 31.05.2021 and did not press the challenge to the order of cognizance dated 05.03.2021.

2. The prosecution case in brief is that on 09.06.2020 at about 8.10 pm, the informant and his staff were performing night patrolling duty at Puruna Nuagaon Area, they got information that a Mahindra Bolero Max pick Up vehicle bearing No.WB-57-B-9682 was coming loaded with ganja. They signaled it to stop but it took a right turn towards Daringbadi. They chased it found the vehicle proceeding towards Daringbadi. On the way after passing through a sub way near the bridge under construction, due to rash and negligent driving of the driver, the vehicle slipped and could not move further. All the four persons in the vehicle tried to run away and the informant after a good chase could catch hold of two persons – Choton

Sk and Jayalal Ansari who belong to West Bengal. They disclosed the names of the persons who escaped as Minarul Sk of West Bengal and Naresh Digal and stated that they were transporting ganja by concealing them under the potato bags. They also revealed that the uncle of Minarul Sk. had financed the deal and had transacted the money through account payment through two accounts. On search 26 polythene packets wrapped with cello tape containing ganja, concealed under 10 potato bags were recovered from the dala of the Bolero. The ganja was in a wet condition. The total weight of ganja came to 131 kgs and 700 grams, excluding the bag. The accused persons and ganja were taken to the K. Nuagaon Police Station and written report was lodged. It was stated in the FIR that the identity of the financier was yet to established. On basis of the written complaint, K.Nuagaon P.S. case No 30 of 2020 was registered against Choton Sk. Jayalal Ansari, Minarul Sk and Naresh Digal under Section 20(b)(ii)(C)/27-A/29 of the NDPS Act.

3. Mr. Haripad Mohanty, learned counsel for the petitioner submits that initially the petitioner was not named in the FIR and was not an accused in the case. He had been issued notice under Section 160 Cr.P.C. on 25.03.2021 to explain under what circumstances so much money had been transferred to the account of the drag traffickers from his account. The copy of the notice has been annexed as Annexure-4 to this application. He was unable to appear in response to the said notice. On 31.05.2021, on the prayer of the I.O for issuance of N.B.W and process under Section 82 and 83 of the Cr.P.C against him and co accused Snehashis Sanyal, N.B.W and processes under Section 82 and 83 of the Cr.P.C have been mechanically issued against them on the same day without recording of subjective satisfaction as required by law. He submits that mere non appearance before the police in response to notice under Section – 160 Cr.P.C or for that matter even before the Court cannot be a ground to issue NBW, and / or process under Section 82 and 83 of the Cr.P.C without any material before the Court that he was deliberately avoiding to appear or there was any chance of his disposing his property. He further submits that NBW and processes under Section – 82 and 83 of the Cr.P.C could not have been issued against him without the ingredients / requirements for issue of NBW and processes not being fulfilled for which the non bailable warrant and processes issued against him are liable to be quashed. He also submits that the impugned order issuing process under Section 82 and 83 of the Cr.P.C simultaneously alongwith the NBW is perse illegal and liable to be quashed. His additional submission is that pursuant to order dated 22.11.2021 passed in ABLAPL No.13189 of 2021 by this Court, Snehasis Sanyal has been released on bail and the petitioner stands on the same footing as him so far as allegations in the case are concerned, but prayer of the petitioner in ABLAPL No.13640 of 2021 was rejected as at that time he could not produce the documents in support of his submission that the funds transferred to the account of the main accused through the petitioner , did not belong to him. He has in the meanwhile obtained the supporting documents and annexed them to this application for consideration of the Court. He submits that although the petitioner is

willing to appear before the learned trial court and move an application for bail alongwith these materials in support of his innocence before the said Court, as because NBW of arrest and process under Section 82 and 83 of the Cr.P.C have been issued against him, the Court below will remand him to custody mechanically. He has relied on the decisions in the case of ***M/s Neeharika Infrastructure Pvt. Ltd.v. State of Maharashtra and others (2021) SCC online SC 315*** and ***Inder Mohan Goswami & Another vs. State Of Uttaranchal & Others (2007) 12 SCC 1*** in support of his submissions.

4. Ms. S.Patnaik, learned Addl. Govt. Advocate submitted that as the petitioner had not turned up for investigation in spite of being served notice under Section 160 of the Cr.P.C., the I.O. apprehended that he would abscond for which he rightly filed application for issue of NBW and process under Section 82 and 83 Cr.P.C. She has filed the copy of the instructions of the I.O. dated 03.08.2023 enclosing the copy of the application filed by the I.O. before the learned Special Judge praying for issuing of N.B.W. and process under Sections 82 and 83 Cr.P.C. against the petitioner and co accused Snehashis Sanyal. She submits that case diary, notices under Section 160 Cr.P.C., zimanama, soliciting of instructions to the S.B.I., requisition to Branch Manager SBI, K Nuagaon had been placed before the learned Special Judge and the impugned order does not call for any interference.

5. The provisions of Section- 82 and 83 of the Cr.P.C. are extracted below:

Section – 82. Proclamation for person absconding:

"1. *If Any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specific place and at a specified time not less than thirty days from the date of publishing such proclamation.*

2. The proclamation shall be published as follows— (i) a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides; b) it shall be affixed to some conspicuous part of the house or home-stead in which such person ordinarily resides or to some conspicuous place of such town or village; c) a copy thereof shall be affixed to some conspicuous part of the Court house; (ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

3. A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of Sub-Section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

4. Where a proclamation published under Sub-Section (1) is in respect of a person accused of an offence punishable under section302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860) and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

5. The provisions of Sub-Sections (2) and (3) shall apply to a declaration made by the Court under Sub-Section (4) as they apply to the proclamation published under Sub-Section (1)."

Section -83 Attachment of property of person absconding:

1. The Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person;

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued;

a) is about to dispose of the whole or any part of his property, or
b) is about to remove the whole or any part of his property from the local jurisdiction of the Court. It may order the attachment simultaneously with the issue of the proclamation.

1. Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

2. If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

a) by seizure; or
b) by the appointment of a receiver; or
c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or
d) by all or any two of such methods, as the Court thinks fit.

1. If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases—

a) by taking possession; or
b) by the appointment of a receiver; or
c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or
d) by all or any two of such methods, as the Court thinks fit.

2. If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

3. The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908)."

6. From a reading of sub-section (1) of Section 82 Cr. P.C. Cr.P.C., it is apparent that that if a Court has *'reason to believe'* that a person, despite issuance of warrant against him or her, is concealing or absconding for which the warrant cannot be executed, the Court may publish a written proclamation requiring the person to

appear at a specified place and time, which should not less than 30 days from the date of publication of such proclamation. It is also apparent that such person must be aware that warrant has been issued against him and is intentionally avoiding execution of the warrant by concealing himself/ herself or by absconding. The *'reason to believe'* or reasons to believe should therefore necessarily be apparent from the material/application placed before the Court. As per Section 82(4) of the Cr.P.C., before declaring a person as a proclaimed person or offender , the Court has to satisfy itself that the steps indicated in Section 82(1) Cr.P.C. have been followed by making such inquiry as it thinks fit. So it imperative that the concerned Court either after taking evidence or without taking evidence, must record the reasons of its belief that the person against whom warrant was issued has absconded or concealed himself for which the warrants could not or cannot be executed.

7. Perusal of the application of the Investigating Officer reveals that a joint prayer has been made for issue of NBW and process Section 82 and 83 Cr.P.C. as the petitioner and co-accused did not respond to the notice under Section 160 Cr.P.C. The relevant portion of the application is extracted below:-

> *"With reference to the subject cited above I have the Honour to submits that during course of investigation on analysis of Bank statement of accused person Sunil Digal S/o-Sadan Digal of Gebapadar,P.S.-Baliguda,Dist-Kandhamal vide his A/C No. 37614672510 it is learnt that an amount of Rs.2,15,500/- was transferred to his account from the account of Bapan Sarkar S/o-Kamal Sarkar of village-Rajpur, P.O.-HagalBaria, Dist-Nadia, (W.B.) from his A/C No. 34984313896 before registration of this case. Similarly on analysis of the Bank statement of accused person Naresh Digal S/o-Sadan Digal of Gebapadar, Sindrigaon, P.S.-Baliguda, Dist-Kandhamal vide his A/C No. 37819792210 it is learnt that an amount of Rs.1,00,000/- was transferred to his account from the account of Snehasish Sanyal S/O- Manindra Kumar Sanyal vill-Bhatsala, P.O.-Basantpur, P.S.-Domkal, Dist-Murshidabad, (W.B.) From his account number 33313282907 before registration of this case. As the ganja loaded vehicle was proceeding to Kolkata, while detected, and accused persons Sunil Digal S/o-Sadan Digal of Gebapadar,, P.S.-Baliguda, Dist-Kandhamal along with Naresh Digal S/o-Sadan Digal of Gebapadar, Sindrigaon, P.S.-Baliguda, Dist-Kandhamal absconded from the ganja loaded vehicle as stated by the arrested accused persons of West Bengal side and during analysis of the Bank statement it was ascertained that Bapan Sarkar S/o-Kamal Sarkar of village-Rajpur, P.O.-HagalBaria, Dist-Nadia.(W.B.) and Snehasish Sanyal S/o- Manindra Kumar Sanyal vill-Bhatsala, P.O- Basantpur, P.S.- Domkal, Dist-Murshidabad, (W.B.) have transferred so much money to the account of the accused persons prior to registration of this case.*
>
> *"Hence both of them namely (1) Bapan Sarkar S/O- Kamal Sarkar of village-Rajpur, P.O.-HagalBaria, Dist-Nadia. (W.B.) and (2) Snehasish Sanyal S/O- Manindra Kumar Sanyal vill-Bhatsala, P.O.-Basantpur, P.S.-Domkal, Dist-Murshidabad, (W.B.) were served with notice U/S 160 Cr.P.C. to explain under which circumstances they transferred so much of money to the ganja traffickers. But they did not respond to the notice which shows that they have complicity in this case and they have financed the ganja business as mastermind and kingpins of this case.*

Under the above circumstances, I pray that orders may kindly be passed for issue of NBW and process U/S 82 and 83 of Cr.P.C. against the absconding accused persons namely (1) Bapan Sarkar S/O Nadia -741122 (W.B.) and (2) Snehasis Sanyal S/O-Manindra Singh Sanyal, village-Bhatsala Colony, P.O.-Basantpur, P.S.-Domkal, Dist-Murshidabad, 742406 (W.B.) to compel their appearance in the Hon'ble court and oblige."

8. Final chargesheet dated 14.06.2021 has been submitted against the co accused persons Choton Sk, Jayalal Ansari, Naresh Digal, Sunil Digal (against whom preliminary chargesheet had earlier been filed) and against Snehashis Sanyal and the petitioner Bapan Sarkar under Section 20(b)(ii)(C)/29 of the NDPS Act . But before that, the Investigating Officer has filed the application praying for issue of NBW, process under Section – 82 and 83 of the Cr.P.C against the petitioner and co accused Snehashis Sanyal. It has been mentioned in the application that as the petitioner and co accused Snehasish Sanyal did not respond to the notice under Section 160 Cr.P.C, they have complicity in this case and have financed the ganja business as mastermind and kingpins of this case for which orders may be passed for issuing process against them under Section – 82 and 83 of the Cr.P.C . It is apparent that without trying to find out if notice under Section – 160 of the Cr.P.C had been on duly served on the petitioner and co accused and the reason for their non appearance, or if there was any material a) to believe that they would not voluntarily appear in court, or b) they were unable to find them to serve a summon or that c) they would harm somebody if not taken into custody immediately, NBW has been issued.

9. Similarly, the contents of the application filed by the I.O, do not reveal existence of any of the requirements of Section 82 (1) and Section 83 (1), so as to justify issue of proclamation or order for attachment of the property. There was nothing before the Court that the petitioner had absconded or concealed himself after warrant was issued as warrant had not been issued earlier and was in fact issued by the same order. The I.O. had also not stated that the petitioner had absconded on concealed himself so that such warrant cannot be executed. Under Section 82 (1) normally, only after 30 days of issuance of written proclamation requiring the petitioner to appear at a specific place and at a specified time not less than thirty days from the date of publishing such proclamation, could the Court issue an order for the attachment of any property, movable or immovable, or both, belonging to the proclaimed person. In the present case the order for attachment has been issued on the same day. As per the proviso to Section – 83 (1), order of attachment under Section 83 (1) can be issued alongwith order under Section 82 (1) where at the time of the issue of the proclamation, the Court is satisfied, by affidavit or otherwise, that the accused was about to dispose of the whole or any part of their property or was about to remove the whole or any part of his/her property from the local jurisdiction of the Court.

10. It appears that co-accused Snehasish Sanyal has been granted bail pursuant to order dated 22.11.2022 passed in ABLAPL No.13189 of 2021 by this Court (he had been directed to be released on bail on surrendering before the learned Additional Sessions Judge, Balliguda and filing an application for bail). Naresh Digal has been granted bail pursuant to order dated 27.01.2021 passed in BL APL No. 4652 of 2020 (under Section – 167(2) of the Cr.P.C). Jayalal Ansari has been granted bail pursuant to order dated 26.11.2021 passed in Crl. Revision No. 495 of 2020 under Section – 167(2) of the Cr.P.C. Choton Sarkar has been granted bail pursuant to order dated 26.11.2021 passed in Crl Revision No. 496 of 2020 under Section –167(2) of the Cr.P.C. perusal of the final chragsheet dated 14.06.2021 reveals that preliminary chargesheet had been submitted against Choton Sk , Jayalal Ansari, Naresh Digal and Sunil Digal showing Sunial Digal to be an absconder and final chargesheet dated 14.06.2021 has been submitted Choton Sk , Jayalal Ansari, Naresh Digal, Sunil Digal, Snehashis Sanyal and the petitioner Bapan Sarkar under Section 20(b)(ii)(C)/29 of the NDPS Act declaring Sunil Digal, Snehashis Sanyal and the petitioner Bapan Sarkar as absconders on the basis of which cognizance of the offences have been taken against them.

11. The Supreme Court in the case of ***Inder Mohan Goswami*** (supra) has emphasized that issuance of non-bailable warrants interferes with personal liberty for which the Courts should be extremely careful before issuing non-bailable warrants. The Supreme Court has held that warrants, either bailable or non-bailable, should never be issued without proper scrutiny of facts and complete application of mind. The relevant portion of the judgment is extracted below:

> ***"Personal liberty and the interest of the State***.
>
> *50. Civilized countries have recognized that liberty is the most precious of all the human rights. The American Declaration of Independence 1776, French Declaration of the Rights of Men and the Citizen 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights 1966 all speak with one voice - liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law.*
>
> *51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.*
>
> *52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.*
>
> ***When non-bailable warrants should be issued***
>
> *53. Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when:*

- *it is reasonable to believe that the person will not voluntarily appear in court; or*
- *the police authorities are unable to find the person to serve him with a summon; or*
- *it is considered that the person could harm someone if not placed into custody immediately*

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.

55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable- warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the courts proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

56. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

57. The Court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-bailable warrant."

In ***Raghuvansh Dewanchand Bhasin v. State of Maharastra****, (2012) 9 SCC* ***791*****,** the Supreme Court has laid down the following guidelines to be adopted in all cases where non - bailable warrants are issued by the Courts*:*

"28.1. All the High Court shall ensure that the Subordinate Courts use printed and machine numbered Form No.2 for issuing warrant of arrest and each such form is duly accounted for;

28.2. Before authenticating, the court must ensure that complete particulars of the case are mentioned on the warrant;

28.3. The presiding Judge of the court (or responsible officer specially authorized for the purpose in case of High Courts) issuing the warrant should put his full and legible signatures on the process, also ensuring that Court seal bearing complete particulars of the Court is prominently endorsed thereon;

28.4. The Court must ensure that warrant is directed to a particular police officer (or authority)and, unless intended to be open-ended, it must be returnable whether executed or unexecuted, on or before the date specified therein;

28.5 Every Court must maintain a register (in the format given below), in which each warrant of arrest issued must be entered chronologically and the serial number of such entry reflected on the top right hand of the process;

28.6. No warrant of arrest shall be issued without being entered in the register mentioned above and the concerned court shall periodically check/monitor the same to confirm that every such process is always returned to the court with due report and placed on the record of the concerned case;

28.7. A register similar to the one in para 28.5 supra shall be maintained at the concerned police station. The Station House Officer of the concerned Police Station shall ensure that each warrant of arrest issued by the Court, when received is duly entered in the said register and is formally entrusted to a responsible officer for execution;

28.8. Ordinarily, the Courts should not give a long time for return or execution of warrants, as experience has shown that warrants are prone to misuse if they remain in control of executing agencies for long;

28.9 On the date fixed for the return of the warrant, the Court must insist upon a compliance report on the action taken thereon by the Station House Officer of the concerned Police Station or the Officer In-charge of the concerned agency;

28.10. The report on such warrants must be clear, cogent and legible and duly forwarded by a superior police officer, so as to facilitate fixing of responsibility in case of misuse;

28.11. In the event of warrant for execution beyond jurisdiction of the Court issuing it, procedure laid down in Section 78 and 79 of the Code must be strictly and scrupulously followed; and

28.12. In the event of cancellation of the arrest warrant by the Court, the order cancelling warrant shall be recorded in the case file and the register maintained. A copy thereof shall be sent to the concerned authority, requiring the process to be returned unexecuted forthwith. The date of receipt of the unexecuted warrant will be entered in the aforesaid registers. A copy of such order shall also be supplied to the accused."...

In the case of ***Bimal Kumar Agarwalla v. State of Odisha and another*** reported in ***(2023) 92 OCR 265: 2023 (II) ILR 215:*** this Court relying on the decisions of the Supreme Court and this Court in ***State of U.P. v. Poosu and another : 1976) 3 SCC 1; Raghunath Das v. Hari Mohan Pani : 1988) 1 OCR 136 ; Inder Mohan Goswami and another v. State of Uttaranchal and others : (2007) 12 SCC 1 ; Raghuvansh Dewanchand Bhasin v. State of Maharashtra & another : (2012) 9 SCC 791 ; and Vikas v. State of Rajasthan :, (2014) 3 SCC 321*** has held as follows :

"8. From a reading of these decisions, it is crystal clear that in view of its disastrous consequences on the personal liberty of an individual, NBW should not be issued mechanically. As the courts derive their "source and sustenance" from the Constitution, which, guarantees the right to life and personal liberty to its citizens under Article 21 and also imposes a duty on the Courts to protect the liberty of the citizens, the Court should be extremely cautious while issuing NBW and should do so only after considering the totality of the facts and circumstances and only after the "Court is fully satisfied that the accused is avoiding the Court's proceeding intentionally"."

9. The impugned order does not reveal that the learned S.D.J.M. had received or called for any report from the police regarding non-execution of the bailable warrant. Nor does the order reveal that the learned S.D.J.M. was satisfied that the accused was

avoiding the Court's proceedings intentionally. The impugned order issuing NBW is therefore liable for interference."

The decision in ***Neharika Infrastructure*** (supra) is not relevant for deciding this case as in that case the Appellant therein had challenged the interim order passed in an application under Section – 482 Cr.P.C, protecting the accused from coercive action.

12. After carefully going through the provisions of Section – 82 and 83 of the Cr.P.C , the decisions referred to above and the submissions of the counsel , the application filed by the I.O and the impugned order , I am satisfied that the order issuing NBW , process under Section - 82 and 83 of the Cr.P.C is vulnerable and liable for interference. The impugned order dated 31.05.2021 passed by the learned Additional District and Sessions Judge –cum- Special Judge , Balliguda in C.T. Case No. 25 of 2020 issuing NBW, process under Section – 82 and 83 of the Cr.P.C against the petitioner is therefore set aside.

13. In order to secure the presence of the petitioner in the case, it is directed that if the petitioner surrenders in the Court of the learned Special Judge, Baliguda in C.T. Case No.25 of 2020 arising out of K.Nuagaon P.S. Case No.30 of 2020 on or before 03.12.2023 and files an application for bail, the same shall be considered in accordance with law on the same day. It is open to the petitioner to submit supporting documents in support of his plea of parity with co accused Snehasis Sanyal who has been released on bail pursuant to order passed by this Court , which shall also be considered in accordance with law.

14. The CRLMC is accordingly disposed of.

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2023 (III) ILR-CUT-1145

M. S. SAHOO, J.

BLAPL NO. 9999 OF 2023

NITIN KAPOOR …….Petitioner

-V-

STATE OF ODISHA …….Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Bail – "Bail is the Rule and Jail is the exception" – Principles discussed with reference to case laws. (Paras 14-15)

Case Laws Relied on and Referred to :-

1. BLAPL No.9407 of 2021 (26.11.2021): Smruti Ranjan Sahoo Vs. State of Odisha
2. BLAPL No.8217 of 2021 (26.11.2021) : Gurdit Dang Vs. State of Odisha
3. BLAPL No.3175 of 2021 (07.09.2021) : Subash Chandra Swain Vs. State of Odisha

4. BLAPL No.9642 of 2020 (15.11.2023) : Kashmir Kumar Agrawal Vs. State of Odisha
5. BLAPL No.6643 of 2020 (10.11.2020) : Amit Beriwal Vs. State of odisha
6. BLAPL No.4266 of 2020 (23.12.2020) : Bikas @ Vikas Sarawgi Vs. State of Odisha
7. BLAPL No.4125 of 2020 (23.12.2020) : Pramod Kumar Sahoo Vs. State of Odisha
8. S.B Crl. Misc.Bail Application No.5882/2021 (04.05.2021): Bhagwan Sahay Gupta Vs. Union of India (Rajasthan High Court, Japipur Bench)
9. Crl. Misc. Bail Application No.742 of 2020 (20.01.2020) : Paridhi Jain Vs. State (Rajasthan High Court, Jodhpur Bench)
10. BLAPL No.776 of 2021 (11.01.2022): Smruti Ranjan Mohanty Vs. State of Odisha
11. BLAPL No.9043 of 2021 (11.01.2022) : Amit Kumar Agarwal @ Amit Agarwal Vs. State of Odisha & Anr.
12. Crl. Misc. Bail Application No.1603 of 2019 (22.10.2019) : Shri P. Chidambaram Vs. Central Bureau of Investigation. [arising out of SLP(Crl) No. 9269/2019]
13. Writ Petition (Crl) No. 339 of 2023 : Gagandeep Singh Vs.Union of India & Ors.
14. SLP Appeal (Crl) No.10319/2022 (05.12.22) : Ratnambar Kaushik Vs. Union of India
15. S.B. Criminal Miscellaneous Bail Application No.17349 of 2022 (01.06.2023) : Vikas Bajoria Vs.Union of India
16. MCRC No.2729 of 2023 (19.07.2023) : Sourabh Agrawal Vs. Union of India
17. SB Criminal Miscellaneous Bail Application No.17536 of 2022 (11.01.2023) : Gaurav Kakkar Vs. Directorate General of Gst Intelligence
18. Bail Application No.4019 of 2020 : Raghav Agrawal Vs. Commissioner of Central Tax and GST Delhi, North of Delhi High Court
19. Bail Appl. No.3257 of 2021 : Yogesh Kumar Goyal Vs. DGGI.
20. 2019 SCC Online P & H 5416 : Akhil Krishan Maggu Vs. Vs. Deputy Director
21. 2005 SCC Online Del 61 : (2005)79 DRJ 554.:Sitaram Aggarwal Vs. Customs
22. 2022 SCC Online Del 134 : Sunder Singh Bhati v. State.
23. 2020 SCC Online Bom 39 : Union of India Vs. Kisan Ratan Singh .
24. (2014) 5 SCC 469 : Arnesh Kumar Vs. State of Bihar .
25. (2013) 7 SCC 439 : Y.S. Jagan Mohan Reddy Vs. Central Bureau of Investigation
26. (1987) 2 SCC 364 : State of Gujarat Vs. Mohanlal Jitamaliji Porwal and another
27. Misc. Criminal Case No. 26215 of 2023 (04.07.2023) : Mohit Jain Vs. Union of India
28. (2013) 7 SCC 466 : Nimmagadda Prasad Vs. C.B.I., Hyderabad
29. AIR 1965 SC 481 : Soni Vallabhdas Liladhar & Anr. v. Assistant Collector of Customs, Jamnagar
30. AIR 1966 SC 1746 : Badaku Joti Savant v. State of Mysore.
31. AIR 1970 SC 940 : Ramesh Chandra Mehta v. State of West Bengal.
32. AIR 1970 SC 1065: Illias v. Collector of Customs, Madras.
33. (2022) 10 SCC 51 : 2022 SCC Online SC 825: Satender Kumar Antil v. CBI
34. (2023) 2 SCC 621 : 2022 SCC OnLine SC1678: Ratnambar Kaushik v. Union of India.

For Petitioner : Mr. R.P. Kar, Sr.Adv., Mr. S.Tibrewal & Mr. Rahul Raheja

For Opp.Parties : Mr. P. Mohapatra, Sr. Standing Counsel, DGGST
Mr. A. Kedia, Junior SC, CGST & Customs

JUDGMENT Date of Hearing : 02.11.2023 & Date of Judgment : 23.11.2023

M.S. SAHOO, J.

1. The petition under section 439, Cr.P.C. has been filed by the petitioner challenging the order dated 22.08.2023, rejecting the prayer for bail by the petitioner passed by learned Special Judge (CBI) Court-I-cum-Addl. Sessions Judge, Bhubaneswar

in BLAPL No. 1443 of 2023 arising out of the order dated 11.07.2023 passed by learned S.D.J.M., Bhubaneswar pertaining to 2(c) CC No. 61 of 2023 (F.No. DGGI/ BbZU/07/GST/2023 dated 11.07.2023) for the offences alleged against the petitioner under section 69 of Central Goods and Service Tax Act, 2017 (for short 'the Act'), read with Sections 132(1)(b), 132(1)(c), 132(1)(f) of the Act rejecting the prayer of the petitioner for bail.

2. Heard Mr. R.P. Kar, learned Senior Counsel appearing for the petitioner instructed by Mr. S. Tibrewal & Mr. Rahul Raheja, advocates. The learned senior counsel advanced arguments at length supporting the prayer for bail.

3. On behalf of the investigating agency, Mr.Mohapatra,learned Senior Standing Counsel, Director General,GST was heard in extenso along with Mr. Avinash Kedia, learned Junior Standing Counsel, CGST & Customs, Orissa High Court, Cuttack.

Pleadings :

4. Apart from considering the averments made in the petition filed by the petitioner, this Court has considered the case compilation filed by the petitioner along with memo dated 17.10.2023 and the written note of submission and compilation of the judgment/orders relied upon by the learned counsel for the petitioner filed on 02.11.2023.

The opposite party have filed their response/objection to the petition in the form of an affidavit dated 16.10.2023 sworn to by the Senior Intelligence Officer on behalf of Directorate General of Goods and Services Tax Intelligence, Bhubaneswar Zonal Unit and further additional affidavit dated 01.11.2023 has been filed on behalf of the opposite party along with written notes of submission on behalf of the opposite parties and a compilation of relevant provisions and judgments filed on 2.11.2023.

Prosecution Report :

5. Investigation Report/complaint dated 8.9.2023 registered as 2(c) CC No. 61 of 2023 was filed before the learned Subdivisional Judicial Magistrate, Bhubaneswar in the form of a complaint for an offence punishable under section 132 of the Act read with section 132 of the Orissa GST Act, 2017 and section 20 of the IGST Act, 2017, which indicates the following :

5.1 That certain registered entities having GSTIN (Goods and Services Tax Identification Number) are non-existent at their registered premises. The supply chain and physical verification at the premises of supplier of the firms is also non-existent at their registered premises. Presumably, the entities having GSTIN and their supplier entity, have been created to pass on and avail "Input Tax Credit" under the GST regimen (for short 'ITC') to defraud government exchequer. The details of vehicle numbers mentioned on the eWay bills generated for purported supply were

verified and found to be non-existent. It is alleged that the fictitious entities have shown export of goods in their GST returns, however, they have never actually received any goods from the alleged supplier. There is no movement of any vehicle for transportation of the alleged goods. It is alleged, the exports declared are all bogus and fake. The ITC received from the Government is misuse of benefits extended by the Government to exporters.

5.2 The bank accounts where the ITC has been credited have been verified from the banks and the ITC has been received in the bank accounts.

5.3 It has been stated in the complaint before the learned S.D.J.M. that searches were conducted in the premises as per the office address of the firms and it was found that there were no goods in those premises. The statement of the accused persons i.e. present petitioner along with accused no.2 named in the complaint were recorded under section 70 of the CGST Act, 2017. The chat contained in the mobile phone of the accused persons were verified by the officers of the complainant agency that lists names of thirteen entities for which offices have been arranged. All the entities have GST registrations. The entities have been registered by using Aadhar and PAN cards of various people who are otherwise not so financially sound and do not have the means to operate the entities. It has been alleged against the present petitioner that he sources documents like Aadhar card, PAN card of different persons. The accused no.2 facilitates finding of place for rent. The rental agreement is signed between the proprietor and the owner of the premises. The proprietor opens a bank account and the details are then furnished. It is indicated in the complaint that the ITC in the goods and service tax (GST) system is a mechanism that allows registered business to claim a credit for the tax, they have paid on inputs used in their business operations. The credit is offset against the GST liability that the business owes to the Government.

5.4 In the context of exports, businesses can claim refunds on the GST paid on the inputs used in the export of goods and services. It is alleged that the refunds have been received by at least two entities and after money has been credited to the bank accounts, the same have been withdrawn. It is alleged that the petitioner has created 111 fake GSTINs to generate bogus transactions and has claimed ITC amount of Rs.267,41,14,087/- thereby a refund to the tune of Rs.16,40,09,812/- has been received.

Submissions on behalf of the petitioner :

6. It is submitted by learned counsel on behalf of the petitioner that there is no material to substantiate the above allegations.

The pleadings of the petitioner and the submissions of learned senior counsel are summarized herein :

6.1 There is no material on record showing that the petitioner has been responsible for affairs of said firms/companies or the petitioner has played any role

in any of said firms. The allegations are completely incorrect and have been made without any basis.

6.2 The entities as alleged are exist in Odisha have a ITC to the tune of Rs.1.96 crores, which is less Rs.2 crores. However, the Department in order to make the offence non-bailable, has added ITC of firms that does not lie within their jurisdiction. Though the DGGI, BBSR Zonal Unit has power to investigate, the amount adjudicated in the complaint in the 2(c) CC before competent court, is tentative. The petitioner is neither the proprietor nor the beneficiary in any firm. Therefore, the allegation under section 132 of the GST Act would not be tenable.

6.3 The authorities have relied on the statement of accused no.2 which has been retracted already. No action has been taken against the proprietor of any of the entities those have been named to have received ITC. The amount of ITC which is alleged to have been received by the recipient entities can be recovered from the entities with interest as per the sections 73 or 74 assuming that there has been contravention of the provisions contained in section 16(2) of the Act.

6.4 By virtue of section 138 of the CGST Act, 2017, the offences are to be tried summarily and also the offences are compoundable by virtue of section 138 of the Act. The final prosecution report has been filed by the authorities, even if further investigation is kept open under section 178(3) of the Cr.P.C., the petitioner shall always cooperate with the agency.

6.5 The maximum punishment prescribed is for five years for the offence alleged against the petitioner and the petitioner is in custody since 11.07.2023 since when he and the co-accused were remanded to judicial custody.

6.6 It is submitted the entire transactions in entire Orissa is below Rs.2 crores. All the evidences are documentary and stored in electronic form with the opp.parties, hence, there is no chance of tampering. All the witnesses are official witness and there is no chance of influencing the witnesses. The petitioner is not a flight risk and is ready and willing to appear before the DGGI Authorities as per the terms and conditions fixed by this Hon'ble Court.

Submissions on behalf of the opposite party :

7. It is submitted by the learned Senior Standing Counsel, DGGI that the learned courts below while considering the factual matrix, circumstances and the gravity of the offences have been pleased to deny bail to the petitioner herein. The petitioner's bail application is premature as the investigation of the case is evolving with the discovery of 111 fabricated GSTINs involved in illegal export benefit claims, fraudulent Input Tax Credits of around Rs.267 crores, and false export transaction representations resulting in a fraudulent refund of approximately Rs.16.40 crores. The ongoing investigation has revealed the intricate supply chains of M/s. Jasem Overeseas and M/s. Rompather General Overseas, involving entities

registered in Delhi with a paper-bound existence,intended for the fraudulent availing of ITC pertaining to fake exports. The co-accused Ronald Earnest Ignatio has assisted Nitin Kapoor and has actively participated in the creation of 13 fake GSTINs, which have declared bogus transactions involving fraudulent ITCs of Rs.17,71,10,560/- thereby obtaining illegal refund of Rs.7,79,52,045/-.

7.1 It is submitted the denial of bail is imperative to ensure an unimpeded and exhaustive investigative process. The statements from accused persons, indicate the petitioner as the mastermind behind the entire conspiracy. The far-reaching transactions create a substantial risk of vital connections being destroyed, disrupting the investigation if the accused is granted bail. It is submitted that the multi-state scope of the investigation indicates a complex network of fraudulent activities, potentially hindering coordination among all India investigative agencies. Incriminating materials like mobile phone has been seized from the petitioner. The petitioner is a flight risk.

Case Law cited :

8. The learned counsel for the petitioner has relied on the following decisions to support his submissions to allow the prayer for bail :

(i) BLAPL No.9407 of 2021 (***Smruti Ranjan Sahoo v. State of Odisha***) disposed of on 26.11.2021.

(ii) BLAPL No.8217 of 2021 (***Gurdit Dang v. State of Odisha***) disposed of on 26.11.2021.

(iii) BLAPL No.3175 of 2021 (***Subash Chandra Swain v. State of Odisha***) disposed of on 07.09.2021.

(iv) BLAPL No.9642 of 2020 (***Kashmir Kumar Agrawal v. State of Odisha***) disposed of on 15.11.2023.

(v) BLAPL No.6643 of 2020 (***Amit Beriwal v. State of odisha***) disposed of on 10.11.2020.

(vi) BLAPL No.4266 of 2020 (***Bikas @ Vikas Sarawgi v. State of Odisha***) disposed of on 23.12.2020.

(vii) BLAPL No.4125 of 2020 (***Pramod Kumar Sahoo v. State of Odisha***) disposed of on 23.12.2020.

(viii) S.B Crl. Misc. Bail Application No.5882 of 2021 (***Bhagwan Sahay Gupta v. Union of India***) disposed of on 04.05.2021. (High Court of Rajasthan, Jaipur Bench)

(ix) Crl. Misc. Bail Application No.742 of 2020 (***Paridhi Jain v. State***) disposed of 20.01.2020 (High Court of Rajasthan, Jodhpur Bench).

(x) BLAPL No.776 of 2021 (***Smruti Ranjan Mohanty v. State of Odisha***) disposed of on 18.02.2022.

(xi) BLAPL No.9043 of 2021 (***Amit Kumar Agarwal @ Amit Agarwal v. State of Odisha and another***) disposed of on 11.01.2022.

(xii) Crl. Misc. Bail Application No.21848 of 2022 (disposed of on 29.07.2022).

(xiii) Crl. Misc. Bail Application No.1603 of 2019 arising out of SLP(Crl.) No.9269 of 2019 (***Shri P. Chidambaram v. Central Bureau of Investigation***) disposed of on 22.10.2019.

(xiv) Writ Petition(s) (Criminal) No(s). 339 of 2023 (***Gagandeep Singh v. Union of India & others***)

(xv) SLP Appeal (Crl.) No.10319 of 2022 (***Ratnambar Kaushik v. Union of India***) disposed of on 05.12.2022

(xvi) S.B. Criminal Miscellaneous Bail Application No.17349 of 2022 (***Vikas Bajoria v. Union of India***) disposed of on 01.06.2023.

(xvii) MCRC No.2729 of 2023 (***Sourabh Agrawal v. Union of India***) disposed of on 19.07.2023.

(xviii) SB Criminal Miscellaneous Bail Application No.17536 of 2022 (***Gaurav Kakkar v. Directorate General of Gst Intelligence***) disposed of on 11.01.2023.

(xix) Bail Application No.4019 of 2020 (***Raghav Agrawal v. Commissioner of Central Tax and GST Delhi North of Delhi High Court***.

(xx) Bail Appl. No.3257 of 2021 (***Yogesh Kumar Goyal v. DGGI***).

(xxi) ***AKhil Krishan Maggu v. Deputy Director : 2019 SCC Online P & H 5416.***

(xxii) ***Sitaram Aggarwal v. Customs: 2005 SCC Online Del 61 : (2005)79 DRJ 554***.

(xxiii) Criminal Petition Nos.979 and 980 of 2019 (***Shravan A. Mehra & Ors, v. Superintendent of Central Tax, Anti-evasion, GST Commissionerate***).

(xxiv) ***Sunder Singh Bhati v.State: 2022 SCC Online Del 134.***

(xxv) ***Union of India v. Kisan Ratan Singh : 2020 SCC Online Bom 39.***

(xxvi) ***Arnesh Kumar v. State of Bihar : (2014) 5 SCC 469***.

9. Learned Senior Standing Counsel for the opposite party has relied on the following decisions in support of his contentions opposing the prayer for bail :

(i) ***Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation (2013) 7 SCC 439***, to contend that economic offences are of a distinct nature and must be treated differently concerning bail.Factors considered while granting bail include the nature of accusations,evidence,potentialpunishment,theaccused's character, unique circumstances, and reasonable possibilities.

(ii) ***State of Gujarat v. Mohanlal Jitamaliji Porwal and another : (1987) 2 SCC 364*** wherein considering the appeal against acquittal it was held economic offences are marked by calculated, deliberate designs for personal profit, disregarding the community's interest and causing damage to the national economy and interest.

(iii) ***Mohit Jain v. Union of India (Misc. Criminal Case No. 26215 of 2023***, disposed of on 04.07.2023 to contend that the instances involving substantial GST refunds through fraudulent entities, anticipatory bail should not be granted.

(iv) ***Nimmagadda Prasad v. C.B.I., Hyderabad (2013) 7 SCC 466*** to contend that when granting bail in such cases,the court should consider various factors, including the nature

of the accusations, the evidence supporting them, potential punishment upon conviction, the accused's character, unique circumstances, witness tampering concerns, and the broader interests of the public and the state.

Further the learned Sr. Standing Counsel Mr. Mohapatra has relied on the following decisions :

(v) ***Soni Vallabhdas Liladhar and another v. Assistant Collector of Customs, Jamnagar: AIR 1965 SC 481***.

(vi) ***Badaku Joti Savant v. State of Mysore :AIR 1966 SC 1746***.

(vii) ***Ramesh Chandra Mehta v. State of West Bengal: AIR 1970 SC 940***.

(viii) ***Illias v. Collector of Customs, Madras : AIR 1970 SC 1065***.

(ix) BLAPL No.748 of 2021 (Thabir Sagar v.State of Odisha) disposed of on 18.06.2021.

Analysis & conclusion :

10. Since the matter is before the learned trial court for consideration any observation on merits herein is likely to prejudice the cases of the petitioner as well as that of the prosecution, therein. For the limited purpose of answering the prayer for grant of bail by this Court, during pendency of trial, the above contentions have been taken note of.

11. Apart from adverting to the aforesaid rival contentions, this Court takes note of the principles laid down by the Hon'ble Supreme Court in ***Satender Kumar Antil v. CBI, (2022) 10 SCC 51 : 2022 SCC Online SC 825 (paragraphs 12 to 16, 19 & 90 to 94 of SCC)***

Bail is the rule

12. The principle that bail is the rule and jail is the exception has been well recognised through the repetitive pronouncements of this Court. This again is on the touchstone of Article 21 of the Constitution of India. This Court in Nikesh Tarachand Shah v. Union of India [Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1 : (2018) 2 SCC (Cri) 302], held that : (SCC pp. 22-23 & 27, paras 19 & 24)

"19. In Gurbaksh Singh Sibbia v. State of Punjab [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , the purpose of granting bail is set out with great felicity as follows : (SCC pp. 586-88, paras 27-30)

'27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in Nagendra Nath Chakravarti, In re [Nagendra Nath Chakravarti, In re, 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476] , AIR pp. 479-80 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the

"Meerut Conspiracy cases" observations are to be found regarding the right to bail which deserve a special mention. In K.N. Joglekar v. Emperor [K.N. Joglekar v. Emperor, 1931 SCC OnLine All 60 : AIR 1931 All 504] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the court that there was no hard-and-fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In Emperor v. H.L. Hutchinson [Emperor v. H.L. Hutchinson, 1931 SCC OnLine All 14 : AIR 1931 All 356] , AIR p. 358 it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

28. Coming nearer home, it was observed by Krishna Iyer, J., in Gudikanti Narasimhulu v. Public Prosecutor [Gudikanti Narasimhulu v. Public Prosecutor, (1978) 1 SCC 240 : 1978 SCC (Cri) 115] that : (SCC p. 242, para 1)

"1. ... the issue [of bail] is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. ... After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right."

29. In Gurcharan Singh v. State (Delhi Admn.) [Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118 : 1978 SCC (Cri) 41] it was observed by Goswami, J., who spoke for the Court, that : (SCC p. 129, para 29)

"29. ... There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail."

30. In American Jurisprudence (2nd Edn., Vol. 8, p. 806, para 39), it is stated:

"Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end."

It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.'

24. Article 21 is the Ark of the Covenant so far as the Fundamental Rights Chapter of the Constitution is concerned. It deals with nothing less sacrosanct than the rights of life and personal liberty of the citizens of India and other persons. It is the only article in the Fundamental Rights Chapter (along with Article 20) that cannot be suspended even in an emergency [see Article 359(1) of the Constitution]. At present, Article 21 is the repository of a vast number of substantive and procedural rights post Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] ."

[Underlined to supply Emphasis]

13. Further this Court in Sanjay Chandra v. CBI [Sanjay Chandra v. CBI, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397] , has observed that : (SCC p. 52, paras 21-23)

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson." *[Underlined to supply Emphasis]*

Presumption of innocence

14. Innocence of a person accused of an offence is presumed through a legal fiction, placing the onus on the prosecution to prove the guilt before the court. Thus, it is for that agency to satisfy the court that the arrest made was warranted and enlargement on bail is to be denied.

15. Presumption of innocence has been acknowledged throughout the world. Article 14(2) of the International Covenant on Civil and Political Rights, 1966 and Article 11 of the Universal Declaration of Human Rights, 1948 acknowledge the presumption of innocence, as a cardinal principle of law, until the individual is proven guilty.

[Emphasis Supplied]

16. Both in Australia and Canada, a prima facie right to a reasonable bail is recognised based on the gravity of offence. In the United States, it is a common practice for bail to

be a cash deposit. In the United Kingdom, bail is more likely to consist of a set of restrictions.

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19. The position in India is no different. It has been the consistent stand of the courts, including this Court, that presumption of innocence, being a facet of Article 21, shall inure to the benefit of the accused. Resultantly burden is placed on the prosecution to prove the charges to the court of law. The weightage of the evidence has to be assessed on the principle of beyond reasonable doubt.

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Economic offences (Category D)

90. What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in P. Chidambaram v. Directorate of Enforcement [P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791 : (2020) 4 SCC (Cri) 646] , after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence. After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis. Suffice it to state that law, as laid down in the following judgments, will govern the field:

[Emphasis Supplied]

Precedents

91.P. Chidambaram v. Directorate of Enforcement [P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791 : (2020) 4 SCC (Cri) 646] : (SCC pp. 804-805, para 23)

"23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may

have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial."

[Underlined to supply Emphasis]

92. Sanjay Chandra v. CBI [Sanjay Chandra v. CBI, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397] : (SCC pp. 62-64, paras 39-40 & 46)

"39. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds : the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.

40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

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Role of the court :

93. The rate of conviction in criminal cases in India is abysmally low. It appears to us that this factor weighs on the mind of the Court while deciding the bail applications in a negative sense. Courts tend to think that the possibility of a conviction being nearer to rarity, bail applications will have to be decided strictly, contrary to legal principles. We cannot mix up consideration of a bail application, which is not punitive in nature with that of a possible adjudication by way of trial. On the contrary, an ultimate acquittal with continued custody would be a case of grave injustice. [Emphasis Supplied]

94. Criminal courts in general with the trial court in particular are the guardian angels of liberty. Liberty, as embedded in the Code, has to be preserved, protected, and enforced by the criminal courts. Any conscious failure by the criminal courts would constitute an affront to liberty. It is the pious duty of the criminal court to zealously guard and keep a consistent vision in safeguarding the constitutional values and ethos. A criminal court must uphold the constitutional thrust with responsibility mandated on them by acting akin to a high priest."

12. In ***Ratnambar Kaushik v. Union of India, (2023) 2 SCC 621 : 2022 SCC OnLine SC 1678 (at page 622 of SCC)***, the Hon'ble Supreme Court granted bail to

the petitioner therein, the facts of the case being somewhat similar to the present case. The relevant paragraphs are quoted herein : (paragraphs 3 to 8 of SCC)

> *"3. The gist of the allegations against the petitioner in the prosecution initiated against him is that the petitioner had clandestinely transported raw unmanufactured tobacco brought from Gujarat by 7 trucks weighing 90,520 kg. It is alleged that raw tobacco was cleared in the name of M/s Maa Ambey Enterprises, Bakoli from M/s Arihant Traders, Kheda, Gujarat but the said trucks went to Patparganj area to M/s Galaxy Tobacco in Delhi. It is further alleged that the said quantity of unmanufactured tobacco has beenapparently used in the clandestine manufacture and supply of chewing tobacco without payment of leviable duties and tax.*
>
> *4. The petitioner contends that even if the tax is levied at 28%, the value would be around Rs 10,30,824. However, as per the case of the respondent, the total tax/duty and cess involved would be Rs 15,57,28,345. The said contention has been raised on the basis of the projected manufacture of zarda pouches from the said quantity of unmanufactured tobacco. Thus on the projected number of pouches, the tax amount if taken into consideration, would be to that extent.*
>
> *5. It is further contended on behalf of the respondent that in the course of the investigation it has also come to light, apart from the 7 trucks, 287 more trucks loaded with raw unmanufactured tobacco has been transported as per the details obtained from the toll/RFID data of NHAI, which shows the movement of the trucks.*
>
> *6. Insofar as the allegations made against the petitioner are concerned, the learned Senior Counsel for the petitioner while rebutting the same would contend that at this juncture, such allegations made by the respondent against the petitioner are far-fetched. Even if one accepts as correct, the allegation on which the proceedings is predicated, wherein 90,520 kg of raw/unmanufactured tobacco in 7 trucks is taken note of, the GST, if reckoned, comes to only Rs 1,93,26,020. It is contended that the sum of Rs 11,04,34,400 shown as cess by the respondent is even without the proof of manufacture of zarda and it has been done only to indicate the projected value of more than Rs 15 crores. The learned Senior Counsel for the petitioner therefore disputed the allegations and contended that such allegations have been made only to allege cognizable and non-bailable offence against the petitioner so as to deny bail and take him into custody.*
>
> *7. Though allegations and counter-allegations are made, at this stage, it would not be necessary for us to advert to the details of the rival contentions, since the matter in any event is at large before the trial court and any observations on merits herein would prejudice the case of the parties, therein. However, for the limited purpose of answering the prayer for the grant of bail, the contentions are taken note of. It is no doubt true, that an allegation is made with regard to the transportation of unmanufactured tobacco and it is alleged that such procurement of unmanufactured tobacco is for clandestine manufacture and supply of zarda without payment of leviable duties and taxes. Though it is further contended that in the process of the investigation, the transportation of a larger quantity of unmanufactured tobacco weighing about 35,57,450 kg is detected, these are all matters to be established based on the evidence, in the trial.*
>
> *8. In considering the application for bail, it is noted that the petitioner was arrested on 21-7-2022 and while in custody, the investigation has been completed and the charge-sheet has been filed. Even if it is taken note that the alleged evasion of tax by the petitioner is to the extent as provided under Section 132(1)(l)(i), the punishment*

provided is, imprisonment which may extend to 5 years and fine. The petitioner has already undergone incarceration for more than four months and completion of trial, in any event, would take some time. Needless to mention that the petitioner if released on bail, is required to adhere to the conditions to be imposed and diligently participate in the trial. Further, in a case of the present nature, the evidence to be tendered by the respondent would essentially be documentary and electronic. The ocular evidence will be through official witnesses, due to which there can be no apprehension of tampering, intimidating or influencing. Therefore, keeping all these aspects in perspective, in the facts and circumstances of the present case, we find it proper to grant the prayer made by the petitioner." [Emphasis Supplied]

13. It is noticed that in some of the decisions cited by learned Senior Standing Counsel for the DGGST, the observations of the Hon'ble Supreme were in the context that the Supreme Court was dealing with appeal against conviction or acquittal and the considerations therein are not similar to the considerations by a Court while taking up a petition under Section 439 of Cr.P.C. , the petitioner praying for grant of bail when the trial is still pending.

It has to be further observed that regarding the statement made before the investigating officer its admissibility and relevancy is not a matter of consideration before this Court in the present proceeding.

14. It is true that the allegation made against the petitioner is that he received the benefit of the amount that was granted to different entities to the tune of Rs.7,79,52,045/-, obtaining refund of Rs.7,79,52,045/- and it is contended by the prosecution/complainant that there is likelihood of the discovery of more such transaction, but it is also not disputed that the final prosecution report has been filed in the case. The petitioner was arrested on 11.07.2023, incarcerated for more than four months and the punishment provided is imprisonment which may extend to five years and fine and completion of trial in any event would take some time. Since the alleged offence constitutes the act of crediting amount of ITC through the departmental Online system, to the account of the certain entities which have been alleged to be non-existent and the money has been subsequently received by the petitioner, the evidence tendered by the opposite party/complainant would essentially be documentary and electronic. The ocular evidence will be through official witnesses of the department due to which there can be no apprehension of tampering, intimidating or influencing.

15. Therefore, keeping all the above aspects in the perspective, in the facts and circumstances of the present case, by applying the principles enunciated by the Hon'ble Supreme Court in ***Satender*** (supra) and ***Ratnambar*** (supra), this Court is inclined to grant the prayer for bail made by the petitioner subject to such stringent terms and conditions that would be imposed by the learned court in seisin of the matter, for which the court shall hear the learned counsel for the complainant as well as the learned counsel for the petitioner and further conditions as would be deemed appropriate can be imposed along with the following conditions :

Two sureties for an amount to the satisfaction of the learned court in seisin of the matter, out of the two sureties one shall be a family member of the petitioner and the other shall be a local person;

the court in seisin of the matter shall ensure and verify the credential of the sureties, the court shall direct and record its satisfaction;

the petitioner shall not in any manner make any inducement, threat or promise to the prosecution witnesses so as to dissuade them from disclosing truth before the court and shall not tamper with the evidence;

the petitioner shall not indulge himself in similar activity;

the petitioner shall surrender his passport if any, before the learned court in seisin of the matter and will not leave India without prior permission of the Court and in the event the petitioner has not been issued with any passport, he would submit an affidavit stating the said fact;

the petitioner shall appear before the concerned authority as would be so required for the purpose; he shall appear before the police having jurisdiction of his area of residence, if directed by the learned court in seisin of the matter in the manner to be decided by the learned court;

the petitioner shall fully cooperate with the ongoing further investigation and make himself available anywhere as and when required for such purpose;

the petitioner shall be available to be contacted over mobile phone and such phone should remain active and normally not be changed, and in case of any change of mobile number of the petitioner for any bona fide reason, the same shall be communicated to the Investigating Agency;

the petitioner shall co-operate with the trial and shall not seek unnecessary adjournments on frivolous grounds to protract the trial;

the petitioner shall not indulge in any criminal activity or commission of any crime after being released on bail; In case of his involvement in any other criminal activities or breach of any condition imposed for grant of bail, the investigating agency shall file petition for cancellation of bail;

16. The BLAPL is disposed of accordingly.

It is clarified that any observations made in this judgment shall not be construed to be the opinion of this Court regarding the merits of the contentions that would be raised in the pending trial before the learned court in seisin by either of the parties to the present petition.

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2023 (III) ILR-CUT-1159

R.K. PATTANAIK, J.

W.P.(C) NO. 26498 OF 2022

Dr. SUDHANSU SARANGI ……Petitioner

-V-

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

ORISSA HOUSING BOARD ACT, 1968 – Section 23 – The authority rejected the application for permission of structural changes with minor modification in respect of the core house allotted to the petitioner – Whether impugned rejection is sustainable? – Held, No – Complete denial to minor alteration/modification is not sustainable, when such a situation is not envisaged anywhere in the Act or brochure or advertisement. (Para-8)

For Petitioner : Mr. Subir Palit, Sr. Adv.

For Opp.Parties: Mr. P.K. Rout, AGA, Mr. D. Mohapatra

JUDGMENT Date of Judgment : 25.09.2023

R.K. PATTANAIK, J.

1. Instant writ petition is filed by the petitioner assailing the impugned order dated 21st September, 2022 vide Annexure-8 and for a direction to the opposite parties to accommodate the structural changes with minor modification in respect of the core house allotted to him corresponding to the building plan of House No.11, Kanan Vihar, Phase-I, Patia, Bhubaneswar on the grounds stated.

2. The impugned action of the opposite parties in denying the modification vis-a-vis the interior of the core house has been questioned with the rejection of the representation as arbitrary and illegal since it was requested while keeping the total plinth area and external elevation intact. In fact, the petitioner had earlier knocked the doors of this Court in W.P.(C) No. 16488 of 2022 which was disposed of on 18th July, 2022 with a direction to the opposite parties and particularly, opposite party No.2 to consider modification of the proposed plan on the extra costs being borne by him and to take a decision on the same. Pursuant to the aforesaid order, the representation of the petitioner was disposed of on 21st September, 2022 vide Annexure-8 with an intimation to him that changing of column position in the allotted house without altering external layout or plinth area is difficult to be implemented in view of the common approved plan for all the 11 HIG houses and furthermore, as per the Scheme, advertisement and brochure conditions, allotment letter was already issued and hence, alteration in the plan at such stage is to create precedence. As it is made to understand, the request of the petitioner for the necessary alteration even on payment of additional costs for modification was not accepted owing to the common layout and design adopted for the HIG houses as per the approved plan. The aforesaid decision of the authority concerned has been challenged by the petitioner on the grounds inter alia that the rejection of the request would subject him to immense inconvenience, hardship and financial loss,if ultimately, the entire structure is demolished and rebuilt as per the proposed plan.

3. Heard Mr. Palit, learned Senior Advocate for the petitioner and Mr. Mohapatra, learned counsel for opposite party No.2 besides Mr. Rout, learned AGA for opposite party No.1.

4. Mr. Palit, learned Senior Advocate for the petitioner would submit that the petitioner in compliance of the terms and conditions of the advertisement deposited the entire of the consideration, which is the price of the core house and also an additional sum while exercising an option for a corner plot and after the online lottery, as he was one among the 11 winners, was allotted the core house vide letter dated 11th June, 2021 and since allotment of a choice plot could not materialize, extra amount received from him was refunded. It is further submitted that after the allotment and on verification of the design of the core house, the petitioner noticed that its interior design needs minor modification, such as, moving of column and adjustment of beam to cater the specific requirements like installation of a lift etc. and carving out proper living area in the ground floor. Mr. Palit further submits that the petitioner's mother is old and ailing and therefore, it is necessary that a lift to be installed and the changes so requested are slight modification internally which do not alter the exterior or plinth area. It is contended that once the construction is concluded, it would be very difficult to carry out the modification unless completed columns are dismantled. It is also contended that if the stand of opposite No.2 is accepted that the changes may be brought about after taking possession of the core house, as according to Mr. Palit, at that stage, the only way would be to bring down the entire structure and therefore, rejection of the request on any such ground is irrational and absurd. It is claimed that the size of the plot permits construction of the two storied building and the modification proposed by the petitioner is well within the limits lawfully allowed keeping in mind future expansion. Mr. Palit also submits that since the petitioner's request was not accepted, a representation under Annexure-2 was submitted to refund the construction cost so that he would be able to undertake the same on his own with minor modification to be carried out as to the interior, which was also turned down on the ground that it violates the terms and conditions of the brochure and advertisement. According to Mr. Palit, learned Senior Advocate, the request of the petitioner was rejected principally on the ground that an approved plan is in place and any such alteration of the same as proposed would create a precedence and is also unworkable despite proper demonstration well supported by professional recommendation which was not duly examined by opposite party No.2 notwithstanding the fact that the petitioner was ready and prepared to bear the additional cost for such modification. While advancing such an argument in favour of the changes to be necessary before any such construction is commenced, Mr. Palit refers to Sections 19 and 23 of Orissa Housing Board Act, 1968 (hereinafter referred to as 'the OHB Act') to state that the programme as sanctioned by the State Government may even be varied at any stage. In other words, Mr. Palit would contend that there is no bar under the OHB Act to allow any such minor modification or changes to the interior of the core house, all the more when, the programme which is related to the annual housing prepared by the Board permits variation as per the Section 23 of the OHB Act.

5. On the contrary, Mr. Mohapatra, learned counsel for opposite party No.2 referring to the counter affidavit submits that the construction of the HIG houses is over left out plots in the Social Housing Scheme for which opposite party No.2 invited applications and out of 24 applicants, the petitioner was one among them picked up through lottery for the allotment of a plot. It is contended that the construction of the core houses is undertaken with due permission of the competent authority as per the structural design specifically referred to in the brochure having been cleared by the Board. It is submitted by Mr. Mohapatra that the brochure conditions do not specify any such provision for changing the structure and design or interior of the allotted core house and in so far as the request of the petitioner for modification pursuant to the order in W.P.(C) No. 16488 of 2022 is concerned, it was declined on just ground. According to Mr. Mohapatra, opposite party No.2 floated the Scheme and the petitioner was one of the applicants and he was allotted the core house as per the conditions of the brochure which was well within his knowledge and therefore, any such modification in the design thereafter by changing the columns, adjustment of beam etc. could not have been permitted. It is stated that the design of the core houses have been made keeping in view various aspects, inasmuch as, the contractor is required to execute the work in consonance with the agreement in place and hence, any such request for modification sans merit and thus, rightly rejected. It is contended that the petitioner cannot take any such ground as to unreasonableness when he was fully aware of the Scheme and for having accepted all the conditions and if the plan failed to meet the specific requirements now demanded, he would not have applied for the allotment. As per Mr. Mohapatra, the proposed modification is as such not permissible and considering all such factors, the representation was rejected vide Annexure-8 and hence, the impugned decision is absolutely justified in the facts and circumstances of the case.

6. From Annexure-1, it is revealed that the petitioner was allotted the core house under the Scheme as one of the allottees with the deposit of the entire sale price. Since the construction work had not commenced despite the allotment, the petitioner requested opposite party No.2 to refund the construction cost only and to permit him to accomplish it on his own as made to appear from Annexure-2. Thereafter, in the month of August, 2021, the petitioner was intimated vide Annexure-3 that handing over the plot instead of a core house could not be considered since it would violate the terms and conditions of the brochure and advertisement and furthermore, requested to deposit the dues payable within a month. In the meanwhile, the modification of the building plan was moved under Annexure-4 with a request to change the location of column to create a larger living space in the ground floor of the core house and to provide an internal staircase and provision of a lift while keeping the floor area and exterior intact. Such request was finally rejected vide Annexure-8 on the grounds discussed hereinbefore.

7. There is no denial to the fact that the allotment was made under an HIG Scheme. For the said purpose, an advertisement was published. According to the

advertisement and as per the Scheme, the construction of the core houses has to be in the lines of the specifications mentioned therein. The petitioner in order to accommodate own requirements submitted the modified plan along with a comparative cost estimate of both the plans having been prepared by a professional of technical expertise in confirmity with the OPWD Code. The details of the proposed plan and comparative cost estimate so submitted by the petitioner are at Annexures-5 and 6 with the rates as admissible under said Code, a copy of which is at Annexure-7 and according to Mr. Palit, learned Senior Advocate, opposite party No.2 did not respond to it properly rather rejected the request which is quite unreasonable and unjustified. The question is, whether, any such acceptance of proposed modification in the structural design is permissible? A copy of brochure is made available for perusal of the Court as per which opposite party No.2 proposed to construct HIG core houses stating therein the details of the infrastructure and the manner in which the allotment shall be made with the cost price etc. The other details are also mentioned in the brochure in respect of the HIG Core Houses Scheme, which is in respect of outright purchase of the plots, etc. In so far as the OHB Act is concerned, the Board shall have to prepare and submit a programme every year to the State Government stating therein the prescribed particulars of the Housing Schemes which it proposes to execute either in part or whole with other details as to the execution and Mr. Palit, learned Senior Advocate referring to Section 19 read with Section 23 would contend that there is no restriction of any kind to vary any such programme as sanctioned by the State Government, rather, the same is permissible subject to the proviso clause and the conditions being fulfilled. The purpose of the argument is to satisfy the Court that the proposed modification is not impermissible when variation to the entire Scheme is allowed in view of Section 23 of the OHB Act even after the sanction for any programme is received from the State Government in a particular year. In so far as the above provisions are concerned, it is in relation to a programme prepared by the Board in respect of Housing Schemes for a specified year and variation thereof which is permissible under the OHB Act. So to say, Section 23 of the OHB Act is in relation to a housing programme as a whole with the authority for the Board to go for any variation subject to conditions. In so far as the case of the petitioner is concerned, it is individual based on specific requirements which has been denied by opposite party No.2. In fact, no any provision of the OHB Act has been drawn to the notice of the Court by Mr. Palit, learned Senior Advocate which relates to any such request for modification which the Board can accommodate on individual request being received by it. But the argument is that when the Board has the authority to consider the variation of a programme, which it can do subject to Section 23 of the OHB Act, the proposed modification of the building plan by the petitioner could also be entertained when it is absolutely necessary to accommodate the specific requirements with minor changes in the location of column with slight modification in the structural design without alteration of the external layout or plinth area. As earlier mentioned,the modified plan and also the comparative cost estimate had been

submitted for a decision by opposite party No.2 while demanding the necessary changes in the ground floor of the core house allotted to the petitioner. If Annexure-8 is read and understood, the request was rejected by opposite party No.2 on the ground that the modification is difficult to be implemented more so in view of the common approved plan and that too when, the allotment letter was already issued and any such alteration in the plan would create precedence. Is it that in view of the common approved plan, the modification, which has been sought for by the petitioner was disallowed? It is also apprehended by opposite party No.2 that in case, the proposed change in the approved plan of the core house is allowed, similar requests might be received in future. But, in absence of any such bar or clear restriction with a specific provision in the OHB Act having not been brought to the notice of the Court either, a question is bound to arise as to why the proposed amendment which is again based on specific requirements should not be permitted. It is certainly quite absurd to suggest that the petitioner could bring the modification later on once the construction of the core house is completed and the same is handed over to him. By such means, after the construction is concluded, if at all the suggestion of opposite party No.2 is accepted, it would result in substantial loss to the petitioner since the entire structure of the core house building or at least substantial part of it would have to be virtually pulled down. When the construction of the core house is not yet commenced, it would rather be a wise option to go for any such modification. To deny the same without considering the plea in its proper perspective taking cognizance of all the factors and being apprehensive of the fact that it would create a precedence to follow is not only unreasonable but also quite unusual with a bizarre suggestion that the petitioner may incorporate the changes once the core house is fully constructed and handed over.

8. According to the Court, opposite party No.2 should be practical and responsive to the needs of the buyers and in the case at hand, it ought to have considered the request when a fresh structural design and estimate was prepared and submitted before it especially in absence of any bar or ouster of jurisdiction under the OPHB Act to deal with the same. The Court is also unaware of any such stipulation in the Scheme or conditions against modifications as nothing has been brought on record. It is rather impliedly assumed that the Scheme and the conditions do not allow such changes and modification even where the same is unlikely to alter the plinth area and exterior design again without looking into the proposed design and estimate. When such a situation is not envisaged anywhere in the OHB Act or brochure or advertisement, to assume that it is impermissible or not just workable in juxtaposition to the materials submitted by the petitioner is something which does not appeal to sense and logic. In fact, the said Act is conspicuously silent rather does not comprehend or cover and meet any such situation. Furthermore, Annexure-8 does not reveal as to whether the proposed change in the building plan or structural design is fraught with any risk or likely to cause any loss to them when the petitioner is inclined to bear the expenses for the additional change inclusive of the costs of the

contractor, who has been issued with the work order. The Court is also made to understand that the modified plan was submitted and a discussion was held in presence of the technical experts from both the sides but surprisingly the request was rejected without its due consideration. When any such modification is sought for, opposite party No.2, in absence of clear indication or provision to the contrary should adopt flexibility to the extent necessary when the changes are suggested keeping in view the specific requirements. To bluntly deny any such proposed modification which is without altering the external layout or plinth area of the core house, the purpose being to create a better living space in the ground floor and to accommodate other facilities, in the humble view of the Court, is clearly unreasoned. At the cost of repetition, it is stated that to out rightly reject the changes at present and to suggest the petitioner to introduce the modification after the construction of the core house is completed is really absurd when nothing is shown on record that any such modification in respect of a Scheme house is expressly prohibited. When opposite party No.2 is unlikely to suffer any loss on account of any such internal changes simply for the reason that the building plan for the core house under the Scheme has been approved with the letter of allotment issued in favour of the petitioner, denial also stands to no reason when a modified plan estimate and comparative statements prepared and submitted to opposite party No.2 have not been discarded. As to the apprehension that permission in favour of the petitioner could result in precedence, it would rather be better to comprehend such distinct situations with proper scheme of things on paper.

9. Hence, it is ordered.

10. In the result, the writ petition stands allowed with the direction to opposite party No.2 to accommodate the request of the petitioner at the earliest preferably within three months from the date of receipt of a copy of this judgment, however, subject to the technical clearance vis-a-vis modifications proposed and additional expenses being borne by him. As a necessary corollary, the impugned order under Annexure-8 is hereby set aside in view of the discussion and observations made herein above.

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2023 (III) ILR-CUT-1165

SASHIKANTA MISHRA, J.

CRA NO. 233 OF 1993

AJIT KUMAR RATH .....Appellant

-V-

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Appellant was convicted for the offence U/ss. 363/366 of IPC – The entire evidence of the victim as regard to the occurrence is an improvement from her earlier version recorded by the I.O – Effect of such contradiction? – Held, minor contradictions in the subsequent statements of witnesses are immaterial but if the contradiction is in material particulars, the version of the witnesses become doubtful.

Case Laws Relied on and Referred to :-

1. (2000) 1 SCC 247 : State of H.P Vs. Lekh Raj.
2. AIR 1965 SCC 942 : S.Varadarajan Vs. State of Madras.

For Appellant : Mr. D.P. Dhal, Sr. Adv.
M/s. A.K. Acharya & D.K. Das

For Respondent : Sri S.K. Mishra, Addl. Standing Counsel

JUDGMENT Date of Judgment : 02.09.2023

SASHIKANTA MISHRA, J.

The appellant questions the legality and correctness of the judgment of conviction and sentence passed by learned Asst Sessions Judge-cum-Sub Judge, Balasore on 20.7.1993 in S.T. No.1/3 of 1993 as per which he was convicted of the offence under Sections 363/366 IPC and was sentenced to undergo rigorous imprisonment for four years on each count with both sentences to run consecutively.

2. Prosecution case, in brief is as follows:

One Ramakrishna Satpathy lodged FIR before the Balasore Town Police Station on 10.4.1992 alleging therein that on that day at about 11 AM his minor daughter 'X' (name withheld) aged about 15 years had been kidnapped by the accused with the intention of marrying her. This led to registration of Balasore Town P.S. Case No. 82(5) of 1992 under Section 366 of IPC followed by investigation. Upon completion of investigation charge-sheet was submitted under Section 366 of IPC. Charge was however framed under Sections 363 and 366 of IPC.

3. The plea of the accused was of complete denial and false implication on the ground that he had refused the proposal of the victim's father to marry his daughter.

4. To prove its case prosecution examined nine witnesses of whom P.W.-1 is the informant and father of the victim, P.W.-2 is the paternal uncle of the victim and P.W.-5 is the victim girl herself. P.Ws.-3 and 4 are doctors who had examined the victim, P.W.-6 is a seizure witness, P.W.-7 is the I.O., P.W.-8 is the Manager of the temple where the marriage between the accused and the victim had allegedly been solemnized and P.W.-9 is the Headmaster of the school in which the victim was studying. Prosecution also proved 11 documents from its side.

Defence did not produce any oral evidence but proved some documents from its side.

5. After appreciating the evidence on record and in particular the evidence of the doctors, P.Ws.-3 and 4 and the School Admission Register, proved as Exhibit-11 through P.W.-9, the trial Court held that the victim was aged about 15 years at the time of the occurrence. As regards the occurrence itself, the trial Court noted that both the informant as well as the victim had greatly improved upon their earlier versions given before the Investigating Officer and the Court. Despite holding so, it was of the view that the accused had enticed the victim girl to go with him from the custody of her parents with a view to marry her and also married on the same day. It was also held that consent of the victim was not material as she was a minor. On such findings, the accused was convicted and sentenced as aforesaid.

6. Heard Mr. D.P. Dhal, learned Senior Counsel with Mr. A.K. Acharya, learned counsel appearing for the appellant and Mr. S.K. Mishra, learned Addl. Standing Counsel.

7. Assailing the findings of the trial court, Mr. Dhal would argue that the finding relating to age of the victim is erroneous in view of the fact that the evidence on record did not conclusively prove that the victim was 15 to 16 years of age. Mr. Dhal would further argue that when the entire version of the victim about the occurrence was proved to be an improvement from her earlier version before the I.O. as also before the Court, there was no legally admissible evidence on record for the trial Court to have held the prosecution case as proved. In this context, it is further argued that the earlier version of the victim was true and correct but what she stated before the Court was obviously because of pressure exerted by her family and therefore, such version could not have been relied upon.

8. Mr. Mishra on the other hand would support the findings of the trial Court by arguing that both the doctors examined by prosecution clearly and conclusively proved that the age of the victim was 15 to 16 years. Further, the School Admission Register also lends support to the prosecution case that the victim was aged 15 years at the relevant time. Thus, the defence plea that the victim had left home with the accused on her own volition is of no consequence as any consent given by a minor is no consent in the eye of law. As regards the so-called contradictions in the evidence of the informant and the victim, Mr. Mishra would argue that the same are not material and in any case do not demolish the prosecution case in view of the clear evidence that the accused and the victim had married in the temple.

9. In order to appreciate the rival contentions it would be apposite to independently scan the evidence on record to see if the same supports the charges framed against the accused. In this regard it is noteworthy that the evidence of the informant, P.W.-1 is greatly at variance from his own version given in the FIR. To elaborate, as already stated, the informant lodged the FIR simply alleging that his daughter had been kidnapped by the accused with a view to marry her. He had not stated anything about such marriage having actually taken place in Khirachora Gopinath Temple. But in his testimony before the Court as P.W.-1 he stated that his

younger brother came to him and reported that some major trouble had happened in their house for which his immediate presence was necessary, hearing which he went to his house by motorcycle. After reaching home his brother told him that he had received some information that the victim's marriage had taken place in Remuna Temple, whereupon they both went to the temple and came to know from the Manager of the temple that on that day marriage had taken place between the accused and the victim and he also produced the duplicate marriage receipt. This is entirely contrary to what he had stated in the FIR and same was also confronted to him by the defence in cross-examination. The I.O., P.W.-7 also admitted that the informant had not only stated such things in the FIR but also had not done so before him during investigation.

10. P.W.-2 is the younger brother of the informant, who corroborated his version but then no reliance can be placed on his testimony since the testimony of P.W.-1 itself is doubtful for the reasons indicated in the preceding paragraph. No other witness or member of the family was examined by prosecution in this regard even though the victim is said to have gone with the accused from her house, which in the circumstances assumes great significance.

11. The victim was examined as P.W.-5. She stated in vivid details about the occurrence. According to her, on the date of occurrence at 11 AM while she was reading in her house, the accused came to her and told that her sister (cousin) Kalpana was calling her and accordingly she went with him to Kalpana's house. When she reached there, Kalpana told her that her marriage would take place with the accused and at that time some friends of the accused were also present. Hearing this she got perplexed and believed that Kalpana was joking. But Kalpana and some friends of the accused confined her in a room and bolted the door from outside and threatened her with dire consequences, if she did not agree to marry the accused. Kalpana also tried to persuade her to marry the accused whereupon she started weeping. Kalpana forced two Rasagollas in her mouth after consuming which she felt inconvenient and experienced reeling of head. Thereafter Kalpana, the accused and his friends carried her to Remuna Temple in a taxi where the accused threatened to kill her by pressing her neck if she shouted. She was then forced to sign on a receipt which was blank and the priest of the temple was asked to perform the marriage. The accused put a garland around her neck but she threw it away out of anger and thereafter Kalpana got another garland and asked her to put it around the neck of the accused and also forced her to do so. Thereafter, they all brought her back to Kalpana's house again and confined her in a room and in the evening her father rescued her being assisted by police.

12. The entire version of the victim as stated above is found to be an improvement over what she had stated in her statement recorded under section 161 of Cr.P.C. by the I.O. and Section 164 of the I.P.C. by the learned Magistrate. It was suggested to her during cross-examination that she had not stated so in her earlier

statements, which she denied but then being confronted, the I.O. admitted that the victim had not stated so. It was also suggested to her that she had stated a different story in her statement recorded under Section 164 of Cr.P.C. by the Magistrate in that she had love intimacy with the accused for two years prior to the occurrence. In her earlier version she had stated that two months prior to the incident her parents came to know about her love affair with the accused and persuaded her to refrain from such activity and had also scolded and beaten her on many occasions and that and 09.04.1992, her father assaulted her and drove her out of the house due to which on the same evening she informed the accused of such fact. It was also suggested to her that she had stated before the Magistrate that the accused had not forcibly taken her to his house and that she went to his brother's house voluntarily. Being confronted the I.O. admitted that the victim had not stated before her whatever she had stated about the occurrence in the Court but had given a different story altogether.

13. From the above narration it becomes evident that the entire evidence of the victim as regards the occurrence is an improvement from her earlier version. To amplify, in her earlier version she had referred to her love relationship with the accused for two years and of her family being against it. She had also referred to the attempts made by her family members to dissuade her from such relationship including scolding and beating her. In fact, she even went to the extent of stating that she had been driven out of her house on the day before the occurrence by her father, which she had conveyed to the accused. Significantly she had stated that the accused had not kidnapped her and that she had voluntarily left home with him. In the Court however she came up with a different story as has already been stated hereinbefore.

14. What would be the effect of such contradiction? It is the basic proposition of law that minor contradictions in the subsequent statement of a witness are immaterial but if the contradiction is in material particulars, the version of the witness becomes doubtful. Reference in this regard may be had to the case of **State of H.P. v. Lekh Raj**, reported in **(2000) 1 SCC 247**. This is a case where the victim omitted to say in the court whatever she had stated before the I.O. earlier. Thus her entire version becomes inherently doubtful and hence, unreliable.

15. Reading of the impugned judgment shows that the Court below has taken note of the contradictions but brushed it aside by holding that the accused availed of the opportunity caused by the ill-treatment meted out to the victim by her father because of her love affair and persuaded her to leave the house and to come with him to marry him. This part of the finding is not there in the evidence at all, but somehow the trial Court has read the same into the evidence. Evidently the trial court referred to the version of the victim in the statement recorded under Section 164 of Cr.P.C. forgetting that the same is not substantive evidence. It need not be emphasized that whatever the witness says in Court is to be accepted. If the version in the Court is found to be consistent with her earlier version,it would be a corroborative

piece of evidence but if it is contrary to the earlier version, both are to be discarded. By doing so, the trial court has accepted the love relationship theory but at the same time held that the accused took advantage of the situation and persuaded the victim to leave home with him for the purpose of marriage which in any case had not been stated by the victim earlier. Thus, the Court appears to have taken a bit from the statement under section 164 of Cr.P.C. and another bit from the victim's evidence in the court which is nothing but a major contradiction in terms.

16. In the earlier statements the victim had stated that she had left voluntary with the accused as her father had misbehaved with her. She had not stated that the accused enticed her to leave with him for marriage though she stated the contrary in the Court. It would be relevant to refer to the relevant statutory provisions at this stage. Section 363 of IPC runs as follows:

> ***"363. Punishment for kidnapping***
>
> *Whoever kidnaps any person from [India] or from lawful guardianship, 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 366 of IPC runs as follows:

> ***"366. Kidnapping, abducting or inducing woman to compel her marriage, etc***
>
> *Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her. will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; 160[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid."*

17. It is seen that to constitute both the offences the essential ingredient is enticing or taking away of the victim from the lawful guardianship. In the case of **S. Varadarajan v. State of Madras, reported in (1965) 1 SCR 243: AIR 1965 SCC 942** the Apex court held as follows:

> *"9. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.*

> *10. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion, if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking"."*

18. As already stated, there is nothing in the evidence to show that the accused had enticed the victim in any manner. Thus the finding of the trial court in this regard is entirely unsustainable.

19. Once the version of the victim is found to be completely unreliable and there being no other acceptable evidence to even remotely establish the guilt of the accused the prosecution case must fall to the ground. For the above reason the impugned order of conviction cannot stand the scrutiny of law.

20. Another significant aspect is failure of the prosecution to implicate Kalpana, who is stated to have played a major role in facilitating the so-called kidnapping and marriage of the victim with the accused. She was not charge-sheeted nor examined as a witness by the prosecution. So, in the absence of such a material witness, the credibility of the victim's testimony gets further eroded.

21. For the foregoing reasons therefore, this Court is of the considered view that the order of conviction passed by the trial court cannot in any manner be sustained in the eye of law. Resultantly, the criminal appeal is allowed. The impugned judgment of conviction and sentence is hereby set aside. The accused being on bail, be discharged of his bail bonds.

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2023 (III) ILR-CUT-1171

SASHIKANTA MISHRA, J.

CRLMC NO. 2891 OF 2023

JITENDRA NATH PATNAIK …….Petitioner

-V-

ENFORCEMENT DIRECTORATE, BBSR .....Opp.Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Whether the proceeding purportedly emanating from the ECIR registered for the commission of offence U/s. 3 of the PML Act can be treated as

criminal proceedings so as to come within the scope of the power U/s. 482 Cr.P.C? – Held, No – Registration of ECIR being an administrative act for initiation of investigation under the PML Act, which is a special statute cannot be quashed in exercise of power U/s. 482 of Cr.P.C because registration of the ECIR is not an act undertaken under the code.

(B) WORDS AND PHRASES – ECIR vis-a-vis FIR – Discussed with reference to case law.

Case Laws Relied on and Referred to :-

1. (2022) SCC OnLine SC 929 : Vijay Madanlal Choudhary Vs. Union of India.
2. (2002) 3 SCC 89 : State of Karnataka Vs. M.Devendrappa.
3. (2023) SCC OnLine TS 987 : Sukesh Gupta Vs. Directorate of Enforcement, Hyderabad & Anr.
4. (2017) SCC OnLine, Sikk 146 : Smt.Usha Agarwal Vs. Union of India & Ors.
5. (2004) 4 SCC 129 : State of West Bengal Vs. Sujit Ku. Rana.
6. (1992) Supp (1) SCC 335 : State of Harayana Vs. Bhajanlal.
7. (2019) 17 SCC 294 : Anil Khadkiwala Vs. State(NCT of Delhi)

For Petitioner : Mr. P. Nayyar, Sr. Adv, & Mr. P. Mittal

For Opp.Party : Mr. G.K. Agarwal (E.D)

JUDGMENT Date of Judgment : 02.09.2023

SASHIKANTA MISHRA, J.

In the present application filed under Section 482 Cr.P.C., the petitioner has prayed to quash the ECIR No.BSZO/ECIR/13/2021 and all proceedings initiated by the Enforcement Directorate consequent upon registration of the ECIR against him.

2. Briefly stated, the petitioner seeks the above relief on the ground that the Supreme Court of India is in seisin over the matter relating to discharge of the petitioner from the schedule/predicate offence under the Prevention of Corruption Act. It is contended that as per the settled position of law if the proceedings in the schedule/predicate offence are ultimately quashed, the proceedings emanating from ECIR registered against him for commission of the offence under Section 3 of the Prevention of Money-Laundering Act, 2002 (for short 'PML Act'), not being a stand-alone offence, would automatically fall to the ground. Therefore, pending adjudication of the petitioner's prayer for discharge from the scheduled offence by the Supreme Court, continuance of investigation against him for the offence under the PML Act would be an abuse of the process of the Court.

3. A preliminary objection was raised by learned counsel for the Enforcement Directorate regarding maintainability of the application under Section 482 of Cr.P.C. mainly on the ground that an ECIR not being akin to an FIR within the meaning of Section 154 of Cr.P.C., cannot be deemed to have given rise to a criminal action against the petitioner so as to give him a cause of action to invoke the inherent power of this Court under Section 482 of Cr.P.C.

Since the question of maintainability goes to the root of the matter, this Court deems it proper to deal with it at the outset more so, as the main relief claimed by the petitioner can be considered only if the present proceeding is held to be maintainable in the eye of law.

4. Heard Mr. Nikhil Nayyar, learned Senior Counsel with Mr. P. Mittal, learned counsel for the petitioner and Mr. G.K. Agarwal, learned counsel for the Enforcement Directorate.

FACTS

5. On the basis of a written complaint submitted by the D.S.P., Vigilance Cell, Cuttack on 17.11.2009, State Vigilance P.S. Case No. 51 of 2009 corresponding to VGR No. 19 of 2011 of the Court of learned Special Judge, Vigilance, Cuttack was registered against the Managing Partners of M/s. B.D. Patnaik Minerals (Pvt.) Ltd. and other Government Officials under Section 13(2) read with Section 12(1)(d) of the Prevention of Corruption Act, 1988, Section 120-B of IPC, Section 21 of MMDR Act and Section 3 of the Forest Conservation Act, 1988. Upon completion of investigation, charge sheet was submitted by the Vigilance Police on 26.03.2013. Learned Special Judge, Vigilance, Cuttack took cognizance of the offences vide order dated 11.06.2013. After appearance, the petitioner filed an application under Section 239 of Cr.P.C. for discharge citing several grounds which came to be rejected by order dated 19.07.2019. The petitioner carried the matter in revision to this Court in CRLREV No. 534 of 2019. By order dated 06.08.2020, the said revision was dismissed. Being further aggrieved, the petitioner has carried the matter to the Supreme Court of India in S.L.P.(Crl.) No. 2278 of 2021. By order dated 15.03.2021, the Supreme Court directed as follows:

"Issue notice returnable in four weeks.

In the meanwhile, no coercive steps be taken against the petitioner."

On 19.03.2021, the Enforcement Directorate registered ECIR No.BSZO/ECIR/13/21 against M/s. B.D. Pattnaik Mines and Others for alleged commission of offence under Section 3 of PML Act on the basis of the aforementioned vigilance case. On 09.04.2021, the ED issued summons to the petitioner to appear on 15.04.2021 pursuant to which he appeared and submitted certain documents. Again on 15.06.2021, he was directed to appear on the same day but he could not appear because of non-issue of transit pass by the district authority. On 11.05.2022, a search was conducted in the office of the petitioner and his wife by the E.D., during which cash amounting to Rs.14,60,900/-, fixed deposit (receipts) amounting to Rs.133,17,03,387/- were collected from his office and cash of Rs.55 lakhs from the house of his wife. Thereafter, the ED filed application under Section 17(4) of PML Act before adjudicating authority for retention of movable properties in the form of Currency Digital Devices Records and documents seized during the search operations. The petitioner sought clarification from the Director of Mines Odisha on 21.06.2022 regarding operation of Kalaparbat Iron Ore mines, in response to which

the Director of Mines, clarified that the lease was operated by the mines under the different provisions of the MC Rules, 1960. The adjudicating authority however, in its order dated 01.11.2022 observed that the materials shown in the O.A. are sufficient to arrive at the conclusion that retention of records, cash and documents under seizure memo dated 11.05.2022 is required for the purpose of adjudication under Section 8 of the PML Act. Challenging such order of the adjudicating authority, the petitioner has preferred an appeal before the PML Appellate Authority, Delhi being Appeal No. 5255/2022, which is pending adjudication.

RIVAL CONTENTIONS ON MAINTAINABILITY

6. Mr. Gopal Agarwal, learned counsel for the E.D. would contend that implication in a schedule offence is sufficient for E.D. to cause investigation under the provisions of PML Act which is a separate and independent offence having no connection with the proceedings initiated on the basis of the FIR registered by the vigilance police. Therefore, the present application under Section 482 of Cr.P.C. at this stage is not maintainable. Mr. Agarwal further submits that the E.D. is not a party in the SLP (Crl.) filed by the petitioner and the petitioner's prayer to implead E.D. as a party was dismissed by the Supreme Court. Mr. Agarwal submits that even otherwise, the present application is premature as the proceeding is at the inquiring stage and no complaint under Section 44 of the PML Act has yet been filed against the petitioner. He further argued that the ECIR is purely an internal administrative document of the Department for initiation of inquiry/investigation into the offence of money laundering and to launch prosecution against the person concerned. It is not equivalent to an FIR under Section 154 of Cr.P.C. The different between ECIR and FIR has been highlighted by the Supreme Court of India in the case of **Vijay Madanlal Choudhary v. Union of India**, reported in 2022 SCC OnLine SC 929. Mere registration of the ECIR cannot therefore, be equated with prosecution of the person concerned so as to be judicially reviewed by this Court exercising its inherent power under Section 482 of Cr.P.C.. In order to further buttress his contention, Mr. Agarwal has relied upon several other judgments which shall be referred to at the appropriate Stage.

7. Mr. Nikhil Nayyar on the other hand would argue that the power of the High Court under Section 482 Cr.P.C. is exercised ex debito justitiae i.e., to do real and substantial justice for the administration of which alone Courts exist. Referring to the interlocutory order passed by the Supreme Court in the SLP (Crl.) filed by the petitioner, Mr. Nayyar would further contend that if the maintainability of the predicate offence itself is under adjudication it would be a travesty of justice to allow the present proceedings to continue. Mr. Nayyar has relied upon the decision of the Supreme Court in the case of **State of Karnataka vs. M. Devendrappa**, reported in (2002) 3 SCC 89 in this regard as also the observations of the Supreme Court in the case of **Vijay Madanlal Choudhary** (supra), wherein it was held that once the schedule offence is not established,the proceeding under the PML Act must

fail. The judgment of the Delhi High Court in the case of **Emta Coal Ltd. and others.Vs.The Deputy Director,Directorate of Enforcement and others** (W.P.(C) No. 3821 of 2022) has also been relied upon. As regards maintainability of the application under Section 482 of Cr.P.C., Mr. Nayyar has relied upon the judgment of the Telengana High Court in the case **of Sukesh Gupta vs. Directorate of Enforcement, Hyderabad and another**, reported in 2023 SCC OnLine TS 987 and of Sikkim High Court in the case of **Smt. Usha Agarwal vs. Union of India and others**, (2017) SCC OnLine, Sikk 146. On the above basis, Mr. Nayyar would sum up his arguments by contending that the ECIR is the genesis of the criminal proceedings contemplated under the PML Act and since in the instant case the ECIR has been registered in spite of the fact that the Supreme Court is in seisin over the matter relating to maintainability and continuance of the predicate offence, allowing the investigation/enquiry on the basis of the ECIR would amount to an abuse of the process of Court and therefore, the inherent power of this Court under Section 482 of Cr.P.C. can be exercised to prevent the same.

ANALYSIS AND FINDINGS

8. Having regard to the rival contentions noted above, it would be apposite to refer to the provision under Section 482 of Cr.P.C. at the outset, which is quoted hereinbelow:

> *"**482. Saving of inherent power of High Court**.-Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

9. Thus, Section 482 envisages three circumstances under which the inherent jurisdiction may be exercised (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and (iii) to otherwise secure the ends of justice. Obviously, such power is to be exercised in relation to a proceeding which is criminal in nature. It would now be proper to examine whether the proceeding 'purportedly emanating from the ECIR' registered against the petitioner can be treated as criminal proceedings so as to come within the sweep of the power under Section 482 of Cr.P.C. Be it noted that under the scheme of Cr.P.C., the criminal law is set into motion after registration of the FIR under Section 154 of Cr.P.C. and/or filing of a complaint under Section 200 of Cr.P.C. The PML Act, 2002 also prescribes for filing of complaint before the Special Court under Section 44 thereof. So what is the scope and purport of the ECIR? This very question has been considered extensively by the Supreme Court in the case of **Vijay Madanlal Choudhary** (supra) and decided in the following words.

> *"**ECIR VIS-À-VIS FIR***
>
> *456. As per the procedure prescribed by the 1973 Code, the officer in-charge of a police station is under an obligation to record the information relating to the commission of a cognizable offence, in terms of Section 154 of the 1973 Code703. There is no corresponding*

provision in the 2002 Act requiring registration of offence of money-laundering. As noticed earlier, the mechanism for proceeding against the property being proceeds of crime predicated in the 2002 Act is a sui generis procedure. No comparison can be drawn between the mechanism regarding prevention, investigation or trial in connection with the scheduled offence governed by the provisions of the 1973 Code. In the scheme of 2002 Act upon identification of existence of property being proceeds of crime, the Authority under this Act is expected to inquire into relevant aspects in relation to such property and take measures as may be necessary and specified in the 2002 Act including to attach the property for being dealt with as per the provisions of the 2002 Act. We have elaborately adverted to the procedure to be followed by the authorities for such attachment of the property being proceeds of crime and the follow-up steps of confiscation upon confirmation of the provisional attachment order by the Adjudicating Authority. For facilitating the Adjudicating Authority to confirm the provisional attachment order and direct confiscation, the authorities under the 2002 Act (i.e., Section 48) are expected to make an inquiry and investigate. Incidentally, when sufficient credible information is gathered by the authorities during such inquiry/investigation indicative of involvement of any person in any process or activity connected with the proceeds of crime, it is open to such authorities to file a formal complaint before the Special Court naming the concerned person for offence of money-laundering under Section 3 of this Act. Considering the scheme of the 2002 Act, though the offence of money-laundering is otherwise regarded as cognizable offence (cognizance whereof can be taken only by the authorities referred to in Section 48 of this Act and not by jurisdictional police) and punishable under Section 4 of the 2002 Act, special complaint procedure is prescribed by law. This procedure overrides the procedure prescribed under 1973 Code to deal with other offences (other than money-laundering offences) in the matter of registration of offence and inquiry/investigation thereof. This special procedure must prevail in terms of Section 71 of the 2002 Act and also keeping in mind Section 65 of the same Act. In other words, the offence of money-laundering cannot be registered by the jurisdictional police who is governed by the regime under Chapter XII of the 1973 Code. The provisions of Chapter XII of the 1973 Code do not apply in all respects to deal with information derived relating to commission of money-laundering offence much less investigation thereof. The dispensation regarding prevention of money-laundering, attachment of proceeds of crime and inquiry/investigation of offence of money-laundering upto filing of the complaint in respect of offence under Section 3 of the 2002 Act is fully governed by the provisions of the 2002 Act itself. To wit, regarding survey, searches, seizures, issuing summons, recording of statements of concerned persons and calling upon production of documents, inquiry/investigation, arrest of persons involved in the offence of money-laundering including bail and attachment, confiscation and vesting of property being proceeds of crime. Indeed, after arrest, the manner of dealing with such offender involved in offence of money-laundering would then be governed by the provisions of the 1973 Code - as there are no inconsistent provisions in the 2002 Act in regard to production of the arrested person before the jurisdictional Magistrate within twenty-four hours and also filing of the complaint before the Special Court within the statutory period prescribed in the 1973 Code for filing of police report, if not released on bail before expiry thereof.

457. Suffice it to observe that being a special legislation providing for special mechanism regarding inquiry/investigation of offence of money-laundering, analogy cannot be drawn from the provisions of 1973 Code, in regard to registration of offence

> *of money-laundering and more so being a complaint procedure prescribed under the 2002 Act. Further, the authorities referred to in Section 48 of the 2002 Act alone are competent to file such complaint. It is a different matter that the materials/evidence collected by the same authorities for the purpose of civil action of attachment of proceeds of crime and confiscation thereof may be used to prosecute the person involved in the process or activity connected with the proceeds of crime for offence of money-laundering. Considering the mechanism of inquiry/investigation for proceeding against the property (being proceeds of crime) under this Act by way of civil action (attachment and confiscation), there is no need to formally register an ECIR, unlike registration of an FIR by the jurisdictional police in respect of cognizable offence under the ordinary law. There is force in the stand taken by the ED that ECIR is an internal document created by the department before initiating penal action or prosecution against the person involved with process or activity connected with proceeds of crime. Thus, ECIR is not a statutory document, nor there is any provision in 2002 Act requiring Authority referred to in Section 48 to record ECIR or to furnish copy thereof to the accused unlike Section 154 of the 1973 Code. The fact that such ECIR has not been recorded, does not come in the way of the authorities referred to in Section 48 of the 2002 Act to commence inquiry/investigation for initiating civil action of attachment of property being proceeds of crime by following prescribed procedure in that regard." [Emphasis added]*

As can be seen, the ECIR is an internal document created by the Department before initiating penal action or prosecution against the person involved with process or activity connected with the proceeds of crime. In other words, registration of ECIR is not akin to launching of prosecution, which can only be done by way of lodging a complaint under Section 44 of the PML Act. Thus, a document or an act, which is administrative in nature, cannot partake the nature of criminal prosecution so as to attract judicial review. In the case of **State of West Bengal v. Sujit Kumar Rana**, reported in (2004) 4 SCC 129, the Supreme Court held as under:

> *"33. From a bare perusal of the aforementioned provision, it would be evident that the inherent power of the High Court is saved only in a case where an order has been passed by the criminal court which is required to be set aside to secure the ends of justice or where the proceeding pending before a court amounts to abuse of the process of court. It is, therefore, evident that power under Section 482 of the Code can be exercised by the High Court in relation to a matter pending before a court; which in the context of the Code of Criminal Procedure would mean "a criminal court" or whence a power is exercised by the court under the Code of Criminal Procedure. Once it is held that the criminal court had no power to deal with the property seized under the Act, the question of the High Court exercising its jurisdiction under Section 482 of the Code of Criminal Procedure would not arise."*

Similar view was taken by a Division Bench of the Madras High Court in the case of **N. Dhanraj Kochar and others vs. The Director, Directorate of Enforcement** (CRL. O.P. No.SR 46376/2021, wherein it was held that registration of ECIR being an administrative act for initiation of investigation under the PML Act, which is a special statute, cannot be quashed in exercise of the power under Section 482 of Cr.P.C. because registration of the ECIR is not an act undertaken under the Code. Significantly, the aforequoted observation of the Supreme Court in **Sujit Kumar Rana** (supra) was also referred to therein. On such reasoning, it was held that the

registration of an ECIR by the officers of the E.D. cannot be the subject matter of judicial review under Section 482 of Cr.P.C.

10. In so far as the case laws cited at the bar, particularly by learned Senior Counsel appearing for the petitioner, this Court finds that in the case of **Sukesh Gupta** (supra), the Telengana High Court held on the facts of the case before it that since there is no evidence of criminal activity nor any property being derived as a consequence of such criminal activity, the proceedings in the concerned ECIR cannot be permitted to continue. In arriving at such finding, learned Single Judge of Telengana High Court relied upon the observations of the Supreme Court in the case of **State of Harayana v. Bhajanlal** reported in 1992 Supp (1) SCC 335, **State of Karnataka v.M. Devendrappa** reported in (2002) 3 SCC 89 and **Anil Khadkiwala v. State (NCT of Delhi)**, reported in (2019) 17 SCC 294 were relied upon. This Court is however, unable to agree with the reasoning of the learned Single Judge for the reason that the nature of the proceedings emanating from registration of ECIR short of filing of the complaint under Section 44 of the PML Act was not specifically taken into account vis-à-vis the distinction made between the ECIR and FIR by the Supreme Court in Vijay Madanlal Choudhury (supra). In the considered view of this Court, the same forms the very basis to decide whether the proceedings emanating from the ECIR would partake the nature of a penal action so as to attract the provision under Section 482 of the Cr.P.C.. As already discussed, the act of registration of ECIR is an administrative act in contradistinction with a penal act and therefore, the ratio of **Sujit Kumar Rana** (supra) would be squarely applicable.

11. The decision of the Sikkim High Court in **Smt. Usha Agarwal** (supra) and of the Delhi High Court in **Emta Coal Ltd.** (supra) being on merits are not applicable in the present context and are therefore, not referred to.

CONCLUSION

12. From the conspectus of the analysis made hereinbefore, this Court is of the considered view that the act of registration of ECIR against the petitioner and the investigation/enquiry said to be in progress on such basis are not amenable to judicial review by this Court in exercise of its inherent power under Section 482 of Cr.P.C..Further, the present motion, which is at a stage when the investigation /enquiry initiated on the basis of the ECIR registered against the petitioner has not culminated in lodging of a complaint under Section 44 of the PML Act, is premature. In view of such finding, the contentions raised by the parties touching upon the merits of the case are not required to be gone into.

13. In the result, the CRLMC is dismissed being not maintainable in the eye of law.

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2023 (III) ILR-CUT-1179

SASHIKANTA MISHRA, J.

CRA NO. 37 OF 1995

BULA SOREN & ORS. ……Appellants

-V-

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Benefit of doubt – Appellants are convicted U/s. 304/34 of IPC – The conviction is entirely based on the evidence of prosecution witnesses nos. 6 & 7 which does not inspire confidence because of contradiction there in – The medical evidence regarding cause of death is not fully consistent with the ocular evidence – Effect of – Held, this court finds that the evidence as laid is not free from reasonable doubt, the benefit would be in the favour of the accused person. (Paras 11-12)

For Appellants : Mr. A.Pradhan, Mr. D.P.Dhal, Mr. S. K.Nayak

For Respondent : Mr. S.Pattnaik, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 26.09.2023

SASHIKANTA MISHRA, J.

The appellants Bula Soren, Damodar Soren and Budhia Hembram have preferred this appeal questioning the correctness of the judgment of conviction and sentence passed by learned Sessions Judge, Balasore on 21.01.1995 in S.T. Case No. 120/94. Being convicted for the offence under Section 304/34 of IPC they have been sentenced to undergo R.I. for 5 years.

2. The prosecution case, briefly stated is that on 23.01.1994 in the evening, the informant received information that his sister Hira had been killed after being assaulted by the Adivasi people of village Sankuapara. He was further informed that a meeting was held under the leadership of accused Laxman Hembram (dead) to decide on allegation of witchcraft against Bhagaban, husband of the deceased Hira. Because of practice of witchcraft the wife of the accused Bula was allegedly suffering from disease. In the meeting, accused Laxman imposed a penalty of Rs. 5,000/- on Bhagaban which, after deliberation was reduced to Rs. 150/-. Bhagaban left the meeting to arrange the amount. At that time Hira came to the meeting and fell prostrate before accused Laxman praying for time to pay the penalty. At this juncture, accused Bula allegedly pulled her legs causing Hira to fall flat on the ground and thereafter the other accused persons trampled over her, throttled her neck and pulled her tongue, as a result of which she died. When the other persons present there intervened the accused persons drove them away by pelting broken bricks and glasses. The brother of the deceased Laxman submitted a report after ascertaining the relevant facts from Bhagaban, the husband of the deceased. This led to registration of Simulia P.S. Case No. 16 of 1994 under Section 302/34 of IPC which

was followed by investigation. Upon completion of investigation, charge-sheet was submitted against the accused persons under the aforementioned sections.

3. The accused persons took the plea of denial.

4. To prove its case, prosecution examined 11 witnesses of whom P.W.5 is the informant, P.Ws. 6 and 7 are eye witnesses to the occurrence, P.W.9 is the Autopsy Surgeon and P.W.11 is the Investigating Officer. Besides, prosecution proved 9 documents from its side. Defence did not adduce any evidence, either oral or documentary.

5. After appreciating the evidence on record, learned Sessions Judge held that the death of the deceased was caused by the assault made jointly by all the accused persons. The ocular evidence was well supported by the medical evidence. However, the learned Sessions Judge found no evidence of the offence of murder. It was on the other hand held that the case was one of culpable homicide not amounting to murder. Since the accused persons did not have any intention but had the knowledge that their acts were likely to cause injury resulting in death, the offence under Section 304 Part II was made out. On such findings, the accused persons were convicted and sentenced as aforesaid.

6. During pendency of the appeal, the convict appellants namely, Laxman Hembram, Karia Soren having expired the case against them stood abated.

7. Heard Mr.A.Pradhan, learned counsel for the appellants and S.K.Mishra Additional Standing Counsel for the State.

8. Assailing the impugned judgment of conviction, Mr. Pradhan would contend that the conviction is entirely based on the evidence of P.Ws.6 and 7 which does not inspire confidence because of contradiction therein. Mr. Pradhan further contends that the medical evidence regarding cause of death is not fully consistent with the ocular evidence, which creates a doubt as regards the veracity of the prosecution case.

9. Per contra, Mr. S.K.Mishra learned Additional Standing Counsel has supported the findings of the Trial Court by submitting that the evidence of the eye witnesses is clear, cogent, consistent and was therefore, rightly relied upon. Further, the medical evidence is fully consistent with the version of the eye witnesses as regards the nature of assault and cause of death of the deceased.

10. Reading of the impugned judgment suggests that learned Sessions Judge has mainly relied upon the version of P.W.6 (Hari Tudu) and P.W. 7 (Rani Tudu), who are husband and wife. P.W.6 claims to be an eye witness to the occurrence. In his evidence, he deposed that at the relevant time in the Panchayat presided over by co-accused Laxman, a penalty of Rs. 500/- was initially imposed on Bhagaban for practising witchcraft which was reduced to Rs. 150/-. Bhagaban want to arrange

funds to pay the fine and thereafter, Hira (deceased) came and fell prostrate before accused Laxman, the Sardar praying for some time to enable them to pay the penalty and while she was lying prostrate, accused Bula pulled her legs. As a result, she fell flat on the ground and all the accused persons thereafter trampled over her while she lay on the ground. They also throttled her neck and pulled her tongue and she died in the process. When P.W.6 intervened and protested the accused persons drove him away and his wife and chased them with broken bricks and glasses. It has been submitted that the statements that Bula pulled the legs of Hira while she was lying prostrate on the ground and that when he (P.W.6) protested the accused persons chased him with broken bricks and glasses are improvements from his earlier version in the FIR as well as his statement recorded under Section 161 Cr.P.C. Moreover, this part of the evidence has also not been specifically brought to the notice of accused Bula during his examination under Section 313 of Cr.P.C. After going through the FIR and the statement of P.W.6 recorded by the I.O. under Section 161 of Cr.P.C, this Court finds force in the submission of learned counsel for the appellants. Moreover, as many as 11 questions were put to Bula but the specific statement of P.W. 6 regarding pulling of legs of the deceased and of chasing him from the spot using brickbats and stones was not specifically put.

11. As regards the evidence of P.W.7, wife of P.W. 6, it is seen that whatever she has said about the overt acts attributed to the accused persons are improvements over her earlier version recorded by the I.O. under Section 161 of Cr.P.C.. There is no evidence to show that she was present at the spot and therefore, her evidence can only be treated as heresay and hence, not admissible.

12. Learned Sessions Judge has however overlooked this vital aspect and accepted the version of P.Ws. 6 and 7 in toto. As it appears, learned Sessions Judge has placed great reliance on the medical evidence to hold that the injuries found on the deceased are consistent with the prosecution case of assault by the accused persons. The evidence of the Autopsy Surgeon P.W.9 shows that he found the following injuries on the body of the deceased.

(i) Abrasion ½ x ¼ two in number on right frontal region.

(ii) Abrasion 1/8 x 1/8 or the right eyebrow on the lateral side of the right eye.

(iii) Abrasion "⅛ x ⅛" n the right knee.

(iv) Haematoma on the right frontal region "x ½ x ½".

(v) Haematoma 1"x ½ x ½" in the mid line of parietal lobe .

(vi) Haematoma 1" x 1" x ½" on the left parietal lobe of the brain.

According to him, the cause of death was Hematoma on the left parietal lobe. If the evidence of P.W.6 is considered, the same suggests that the accused persons throttled her neck and pulled her tongue after trampling over her. There is absolutely no mention of any injury being caused to the head of the deceased and the statement that accused Bula pulled the legs of the deceased as a result of which she fell flat on

the ground is an improvement over his earlier version. Thus, bereft of the statement there is nothing in the evidence to show as to how the injuries to the head were caused. Obviously, throttling of the neck and pulling of the tongue and even trampling over her body could not have resulted in any injury on the head of the deceased. Significantly, the Doctor did not find any injury on the neck or chest and stomach of the deceased even though, the accused persons allegedly trampled over her. Thus, there is clear gap in the ocular and medical evidence which learned Sessions Judge seems to have overlooked.

13. From a conspectus of the analysis of the evidence as made hereinbefore, this Court finds that the evidence as laid is not free from reasonable doubt, the benefit of which should have gone to the accused persons. The finding of learned Sessions Judge that the pulling of the legs and then trampling over the body and throttling and pressing the deceased were simultaneous acts being apparently based on the version of P.W.6 and 7, which this Court finds difficult to believe, is therefore, not acceptable. Moreover, learned Sessions Judge also appears to have overlooked the fact that the above evidence relating to pulling her legs was not specifically put to accused persons and therefore, could not have been relied upon or utilised to hold the accused guilty.

14. For the foregoing reasons therefore, this Court is of the considered view that the finding of guilt arrived at by the learned sessions Judge cannot be sustained in the eye of law. Resultantly, the appeal is allowed. The impugned judgment of conviction and sentence is hereby set aside. The accused appellant being on bail, his bail bonds be discharged.

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2023 (III) ILR-CUT-1182

A.K. MOHAPATRA, J.

W.P.(C) NO. 29125 OF 2022

BANSHIDHAR BEHERA .....Petitioner

-V-

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

W.P.(C) NO. 29128 OF 2022
ABHINNA KUMAR PARIJA -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 29130 OF 2022
KHALI GAUDA -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 29132 OF 2022
HARI BARIK -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 29134 OF 2022
BHIMSEN MOHAPATRA -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 29136 OF 2022
CHINTAMANI SAHOO -V- STATE OF ODISHA & ORS.
W.P.(C) NO. 29140 OF 2022
PRAMOD KUMAR KHUNTIA -V- STATE OF ODISHA & ORS.
W.P.(C) NO. 30001 OF 2022
ULLAS LENKA -V- STATE OF ODISHA & ORS.

SERVICE LAW – Regularization – Pensionary benefit to work charged employee – The petitioners have worked for several decades in the work charged establishment – The Opp. Parties rejected the representation for regularization and extension of pension as well as other pensionary benefits – Whether the rejection order is sustainable? – Held, No – The rejection order is hereby quashed – It is directed that the opp. Party shall do well to regularise the service of petitioners for a day at least, a day before the date of their retirement and the petitioner be paid the pensionary benefit. (Para-29)

Case Laws Relied on and Referred to :-

1. W.P(C) No. 24041 of 2017 (D.O.J-20.12.2017) : State of Odisha Vs. Pitambar Sahoo.
2. W.P(C) No.19950 of 2011 (D.O.J-03.02.2021) : Chandra Nandi Vs. State of Odisha.
3. O.A.No.1189(C)/2006 (D.O.J-11.04.2009) : Narasu Pradhan Vs. State of Odisha.
4. W.P(C) No.5570 of 2023(D.O.J-24.02.2022) : Narayan Swain Vs. State of Odisha & Ors.
5. 2006 (4) SCC 1 : State of Karnataka Vs.Uma Devi.
6. AIR 2010 SC 2587 : State of Karnataka & Ors.Vs. M. L. Kesari & Ors.
7. 2013 AIR SCW 4919 : Nihal Singh Vs.State of Punjab.
8. 2014 (13) SCC 249 : Malathi Das Vs. Suresh & Ors.
9. 2014 (13) SCC 264 : Yashwant Arjun More & Ors.Vs. State of Maharashtra & Ors.
10. 2015 (8) SCC 265 : Amar Kant Ray Vs. State of Bihar & Ors.
11. (2018) 8 SCC 238 : Narendra Kumar Tiwari Vs. State of Jharkhand.
12. 2016 (1) SCC 397 : Sunil Kumar Verma & Ors Vs. State of Uttar Pradesh & Ors.
13. WPC (OAC) No.865 of 2018 : Sadananda Setha Vs. State of Odisha & Ors.

For Petitioner : Mr. S. Patra.
For Opp.Parties: Mr. B.P. Tripathy, A.G.A.

JUDGMENT Date of Hearing :15.11.2022 & Judgment : 02.11.2023

A.K. MOHAPATRA, J.

01. All the above noted writ applications have been filed with a common prayer to quash the order of rejection of their prayer by the Opposite Parties i.e. the order dated 22.02.2022 under Annexure-6 to W.P.(C) No.29125 of 2022 and further for a direction to the Opposite Parties by issuing a writ of mandamus to allow pensionary benefits to the Petitioners after regularizing their service upon completion of five years of service in the work charged establishment or in the alternative to at least regularizing their service for a day prior to the retirement and on such basis treating the Petitioner as regular employee and further to grant all consequential benefits

including pensionary benefits along with interest @ of 12% on such arrear dues. It is relevant to mention here that all the above noted writ applications involved a common question of law and an identical prayer which is based on similar set of facts. In view of the aforesaid factual background, this Court deems it proper to take up all the matters together for hearing and the above noted batch of writ applications are being disposed of by the following common order.

02. For the sake of brevity and convenience the facts involved in the W.P.(C) No.29125 of 2022 are being taken up for analysis and discussion. One Banshidhar Behera-Petitioner in W.P.(C) No.29125 of 2022 was duly selected and appointed on 22.12.1980 in the Fitter Grade-IV under work charged establishment pursuant to order dated 19.12.1980 issued by the Superintending Engineer, Rengali Dam Circle. Since the date of joining, the Petitioner has been discharging his duties sincerely to the satisfaction of the higher authorities. During his service career the Petitioner had worked under different divisions and while working under Opposite Party No.4 the Petitioner has retired from service with effect from 28.02.2005 on attaining the age of superannuation.

03. In the year 2001, the Petitioner came to know about the fact that similarly situated work charged employees have been brought over to the regular establishment in view of the Finance Department Resolution dtd.22.01.1964 and 06.03.1990. Accordingly, the Petitioner along with 33 others approached the learned Odisha Administrative Tribunal by filing O.A. No.2422(C) of 2001 with a prayer for a direction to regularize the service of the Petitioner with effect from the date on which they have completed five years of services and for a further direction that entire service period be taken into consideration for the purpose of granting pension/ pensionary benefits. While this was the position, pursuant to the direction of the Hon'ble Supreme Court, the Finance Department issued another circular on 15.05.1997 to bring over the NMRs, DLRs employees to regular establishment wherein it has stipulated to give preference to employees under work charged establishment on the basis of their seniority according to their respective date of joining in service.

04. In the writ petition, it has also been pleaded that vide order dated 27.05.2014 & 26.06.2014, 569 work charged employees were brought over to the regular (wages) establishment against created post. Pursuant to the aforesaid order some of the juniors to the Petitioner have been brought over to the regular wages establishment without considering the case of the Petitioners for regularization of their service. Some of the employees whose services were regularized and they had approached the Tribunal along with the Petitioners had subsequently withdrawn their cases before the Tribunal. Although the Petitioner has retired from service long since and he has been staying in Sorada under Ganjam district and he had no knowledge about the aforesaid developments. When he came to know about the fact that similarly circumstanced persons including the juniors to the Petitioners have

been regularized in service and are getting pensionary benefits, only then the Petitioner enquired about the matter. Finally,on 17.07.2018, the Petitioner submitted a representation before Opposite Party No.1 with a prayer to allow him pension after regularizing his service period in the work charged establishment. Since no action was taken the Petitioner filed O.A. No.2775(C) of 2018 before the learned Odisha Administrative Tribunal for a direction to the Opposite Parties to allow pension and pensionary benefits to the Petitioner after regularizing his service.

05. While this was the position, after abolition of the learned Odisha Administrative Tribunal, the O.A. No.2422(C) of 2001 was transferred to this Court and was renumbered as WPC (OAC) No.2422 of 2001. This Court vide order dated 21.06.2021 was pleased to dispose of the said WPC(OAC) by granting liberty to Petitioner to file a fresh representation before the Competent Authority with a further direction to such authority to consider the case of the Petitioner by taking into account the judgment in Umadevi's case, M.L. Kesari's case and Nihal Singh's case. Accordingly, the Petitioner submitted a fresh representation on 02.07.2021 before the Opposite Party No.1 along with a copy of order dated 21.06.2021.

06. Since no action was taken immediately, the Petitioner was compelled to file CONTC No.7636 of 2021 which was disposed of on 06.01.2022 by granting further time to contemnor to comply with the direction of this Court. Despite such extension of time, the Opposite Party No.1 did not act upon the order passed by this Court thereby compelling the Petitioner to file another contempt bearing CONTC No.2918 of 2022, which is stated to be pending before this Court. In the meanwhile, the Opposite Party No.1 vide order dated 22.02.2022 rejected the claim of the Petitioner on some untenable and unreasonable grounds. Being aggrieved by such rejection order dated 22.02.2022 the Petitioner has approached this Court by filing the present writ application.

07. Heard Sri S. Patra, learned counsel appearing for the Petitioner and Sri B.P. Tripathy, learned Additional Government Advocate for the State-Opposite Parties. Perused the writ application and the documents annexed thereto as well as other materials placed before this Court in course of hearing.

08. Mr. Patra, learned counsel appearing for the Petitioner at the outset contended that the Government of Odisha had issued notification/ circular on 22.01.1965 and 06.03.1990 to bring over the work charged employees to the regular establishment in order to give them pension/ pensionary benefits. In view of such circulars/notifications a number of work charged employees pursuant to orders passed by different departments/authorities under the Government have allowed pension and pensionary benefits to such work charged employees by bringing them over to regular establishment upon their completing five years of service in the work charged establishment. In the aforesaid context, Mr. Patra, learned counsel, referred to the order dated 18.05.1990 passed by the learned Odisha Administrative Tribunal in O.A. No.84/1987 (Mohan Singh & others vs. State of Odisha).

09. In the aforesaid matter the learned Odisha Administrative Tribunal had directed that the Petitioners be absorbed in permanent employeement, if required, by creating posts and that their entire service period should be taken into consideration for the purpose of their service benefits and pension/ pensionary benefits. The aforesaid order of the Tribunal has been affirmed by the Hon'ble Supreme Court in Special Leave to Appeal (Civil) No.12410/1990.

10. Similarly, in O.A. No.2559(C)/1999 i.e. in Kashidev Maharana & a batch of similar other matters were disposed of by the Tribunal on 16.11.1999 with a direction to the Opposite Parties to absorb the applicants in the regular post with effect from the date they have completed five years of continuous service. The aforesaid order of the Tribunal was challenged in a review which was dismissed on 13.07.2015. Thereafter, the State-Opposite Parties challenged the order dated 16.11.1999 in W.P.(C) No.7246 of 2016 which was dismissed on 08.07.2018. Thereafter, the State-Opposite Parties preferred a SLP bearing SLP Diary No.23207 of 2018. The Hon'ble Supreme Court has also been pleased to dismiss the SLP.

11. After dismissal of the SLP filed by the State, the State-Opposite Parties have carried out the order passed by the Tribunal vide their order dated 24.08.2021, 26.08.2021 and 27.08.2021 under Annexure-7 series to the writ application. In total 19 number of work charged employees including the retrenched employees were brought over to the regular establishment and extended with the pensionary benefits. He further contended that this Court also took up another similar case in W.P.(C) No.21585 of 2014 and finally disposed of the said case in the light of decision rendered in Kashidev Maharana's case (supra) which was confirmed by the Hon'ble Supreme Court in SLP (C) Diary No.10145 of 2023 disposed of on 05.04.2023.

12. In the aforesaid factual background and further referring to various orders passed by different courts/ Tribunal and that of the Hon'ble Supreme Court of India, learned counsel for the Petitioner submitted that the Petitioner also stands in a similar footing with the persons who have been extended with similar benefits pursuant to the order passed by the Tribunal, this Court as well as the Hon'ble Apex Court. He further contended that some of the employees who have been regularized and have been given the pensionary benefits are juniors to the Petitioner. Therefore, it was alleged that the conduct of the State-Opposite Parties are in gross violation of Article-14 and 16 of the Constitution of India. As the Opposite Parties have adopted a pick and choose method and treated the present Petitioner in an arbitrary and discriminatory manner. Such conduct of the Opposite Parties violates the Petitioner's fundamental right to equal treatment and therefore, the same is unsustainable in law.

13. In course of his argument, Mr. Patra, learned counsel appearing for the Petitioner referred to the decision of this Court in ***State of Odisha vs. Pitambar Sahoo*** in ***W.P.(C) No.24041 of 2017*** disposed of on 20.12.2017 which wasconfirmed by the

Hon'ble Supreme Court in SLP (C) Diary No.30806 of 2018. He also referred to the case in ***Chandra Nandi vs. State of Odisha*** and others in ***W.P.(C) No.19950 of 2011*** decided on 03.02.2021. In ***Premananda Tripathy vs. State of Odisha*** in ***W.P.(C) No.27950 of 2019*** decided on 03.02.2021, this Court had taken a similar view.

14. Further, referring to the case of ***Narasu Pradhan vs. State of Odisha*** in ***O.A. No.1189 (C)/2006*** disposed of on 11.04.2009, learned counsel for the Petitioner submitted that the order of the Tribunal was affirmed by a Division Bench of this Court in W.P.(C) No.5377 of 2010 vide order dated 19.10.2011. The Division Bench of this Court in ***Narusu Pradhan***'s case directed the Government to regularize the service of the Petitioner at least one day before his retirement and to grant pensionary benefits. The order passed in ***Narusu Pradhan***'s case has also been affirmed by the Hon'ble Supreme Court in Civil Appeal (C.C.) No.22498 of 2012.

15. He further contended that this Court after taking into consideration a number of orders passed by this Court as well as the Hon'ble Supreme Court vide order dated 24.02.2022 in W.P.(C) No.5570 of 2023 (***Narayan Swain vs. State of Odisha & others***) allowed the writ petition and directed to grant similar benefits as has been done in the case of ***Narasu Pradhan***. Further, the attention of this Court was also drawn to the case in ***Jageswar Mahanta vs. State of Odisha*** (W.P.(C) No.36686 of 2021) and batch of other cases. Wherein the hearing is concluded and judgment is yet to be delivered. Accordingly, learned counsel for the Petitioner submitted that the present case be taken up along with pending batch of matters.

16. While countering the impugned rejection order, learned counsel for the Petitioner contended that the Opposite Party No.1 by misinterpreting the judgment of the Hon'ble Supreme Court in ***State of Karnataka vs. Uma Devi*** reported in ***2006 (4) SCC 1*** and without taking note of the other two judgments as directed by this Court in the earlier writ petition, refused to grant the relief claimed by the Petitioner and accordingly in an illegal and arbitrary manner rejected the claim of the Petitioner. Therefore, it was also contended that the case of the Petitioner has not been considered in the right perspective and by taking into consideration the above noted facts and the ratio laid down by this Court as well as the Hon'ble Apex Court. In such view of the matter, learned counsel for the Petitioner submitted that the impugned rejection order is not inconformity with the direction issued by this Court in the earlier round of writ application, moreover, the same is also contrary to the ratio laid down by this Court as well as the Hon'ble Apex Court in identical matters.

17. He also contended that the State-Opposite parties having accepted the legal position and the ratio laid down by this Court as well as the Hon'ble Apex Court and after implementing such orders and accordingly giving such benefits to similarly situated persons, are legally estopped to take a different stand in the case of the present Petitioners. Mr. Patra, learned counsel would further argue that the State

being a model employer is expected to act in a fair, reasonable and transparent manner and the authorities are expected to maintain parity at all time while dealing with similarly situated Government employees. However, such well recognized principle of law has not been adhered to by the State-authorities. The Opposite Party No.1 contrary to the settled position of law and the ratio laid down by the above noted judgments has arbitrarily rejected the representation of the Petitioner without considering the same in its perspective and thereby refusing to extend similar benefits which have been extended in favour of the similarly situated persons. Thus, such conduct is grossly violating of Article-14 and 16 of the Constitution of India and as a result of which the impugned rejection order is liable to be quashed and the present writ application deserves to be allowed with a direction to the Opposite Parties to extend similar benefits to the Petitioner.

18. In course of his argument, Mr. Patra, learned counsel also referred to the judgments in ***State of Karnataka and others vs. M. L. Kesari & ors.*** reported in ***AIR 2010 SC 2587***, in ***Nihal Singh vs. State of Punjab*** reported in ***2013 AIR SCW 4919***, in ***Malathi Das vs. Suresh & others*** reported in ***2014 (13) SCC 249***, in ***Yashwant Arjun More & others vs. State of Maharashtra & others*** reported in ***2014 (13) SCC 264***, in ***Amar Kant Ray vs. State of Bihar & others*** reported in ***2015 (8) SCC 265***, in ***Narendra Kumar Tiwari vs. State of Jharkhand*** reported in ***(2018) 8 SCC 238***, in ***Sunil Kumar Verma & others vs. State of Uttar Pradesh & others*** reported in ***2016 (1) SCC 397***. This Court considered all the aforesaid judgments. The legal proposition pronounced by the Hon'ble Supreme court in the above noted judgments are too well known, therefore, the same does not required any further elaboration at this stage. However, it is made clear that this Court has taken note of the law laid down by the Hon'ble Supreme Court in the above noted judgments while considering the present batch of writ application.

19. Mr. B.P. Tripathy, learned Additional Government Advocate, on the other hand tried to justify the impugned order dated 22.02.2022 under Annexure-6 to the writ application. He further contended that pursuant to the order passed by this Court earlier the case of the Petitioner was considered by the Opposite Party No.1 and by virtue of a reasoned order the claim of the Petitioner was found to be legally unsustainable and accordingly the prayer of the Petitioner for regularization of his service in the regular establishment and sanction of pensionary benefits was also found to be devoid of merit and accordingly the representation was rejected.

20. Learned Additional Government Advocate further contended before this Court that the Petitioner was appointed as a Helper in the work charged establishment under the Superintending Engineer, Rengali Dam Circle on 30.11.1978 and subsequently he was promoted to the post of Operator w.e.f. 10.04.1981. Thereafter, on transfer he came under the control of Chief Engineer and Basin Manager, Subaranarekha Irrigation Project w.e.f. 01.11.1981. While working as such the Petitioner has retired from service w.e.f. 28.02.2013 on attaining the age

of superannuation. In such view of the matter, learned Additional Government Advocate further contended that all throughout the Petitioner was working in the work charged establishment till he retired from service on attaining the age of superannuation. Since the Petitioner had not been brought over to the regular establishment, therefore the Petitioner cannot be treated as a regular employee in the pensionable establishment and as such he falls outside the purview of pension rules and accordingly he is not entitled to any pensionary benefits.

21. In course of his argument, learned Additional Government Advocate referring to the cases of other petitioners also contended that they were also initially engaged in the work charged establishment and continued as such till they retired from service on their respective date of retirement. He further contended that at no point of time they were brought over to the regular establishment. Therefore, the question of regularization of their service, post retirement, does not arise and since they were not working in regular pensionable establishment the question of grant of pensionary benefits also does not arise. He further contended that the Petitioners worked under the work charged establishment and were regulated under the Odisha work charged employees (appointment and conditions of services) instruction-1974. Although,the Petitioner have prayed for regularization of service on completion of five years as work charged employees, however, their cases cannot be considered for regularization in the regular establishment.

22. Mr.Tripathy, learned Additional Government Advocate in reply to the Finance Department Resolution dated 22.01.1965 submitted before this Court that the principle laid down in the said resolution will not apply to big projects, dams and other construction works, until such projects, dams and construction works are completed and minimum residual staffs necessary for normal functioning of these projects are determined by the competent authority. On the contrary, learned Additional Government Advocate referred to Finance Department Resolution dated 06.03.1990 to submit before this Court that the service of an employee rendered under the work charged establishment, can be considered for grant of pensionary benefits only if the employee concerned is brought over to the regular pensionable establishment. In such view of the matter, he also contended that the past service of the Petitioners cannot be taken into consideration for grant of pension/pensionary benefits.

23. He also submitted that there is no provisions in OCS Pension Rules, 1992 under which the work charged employees are entitled to get pension and pensionary benefits. Since the service rendered by the Petitioners are admittedly under the work charged establishment, which is non-pensionable establishment, the question of granting them pension/ pensionary benefits does not arise at all for consideration. Similarly, referring to the Finance Department Resolution dated 15.05.1997, learned Additional Government Advocate submitted that there are certain conditions which is required to be fulfill before bringing the employees in the work charged establishment

to the regular establishment and that the same is not automatic. Since such conditions could not be satisfied the Petitioners have not been brought over to the regular establishment and accordingly, their services have not been regularized.

24. On a careful analysis of the impugned order under Annexure-6 to the writ application, this Court observed that the Opposite Parties have admitted the factual background of the case, to the extent that the Petitioners were engaged in the work charged establishment right from the beginning and they were continuing as such till the date of their retirement. Moreover, this Court also observed that in the earlier round of writ application, this Court had given a specific direction to consider the case of the Petitioner in the light of the judgments of the Hon'ble Supreme Court. However, the Opposite Party No.1 has although referred to a judgment in ***Secretary State of Karnataka vs. Uma Devi*'s** case (supra), however it appears that the same is completely misunderstood and misinterpreted by the Opposite Party No.1. On the contrary, this Court is of the view that by the time the judgment in ***Uma Devi***'s case (supra) was delivered by the Hon'ble Supreme Court, the Petitioners were eligible to be regularized as a onetime measure as has been directed in para-55 of the said judgment. On a careful reading of the impugned order it appears that the case of the Petitioner has not been considered in the light of the aforesaid observation in ***Uma Devi***'s case (supra).

25. Reverting back to the facts of the present case, this Court observed that since the late 70s or early 80s the Petitioners were engaged in the work charged establishment and as such facts remains unchallenged/ undisputed. Thereafter, the Petitioners continued to render their services in the work charged establishment to the satisfaction of the authorities. Some of them were also given promotion in due course. However, working for several decades continuously they were never brought over to the regular establishment for reasons best known to the authorities. If the nature of work which they were performing were regular in nature, which fact is established by the materials on record that the Petitioners continued to discharge their services in the work charged establishment for several decades till their retirement, the Opposite Parties should have considered the case of the Petitioner in the light of the Government Resolution and the services of the Petitioners should have been regularised.

26. It is not the case of the Opposite Parties that the employees who were similarly placed and were engaged in the work charged establishment have not been regularised and they have not been given pensionary benefits. As has been discussed, in the preceding paragraphs, in several cases the Tribunal as well as this Court and the Hon'ble Supreme Court have issued directions to regulaize their service and to pay them the pensionary benefits. Further, on an analysis of the factual background of the present batch of writ application, this Court takes an exception to the conduct of the Opposite Parties in allowing the Petitioners to continue in work charged establishment for more than three decades and finally,after

their retirement from service refused to grant them the pensionary benefits only on the ground they were not brought over to the regular establishment. In similar type of cases this Court has taken a view that such type of employees be regularised for a day before their retirement and accordingly the pensionary benefits be calculated on that basis and be paid to them.

27. This Court in a recent judgment in ***Sadananda Setha vs. State of Odisha & others*** in ***WPC(OAC) No.865 of 2018*** decided on 17.12.2021 was dealing with a case of identical nature. The above named Sadananda Setha was initially engaged as a Khalasi in the work charged establishment on 01.03.1989 and after discharging his duties sincerely for several decades, finally he had retired from service on 30.06.2016. However, due to latches on the part of the authorities, he could not be brought over to the regular establishment. Therefore, he was denied the pensionary benefits. Initially the above named Sadananda Setha approached the Tribunal by filing an O.A. On abolition of the Tribunal the matter was transferred to this Court, this Court by virtue of a detailed judgment dated 17.12.2021 after taking into consideration the judgments delivered in **Abhay Chandra Mohanty vs. State of Odisha** and **Narasu Pradhan vs. State of Odisha** as well as **Chandra Nandi vs. State of Odisha** allowed the writ application.

28. While allowing the above noted writ applications, this Court had also taken note of the resolution of Water Resources Department dated 07.09.1995 which provides that on completion of 10 years of service in work charged establishment, the work charged employee is eligible to be brought over to the regular establishment. Since the Petitioner was not brought over to the regular establishment even after completion of 10 years of service in the work charged establishment, this Court finally disposed of the writ application by directing the authorities to grant similar benefits to the Petitioner as has been given in the case of ***Narasu Pradhan***'s case (supra).

29. On a careful analysis of the facts as well as the legal position and after considering the submission made by the learned counsels for both sides, this Court is of the considered view that keeping in view the fact that the Petitioners have worked for several decades in the work charged establishment till they retired from service, it would be utter injustice to them if they are not regularised in service and are not paid the pension and pensionary benefits. In such view of the matter, this Court has no hesitation in allowing the present batch of writ applications and accordingly the same are hereby allowed.The impugned order passed by the Opposite Party No.1, thereby rejecting the respective representation of the petitioners, is hereby quashed. Further, it is directed that the Opposite Party No.1 shall do well to regularise the service of the Petitioners for a day at least i.e. a day before the date of their retirement and accordingly, the Petitioners be paid the pensionary benefits as has been given in the case of **Narasu Pradhan** and similarly situated many other employees within a period of three months from the date of

communication of a certified copy of this judgment. Upon such regularisation the Petitioners shall also be entitled to other consequential and service benefits, if any, they are entitled to as per law.

30. With the aforesaid observations/directions, the batch of writ applications are allowed, however, there shall be no order as to cost.

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2023 (III) ILR-CUT-1192

V. NARASINGH, J.

GA NO. 13 OF 1997

STATE OF ORISSA ……Appellant

-V-

BINOD BIHARI SAHU .....Respondent

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 378 – Appeal against acquittal – Scope of the appellate court to "re-appreciate", "review" or "reconsider" of evidence and interfere with an order of acquittal – Discussed with reference to case law. (Paras 5-6)

(B) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Sections 42, 52-A – Non-compliance of mandatory provisions – Held, the accused/respondent is acquitted. (Paras 18-23)

Case Laws Relied on and Referred to :-

1. (2011) 9 SCC 479 : Mrinal Das & Ors. Vs. The State of Tripura.
2. (2007) 4 SCC 415 : Chandrappa & Ors. Vs. State of Karnataka.
3. (2009) 8 SCC 539 : Karnail Singh Vs. State of Haryana.
4. (2016) 14 SCC 358: Darshan Singh Vs. State of Haryana.

For Appellant : Mr. P.K. Maharaj, ASC
For Respondent : None

JUDGMENT Date of Hearing : 31.10.2023 : Date of Judgment : 21.11.2023

V. NARASINGH, J.

1. Heard Mr. Maharaj, learned ASC for the Appellant.

2. None appears for the Respondent.

3. This Appeal at the instance of the State is filed under Section 378(1)(3) of the Cr.P.C.assailing the judgment of acquittal dated 09.03.1996 passed by the learned Sessions Judge, Kalahandi-Nuapada at Bhawanipatna in G.R. Case No.140 of 1991 acquitting the Respondents of the charges under Section 20(b)(i) of N.D.P.C. Act.

4. The principles governing the exercise of power in an appeal against acquittal is worth reiterating before adverting to the factual matrix of the case at hand.

5. In **Mrinal Das & Others vs. the State of Tripura**, 2011 (9) SCC 479, the apex Court has extensively dealt with the scope of an Appellate Court to interfere with an Appeal against acquittal.

6. The guiding principles in an Appeal against acquittal and the power of the Appellate Court to "re-appreciate, review or reconsider evidence and interfere with an order of acquittal was stated in paragraph-42 of the judgment of the Apex Court in the case of **Chandrappa and Others vs. State of Karnataka**, (2007) 4 SCC 415 which was referred to in the judgment of the Apex Court in the case of **Mrinal Das (Supra).**

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

7. Thus on the touchstone of the law laid down by the Apex Court, the contention of the learned Public Prosecutor has to be examined as to whether the case at hand merits interference, with the impugned judgment of acquittal.

8. The Respondents were charged under Section 20(b)(i) of N.D.P.C. Act and it is the case of the prosecution that on 05.04.1991, the I.O. received an information that the accused-respondent was dealing in ganja business in his village Ladugaun under Koksara Police Station. Accordingly, he made a station diary entry proceeded to the house of the accused-respondent and he found one tin box with two gunny

bags containing ganja weighing 56 k.gs and he seized the same from the house of the accused-respondent. Since the accused-respondent did not produce any authority or license, the I.O. seized the ganja and arrested the accused and took up the investigation. After completion of the investigation, charge sheet was submitted under Section-20(b)(i) of the NDPS Act for possessing contraband to the tune of 56 kgs of ganja.

9. The case of the defence was one of complete denial and pleaded not guilty.

10. Eight witnesses were examined on behalf of the prosecution out of which P.W.8 is the I.O.

11. In the Judgment of acquittal, the learned Court on an analysis of the evidence held that the I.O. (P.W.8) has not made any requisition to any gazetted officer before conducting the house search. P.W.8 thus admitted non-compliance of Section-50 of the NDPS Act.

12. And, P.W.8 admitted to have made a station diary entry but not submitted the same to his higher Authority.

13. Learned counsel for the State-Appellant, Mr. Maharaj submitted with vehemence that the trial Court has committed an illegality in acquitting the accused on the ground of non-compliance of section-42 of the NDPS Act.

14. It is stated that the learned Sessions Judge has not taken into consideration the seizure of 56 kg of ganja from the conscious and exclusive possession of the accused-respondent and also not accepting the statement of official witnesses as well as independent witnesses. Hence, the impugned judgment is liable to set aside.

15. It is the contention of the learned counsel for the State that the findings of the learned trial Court are based on surmises and conjectures and militate against the weight of materials on record and states that in the case at hand, the materials on record unerringly point to the guilt of the accused-Respondent and the only conclusion that is possible on the basis of evidence on record, is that the Respondents is guilty of committing the alleged offence. Hence, the judgment of acquittal is unsustainable.

16. To fortify their allegation against the Respondent, the prosecution relied on the evidence of eight witnesses. In the facts of the present case, P.W.8 the I.O. is the most material witness and on scrutiny of whose evidence, the judgment of acquittal was passed.

17. The charge against the accused was of commission of offence under Section 20(b)(i) of NDPS Act for possessing contraband (ganja) to the tune of 56 kgs which was allegedly recovered from the house of the Respondent on search.

18. In a case under Section 20(b)(i) of the NDPS Act, law is well settled that adherence to the provisions of Section 42 and 50 of the NDPS Act are mandatory.

18.A. For convenience of ready reference,both the Sections are extracted hereunder;

> **"42. Power of entry, search, seizure and arrest without warrant or authorisation.-**
>
> (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intellegence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-
>
> (a) enter into and search any such building, conveyance or place;
>
> (b) in case of resistance, break open any door and remove any obstacle to such entry;
>
> (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and
>
> (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:
>
> [Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:
>
> Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.
>
> (2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.
>
> xxx xxx xxx
>
> **"50.Conditions under which search of persons shall be conducted.-**

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]

19. In the case at hand, admittedly, the seizure is from the house of the Respondent and not from his possession. As such, the provision of Section 50 of the NDPS Act ex-facie does not come into play. And, on this count, this Court finds force in the submission of the learned counsel for the State that non-adherence to Section 50 of the NDPS Act by the learned Trial Court is a patent error of appreciation of law.

20. And, the statement of the I.O.- P.W.8 runs thus;

X-Examination by the defence.

"4. I have not mentioned the time at which I received the reliable information excepting mentioning in Ext.4 that I received in the morning of 5.4.91. I have made an entry to that effect in the Station Diary the copy of the same has not been sent to the Court. I have not got the authority from the Magistrate to search the house of the accused. My investigation does not disclose that due to what reason I could not obtain a search warrant from the Magistrate having jurisdiction. There are many gazette officers at Koksara. I have not requisitioned the services of any gazette officer before condicting house search or at the time of search, recovery and seizure. I have not asked the accused or any of the inmates of the house whether they want their house should be searched in presence of a gazette officer or a Magistrate."

[Ext.4 - plain paper F.I.R]

xxx xxx xxx

"6. It has not been mentioned in Ext.3 the seizure list the size of the rooms and the quantity of ganja alleged to have been recovered from which room. The seizure list does not disclose that a tin box containing ganja from one room and two gunny bags containing ganja was recovered from another room. I have not written in Ext.4 that ganja

was there in an old tin box in one room and two gunny bags containing ganja from another room. I have not prepared any chart showing taking of sample ganja from tin box as well as from the two gunny bags. My case diary does not show as to when the seized ganja was forwarded to Court. My case diary dies not disclose as to where the seized ganja was kept. The same is also regarding the sample ganja. I cannot say if at all the seized ganja were forwarded to court or not.

xxx xxx xxx" (Emphasized)

[Ext.3 - Seizure List]

21. From the evidence of the I.O., it is abundantly clear that there has been patent violation of Section 42 and 52-A of the NDPS Act. For convenience of the ready reference, Section 52-A of the NDPS Act is extracted hereunder;

"52-A. Disposal of seized narcotic drugs and psychotropic substances.—

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances by notification in the Official Gazette, specify such narcotic drugs or psychotropic substances or controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of orgin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances], and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]

22. The import of violation of Section 42 of the NDPS Act has been laid down by the Apex Court in a plethora of decision.

23. In the case of **Karnail Singh vrs. State of Haryana, (2009) 8 SCC 539** Constitution Bench of the Apex Court dealing with the provisions of Section 42 of the NDPS Act held thus in paragraph-35 (SCC pp. 554-55);

> "35. In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:
>
> (a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).
>
> (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.
>
> (c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.
>
> (d) *While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible,* delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. *Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the* Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."
>
> (Emphasis supplied)

It is apt to note here that in a case based on prior information as in the case at hand, the procedure as noted by the Apex Court in paragraph-a above has to be adhered to and the same has been reiterated in the case of **Darshan Singh vs. State of Haryana**, (2016) 14 SCC 358 wherein it has been held that non-adherence to the procedure under Section 42(1) of the NDPS Act entitles acquittal.

24. On an analysis of the materials on record, keeping in view the contours of this Court in exercising jurisdiction in a judgment of acquittal, in the facts of the present case, it is established that there has been patent violation of the mandatory provision of Section 42 of the NDPS Act as well as the provision of Section 52-A of the NDPS Act. Since the judgment has been passed on a cogent analysis of materials on record vis-a-vis the mandatory prescription of law and its patent violation as noted in the impugned judgment and there being no perversity in appreciation of either fact or in application of law save and except the observation relating to Section 50 of the NDPS Act, this court does not find any merit in this Appeal which is accordingly dismissed.

25. The bail bond of Respondent stands cancelled and sureties be discharged.

26. Accordingly, the G.A. stands disposed of.

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2023 (III) ILR-CUT-1199

V. NARASINGH, J.

CRLMP NO. 2270 OF 2022

KANDARPA DANSANA …….Petitioner

-V-

STATE OF ODISHA & ORS. …….Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 226 – Petitioner filed the writ application aggrieved by non-registration of the complaint – Whether the court should exercise the discretionary power? – Held, unless the fact and situation so warrants plenary discretion of this court ought not to be exercised to direct registration of the FIR. (Paras 20-21)

Case Laws Relied on and Referred to :-

1. AIR 2014 SC 187 : Lalita Kumari Vs.Government of U.P. & Ors.
2. 2022 (II) OLR (SC) 570 : XYZ Vs. State of Madhya Pradesh &Ors.
3. 2022 (I) OLR 543 : Nillufar Hamid Vs. State of Odisha & Ors.
4. (2016) 6 SCC 277 : Sudhir Bhaskarrao Thambe Vs. Hemant Yashwant Dhage & Ors.
5. (2020) 16 SCC 728 : M. Subramaniam and anr Vs. S. Janaki & Anr.

For Petitioner : Mr. A.K. Mishra

For Opp. Parties : Mr. A. Pradhan, ASC
Mr. P.K. Ray, Mr. G. Mukherji, Sr. Adv.
Mr. D.N. Mishra

JUDGMENT Date of Hearing : 23.11.2023: Date of Judgment : 29.11.2023

V. NARASINGH, J.

1. Being aggrieved by non-registration of the complaint at Annexure-1 as FIR, which according to the learned counsel for the Petitioner, discloses a cognizable offence, the present CRLMP has been filed invoking the jurisdiction of this Court under Article 226 of the Constitution of India.

2. The Petitioner availed loan of Rs.6 lakhs from Verita Finance Private Limited, Opposite Party No.4 (hereinafter referred to as"VFPL").The sum and substance of the complaint at Annexure-1 is that the Petitioner was duped in signing documents providing for higher rate of interest of 24%, than the assured rate of 12%, taking mean advantage of that the Petitioner does not know English. And, the Opposite Party No.4-VFPL got the documents signed by the Petitioner through its agent one Sanu Sahu.

3. Considering the nature of grievance, this Court by order dated 23.12.2022 directed for impletion of Reserve Bank of India as Opposite Party No.5.

4. Learned counsel for the Petitioner, Mr. Mishra relying on the judgment of the Apex Court in the case of **Lalita Kumari Vrs. Government of U.P. & others, AIR 2014 SC 187** submitted that in the facts of the present case since a cognizable offence is made out, FIR ought to be registered and consequential steps in terms of the said FIR have to be taken.

5. Learned counsel for the Petitioner further relied on the order of the Apex Court in the case of **XYZ vrs. State of Madhya Pradesh & others, 2022 (II) OLR (SC) 570** and the order of this Court in the case of **Nillufar Hamid vrs. State of Odisha and others, 2022 (I) OLR 543**.

6. Per contra, learned counsel for the Opposite Party No.4- VFPL whose agent supposed to have duped the Petitioner in signing the documents for obtaining the loan at the interest rate of 24% than the promised 12% submitted that the Opposite Party No.4 is a non-banking financial institution and name of the Company finds place at serial no.195 of the non-banking financial institution.

7. It is further stated that the Company is engaged in the business of finance focusing on providing inclusive finance to the self-employed borrowers, who have no access to funding from banks and providing loans under various categories to the interested persons. The registration certificates and list of the NBFCs containing the name of Opposite Party No.4 was placed on record.

7-A. And, it is submitted by the learned counsel for the said Opposite Party No.4 that the loan availed by the Petitioner comes under the MSME Rural Business Loans and is categorized as "prime plus" and since the loan amount is Rs.6 lakhs, rate of interest @ 21% to 24% chargeable and accordingly, there is no illegality in charging

interest at 24%. He strongly refutes the allegation that the Petitioner was ever promised loan @ 12% and controverts Petitioner's assertion on this count. It his assertion that the Petitioner and his wife signed the loan documents being fully aware of its terms since the same were explained to them in vernacular (Odia language).

8. It is the further contention of the learned counsel for the Opposite Party No.4 that the loan of Rs.6 lakhs was disbursed within three days and thereafter the Petitioner has not paid a single instalment. It has also been stated that Opposite Party No.4 has not charged high rate of interest as alleged and it is at par with the MSME Rural Business Loans and in this context, the Opposite Party No.4 has relied on the comparative table.

9. It has also been asserted by Opposite Party No.4 that the Opposite Party No.5-RBI does not prescribe any particular rate of interest.

10. It is apt to note here that the Petitioner has not controverted the recitals in the counter affidavit filed by the Opposite Party No.4 by filing rejoinder.

11. Learned counsel for the State, Mr. Pradhan, learned ASC referring to the sanction details at Annexure E/4 submitted that the same clearly refers to the rate of interest as 24%. The Petitioner and his wife have signed the same and according to the learned counsel for the State, there is no illegality in not instituting the FIR since prima facie no cognizable offence is made out.

12. Learned Senior Counsel Mr. Mukharji instructed by Mr.Mishra, learned counsel for the Opposite Party No.5-RBI, places reliance on Paragraphs 3,4 and 7 of the affidavit filed on behalf of the Opposite Party No.5-RBI. Recitals of the said Paragraphs 3,4 and 7 of the affidavit are extracted hereunder for convenience of ready reference :

> "3. That dispute regarding grant of loan, terms and conditions and its repayment are governed by the contract entered between the parties concerned. Reserve Bank has not prescribed or fixed any interest rate on loans and advances extended by NBFCs to its customers and has allowed themselves to decide the rate of interest. Though the RBI has not prescribed any ceilings on the rates of interest to be charged by NBFCs on the loans and advances granted to borrowers, guidelines have been issued through Circulars based on economic principles so that NBFCs fix reasonable and competitive rates of interest in the interest of public.
>
> 4. That in exercise of power conferred under Section 45L of the Reserve Bank of India Act, 1934, RBI has issued guidelines on fair practice Code for NBFCs. The bank has prescribed the broad guidelines on fair practices that are to be framed and approved by the Board of Directors of NBFCs. The guidelines prescribe about application for loans and their processing, loan appraisal and terms/conditions, disbursement of loans including charges in terms and conditions etc., in regard to the practices to be adopted by the NBFCs in advancement of loans and its recovery. Copy of the guidelines on fair practices Code for Non-Banking Financial Companies dated 28.09.2026 is annexed as AnnexureA/5.

xxx xxx xxx

7. That the RBI in exercise of powers U/S 45 L of the RBI Act,1934 issued directions regarding excessive rate of interest charge by NBFCs on 02.01.2009. As per the notification dated 02.01.2009 the Board of each NBFCs shall adopt an interest rate model taking into account relevant factors such as, Cost of funds, margin and risk premium, etc and determine the rate of interest to be charged for loans and advances. The rate of interest to different categories of borrowers shall be disclosed to the borrower or customer in the application form and communicated explicitly in the sanction letter. The rate of interest and the approach for gradation of risks shall also be made available on the websites of the companies or published in the relevant Newspapers. The rate of interest should be annualised rates so that the borrower is aware of the exact rates that would be charged to the account. Copy of the Notification No.DNBS.204/CGM(ASR)-2009 dated 02.01.2009 is annexed herewith as Annexure D/5."

13. Learned counsel for the RBI also places on record the loan sanction letter which contains the signature of the Petitioner and his wife wherein the rate of interest has been stated as 24% including the Photostat copy of the "declaration for signing in vernacular language/thumb impression".

14. On a bare perusal of the list of documents produced, it can be seen that the Petitioner and his wife have signed each page in vernacular. In the background of the Petitioner's allegation, the declaration for signing in vernacular including thumb impression referred to herein above is extracted hereunder for convenience of ready reference:

DECLARATION FOR SIGNING IN VERNACULAR LANGUAGE/THUMB IMPRESSION

e KANDARPA PANIGRAHI, KSHIRA PANIGRAHI Son / Daughter / Wife of .....

.....residing at PUTUK, BARGARH, ODISHA

.....do hereby state declare

nd solemnly affirm as under:

The contents of the loan application and all other documents incidental to availing loan from Veritas have been read out and explained to me in the language of my signature and we have understood the same and do hereby agree to abide by all terms and conditions of the loan.

we declare that whatever we have stated herein above is true and correct to the best of my knowledge and belief.

Signature(Vernacular/Thumb Impression)

Date: 27/05/2022
Place: BARGARH

Witness:

Name & Address: AMIT BHOI
BARGARH, ODISHA

Signature of the Witness:

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> "The contents of the loan application and all other documents incidental to availing loan from Veritas have been read out and explained to me in the language of my signature and we have understood the same and do hereby agree to abide by all terms and conditions of the loan". (Emphasized)

15. Thus, it is manifestly clear that the Petitioner had executed the documents being fully aware of all the contents of the loan application which includes the rate of interest.

16. Hence, the submission of the learned counsel for the Petitioner that the Petitioner has been duped to sign the documents since they were in English ex facie does not stand to reason.

17. There is no cavil about the decision of the Apex Court in the case of Lalita Kumari (supra) and the judgment of the Apex Court in the case of XYZ (supra) and the order of this Court

18. It is trite that a judgment has to be understood in the context in which the same has been passed.

19. In this context, it is apt to refer to the following judgments of the Apex Court :

> A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for is disposal. (Ref : Executive Engineer, Dhenkanal Minor Irrigation Division vrs. N.C. Budharaj, (2001) 2 SCC 721. (Emphasised)

> There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrigton v. British Railways Board (Sub nom British Railways Board v. Herrington). Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. (Ref : Haryana Financial Corporation vrs. Jagdamba Oil Mills, (2002) 3 SCC 496)

19-A. While giving direction in the case of Lalita Kumari (supra), the Apex Court disapproved the approach to scrutinize the complaint for registration if prima facie a cognizable offence is made out. Hon'ble Supreme Court categorically directed that if a cognizable offence is made out the FIR has to be registered and non-registration would be contumacious.

20. It is apposite to state that in the case of **Sudhir Bhaskarrao Thambe Vrs. Hemant Yashwant Dhage and others, (2016) 6 SCC 277**, the Apex Court sounded a caution that unless the fact situation so warrants plenary discretion of this Court ought not to be exercised to direct registration of the FIR, otherwise, "they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions".

20-A. The same was reiterated by the Larger Bench of the Apex Court in the case of **M. Subramaniam and another Vrs. S. Janaki and another, (2020) 16 SCC 728**.

21. Prima facie this Court is not persuaded to agree with the submission of the learned counsel for the Petitioner that a cognizable case is made out. Hence, this Court does not find any merit in the CRLMP and the same is accordingly disposed of.

22. It shall be open to the Petitioner to move the Opposite Party No.5-RBI relating to his grievance of higher rate of interest being charged and more so since for the particular category of loan the rate of interest varies from 21% to 24%.

22-A. If such a representation is made to the Opposite Party No.5-RBI within a period of four weeks from the date of receipt of representation, they are called upon to look into the matter in accordance with the guidelines and take up the matter with the O.P. No.4-VFPL and decision taken be communicated to the Petitioner within four weeks from the date of such representation.

23. It shall be open to the Petitioner to take recourse to the provisions of the Cr.P.C for redressal, if so advised. If so moved, learned Court shall consider the same independently on merits without being prejudiced by any of the observations made herein.

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2023 (III) ILR-CUT-1204

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) (OAC) NO.153 OF 2015

BICHITRA NANDA BEHERA .....Petitioner

-V-

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

SERVICE LAW – Regularization – Petitioner being a Swechhasevi Siksha Sahayaka acquired qualification of Diploma in Elementary Education from National Open School – The Opp.Party took a stand that the qualification acquired by the petitioner is not equivalent to C.T as he has not passed the same from the Board of Secondary Education and not eligible for regularization – Whether such a plea of the State/ Opp.Party is acceptable? – Held, No – When the Opp.Party allowed the petitioner to take the OTET examination conducted by the Board after taking note of the qualification so acquired as training qualification equivalent to C.T, the stand taken by the State in the present case is not acceptable. (Paras 9.1-9.2)

For Petitioner : Ms. U. Padhi
For Opp. Parties : Mr. R.N. Mishra, AGA

ORDER Date of Order : 25.09.2023

BIRAJA PRASANNA SATAPATHY, J.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical) Mode.

2. Heard learned counsel for the Parties.

3. The Petitioner has filed the present Writ Petition *inter alia* with the following order:-

> *"(i) Direction may be given to the Respondent to show cause why the applicants case shall not be considered for appointment as regular primary school teacher keeping in view of Annexure-3, 4 and 9 series of the O.A.*
>
> *And thereby Direction may be given to the Respondent No.1 to 4 to consider the representation of the applicant for appointment of left out untrained SC/ST/PH Jr. Teacher under Zilla Parisad, Cuttack as regular Primary School teacher, considering the facts and circumstances of the case which deems to fit and proper.*
>
> *And thereby direction may be given to the Respondents to consider the grievance of the applicant for allowing him to get a chance for C.T Training in a distance course with prospective effect by changing the cut-off date, vide Annexure-7 & 10.*
>
> *And thereby any other/order/orders or direction/direction(s) be passed so as to give complete relief to the applicant."*

4. It is contended by the learned counsel for the Petitioner that the Petitioner belongs to Scheduled Caste category that he was engaged as a Swechhasevi Sikshya Sahayaka in terms of the agreement executed on 09.02.2006 and order of appointment issued in his favour on 28.02.2006 under Annexure-1.

4.1. It is contended that since the Petitioner was untrained hand at the time of his appointment and he was directed to undergo such training, the Petitioner acquired the qualification of Diploma in Elementary Education from the National Institute of Open Schooling the result of which was published on 05.06.2015.

4.2. It is contended that since the Petitioner acquired the qualification of Diploma in Elementary Education from the National Institute Open Schooling, which is equivalent to C.T., the Petitioner in view of communications issued by the Government in the Department of School & Mass Education under Annexures-3, 4 and 9 became eligible for his absorption as a regular Primary School Teacher.

4.3. It is also contended that similarly situated untrained teacher belonging to Scheduled Caste category were regularized with similar training qualification, but the Petitioner was left out. Even though the Petitioner moved Opposite Party

No.1 seeking his regularization vide Annexure-8 and 8/1, but no decision when was taken, the present writ petition has been filed.

4.4. It is accordingly contended that in view of the continuance of the Petitioner as a Swechhasevi Sikshya Sahayaka since 28.02.2006, and the acquisition of the training qualification of Diploma in Elementary Education from National Institute Open Schooling, the Petitioner is eligible and entitled for his absorption as a regular primary school teacher.

5. In the counter affidavit so filed when a stand was taken that qualification of Diploma in Elementary Education acquired by the Petitioner from National Institute of Open Schooling and Diploma in Elementary Education is not a training qualification equivalent to C.T, Petitioner was directed to satisfy this Court on that issue.

6. Basing on the order passed by this Court an affidavit was filed by the Petitioner indicating therein that taking into account the acquisition of qualification of Diploma in Elementary Education, which is equivalent to C.T., he was allowed to take the OTET Examination so conducted by the Board. It is contended that unless and until a candidate is having the required training qualification, he is not allowed to take the OTET Examination so conducted by the Board of Secondary Education,Orissa, Cuttack. Since by accepting the qualification of Diploma in Elementary Education as equivalent to C.T, the Petitioner was allowed to take the OTET Examination so conducted by the Board, it is to be held that the Petitioner has the required training qualification.

7. Basing on the affidavit so filed by the Petitioner, this Court when directed the State Counsel to obtain instruction with regard to the stand taken by the Petitioner that he has got the required training qualification. Mr. Mishra, learned Addl. Government Advocate fairly contended that the Diploma in Elementary Education conducted by the Board of Secondary Education, Orissa is equivalent to C.T and not the qualification acquired by the Petitioner from National Institute of Open Schooling.

It is accordingly contended that since the Petitioner is not having the required training qualification, he is not eligible and entitled to be regularized as a Primary School Teacher.

8. To the aforesaid submission of Mr. Mishra, Ms.Padhi contended that even if accepting the submission of the State Counsel that the Petitioner does not have the required training qualification but vide office order dtd.21.09.2013 so issued by the Collector-cum-Chief Executive Officer, Zilla Parishad, Keonjhar under Annexure-9 similarly situated untrained Teacher belonging to Scheduled Caste category have been regularized as Primary School Teacher.

It is accordingly contended that on the ground of parity, the Petitioner is also otherwise eligible for his absorption as a regular primary school teacher.

9. Having heard learned counsel for the Parties and taking into account the submissions made, this Court finds that the Petitioner was engaged as a Swechhasevi Sikshya Sahayak vide order dtd.28.02.2006. It is also found that the Petitioner belong to Scheduled Caste Category and since he was an untrained hand, he was allowed to undergo the required training qualification from National Institute of Open Schooling. The Petitioner as found from the record, acquired the training qualification of Diploma in Elementary Education from the National Institute of Open Schooling, the result of which was published on 05.06.2015.

9.1. It is also found that taking into account the qualification so acquired as a training qualification equivalent to C.T., the petitioner was allowed to take the OTET Examination so conducted by the Board.

Therefore, the stand taken by the learned State Counsel that the qualification of Diploma in Elementary Education so acquired by the Petitioner from the National Institution of Open Schooling, is not equivalent as she has not passed the same from Board of Secondary Education is not acceptable.

9.2. It is also found that persons similarly situated and belonging to Scheduled Caste Category, having no training qualification have been regularized as regular primary school teacher vide order under Annexure-9. This Court taking into account the entirety of the facts is of the opinion that the Petitioner since has acquired the training qualification from National Institute of Open Schooling and basing on that he was allowed to appear the OTET Examination so conducted by the Board of Secondary Education, Orissa, Cuttack, directs Opposite Party No.2 to regularize the services of the Petitioner as a regular Primary School Teacher within a period of three (3) months from the date of receipt of this order. However, the said order of regularization shall be prospective in nature.

10. With the aforesaid observations and directions,the Writ Petition stands disposed of.

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2023 (III) ILR-CUT-1207

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO. 32574 OF 2022

KISHORE CHANDRA DIXIT ……Petitioner

-V-

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

ORISSA EDUCATION SERVICE (COLLEGE BRANCH) RECRUITMENT RULES, 2020 – Rule 5(2) – The Orissa Public Service Commission in view of the provisions contained under Rule 5(2) of the Rule is competent to Judge the merit of the candidate, taking into account the

performance in the interview and to publish the merit list on the basis of such interview – The commission has fixed the cut off mark at 50% for the interview which was not found either in recruitment rule or in the advertisement – Whether fixation of cut off mark at 50% without prior intimation to the candidates is sustainable? – Held, No.

(Paras 7.3-7.4)

Case Laws Relied on and Referred to :-

1. (2008) 3 SCC 512 : K. Manjusree Vs State of Andhra Pradesh & Anr.
2. (2022) 11 SCC 742 : Goa Public Service Commission Vs. Pankaj Rane & Ors.
3. (2020), 20 SCC 209 : Ramjit Singh Kardam & Ors. Vs. Sanjeev Kumar & Ors.
4. (2006) 6 SCC 395 : K.H. Siraj Vs. High Court of Kerala & Ors.
5. (2019) 11 SCC 620 : PEC Limited Vs. Austbulk Shipping SDN. BHD.
6. 2023 Live Law (S.C) 137 : Sureshkumar Lalitkumar Patel & Ors. Vs. State of Gujarat & Ors.
7. (2007) 3 SCC 720 : Sanjay Singh & Anr. Vs. U.P. Public Service Commission, Allahabad & Anr.

For Petitioner : M/s. D.K. Pattnaik, S. Mishra, J.Sahoo, S.S. Parida & A. Mishra

For Opp. Parties : M/s. R.N. Mishra, AGA
M/s. A. Behera

JUDGMENT Date of Hearing : 06.07.2023 : Date of Judgment : 03.10.2023

BIRAJA PRASANNA SATAPATHY, J.

The Present Writ Petition has been filed challenging the order dt.22.11.2022 so passed by Opp. Party No.3 under Annexure-15 wherein the claim of the Petitioner to get appointment as against the post of Asst. Professor (Teacher Education) in Educational Studies in PWD category-2 was rejected.

2. It is the case of the Petitioner that pursuant to the advertisement issued by the Orissa Public Service Commission (hereinafter called as "The Commission") on 27.07.2021 vide advertisement No.9 of 2021-22 under Annexure-1, the Petitioner made his application for the post of Asst. Professor (Teacher Education)-Stage-1 under Annexure-2.Vide the said advertisement, applications were invited for recruitment to 385 posts of Asst. Professor (Teacher Education) Stage-1 in different discipline of Government Teachers Training Institute of the State under Department of Higher Education in the scale of Pay Scale 7-I-I-10 in the pay Matrix under ORSP (CT) Rules, 2019 with usual D.A and allowances as admissible. Out of the 385 posts so advertised, 4% of the same i.e. 15 posts were reserved for PWD category candidates. Not only that, out of the said 385 Posts so advertised as against the discipline Teacher Education(Educational Studies), the total vacancies were indicated at 113 with the following break up.

25 for ST (8-women), 18-for S.C (6-women), 13 for SEBC (4-Women) and 57 for U.R(20-Women).

2.1. As against the aforesaid 113 posts so advertised with regard to the discipline Teacher Education (Educational Studies), 678 applications were received by the Commission and out of the same, 382 candidates were short-listed for document verification. During verification of such documents,candidature of further 60 candidates were rejected leaving aside 322 valid applications. Out of the 322 valid applications so arrived at, after verification of documents, 291 candidates were shortlisted for interview. The Petitioner is one of the candidate who was shortlisted for such interview and the Petitioner was noticed to appear for the interview vide Annexure-10 notice dt.15.09.2022 fixing the date of interview to 13.10.2022. Pursuant to the notice, Petitioner attended the interview on the scheduled date. But vide notification No.9622 dt.19.10.2022 under Annexure-11 series, the Commission published a list of 101 successful candidates as against the total advertised vacancies of 113 in the discipline Teacher Education(Educational Studies) and Petitioner's name when was not reflected in the select list, Petitioner made a representation to Opp. Party No.3 on 20.10.2022 under Annexure-12 to consider his claim.

2.2. As Opp. Party No.3 did not take any action on the representation so made on 20.10.2022, Petitioner again moved Opp. Party No.3 along with Opp. Party Nos.1 & 2 on 25.10.2022 under Annexure-12 series. As no action was taken in considering the grievance raised by the Petitioner under Annexure-12 series, Petitioner approached this Court in WP(C) No.28997 of 2022.

2.3. This Court vide order dt.02.11.2022 under Annexure-13 while disposing the matter directed Opp. Party No.3 to take a decision on the Petitioner's claim as made in his representation within a period of 15 days from the date of receipt of this order. The order being communicated to Opp. Party No.3, the claim of the Petitioner without proper appreciation was rejected vide the impugned order dt.22.11.2022 under Annexure-15. Challenging the said order, the present writ petition bas been filed.

3. Learned counsel for the Petitioner contended that pursuant to the advertisement issued under Annexure-1 by the Orissa Public Service Commission vide Advertisement No.9 of 2021-22 as against the total 385 vacancies indicated in different discipline, 113 posts were advertised as against the discipline Teacher Education (Educational Studies). Out of the total advertised vacancies of 385, 4% was reserved for PWD candidates, which comes to 15 posts. Taking into account the vacancies indicated in the discipline Teacher Education (Educational Studies) at 113, 4% of the vacancies comes to 4 posts.

3.1. Pursuant to the advertisement issued under Annexure-1, as against the discipline Teacher Education (Educational Studies) in total 678 candidates submitted their applications. The Commission out of the said 678 applications, shortlisted 382 candidates for the purpose of document verification. On verification of documents of those 382 candidates, candidature of 60 candidates were further rejected and documents of 322 candidates were found valid. Out of the 322 applications which

were found valid, the Commission shortlisted 291 candidates and issued the notice on 15.09.2022 under Annexure-10 asking the applicants to take part in the interview. Pursuant to the said notice, the date of interview of the Petitioner was fixed to 13.10.2022. Even though the Petitioner participated in the interview, but while issuing the select list on 19.10.2022 under Annexure-11 series, out of the total 113 vacancies in the discipline Teacher Education (Educational Studies), 101 candidates were selected.

3.2. Not only that since out of the total 113 vacancies in the discipline of Teacher Education(Educational Studies), 4% was reserved for PWD candidates which comes to 4 posts, only 2 candidates were selected in the category vide notification issued under Annexure-11 series on 19.10.2022.

Since the Petitioner was deprived from the purview of selection as a PWD candidate, he moved Opp. Party No.3 initially claiming his appointment on 20.10.2022. As the same was not considered, Petitioner again moved Opp. Party No.3 on 25.10.2022 with copy to Opp. Party Nos.1 & 2 under Annexure-12 series. In spite of such request made by the Petitioner to consider his case, when no action was taken, Petitioner approached this Court in W.P.(C) No.28947 of 2022. This Court vide the order dt.02.11.2022 when directed Opp. Party NO.3 to take a decision on the claim of the Petitioner, Opp. Party No.3 without proper appreciation of the Petitioner's claim, rejected the same vide the impugned order dt.22.11.2022 under Annexure-15.

3.3. It is contended that only on receipt of the impugned order, Petitioner could know that the Petitioner has not been selected only on the ground that the Petitioner has failed to secure the minimum 50% mark in the interview which was fixed by the Selection Committee while conducting the interview of 291 candidates, who were shortlisted for such interview in the discipline Teacher Education (Educational Studies).

3.4. Learned counsel for the Petitioner contended that the recruitment in question for the post of Asst. Professor (Teacher Education)-Stage-1 in different discipline was governed by the provisions contained under the Orissa Education Service (College Branch) Recruitment Rules, 2020 so available under Annexure-17(In short, "the Rules"). The selection procedure for direct recruitment in the rank of Asst. Professor, Stage-1 was provided under Rule-5 of the said Rules. Rule-5(2) of the Rules provides the selection of direct recruitment to the rank of Asst. Professor (Stage-1) to be made by the Commission on the basis of merit to be judged by performance in the interview of eligible shortlisted candidates.Rule-5(6) of the Rules provides that on the basis of result of interview, the Commission shall prepare a subject wise merit list of successful candidates, arranged in order of merit, equal to the number of posts to be filled up, and furnish the same to the Government.

3.5. It is contended that as against the discipline Teacher Education(Educational Studies), since 113 posts were advertised vide Annexure-1 and 291 candidates were shortlisted for the purpose of interview, as provided under Rule 5(6) of the aforesaid Rules, the Commission was required to publish the merit list of successful candidates arranged in order of merit equal to the number of posts to be filled up. But in the case in hand, out of the 113 vacancies available, the Commission published the merit list of 101 candidates. Not only that, out of the 4 posts reserved for PWD candidates in the discipline, only two candidates were included in the merit list. It is accordingly contended that since the Commission has not followed the Recruitment Rules while conducting the selection with publication of the merit list under Annexure-12, the selection so conducted by the Commission is vitiated.

3.6. It is also contended that nowhere in the 2020 Rules, there is any provision for fixation of cut-off mark for the purpose of interview to be conducted amongst the shortlisted candidates. It is also contended that while issuing the advertisement under Annexure-1, no such criteria was also indicated that a candidate has to secure 50% marks in the interview, otherwise he will not be found eligible for his selection. It is accordingly contended that since neither in the recruitment rules nor in the advertisement, there was any stipulation for securing 50% mark in the interview or else the candidature will be found ineligible, such a practice followed by the Commission after conducting the interview, is not sustainable in the eye of law.

3.7. It is also contended that in the advertisement issued under Assnexure-1, nothing was indicated with regard to securing of 50% cut-off mark in the interview. Not only that while issuing notice to the shortlisted candidates to appear the interview nor prior to conducting the interview, pursuant to the notice issued on 15.09.2022 under Annexure-10, such a prescription was intimated to the candidates. Since no rules/stipulation is either provided in the Recruitment rules or in the advertisement issued under Annexure-1 to secure 50% mark in the interview, the action of the Commission in fixing a cut-off mark of 50%to be secured by a candidate in the interview is not sustainable in the eye of law and consequential publication of the merit list under Annexure-12 basing on such wrong fixation of cut-off mark.

3.8. In support of his aforesaid submission, learned counsel for the Petitioner relied on a decision of the Hon'ble Apex Court reported in the case of ***K. Manjusree Vs State of Andhra Pradesh and another, (2008) 3 SCC 512***. Hon'ble Apex Court in Paragraph-27 of the said judgment held as follows:

> ***27.*** *But what could not have been done was the second change, by introduction of the criterion of minimum marks for the interview. The minimum marks for interview had never been adopted by the Andhra Pradesh High Court earlier for selection of District & Sessions Judges, (Grade II). In regard to the present selection, the Administrative Committee merely adopted the previous procedure in vogue. The previous procedure as stated above was to apply minimum marks only for written examination and not for the oral examination. We have referred to the proper interpretation of the earlier Resolutions*

dated 24-7-2001 and 21-2-2002 and held that what was adopted on 30-11-2004 was only minimum marks for written examination and not for the interviews. Therefore, introduction of the requirement of minimum marks for interview, after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible. We are fortified in this view by several decisions of this Court. It is sufficient to refer to three of them — P.K. Ramachandra Iyer v. Union of India, Umesh Chandra Shukla v. Union of India and Durgacharan Misra v. State of Orissa.

3.9. Learned counsel for the Petitioner also relied on another decision of the Hon'ble Apex Court in the case of ***Goa Public Service Commission Vs. Pankaj Rane and Others***, ***(2022)*** **11 SCC 742**. Hon'ble Apex Court in Paragraph 23 to 28 of the said judgment held as follows.

23. *In this regard, we must notice that in the facts of this case of the 1866 candidates who appeared in the screening test/computer test, only 7 candidates which included Respondents 1 to 3 cleared the test. The number stood further reduced to 4 and which again included Respondents 1 to 3. Therefore, when the question arose as to how the interview should be conducted, the Commission decided on 16-5-2017 to fix 26 marks out of 40 as cut-off marks. It no doubt works out at 60% of the total marks in the interview segment. Rules did not provide for a separate minimum for the interview. The advertisement did not provide for a separate minimum in the interview. It is almost a week before the interview that the Commission took the decision in this regard.*

24. *We have stated these facts only to highlight that this is not a case where the Commission was faced with the task of having to interview a very large number of candidates. For 6 unreserved posts and 5 reserved posts finally, only 4 emerged as candidates to be dealt with at the final stage viz. the oral interview. This, therefore, is distinguishable, in other words, from the judgment relied upon by Mr Pratap Venugopal, learned counsel for the appellant viz. M.P. Public Service Commission . That was a case where this Court noted that the appellant Commission therein noting the large number of applications received from the General Category candidates against four posts decided to call only 71 applicants who had 7½ years of practice although 188 applicants were eligible, in view of the fact that under Section 8(3)(c) of the provisions applicable in the said case, five years of practice as an advocate or pleader of Madhya Pradesh was a minimum requirement.*

25. *It was therefore, a case which though relied upon by the appellant is distinguishable on facts. This is apart from noticing that the appellant has not been able to inform the Court as to whether there was a Rule in the said case similar to Rule 12 as present in this case. As far as Yogesh Yadav is concerned, this again is not a case which involved a rule resembling Rule 12 of the Rules. We further may also notice that in the said case recruitment was carried out by the employer itself and it was not done by the recruiting body which the appellant is and which is limited by statutory rules made under Article 309 of the Constitution.*

26. *Para 13 of Yogesh Yadav is extracted hereinbelow : (SCC p. 628)*

"13. The instant case is not a case where no minimum marks are prescribed for viva voce and this is sought to be done after the written test. As noted above, the instructions to the examinees provided that written test will carry 80% marks and 20% marks were

assigned for the interview. It was also provided that candidates who secured minimum 50% marks in the general category and minimum 40% marks in the reserved categories in the written test would qualify for the interview. The entire selection was undertaken in accordance with the aforesaid criterion which was laid down at the time of recruitment process. After conducting the interview, marks of the written test and viva voce were to be added. However, since a benchmark was not stipulated for giving the appointment, what is done in the instant case is that a decision is taken to give appointments only to those persons who have secured 70% marks or above marks in the unreserved category and 65% or above marks in the reserved category. In the absence of any rule on this aspect in the first instance, this does not amount to changing the "rules of the game". The High Court has rightly held that it is not a situation where securing of minimum marks was introduced which was not stipulated in the advertisement, standard was fixed for the purpose of selection. Therefore, it is not a case of changing the rules of the game. On the contrary in the instant case a decision is taken to give appointment to only those who fulfilled the benchmark prescribed. The fixation of such a benchmark is permissible in law. This is an altogether different situation not covered by Hemani Malhotra case.

27. *Though the learned counsel for the appellant did emphasise the said observations, we are of the view that it is distinguishable at any rate having regard to Rule 12 which we have already noticed which is applicable to the facts of this case. In other words, we would think that in the facts of this case, they are closer to the facts in P.K. Ramachandra Iyer case and the judgment following the same which we have already noted. As far as Tej Prakash Pathak case is concerned, it again did not specifically involve a rule similar to Rule 12.*

28. *It is true that there is a distinction in the facts with those in K. Manjusree . We notice that that was a case where the requirement of minimum marks for interview was made after the entire selection process consisting of the written examination and interview was completed and noticing the facts, the Court declared that it would amount to changing the Rules after process is completed. In this case, the stipulation as to the minimum to be obtained in the interview was announced prior to the holding of the interview. However, we would think that this case must fall to be decided on the principle which has been laid down in P.K. Ramachandra Iyer and Durgacharan Misra for the reasons which we have already indicated."*

3.10. The decision of the Hon'ble Apex Court in the case of ***Ramjit Singh Kardam and others Vs. Sanjeev Kumar and Others (2020), 20 SCC 209*** was also relied on by the learned counsel for the Petitioner. Hon'ble Apex Court in Paragraphs 33.1,33.2,45, 45.1 & 45.2 of the said judgment has held as follows-:

33.1. *Whether the respondent writ petitioners who had participated in the selection were estopped from challenging the selection in the facts of the present case?*

33.2. *Whether the respondent writ petitioners could have challenged the criteria of selection applied by the Commission for selection after they had participated in the selection?*

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45. *The Division Bench of the High Court is right in its conclusion that the selection criteria, which saw the light of the day along with the declaration of the selection result could be assailed by the unsuccessful candidates only after it was published. Similarly, selection process which was notified was never followed and the selection criteria which*

was followed was never notified till the declaration of final result, hence, the writ petitioners cannot be estopped from challenging the selection. We, thus, hold that the writ petitions filed by the petitioners could not have been thrown on the ground of stopped and the writ petitioners could very well challenge the criteria of selection applied by the Commission, which was declared by the Commission only at the time of declaration of the final result. We, thus, answer Points 1 and 2 as follows:

45.1. *The writ petitioners, who had participated in the selection are not estopped from challenging the selection in the facts of the present case.*

45.2. *The writ petitioners could have very well challenged the criteria of selection, which was declared by the Commission only in the final result declared on 10-4-2010.*

3.11. Making all such submissions, learned counsel for the Petitioner contended that since the process of selection so followed by the Commission in respect of the discipline Teacher Education (Educational Studies) was not conducted in accordance with the Recruitment Rules and the cut-off mark in the interview was fixed arbitrarily and without any prior notice, the selection process undertaken by the Commission in respect of the discipline Teacher Education (Educational Studies) pursuant to Annexure-1 is vitiated and calls for interference of this Court.

4. Mr. Arnav Behera, learned counsel appearing for the Commission on the other hand made his submission basing on the stand taken in the counter affidavit so filed by Opp. Party No.3.

Though it is not disputed by the Commission that the recruitment process pursuant to Annexure-1 is governed under Rule-5 of the 2020 Recruitment Rule, but it is contended that basing on the provisions contained under Rule 5(2) of the said Rules, the Commission adopted the system of weightage for assessing the performance of candidates in the interview. Rule 5(2) of the Rules provides that selection for direct recruitment to the rank of Asst. Professor (Stage-1) shall be made by the Commission on the basis of merit to be judged by performance in interview of eligible shortlisted candidates.

4.1. It is contended that in terms of the said provision contained under Rule-5(2) of the Rules, the Commission adopted the system of weightage for assessing the performance of the candidates in the interview. The maximum weightage was assessed at 100 and out of the said 100 mark, 40% was kept for domain knowledge, 40% of pedagogy Skill and 20% for Quality of Research Publications. The Commission also decided to select a candidate in UR/SEBC category who secure 50% of the weightage and for SC & ST category, it was fixed at 45%. The Commission also decided to fix the percentage so fixed for UR/SEBC candidates in respect of candidates applying under horizontal reservation like Sports person, persons with disability and ex-servicemen.

4.2. It is contended that as was decided by the Commission, PWD candidates have also to secure the minimum weightage as fixed for UR/SEBC candidates, as PWD reservation is a horizontal one. Since the Petitioner out of the 50% cut-off marks

so fixed by the Commission,only secured 35 weightage mark in the interview, his name was not included in the select list so published under Annexure-11. When the Petitioner moved the Commission for consideration of his claim pursuant to the order passed by this Court in the earlier Writ Petition, his claim was considered and was rejected as the Petitioner has failed to secure the cut-off mark so fixed by the Commission. The Petitioner out of the cut-off 50% mark has secured only 35 marks and accordingly, he is not eligible to get the benefit of selection and appointment.

4.3. Learned counsel appearing for Opp. Part NO.3 however contended that though as provided under Clause-6 of the Resolution dt.25.02.2021 so issued by the State Government in the Deptt. Of Social Security and Empowerment of Persons with Disability, the authorities have been vested with the discretion to relax the standard in respect of P.W.D candidates, but with regard to the recruitment process so undertaken pursuant to Annexure-1., the Commission decided not to give any such relaxation to PWD candidates. It is accordingly contended that since the Petitioner failed to secure the minimum cut-off mark, so fixed by the Commission in the interview and only secured 35 marks, out of the cut-off marks fixed at 50, his candidature has been rightly rejected vide the impugned order under Annexure-15 and it needs no interference.

4.4. In support of his aforesaid submission, learned counsel for Opp. Party No.3 relied on the decision of the Hon'ble Apex Court in the case of ***K.H. Siraj Vs. High Court of Kerala and Others (2006) 6 SCC 395,*** Hon'ble Apex Court in Paragraphs-11,14,24,48,49,50 and 57 of the said judgment has held as follows:.

> ***11.*** *The Kerala Judicial Service Rules, 1991 (hereinafter referred to as "the Rules") were made in exercise of the powers conferred by Articles 234 and 235 of the Constitution of India and sub-section (1) of Section 2 of the Kerala Public Services Act, 1968 (19 of 1968). Rule 7 of the Rules reads thus:*
>
> *"7. Preparation of lists of approved candidates and reservation of appointments.—(1) The High Court of Kerala shall, from time to time, hold examinations, written and oral, after notifying the probable number of vacancies likely to be filled up and prepare a list of candidates considered suitable for appointment to Category 2. The list shall be prepared after following such procedure as the High Court deems fit and by following the rules relating to reservation of appointments contained in Rules 14 to 17 of Part II of the Kerala State and Subordinate Services Rules, 1958.*
>
> *(2) The list consisting of not more than double the number of probable vacancies notified shall be forwarded for the approval of the Governor. The list approved by the Governor shall come into force from the date of the approval and shall remain in force for a period of two years or until a fresh approved list is prepared, whichever is earlier."*
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> *xxx xxx xxx xxx*
>
> ***14.*** *According to Mr L.N. Rao, Rule 7 of the Rules has to be interpreted in the following manner:*

The High Court of Kerala shall hold examinations written and oral and prepare a list of suitable candidates for appointment to category 2. The wording written and oral means the suitability of a candidate eligible for appointment has to be considered by the aggregate marks of written examination and oral examination. The legislative intention is to take the aggregate marks of both written examination and oral examination to decide the suitability of the candidate. List has to be prepared after following such a procedure as the High Court deems fit. Procedure means the manner of doing things and not substantive. Fixing a separate minimum cut-off marks is not procedural which is an additional eligibility for the post which is contrary to Rule 7. Rule 7 is silent as to the fixation of cut-off marks which is for relaxation from time to time for the purpose of reservation. The wording procedure deems fit does not confer any power on the Selection Authority so as to take away a right provided elsewhere, reported in Raja Ram Mahadev Paranjype case , followed in Babulal Nagar v. Shree Synthetics Ltd. The Selection Authority cannot follow any procedure not in violations of the rule of reservation.

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24. *According to Mr L.N. Rao, the following questions which are posed for the consideration of this Court in these appeals/petitions are as under:*

1. In the absence of specific legislative mandate under Rule 7(i) of the Kerala Judicial Service Rules, 1991 prescribing cut-off marks in oral examination whether the fixing of separate minimum cut-off marks in the interview for further elimination of candidates after a comprehensive written test touching the required subjects in detail is in violation of the statute.

2. Whether the select list (Annexure P-2) is prepared in violation of the principles of reservation as provided under Rules 14 to 17 of the Kerala State and Subordinate Services Rules, 1958?

3. Whether the first respondent the High Court has the power to decide that the reserved posts are to be dereserved to carry forward in the absence of a decision taken by the Government in this regard?

4. Whether Annexure P-2 list is liable to be struck off at its entirety?

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48. *In this background, two questions raised by Mr L.N. Rao have to be considered:*

1. The prescription of minimum mark for the oral examination as a condition of eligibility for selection as Munsif Magistrate is not authorised by Rule 7 of the Kerala Judicial Service Rules, 1991;

2. The select list has not been prepared in accordance with Rules 14 to 17 of the KSSSR, 1958.

49. *So far as the first submission is concerned, we have already extracted Rule 7 in paragraph supra. Rule 7 has to be read in this background and the High Court's power conferred under Rule 7 has to be adjudged on this basis. The said rule requires the High Court firstly to hold examinations written and oral. Secondly, the mandate is to prepare a select list of candidates suitable for appointment as Munsif Magistrates. The very use of the word "suitable" gives the nature and extent of the power conferred upon the High Court and the duty that it has to perform in the matter of selection of candidates. The*

High Court alone knows what are the requirements of the subordinate judiciary, what qualities the judicial officer should possess both on the judicial side and on the administrative side since the performance of duties as a Munsif or in the higher categories of Subordinate Judge, Chief Judicial Magistrate or District Judge to which the candidates may get promoted require administrative abilities as well. Since the High Court is the best judge of what should be the proper mode of selection, Rule 7 has left it to the High Court to follow such procedure as it deems fit. The High Court has to exercise its powers in the light of the constitutional scheme so that the best available talent, suitable for manning the judiciary may get selected.

50. *What the High Court has done by the notification dated 26-3-2001 is to evolve a procedure to choose the best available talent. It cannot for a moment be stated that prescription of minimum pass marks for the written examination or for the oral examination is in any manner irrelevant or not having any nexus to the object sought to be achieved. The merit of a candidate and his suitability are always assessed with reference to his performance at the examination and it is a well-accepted norm to adjudge the merit and suitability of any candidate for any service, whether it be the Public Service Commission (IAS, IFS, etc.) or any other. Therefore, the powers conferred by Rule 7 fully justified the prescription of the minimum eligibility condition in Rule 10 of the notification dated 26-3-2001. The very concept of examination envisaged by Rule 7 is a concept justifying prescription of a minimum as benchmark for passing the same. In addition, further requirements are necessary for assessment of suitability of the candidate and that is why power is vested in a high-powered body like the High Court to evolve its own procedure as it is the best judge in the matter. It will not be proper in any other authority to confine the High Court within any limits and it is, therefore, that the evolution of the procedure has been left to the High Court itself. When a high-powered constitutional authority is left with such power and it has evolved the procedure which is germane and best suited to achieve the object, it is not proper to scuttle the same as beyond its powers. Reference in this connection may be made to the decision of this Court in Union of India v. Kali Dass Batish wherein an action of the Chief Justice of India was sought to be questioned before the High Court and it was held to be improper.*

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57. *The qualities which a judicial officer would possess are delineated by this Court in Delhi Bar Assn. v. Union of India [(2002) 10 SCC 159 : 2003 SCC (L&S) 85]. A judicial officer must, apart from academic knowledge, have the capacity to communicate his thoughts, he must be tactful, he must be diplomatic, he must have a sense of humour, he must have the ability to defuse situations, to control the examination of witnesses and also lengthy irrelevant arguments and the like. Existence of such capacities can be brought out only in an oral interview. It is imperative that only persons with a minimum of such capacities should be selected for the judiciary as otherwise the standards would get diluted and substandard stuff may be getting into the judiciary. Acceptance of the contention of the appellant-petitioners can even lead to a postulate that a candidate who scores high in the written examination but is totally inadequate for the job as evident from the oral interview and gets zero marks may still find a place in the judiciary. It will spell disaster to the standards to be maintained by the subordinate judiciary. It is, therefore, the High Court has set a benchmark for the oral interview, a benchmark which is actually low as it requires 30% for a pass. The total marks for the interview are only 50 out of a total of 450. The prescription is, therefore, kept to the bare minimum*

and if a candidate fails to secure even this bare minimum, it cannot be postulated that he is suitable for the job of Munsif Magistrate, as assessed by five experienced Judges of the High Court.

4.5. With regard to the provisions contained under Rule 5(6) which mandates that the Commission shall prepare a subject-wise merit list of successful candidates equal to the number of posts to be filled up, learned counsel for the Commission contended that the word 'shall' so reflected under Rule 5(6) cannot always be treated as 'shall' and it may be read as 'may' in some of the cases.

In support of his aforesaid stand that the word 'shall' so reflected under Rule-5 (6) of the Rules in the present case be treated as 'may', learned counsel for the Commission relied on a decision of the Hon'ble Apex Court reported in the case of ***PEC Limited Vs. Austbulk Shipping SDN. BHD., (2019) 11 SCC 620.*** Hon'ble Apex Court in Para 14 to 24 of the said judgment has held as follows:

14. *Admittedly, an authenticated copy of the arbitration agreement was not placed on record by the Respondent at the time of filing of the application for enforcement. It is clear from the record that the Appellant placed the arbitration agreement along with its reply and thereafter the Respondent also filed the original arbitration agreement in the Court. The submission made by the Appellant is that production of the arbitration agreement at the time of filing of the application is mandatory, the non-compliance of which ought to have resulted in the dismissal of the application. The Appellant sought support for this submission from the word "shall" appearing in Section 47. We do not agree with the submission made by the learned counsel for the Appellant. We are of the opinion that the word "shall" appearing in Section 47 of the Act relating to the production of the evidence as specified in the provision at the time of application has to be read as "may".*

15. *The word "shall" in its ordinary import is "obligatory". But there are many decisions wherein the Courts under different situations construed the word to mean "may" . The scope and object of a Statute are the only guides in determining whether its provisions are directory or imperative. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.*

16. *The word "shall", though prima facie gives an impression of being of mandatory character, is required to be considered in light of the intention of the legislature by carefully attending to the scope of the Statute, its nature and design and the consequences that would flow from the construction thereof one way or the other. The Court is required to keep in mind the mischief that would ensue by the construction of the word "shall" as "may". Whether the public convenience would be subserved or whether public inconvenience or general inconvenience may ensue if it is held mandatory.*

17. *Section 46 of the Act makes a foreign award enforceable under the Act as binding on the persons between whom it is made. Article III of the New York Convention provides for recognition of arbitral awards by each contracting State as binding. Enforcement of the arbitral awards shall be in accordance with the rules and procedure of the territory where the award is sought to be enforced. Article III restricts imposition of substantial onerous conditions for enforcement of the arbitral awards. Article IV*

requires the party applying for recognition and enforcement to file an authenticated original award or duly certified copy thereof and the original agreement referred to in Article II or a duly certified copy thereof at the time of the application. It is relevant to mention that the work "shall" is employed in Article IV.

Mohan Singh v. International Airport Authority of India, (1997) 9 SCC132

Ed. Para 17 corrected vide Official corrrigendun No.F3/Ed.BJ./79/2018 dated 15-1-2019

***"5.** Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.*

***"IV. 1**. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:*

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

***2**. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.*

*"**II.1.** Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*

***2.** The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*

***3.** The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

***18.** The object and purpose of the New York Convention as summarized by the Guide to Interpretation of the New York Convention issued by the International Council for Commercial Arbitration is as follows:*

"The Convention is based on a pro-enforcement bias. It facilitates and safeguards the enforcement of arbitration agreements and arbitral awards and in doing so it serves international trade and commerce. It provides an additional measure of commercial security for parties entering into cross-border transactions".

***19**. The object and purpose of the New York Convention is to facilitate the recognition of the arbitration agreement within its purview and the enforcement of the foreign arbitral*

awards. This object and purpose must, in the first place, be seen in the light of enhancing the effectiveness of the legal regime governing international commercial arbitration.

20. *According to the ICCA Guide, the approach of the Court for enforcement should be having a strong pro enforcement bias, a pragmatic, flexible and non formalist approach. The Courts in several countries have been liberal in interpreting the formal requirements of Article IV of the New York Convention. Excessive formalism in the matter of enforcement of foreign awards has also been deprecated.*

21*. It is relevant to take note of the Preamble of the Act wherein it is mentioned that the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model law on International Commercial Arbitration ("Model Law") in 1985 and that the Act is made taking into account the Model law and Rules. Chapter VIII of the Model Law governs the recognition and enforcement of Awards. Article 35 (2) [14] provides that the party applying for enforcement of the award shall supply the original award or a copy thereof. The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedudral laws and practices. However, Article 35(2) was amended in 2006 to liberalise formal requirements. Presentation of a copy of the arbitration agreement is no longer required under Article 35(2).*

22. *The object of the New York Convention is smooth and swift enforcement of foreign awards. Keeping in view the object and purpose of the New York Convention, we are of the view that the word "shall" in Section 47 of the Act has to be read as "may". The opposite view that it is obligatory for a party to file the arbitration agreement or the original award or the evidence to prove that the award is a foreign award at the time of filing the application would have the effect of stultifying the enforcement proceedings. The object of the New York Convention will be defeated if the filing of the arbitration agreement at the time of filing the application is made compulsory. At the initial stage of filing of an application for enforcement, non-compliance of the production of the documents mentioned in Section 47 should not entail in dismissal of the application for enforcement of an award. The party seeking enforcement can be asked to cure the defect of non-filing of the arbitration agreement. The validity of the agreement is decided only at a later stage of the enforcement proceedings.*

23. *It is relevant to note that there would be no prejudice caused to the party objecting to the enforcement of the Award by the non-filing of the arbitration agreement at the time of the application for enforcement. In addition, the requirement of filing a copy of the arbitration agreement under the Model Law which was categorized as a formal requirement was dispensed with. Section 48 which refers to the grounds on which the enforcement of a foreign award may be refused does not include the non-filing of the documents mentioned in Section 47. An application for enforcement of the foreign award can be rejected only on the grounds specified in Section 48. This would also lend support to the view that the requirement to produce documents mentioned in Section 47 at the time of application was not intended to be mandatory.*

24. *Reading the word "shall" in Section 47 of the Act as "may" would only mean that a party applying for enforcement of the award need not necessarily produce before the Court a document mentioned therein "at the time of the application". We make it clear that the said interpretation of the word "shall" as "may" is restricted only to the initial stage of the filing of the application and not thereafter. It is clear from the decisions*

> *relied upon by the counsel for the Appellant that Courts in certain jurisdictions have taken a strict view regarding the filing of the documents for enforcement of a foreign award. Courts in many other jurisdictions have taken the opposite view that the application for enforcement of the foreign awards does not warrant rejection for non-filing of the relevant documents including the award and the arbitral agreement. We need not adjudicate on this issue as the subject matter of this case does not relate to the non-filing of the arbitration agreement during the enforcement proceedings. There is no dispute that the arbitration agreement has been brought on record by both the parties."*

4.6. Mr. Behera also relied on another decision of the Hon'ble Apex Court in the case of ***Sureshkumar Lalitkumar Patel and others vs. State of Gujarat and others 2023 Live Law (S.C) 137***. Hon'ble Apex Court in paragraph 22 & 23 of the said judgment has held as follows"

> ***22.*** *We are dealing with the recruitment process by which the posts pertaining to each of the separate categories is to be filled up by only one mode, i.e., written examination. The cut-off marks have been fixed with a distinct clarification that it would not be tinkered with by facilitating anyone to be considered, if the candidate acquired lesser marks. There is a difference between qualification for making an application, and the eligibility to be determined in the process of selection. We are not concerned with the qualification for making an application in the present case, but rather an eligibility after the examination is conducted.*
>
> ***23.*** *Another unique feature of the present case is that the Selection Committee has reduced the marks to facilitate the horizontal reservation by treating it as a vertical reservation. Admittedly, the rules do not provide for such reservation to be treated as a vertical one. Likewise, the rules do not fix any cut-off marks. An advertisement, made pursuant to a notification, binds the parties. It has got all the trappings of a statutory prescription, unless it becomes contrary to either a rule or an Act. A change, if any, can only be brought forth by way of an amendment and nothing else. Such an amendment even if it is permissible can be tested on the touchstone of Article 14 of the Constitution of India. It cannot be introduced to give an entry to a special reservation, in a case where a right becomes accrued to a candidate, under a policy decision reduced in the form of an advertisement, to be considered for a post in the absence of any eligible candidate from the horizontal category.*

4.7. It is also contended that the Commission being the selecting authority, it is competent to fix the cut-off mark in order to assess the suitability of the candidates. Since the post in question is with regard to the post of Asst. Professor in Teacher Education, the Petitioner having not been able to secure the minimum 50% mark in the interview, he has no right to claim the benefit of such appointment. The Commission accordingly has rightly rejected the claim of the petitioner vide the impugned order which requires no interference.

4.8. Making all such submissions and relying on the decisions as cited (*supra*) learned counsel for the Opp. Party No.3 contended that in order to assess the suitability of the candidates, the Commission decided to fix the cut-off mark at 50% in the interview and since the Petitioner participated in the interview without raising any such objection, he cannot challenge the same after becoming unsuccessful in the selection process.

5. To the aforesaid submissions of the learned counsel appearing for the Commission, Mr. Pattanaik, learned counsel for the Petitioner made further submission so taken by him in the rejoinder affidavit.

5.1. It is contended that under Rule 5(6) of the 2020 Recruitment Rules, there is no such provision to fix any cut-off mark in the interview and the Commission suo motu evolved such a principle in the midst of the selection process and without issuing any notice to the shortlisted candidates prior to conducting the interview.

5.2. It is also contended that as provided under Clause-6(D) of the advertisement issued under Annexxure-1, selection for recruitment to the rank of Asst. Professor-Stage-1 shall be made on the basis of the result of the interview and the Commission shall prepare a subject wise merit list of successful candidates arranged in order of merit equal to the number of posts to be filled up and furnish the same to the Government. Since neither in the recruitment Rules nor in the advertisement, there was any such prescription fixing 50% cut-off mark to be obtained by a candidate in the interview, such a practice followed by the Commission in the midst of the selection process and that too without issuing any notice prior to conducting the interview, is not permissible and sustainable in the eye of law.

5.3. It is also contended that as admitted by the Opp. Party-Commission though there is provision to relax the cut-off mark in respect of the candidate belonging to PWD category in terms of the provisions contained under Clause-6 of the Resolution dt.25.02.2021 issued by the State Government in the Department of Social Security and Empowerment of persons with disability, but the Commission did not follow the resolution by relaxing the provision in respect of the Petitioner who belongs to PWD category.

5.4. It is also contended that since out of the 113 vacancies in the discipline of Teacher Education (Educational Studies), four posts were reserved for PWD candidates and only two candidates have been selected, the Petitioner is eligible and entitled to get the benefit of appointment as against the available two posts which has not yet been filled up. It is accordingly contended that the impugned order needs interference of this Court with passing of an appropriate order in the matter.

6. I have heard Mr. D. K. Pattanaik, learned counsel appearing for the Petitioner, Mr. A. Behera, learned Counsel for the Opp. Party-Commission and Mr. R.N. Mishra, learned Additional Government Advocate appearing for the State-Opp. Parties.

On the consent of the learned counsel appearing for the parties with due exchange of the pleadings, the matter was heard at the stage of admission and disposed of by the present order.

7. This Court after going through the materials placed by the respective parties finds that the Commission issued advertisement vide Advertisement No.9 of 2021-22 under Annexure-1 inviting applications for recruitment of 385 posts of Asst.

Professor (Teacher Education)-Stage-1. Out of the total vacancies so advertised, 113 posts were to be filled up in the discipline Teacher Education (Educational Studies). Since 4% of 385 posts is reserved for P.W.D candidates, taking into account the vacancies in the discipline of Teacher Education (Educational Studies) at 113, the same comes to 4.

7.1. As found from the record, the Petitioner made his application in the discipline Teacher Education (Educational Studies) as a PWD candidate. As found from the record as against 113 vacancies, 678 applications were received in total and the commission shortlisted the same to 382, for verification of documents. After such verification of documents, further 60 applications were rejected and 322 valid applications were found. Out of the said 322 valid applications, 291 candidates were shortlisted for the purpose of interview and the Commission issued the notice on 15.09.2022 fixing the date of interview of such shortlisted candidates under Annexure-10. After conducting the interview on the date fixed, Opp. Party No.3 vide notification dt.19.10.2022 under Annexure-11 series published the select list of 101 candidates in the discipline Asst. Professor (Teacher Education).

7.2. The Petitioner when was deprived from such selection and appointment, approached the Opp. Party No.3 for consideration of his case by making necessary application under Annexure-12 series and this Court in W.P.(C) No.28997 of 2022 directed Opp. Party No.3 to take a decision on the Petitioner's claim. As found from the impugned order, the claim of the Petitioner was rejected on the ground that the Petitioner has failed to secure the 50% cut-off mark, so fixed by the Commission and to be obtained by a candidate in the interview. It is not disputed by either of the parties that the selection to the post of Asst. Professor (Teacher Education) Stage-1 in different discipline is covered by the provisions contained under the Orissa Education Service (College Branch) Recruitment Rules, 2020. Under Rule-5 of the said Rules, the selection process to be followed by the Commission for direct recruitment in the rank of Asst. Professor, Stage-1 is provided. Rule-5 (2) of the Rules, provides the discretion on the Commission to select candidates for direct recruitment to the rank of Asst. Professor, Stage-1 on the basis of merit to be judged by the performance in interview of eligible shortlisted candidates.

7.3. As provided under Rule 5(6) of the Rules, on the basis of the result of the interview, the Commission shall prepare a subject wise merit list of successful candidates arranged in order of merit equal to the number of posts to be filled up and furnish the same to the Government.It is found that nowhere in the Recruitment Rules, nor in the advertisement issued under Annexure-1, the Commission at any point of time, prior to conducting the interview, pursuant to the notice issued under Annexure-10, fixed the cut-off mark at 50% with due intimation to the candidates who were called to attend the interview after the short listing.

7.4. Placing reliance on the decisions cited by the learned counsel for the Petitioner as well as Opp. Party No. 3, though this Court is of the view that the

Commission in view of the provisions contained under Rule 5(2) of the Rules is competent to judge the merit of the candidates, taking into account the performance in the interview and to publish the merit list on the basis of such interview, but in the present case, the Commission at no point of time prior to conduct of the interview in terms of the notice issued under Annexure-10, fixed the cut-off mark with due intimation to all the candidates. In view of the decision of the Hon'ble Apex Court in the case of K. Manjushree as cited (supra), fixation of cut-off mark can only be done in advance i.e. prior to conduct of the interview. Since the principle laid down in the case of K. Manjushree has not been followed in the instant case, it is the view of this Court that rejection of the petitioner's claim on the ground that the petitioner has failed to secure the cut-off mark is not sustainable in the eye of law.

7.5. However, since the selection process as contended by the learned counsel appearing for the Opp. Party No.3 has already been finalized, but taking into account the submissions of learned counsels appearing for the parties that as against the 4 posts meant for PWD candidates, two posts have not been filled up as yet, this Court placing reliance on the relaxation provisions contained in the Resolution dt.25.02.2021 issued by the State Government in the Department of Social Security and Empowerment of Persons with Disability and the decision of the Allahabad High Court in the case of ***Manoj Kumar Pandey & Others Vs. State of Uttar Pradesh & Another*** as well as the decision of the Hon'ble Apex Court in the case of ***Sanjay Singh & Another Vs. U.P. Public Service Commission, Allahabad & Another, (2007) 3 SCC 720***, is of the view that the Commission needs to relax the provisions in the case of the Petitioner and provide him appointment as against the post of Asst. Professor (Teacher Education) Educational Studies, Stage-1. This Court is also unable to accept the contention raised by the learned Counsel appearing for Opp. Party No.3 that some meritorious candidates are there above the Petitioner in PWD category as it is the Petitioner who has approached this Court, challenging the process of selection. Allahabad High Court in Paragraphs-2,9 & 10 of the order in the case of Manoj Kumar Pandey has held as follows:

> ***"2.*** *Learned counsel for the Petitioners has submitted that all the petitioners had appeared in the written examination and were also called for interview. The final select list was declared on 20th March, 1999 and even though the names of the Petitioners were not included in the main select list, but they are hopeful that their names would be included in the waiting list. The State Government had sent a requisition to the Commission to recommend the names of the candidates next in order of merit, as certain candidates did not join the post, but the Commission expressed its inability as the life of the waiting list had expired. This decision of the Commission was challenged by 11 candidates by filing a writ petition in this Court which was dismissed. The Supreme Court however granted relief to them by directing that they shall be considered by the Commission and the State Government, and would be appointed if otherwise found suitable and eligible. The said decision was rendered n Sheo Shyam & Ors. Vs. State of U.P. & Others., (2004) 2 ESC 256. The Supreme Court in the said decision held that the*

life of the waiting list which is of one year should be reckoned from the last date when the recommendation was made by the State Government. However, in view of the fact that after the decision of the Commission not to send the names to the State Government as the waiting list had expired, which decision was the subject matter of the writ petition before the High Court, the State Government itself had sent a requisition of 56 posts, including 11 posts to which the dispute related, and examinations were held subsequently on 9th November, 2003, the Supreme Court observed that the career of 11 candidates cannot be jeopardized, and therefore in these peculiar circumstances, it directed that the appointment shall be considered by the Commission and the State Government.

xxx ***xxx*** ***xxx***

9. *The Hon'ble Apex Court while considering the case has granted relief only to those persons who had approached the Court and those were the persons who had filed the writ petition before this Court within one year from the date on which the last recommendation had been made. Therefore, those persons had approached the Court when the select list/merit list was alive. The case of the petitioners is quite distinguishable as they have approached this Court after more than two months of the expiry of the select list. Therefore, Petitioners cannot claim the relief which had been granted to other persons by the Hon'ble Apex Court.*

10. *If some person has taken a relief from this Court by filing a Writ Petition immediately after the cause of action had arisen, Petitioners cannot take the benefit thereof by filing a writ petition belatedly. They cannot take any benefit thereof at such a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person."*

7.6. Similarly Hon'ble Apex Court in Paragraph-53 of the judgment in the case of Sanjay Singh has held as follows:

"**53**. *However, in so far as the petitioners are concerned, we deem it proper to issue the following directions to do complete justice on the facts of the case :*

a) If the aggregate of raw marks in the written examination and the marks in the interview of any petitioner is less than that of the last selected candidate in the respective category, he will not be entitled to any relief (for example, the petitioners in WP(C) No. 165/2005 belonging to the Category 'BC' have secured raw marks of 361 and 377 respectively in the written examinations, whereas the last five of the selected candidates in that category have secured raw marks of 390, 391, 397, 438 and 428 respectively. Even after adding the interview marks, the marks of the petitioners in W.P. (C) No.165/2005 is less than the marks of the selected candidates).

b) Where the aggregate of raw marks in the written examination and the interview marks of any petitioner, is more than the aggregate of the raw marks in the written examination and interview marks of the last selected candidate in his category, he shall be considered for appointment in the respective category by counting his appointment against future vacancies. (For example, we find that petitioner Archna Rani, one of the petitioners in WP (C) No. 467/2005 has secured 384 raw marks which is more than the raw marks secured by the last five selected candidates [347, 337, 336, 383 and 335] under the SC category and even after adding the interview marks, her marks are more than the five selected candidates. Hence, she should be considered for appointment). This relief will be available only to such of the petitioners who have approached this Court and the High Court before 31st August, 2005"

7.7. This Court taking into account the entirety of the facts and placing reliance on the decision in the case of K. Manjushree and others decisions relied on by the learned counsel appearing for the Petitioner and the decision of the Allahabad High Court in the case of Manoj Kumar Pandey as well as the decision of the Hon'ble Apex Court in the case of Sanjay Singh & Another, directs Opp. Party No.3 to relax the cut-off mark to the case of the Petitioner and provide him appointment as against the post of Asst. Professor (Teacher Education) Educational Studies, Stage-I as against the available 2(two) number of vacancies in PWD category. This Court directs Opp. Party No.3 to complete the entire exercise within a period of 2(two) months from the date of receipt of the order. However, there shall be no order as to cost. The Writ Petition is accordingly disposed of.

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2023 (III) ILR-CUT-1226

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.10333 OF 2020

BIJAYA KUMAR PATTANAIK ……Petitioner

-V-

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

ODISHA CIVIL SERVICES (PENSION) RULES, 1992 – Rule 18(3) r/w Rule 72(2) of Odisha Service Code – The Petitioner after rendering ten years in work charged establishment as Khalasi brought to regular establishment w.e.f 18.10.1978 – After rendering about 5 years in regular service, petitioner remain absent from duty – Whether the petitioner is eligible for pension? – Held, Yes – In terms of Rule 72(2) of code, no action was taken by the State/Opp.Parties against the petitioner before attaining the age of superannuation – Hence, the petitioner is entitled to pension in terms of rule 18(3) of the Rules 1992.

(Para 18)

Case Laws Relied on and Referred to :-

1. 83 (1997) C.L.T. (O.A.T) 42 : Uttam Pradhan & Ors. Vs. State of odisha & Ors.
2. (1997)1 OLR (CSR)-40 : Nakhaari Bewa Vs. State of Odisha.
3. (2014)1 OLR 734 : Chandra Nandi Vs. State of Odisha.
4. (2008) 105 CLT 309 : Kishori Dash Vs. State of Orissa & Ors..
5. 2017(I) ILR-CUT-906 : Karunakar Behera Vs. State of Orissa & Ors.
6. (2000) 5 SCC 65 : Syndicate Bank Vs. General Secretary, Syndicate Bank Staff Association & Anr..

For Petitioner : Mr. S.K. Nath

For Opp.Parties : Mr. S.N. Pattanaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 17.08.2023 : Date of Judgment : 31.10.2023

S.K. MISHRA, J.

The Writ Petition has been preferred with a prayer to set aside the order dated 10.02.2020 (Annexure-4), vide which the representation dated 14.08.2019 of the Petitioner for sanction of pension in his favour was rejected by the Executive Engineer, Khordha Irrigation Division, Khordha (Opposite Party No.2). A further prayer has been made to direct the said Opposite Party for sanction of pension and retirement benefits in favour of the Petitioner within a stipulated time frame.

2. The brief background facts which lead to filing of the Writ Petition are that, the Petitioner was appointed as "Khalasi" under Work-Charged Establishment on 18.11.1967 to work under Salia Dam Sub-Division, Banpur. Thereafter, he was brought over to Regular Establishment with effect from 18.10.1978 and was allowed with G.P.F. Number and was covered under the Group Insurance Scheme of the State Government. The Petitioner continuing for about 10 years 11 months in the Work-Charged Establishment and for about five years in a Regular Establishment, he was transferred to Tangi Irrigation Section by the Opposite Party No.2 and was on leave up to 30.05.1984. Due to non-joining of the Petitioner, a Show Cause Notice was issued by the Opposite Party No.2 on 24.10.1986, as to why his service shall not be terminated due to willful absence from Government duty. After filing of satisfactory reply, the Petitioner was transferred to Berhampur Irrigation Division from Khordha Irrigation Division by the Superintending Engineer, vide letter No.9012 dated 18.11.1986. Thereafter, the Opposite Party No.3 (The Executive Engineer, South Irrigation Division, Berhampur) reposted the Petitioner to work under Assistant Engineer, Rushikulya Irrigation Sub-Division, Humma, vide Order No.54 dated 04.12.1986. It is further case of the Petitioner that from the transfer order as at Annexure-1, it is crystal clear that the Superintending Engineer had passed mutual transfer order between one Budheswar Das, Khalasi from Berhampur Irrigation Division and the Petitioner from Khordha Irrigation Division, clearly mentioning therein that no T.T.A. and joining time is allowed. Instead, the actual joining time is allowed as the transfers are made at their own request. Further, it was clarified vide Office Order No.54 of 1986-87 (Annexure-2) that the Petitioner was reposted to the Office of S.D.O., Rushikulya Irrigation Sub-Division, against vacant post due to transfer of one Budheswar Das, Khalasi and a copy of the said order as at Annexure-2 was communicated to the Petitioner on 15.12.1986 by the S.D.O. Salia Dam Sub-Division as mentioned at the bottom of the said Order at Annexure-2. Pursuant to the orders as at Annexures-1 & 2, the Assistant Engineer allowed Budheswar Das to join in place of the Petitioner, whereas the Petitioner was not allowed to join in place of Budheswar Das. Rather, the Petitioner was reposted to Purusottampur Irrigation Section No.II with headquarter at Hinjilicut, vide order dated 23.12.1986. The Petitioner attended the Office of the Assistant Engineer, Rushikulya Irrigation Sub-Division, Humma, and submitted joining report on 27.12.1986 and came to know about his posting to Purusottampur Irrigation Section No. II. Knowing about the same, the Petitioner requested to post him under the

Assistant Engineer, Humma, who did not accept the joining report of the Petitioner. After returning from Humma, the Petitioner reported such situation to the Assistant Engineer, Salia Irrigation Sub-Division, who in turn requested Assistant Engineer, Humma to accept the joining report of the Petitioner. Thereafter, the Petitioner represented several times before higher authorities. But there was no response to the allegation of the Petitioner. Thereafter, because of the said illegal action on the part of the authority concerned, judicial proceeding continued till 2009. In the meantime, as co-employees were superannuated, the petitioner was also supposed to be retired from Government service and prayed for pension. Because of inaction, he was constrained to approach this Court by filing W.P.(C) No.11320 of 2009, which was disposed of on 18.07.2019 granting liberty to the Petitioner to file fresh representation before the Executive Engineer, Khordha, with a direction to consider and dispose of the same in accordance with law. Accordingly, the Petitioner submitted the representation on 14.08.2019 being so directed by this Court. The Opposite Party No.2 disposed of the representation of the Petitioner dated 14.08.2019 by rejecting the same, vide letter dated 10.02.2020 on the ground that the said representation merits no consideration for pension, which is the subject matter of challenge in the present Writ Petition.

3. It is further case of the Petitioner that the reason assigned in the impugned rejection order dated 10.02.2020 is unsustainable. The grounds of rejection of the representation that the Petitioner was not working under the Khordha Division after 31.03.1984 and he was not given retirement from Government service on superannuation and interruption of duty so also the claim of the Petitioner for pension will not be governed by Rule 18 (3) of the O.C.S. Pension Rules is not tenable. Though the Petitioner asked for providing copy of the Service Book under the Right to Information Act, the Opposite Party No.2 intentionally avoided to provide the same. Though the Petitioner submitted the pension papers before the Opposite Party No.2, the same was returned on 19.02.2015 with a mention that Petitioner was not working under the said Division till retirement. It is the case of the Petitioner that as he had rendered service for a period of 19 years 5 months 3 days including the Work Charged service period, is entitled for pension under Rule 18(3) of Orissa Pension Rules, 1992 as decided in the judgment reported in 85 (1998) CLT (OATC) – 18. Hence, a prayer has been made to set aside the rejection order as at Annexure-4 and direct the Opposite Party No.2 to provide copy of the Service Book along with pension and retirement benefits.

4. Being noticed, the State/Opposite Party Nos.1 to 3 filed their common Counter Affidavit taking a stand therein that the Petitioner was appointed as Khalasi under Work-Charged Establishment and was posted to work under Salia Sub-Division, Banpur with effect from 11.11.1968 (F.N). He was brought over to regular wages establishment with effect from 18.10.1978, vide order dated 27.02.1979 of the Superintending Engineer, Southern Irrigation Circle, Berhampur. He was transferred from Salia Dam Sub-Division, Banpur to Khordha Irrigation Sub-Division

with headquarters at Tangi by the Executive Engineer, Khordha, vide Office Order dated 19.01.1984 and was relived from Salia Dam Sub-Division, Banpur, under Khordha Irrigation Division, Khordha, with effect from 31.03.1984 (F.N) in order to join in his new place of posting at Tangi Irrigation Section, Tangi under the same Division. However, the Petitioner refused to receive the said relieve order which was confirmed vide letter dated 04.04.1984 of the Assistant Engineer, Salia Dam Sub-Division, Banpur. Instead of joining in his new place of posting, the Petitioner applied for leave up to 30.05.1984 on the ground of his wife's illness without any supporting documents. After 30.05.1984, neither the Petitioner joined in his duty nor applied for extension of leave and remained absent unauthorizedly. Hence, he was served with Show Cause Notice by the Executive Engineer, Khordha Irrigation Division, Khordha, vide letter No.4602 dated 24.10.1986 to submit satisfactory reply as to why his services shall not be terminated due to his willful absence from duty. In response to the said notice, after expiry of the scheduled date for submission of Show Cause Reply, the Petitioner gave his response to the said Show Cause Notice without any satisfactory reply to justify his willful absence from duty. In the meantime, the Petitioner was transferred from Khordha Irrigation Division, Khordha and posted under the control of Executive Engineer, Berhampur Irrigation Division, Berhampur vide letter dated 18.11.1986 of the Superintending Engineer,Southern Irrigation Circle, Berhampur. The Executive Engineer, Berhampur Irrigation Division, Berhampur reposted the Petitioner to Rushikulya Irrigation Sub-Division, Humma against the existing vacancy vide Office Order No.54 of 1986-87 dated 04.12.1986. The Assistant Engineer, Rushikulya Irrigation Sub-Division reposted him to Purusottampur Irrigation Section No.II with headquarters at Hinjilicut, vide Office Order No.12 of 1986 dated 23.12.1986. However, the Petitioner did not join the Office of the Assistant Engineer, Rushikulya Irrigation Sub-Division, Humma and requested to post him under the Junior Engineer, Humma Irrigation Section, which is not accepted by the authority concerned. However, due to inadequate existing staff for maintenance of canal work in Purusottampur Irrigation Section No.II at Hinjilicut, the Petitioner was posted to Purusottampur Irrigation Section vide letter No.324 dated 20.04.1987 of the Assistant Engineer, Rushikulya Irrigation Sub-Division, Humma, addressed to the Executive Engineer, Berhampur Irrigation Division, Berhampur. But the Petitioner did not join the said office and was not working under the said Division after 31.03.1984 and remained absent since then. A further stand has been taken in the Counter that unauthorized absence from duty for more than five years leads to removal from service in terms of Rule-72(2) of Odisha Service Code. Hence, the Petitioner is not eligible for pension and has rightly not been given provisional pension and the prayer made in the Writ Petition, being devoid of any merit, is liable to be dismissed.

5. In response to the Counter Affidavit filed by the State/Opposite Parties, a Rejoinder Affidavit has been filed by the Petitioner reiterating the stand taken in the Writ Petition. However, in addition to the same, in reply to Paragraphs-3 to 6 of the

Counter Affidavit, it has been stated that in view of the admission made in the Counter Affidavit, the Petitioner had worked as Work-Charged employees for 10 years 11 months and 7 days and as Regular Employee for 5 years 5 months 13 days. Hence, in terms of the said admission made in the Counter Affidavit, the total service period ,including Work-Charge period, is 16 years 4 months 20 days, which is treated as qualified service period for sanction of pension as per Rule 18(3) of the Odisha Civil Services (Pension) Rules, 1992. But Opposite Party No.3 has referred to Rule-72(2) of the Odisha Service Code, which is no way connected to Odisha Civil Services (Pension) Rules, 1992. It has further been stated in the Rejoinder Affidavit that since the Petitioner was working for more than ten years, which is treated as qualified service for pension, he is entitled to get pension as a Class-IV Govt. Employees.

6. Mr. Nath, learned Counsel for the Petitioner, reiterating the stand taken in the Writ Petition, submitted that in view of the admitted facts on record, the Petitioner is entitled for pension. To substantiate his submission so also prayer made in the Writ Petition, Mr. Nath relied on the Judgments reported in 83 (1997) C.L.T. (O.A.T) 42 (**Uttam Pradhan & others Vs. State of Odisha and others**), 1997 (1) OLR (CSR)-40 (**Nakhaari Bewa Vs. State of Odisha**), 2014 (1) OLR 734 (**Chandra Nandi Vs. State of Odisha**), 105 (2008) CLT 309 (**Kishori Dash Vs. State of Orissa and others**) and 2017(I) ILR–CUT–906 (**Karunakar Behera Vs. State of Orissa and others**).

7. Mr. Pattanaik, learned Additional Government Advocate for the State /Opposite Parties, reiterating the stand taken in the Counter Affidavit, submitted that the Petitioner's grievance cannot be considered under the provision of Rule 18(3) of Odisha Civil Services (Pension) Rules, 1992, as it is clear case of voluntary abandonment of service. He further submitted that the Petitioner miserably failed to explain satisfactorily for such long absence without any material behind it.To substantiate the said submission, Mr. Pattnaik relied on the judgment of the apex Court reported in (2000) 5 SCC 65 (**Syndicate Bank Vs. General Secretary, Syndicate Bank Staff Association and another**).

8. Mr. Pattanaik further submitted that law is well settled that if an employee remains absent beyond the granted period of leave of any kind, he should be treated to have resigned and ceases to be in service. Hence, though a Show Cause Notice was given to the Petitioner for his unauthorized absence beyond the leave period and the explanation tendered by the Petitioner was found to be unsatisfactory, thereafter no further Departmental Proceeding was initiated against the Petitioner after tendering such unsatisfactory explanation. In view of the Judgment rendered by the apex Court, the Petitioner is to be treated to have ceases to be in service because of such long unauthorized absence.

9. From the pleadings of the parties as detailed above, it is an admitted fact that the Petitioner was appointed as Khalasi under Work-Charged Establishment with effect from 11.11.1968. Thereafter he was brought over to Regular Establishment from 18.10.1978 vide order dated 27.02.1979. While working so, he was transferred from Salia Dam Sub-Division, Banpur to Khordha Irrigation Sub-Division with headquarters at Tangi by the Executive Engineer, Khordha, vide Office Order dated 19.01.1984. He was relived from Salia Dam Sub-Division, Banpur, with effect from 31.03.1984 in order to enabling him to join new place of posting at Tangi Irrigation Section, Tangi under the same Division. Instead of joining in his new place of posting, the Petitioner applied for leave up to 30.05.1984. After the said period, because of not reporting for duty and not applying for any extension of leave and remaining absent unauthorizedly, he was served with Show Cause Notice on 24.10.1986 advising him to submit his reply as to why his services shall not be terminated due to his willful absence from duty. Thereafter, the Petitioner replied to the said Show Cause Notice. Though the said reply was unsatisfactory, no Departmental Proceeding was initiated against the Petitioner for such unauthorized absence. Rather, he was transferred from Khordha Irrigation Division, Khordha and was posted under the control of Executive Engineer, Berhampur Irrigation Division, Berhampur, by the Superintending Engineer, Southern Irrigation Circle, Berhampur, vide letter dated 18.11.1986. The said order of transfer well demonstrates that such transfer was made on the request of one Budheswar Das, Khalasi so also the present Petitioner on mutual understanding. However, instead of allowing the Petitioner to join in the place and position held by Sri Budheswar Das, Khalasi, the Executive Engineer, Berhampur Irrigation Division, reposted the Petitioner to Rushikulya Irrigation Sub-Division vide order dated 04.12.1986. Thereafter, again the Assistant Engineer, Rushikulya Irrigation Sub-Division, Humma, reposted him to Purusottampur Irrigation Section No.II with headquarters at Hinjilicut, vide Officer Order dated 23.12.1986. On being so reposted twice, which was contrary to the Office Order dated 18.11.1986 of the Superintending Engineer, Southern Irrigation Circle, Berhampur, the Petitioner rightly requested to post him under the Junior Engineer, Humma Irrigation Section, in terms of letter dated 18.11.1986. But on the plea of inadequate existing staff for maintenance of canal works in Purusottampur Irrigation Section No.II at Hinjilicut, the Petitioner was posted to the said Section vide letter dated 20.04.1987 by the Assistant Engineer, Rushikulya Irrigation Sub-Division, Humma, for which the Petitioner was being constrained to venture into series of litigations as detailed in the date chart tendered by the learned Counsel for the Petitioner dated 16.08.2022. Though the Petitioner was asked to show cause vide notice dated 24.10.1986 for remaining authorizedly absent from duty w.e.f. 30th May, 1984 and the Petitioner gave his response to the said Show Cause Notice for allegedly remaining absent beyond 31.03.1984, the Petitioner attended the Office of the Assistant Engineer, Rushikulya Irrigation Sub-Division, Humma, on 27.12.1986 and requested to post him under Junior Engineer, Humma Irrigation Section. Thereafter, he was never charge-sheeted or asked to show cause for not reporting for

duty at Purusottampur Irrigation Section No.II, with headquarters at Hinjilicut, in terms of the letter dated 20.04.1987. Further, a stand has been taken in the Counter Affidavit that unauthorized absence of a Government employee from service for more than five years, leads to removal from service in terms of Rule-72(2) of Odisha Service Code. The said Rule is extracted below for ready reference.

> *"**72. REMOVAL OF GOVERNMENT SERVANT AFTER REMAINING LEAVE FOR A CONTINUOUS PERIOD EXCEEDING FIVE YEARS**.*
>
> *(2) Where a Government servant does not resume duty after remaining on leave for a continuous period of five years, or where a Government servant after the expiry of his leave remains absent from duty otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him exceeds five years, **he shall unless Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Orissa Civil Services (Classifications, Control and Appeal) Rules, 1962**."* *(Emphasis Supplied)*

10. Admittedly, the said Rule prescribes that where a Government servant does not resume duty after remaining on leave for a continuous period of five years, or where a Government servant, after the expiry of his leave, remains absent from duty otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him exceeds five years, he shall, unless Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Orissa Civil Services (Classifications, Control and Appeal) Rules, 1962. Hence, from the said provision enshrined under Rule 72(2) of the Odisha Service Code, it is amply clear that before invoking the said provision to remove an employee from service, the State is to follow the prescribe procedure laid down under the Orissa Civil Services (Classifications, Control and Appeal) Rules, 1962 and it cannot be automatic. Further, it is also admitted fact that invoking such provision enshrined under Rule-72(2), no communication was made to the Petitioner till he attained the age of superannuation to the effect that because of his absence for more than five years, he is removed from service. Rather, though the Petitioner was asked to show cause and he tendered his explanation and it was allegedly found unsatisfactory, no further enquiry was conducted by the employer for such misconduct of unauthorized absence beyond the leave period. Thereafter, the Petitioner was transferred to different places. In order to accommodate one Budheswar Das, Khalasi, on mutual understanding, vide order dated 18.11.1986, the Petitioner was transferred in place of Mr. Das and vice versa. Though Mr. Das was allowed to join in the place and position of the Petitioner, but he was not allowed to join in the said place and position of Mr. Das in terms of the Office Order dated 18.11.1986. Thereafter, contrary to the said Office Order, the Petitioner was reposted at various places. Being aggrieved by such reposting orders issued by various authorities as detailed above, the Petitioner was being compelled to give representation to the authority

concerned and so also approached the Administrative Tribunal and this Court for redressal of his grievances.

11. In **Kishori Dash** (supra), vide paragraphs-11 & 12, the coordinate Bench held as follows:

> *"11. Rule 72 of the Orissa Service Code provides that no Government servant shall be granted leave of any kind for a continuous period exceeding five years and where a Government servant does not resume duty after remaining on leave for a continuous period of five years, or where a Government servant after the expiry of his leave remains absent from duty otherwise than on foreign service or on account of suspension,* ***for any period which together with the period of the leave granted to him exceeds five years, he shall, unless Government, in view of the exceptional circumstances of the case, otherwise determine, be removed from service after following the procedure laid down in the Orissa Civil Services (Classifications, Control And Appeal) Rules, 1962****.*
>
> *12. A conjoint reading of Rule 8(2) of the Retirement Rules with Rule 72 of the Orissa Service Code clearly shows that when a primary school teacher remains absent for more than five years and does not resume his duty after the period of leave, can be removed from service by following the procedures laid down in the Orissa Civil Service (Classification, Control and Appeal) Rules, 1962.* ***In other words, such a teacher cannot be removed from service without issuing a show cause notice and initiating a departmental proceeding as otherwise the same would clearly amount to violation of principle of natural justice and in the case of Government servant, it would be ultra vires to Article 311(2) of the Constitution inasmuch as the same would not be in conformity with the relevant provisions of Orissa Civil Service (Classification, Control & Appeal) Rules, 1962.****"* *(Emphasis Supplied)*

12. In **Karunakar Behera** (supra), the coordinate Bench, relying on **Kishori Das** (supra), vide paragraphs-22 & 23 held as follows:

> *"22. In the instant case, undoubtedly petitioner has worked from 1968 to 25.6.1983 continuously* ***and thereby earned more than ten years of qualifying service to receive pension*** *and he is also entitled to receive gratuity. It is needless to say that* ***although the petitioner remained absent without informing the authorities from 25.6.1983 till his notional retirement on 2.1.2001 because of the supervening circumstances, which is beyond the human control as stated above, compelling the petitioner to remain on leave, the service of the petitioner is to be regularized till attaining the age of superannuation. Since he has not worked during that period****, no arrear pay can be given because of the principle of "no work no pay" but his pay can be revised notionally from time to time keeping in mind the Orissa Revised Scale of Pay Rules applicable from time to time till his date of retirement. The contention of the State that the petitioner being Government servant should have approached the Tribunal instead of this Court is untenable in the facts and circumstances and writ is maintainable. Point No.(ii) is answered accordingly.*
>
> ***CONCLUSION***
>
> *23. Considering all such aspects****, the writ petition is disposed of with a direction to the opposite parties to sanction pension, gratuity and other pensionary benefits of the petitioner proportionately in accordance with Rules, 1981 and the Orissa Civil Services***

(Pension) Rules, 1992 after regularizing his service from 25.6.1983 till the date of his superannuation in accordance with law*. The entire process must be completed by the opposite parties within a period of three months from today.*

The writ petition is disposed of accordingly." ***(Emphasis Supplied)***

13. In **Nakhaari Bewa** (supra), the Administrative Tribunal vide paragraph-6 held/observed as follows:

> *"6. In this connection I think I should refer to a decision rendered by a Division Bench of this Tribunal in the case of Abhimanyu Das v. State of Orissa and others, in O.A, 1561 of 1991 (1905) I ATT (Oat) 286. In the said case the relevant Government Resolutions have taken into consideration and it has been concluded that the applicant therein who had continued in work charged establishment and thereafter taken over to regular establishment, was entitled to pension as per the Government Resolution. It was directed in the said judgment that period spent by the applicant in the work charged establishment had to be taken into consideration for the purpose of computing the total number of years of qualifying services rendered by him till retirement on superannuation for the purpose of pension.*
>
> *In the above case the earlier judgment of this Tribunal delivered on 21.08.1990 in T.A. No.787 of 1987 (Jacob Sahu v.State of Orissa and others) which had been unsuccessfully challenged before the Apex Court has been taken notice of. Reference has also been made therein to another judgment delivered by this Tribunal on 18.08.1990. In O.A. 84 of 1987 (Mohan Singh and 6 others v. State of Orissa and others). Referring to the Government Resolution issued on 21.01.1965, which has also been referred to in the present case, it was observed in the said judgment.*
>
> *"….Government is a model employer and it is expected that they would be fair to their employees at least to the extent of written commitment made to them. A person appointed and working in Government for 20 years or more and yet his service would be treated as the work charged, appears to us to be absurd. If Government did not need these persons they could have retrenched them and recruited persons when they need other work, but having engaged them for such a long time, we feel it unfair if they are not made permanent…."*
>
> *The above judgment delivered in the case of Mohan Singh and 6 others (supra) by this Tribunal had also been challenged before the Apex Court and the SLP had been dismissed.*
>
> *The present case seems to be fully covered by the ratio decided in the earlier cases before this Tribunal referred to above and I think the Respondents must take notice of these judgments and decide the claims of pension/family pension of all such employees and their widows including the applicant's husband and the application who came within the purview of the Finance Department Resolution No.4419 dated 22.1.1965 and reiterated in Finance Department Office Memorandum No.5483 dated 6.3.1990."*

14. The Division Bench of this Court in **Chandra Nandi** (supra) while affirming the award passed by the Tribunal recording the submissions made by the learned Counsel for the State as to eligibility of an employee to receive pension, ordered as follows:

"Learned counsel for the State, on the contrary, submits that in order to be eligible to receive minimum pension, the petitioner should have been regularized at least one day prior to his superannuation. We find that failure to regularize him as a part of inaction on the part of the State.

We, therefore, direct that the petitioner should be treated to have been regularized in service at least one day prior to his superannuation notionally and we further direct that calculating his entitlements, his pension amount shall be fixed by the opposite parties – State, in accordance with the** rules and the arrear pension of the petitioner so calculated shall be paid to the petitioner by the end of March, 2014 and further the monthly payment of pension shall be made to the petitioner regularly thereafter." **(Emphasis Supplied)

15. In **Uttam Pradhan** (supra), the Tribunal vide paragraph-6 held as follows:

*"6. **In the circumstances, we would dispose of this original application with direction to the Respondents to take appropriate action in accordance with the Finance Department Resolution issued on 22.01.1965 and also the instructions issued later in the matter of counting the period spent by an employee in the work charged establishment for the purpose of pension** and disburse the claim of the applicant made in the original application within three months from the date of receipt of a copy of this order. There should not be any discrimination made in the matter of extending the benefit to the applicants since such benefit has been extended to the employees similarly placed like the late Dinabandhu Pradhan. The applicants if would feel aggrieved on account of any order passed by the appropriate authority pursuant to the aforesaid direction, they are free to approach this Tribunal seeking appropriate direction."*
(***Emphasis Supplied***)

16. So far as the judgment cited by the learned Counsel for the State/Opposite Parties i.e. **Syndicate Bank** (supra), the same is relating to an industrial dispute matter pertaining to a reference made by the appropriate Government to the Industrial Adjudicator to answer as to whether the action of the Bank Management in terminating the services of the workman, who was a Clerk, is legal and justified. If not, to what relief the workman is entitled to? The Bank Management took a stand that such an action of termination of service of the workman is based on terms of a Bipartite Settlement between the Management of the Bank and the employees with regard to voluntary retirement from service of the Bank for his unauthorized absence from duty for a long period and it was not necessary to conduct a domestic enquiry. It was held that the Bank Management has followed the terms of Clause-16 of the Bipartite Settlement which is binding on the workman. Accordingly, it was further held that in terms of the said settlement, the long unauthorized absence of the workman was treated to be his voluntary retirement from the service of the Bank and it was not necessary for the Bank to hold an enquiry before passing of the order of termination. Hence, this Court is of the view that the said judgment cited by the learned Counsel for the State/Opposite Parties is not applicable to the facts of present case.

17. At this juncture, it is apt to reproduce below Rule-18 (3) of the Odisha Civil Services (Pension) Rules, 1992.

"18. ***Conditions subject to which service qualifies-***

(3) Notwithstanding anything contained in clauses (i) and (ii) of sub-rule (2) a person who is initially appointed by the Government in a work-charged establishment for a period of five years or more and is subsequently appointed to the same or another post in a temporary or substantive capacity in a pensionable establishment without interruption of duty, the period of service so rendered in work-charged establishment shall qualify for pension under this rule."

18. From the admitted facts on record, in terms of Rule 72 of the Orissa Service Code, following the procedure laid down in the Orissa Civil Services (Classifications, Control and Appeal) Rules, 1962, no action was taken by the State/Opposite Parties for removing the Petitioner from service before he attained the age of superannuation. Also no communication was ever made to the Petitioner to the said effect. Hence, in view of the legal provisions for awarding pension, so also the judgments cited by the learned Counsel for the Petitioner, as detailed above, this Court is of the view that the Petitioner is entitled for pension in terms of Rule 18(3) of Odisha Civil Services (Pension) Rules, 1992 and the impugned rejection order dated 10.02.2020 under Annexure-4, which was passed wrongly relying on Rule 72 of the Orissa Service Code, is liable to be quashed. Accordingly, the said rejection order dated 10.02.2020 is hereby set aside. The Opposite Parties are directed to grant pension and other benefits to the Petitioner proportionately in terms of Rule 18(3) of Odisha Civil Services (Pension) Rules, 1992, after regularizing the service of the Petitioner from the date of alleged unauthorized absence i.e. beyond 30th May, 1984, till the date of his attaining the age of superannuation in accordance with law. The entire process shall be completed by the Opposite Parties within a period of two months from the date of production of the certified copy of this Judgment.

19. Accordingly, the Writ Petition stands disposed of. However, there shall be no order as to cost.

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2023 (III) ILR-CUT-1236

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 8150 OF 2014

CHANDRA SEKHAR DWIVEDI .....Petitioner

-V-

DIRECTOR OF INDUSTRIES & ANR. .....Opp.Parties

ODISHA PUBLIC DEMAND RECOVERY ACT, 1962 – Sections 37(i), 51 – Petitioner is one of the legal heirs of the deceased /Certificate Debtor – The certificate officer straightway issue show cause notice as to why

warrant of arrest shall not be issued against the petitioner without following due procedure as prescribed in the Act – Whether the order is sustainable? – Held, No – Without following due procedure and giving opportunities to file petition denying liability, issuance of show cause U/s 37(i) of the Act is not sustainable.

Case Laws Relied on and Referred to :-

1. 83 (1997) C.L.T. (O.A.T) 42 : Uttam Pradhan & Ors. Vs. State of odisha & Ors..
2. (1997)1 OLR (CSR) 40 : Nakhaari Bewa Vs. State of Odisha.
3. (2014)1 OLR 734 : Chandra Nandi Vs. State of Odisha.
4. (2008) 105 CLT- 309 : Kishori Dash Vs. State of Orissa & Ors..
5. 2017(I) ILR-CUT-906 : Karunakar Behera Vs. State of Orissa & Ors.
6. (2000) 5 SCC 65 : Syndicate Bank Vs. General Secretary, Syndicate Bank Staff Association & Anr..

For Petitioner : Mr. P.C. Dash (Proxy Counsel) & Mr. P.K. Jena

For Opp. Parties: Mr. S.N. Pattnaik, AGA

JUDGMENT Date of Hearing & Judgment : 09.11.2023

S.K. MISHRA, J.

1. The present Writ Petition has been preferred with a prayer to set aside the certificate proceeding in Certificate Case No.85/148 of 1977, pending before the Court of Certificate Officer, Jajpur.

2. The fact of the case in brief is that the Petitioner's father late Banamali Diwedy had availed a loan of Rs.20,000/- under Section 4(a) of the Bihar and Orissa State Aid to Industries Act, 1923, shortly, the Act, 1923, from the Director of Industries, Orissa, which was sanctioned vide Order dated 20.05.1968 for establishment of a Baby Oil Expeller Unit. Condition of repayment was to repay the loan amount in eight equal annual and consecutive instalments. Petitioner's father failed to repay the said loan amount as per the condition imposed. Accordingly, a notice to Show Cause was issued to his father as to why appropriate proceeding shall not be initiated against him for recovery of the loan amount. In response to the Show Cause Notice, Banamali Diwedy submitted a reply before the Under Secretary to Government by letter dated 04.11.1975, which was found to be unsatisfactory. Hence, the State Aid Loan granted to Banamali Diwedy was terminated vide Order dated 04.11.1975 of the Under Secretary to Government, Industries Department, Government of Orissa, Bhubaneswar in terms of Section 19 (A) of the Act, 1923.

After termination of the Loan Agreement, Certificate Case No.85/148 of 1977 was initiated against Banamali Diwedy on 23.12.1977 due to non-payment of an amount of Rs.32, 231.30, which includes interest. Accordingly, a notice was issued to him. On being noticed, Banamali Diwedy appeared before the Certificate Officer, Jajpur and refused to pay the dues. On 08.02.1979 an order was passed for auction of the landed properties of Banamali Diwedy for recovery of the loan

amount. However, during pendency of the certificate proceeding, Banamali Diwedy died in the year 1989. After his death, the Opposite Party No.2 furnished the details of legal representatives of Banamali Diwedy vide letter dated 15.03.1993 with a request to initiate necessary legal action for effecting recovery of Government dues from the said legal representatives. On being so written, the legal representatives of late Banamali Diwedy were substituted as Certificate-Debtors in the year, 1993. But none of the said legal representatives, excepting the Petitioner, received any notice from the Certificate Officer. Petitioner, after receiving notice in Certificate Case No.85/148 of 1977, came to know that his father had taken a loan of Rs.20,000/- which became Rs.32, 231.30 with interest. After knowing so and making a query, the Petitioner came to know that without asking to Show Cause, order was passed behind his back. Though loan was taken in the year 1968 by his deceased father, the Petitioner came to know about the same in the month of October, 2013. Notice of Show Cause was issued as to why he shall not be arrested bearing P.R. No.16 dated 18.10.2013. On getting the Show Cause Notice as to why warrant of arrest shall not be issued, as other legal heirs had already died by the said time, the Petitioner, being one of the legal representatives of late Banamali Diwedy, appeared in the said case. After obtaining the certified copy of the entire order sheet in Certificate Case No.85/148 of 1977 and other document, it came to the notice of the Petitioner about the reason of initiation of certificate proceeding as well as the wrong procedure followed by the Certificate Officer to implead the Petitioner and others as the Certificate Debtors. Hence, the Petitioner was being compelled to prefer the present Writ Petition, for not following various provisions under the Odisha Public Demands Recovery Act, 1962, shortly, the Act, 1962, before as well as after impleading him in the said proceeding as one of the Certificate Debtors.

3. The grievance of the Petitioner is that he is not the beneficiary of the loan, which was taken by his deceased father and before initiation of the proceeding against the Petitioner, no opportunity of hearing was given to him. It is further stand of the Petitioner, even though he is one of the legal representatives of the deceased Banamali Diwedy (original Certificate-Debtor), the other Legal Representatives have already died before receiving notice dated 23.10.2013, as at Annexure-4. Therefore, the proceeding regarding recovery of loan amount with interest from the Petitioner is bad in law.

4. The State-Opposite Parties have filed a Counter Affidavit taking a stand therein that a Certificate Case against Banamali Diwedy (Certificate-Debtor) was initiated before the Certificate Officer, Jajpur bearing No.85/148 of 1977 for recovery of State-Aid-Loan, which was disbursed in favour of the Petitioner's father as per terms and conditions of State-Aid-Loan under the Act, 1923. The loan was sanctioned in favour of the Petitioner's father late Banamali Diwedy vide sanction order dated 20.05.1968 of the Director of Industries, Odisha, Cuttack for an amount of Rs. 20,000/- for establishment of a Baby Oil Expeller. The said amount was disbursed in favour of the father of the Petitioner on 22.06.1968 after execution of

Mortgage Deed and obtaining proper receipt from the Petitioner's father. However, because of non-repayment of the loan amount, as per the condition of loan, a certificate proceeding was initiated against his father. As per the Enquiry Report, the General Manager, DIC, Cuttack, intimated to the Government in Industries Department vide letter dated 21.05.1974 that the father of the Petitioner mis-utilized the loan amount of Rs.20,000/- under the said Scheme and failed to deposit any instalment. A Show Cause Notice was issued to him as to why appropriate legal action shall not be initiated for recovery of the loan amount. Due to mis-utilisation of loan amount as well as non-repayment of the State-Aid-Loan by the father of the Petitioner, the State-Aid-Loan was terminated by the Government in Industries Department, vide Order dated 04.11.1975.Thereafter, the certificate proceeding was initiated for realisation of principal amount as well as interest to the tune of Rs.32,231.30. During pendency of the certificate proceeding, it came to the notice of the Certificate Officer as to death of late Banamali Diwedy. Being directed by the Certificate Officer, Jajpur, the Additional Tahasildar, Sukinda submitted list of legal heirs of the deceased Banamali Diwedy (original Certificate-Debtor) namely, Saraswati Dwivedi, Nilamani Dwivedi, Ranjan Dwivedi, Chandrasekhar Dwivedi and Susama Devi, who have been substituted as Certificate-Debtors in C.C. No. 85/148 of 1977 for recovery of said State-Aid-Loan amount and the said proceeding is still pending. There is no illegality or infirmity in issuing the Show Cause Notice against the Petitioner.

5. Mr. Dash, learned proxy Counsel for the Petitioner, draws attention of this Court to Orders dated 03.07.1992 so also 04.05.1993 passed in Certificate Case No.85/148 of 1977 and submits, the Certificate Officer, Jajpur, on getting information regarding the death of late Banamali Diwedy, vide Order dated 03.07.1992 directed the Revenue Officer to furnish the details of legal representatives of the Certificate Debtor. But on the communication made by one of the Certificate-Holders, present Opposite Party No.2, vide Order dated 04.05.1993, substituted the Petitioner and other legal heirs of late Banamali Diwedy as Certificate Debtors. Pursuant to the same, it was ordered to issue notice to the legal representatives of late Banamali Diwedy to Show Cause as to why warrant of arrest shall not be issued against them for not depositing the certificate amount in terms of Section 37(1) of the Act, 1962. On being so noticed, vide notice dated 23.10.2013 under Section 37(1) of the Act, 1962, the Petitioner, not being liable to pay the certificate dues to be recovered under the Act, 1962 appeared before the Certificate Officer and took time. After obtaining the certified copy of the entire order sheet and knowing about the alleged dues, the Petitioner was being compelled to approach this Court in form of the present Writ Petition.

6. Mr. Dash, learned proxy Counsel for the Petitioner submits, though his client was substituted as one of the legal representatives of the Certificate-Debtor, he has a right to get a notice in terms of Section 6 of the Act, 1962 to know about the nature of certificate dues recoverable from him so also to have his say in terms of

Section 8 of the Act, 1962. Without affording opportunity to his client to file Petition denying liability allegedly payable to the Certificate-Holder, the Certificate Officer straightway issued a Show Cause Notice under Section 37(1) of the Act, 1962 with regard to warrant of arrest vide notice dated 23.10.2013, for which his client was being compelled to approach this Court.

Mr. Dash further submits, had his client been noticed in terms of Section 6 of the Act, 1962, affording opportunity to file Petition denying liability in terms of Section 8 of the Act, 1962, he would have been able to bring to the notice of the Certificate Officer about the death of other legal representatives of late Banamali Diwedy, apart from filing Petition denying the said liability. Mr. Dash submits, in an execution proceeding, without any valid service of summon on all the Certificate-Debtors, that to proceeding against dead persons, is a nullity in the eye of law. Mr. Dash, drawing attention of this Court to Section 51 of the Act, 1962 submits, though his client is liable to be impleaded /substituted as Certificate-Debtor after the death of his father, he being one of the Certificate-Debtors, his liability should be confined to the extent of property of his father inherited by the Petitioner and if the same has not been duly disposed of by the Petitioner by the time he was so impleaded as one of the Certificate-Debtors. The other legal heirs of deceased Certificate-Debtor, who were also liable to the extent of their share in terms of Section 51 of the Act, 1962, are no more alive. Mr. Dash submits, out of the said certificate amount of Rs.32,231.30, being directed by this Court vide Order dated 07.05.2015 in Misc. Case No.7404 of 2014, his client has already deposited a sum of Rs.20,000/- before the Certificate Officer, Jajpur since 2015. Hence, his client should not be saddled with any additional amount, over and above Rs. 20,000/-, which has been deposited by his client, the same being more than the share of the Petitioner.

7. Mr. Pattnaik, learned AGA for the State Opposite Parties, do not dispute the said contention of the learned Counsel for the Petitioner with regard to issuance of notice dated 23.10.2013 in terms of Section 37(1) of the Act, 1962 to Show Cause as to why warrant of arrest shall not be issued against the legal heirs of the deceased Certificate-Debtor for non-payment of the said amount. However, reiterating the stand taken in the Counter Affidavit Mr. Pattnaik submits, there is no infirmity in the impugned notice, as the same has been given in accordance with law.

8. In view of the pleadings and documents on record, so also submissions made by the learned Counsel for the Parties, before dealing with the issue involved in the present lis, this Court thinks it appropriate to reproduce below the relevant Sections i.e. Sections 6, 8, 9 ,10, 13, 37 and 51 of the OPDR Act,1962:

> ***"6. Service of notice and copy of certificate on certificate debtor-*** *When a certificate had been filed in the office of a Certificate Officer under Section 3 or Section 5, he shall cause to be served upon the certificate debtor, in the prescribed manner,* ***a notice in the prescribed form and a copy of the certificate****.*

8. Filing of petition denying liability *–(1) the certificate-debtor may, within thirty days from the service of the notice required by Section 6 or where the notice has not been duly served, then within thirty days from the execution of any process for enforcing the certificate, present to the Certificate Officer in whose office the certificate is filed or to the Certificate Officer who is executing the certificate,* ***a petition, in the prescribed from, signed and verified in the prescribed manner, denying his liability*** *only on the ground that –*

(a) the certificate dues have been fully or partly paid; or

(b) the person on whom such notice has been served is not the person named as certificate-debtor in the certificate:

Provided that a certificate-debtor in respect of dues other than those in relation to which the liability under any law for the time being in force is not open to question in a Civil Court may also deny his liability on any other ground;

Provided further that no petition under this sub-section shall be entertained by a Certificate Officer unless he is satisfied that such amount of the certificate dues as the certificate-debtor may admit to be due from him has been paid.

(2) If any such petition is presented to a Certificate Officer other than the Certificate Officer in whose office the original certificate is filed, it shall be sent to the latter officer for disposal.

9. Hearing and determining of such petition *– The Certificate Officer in whose office the original certificate is filed may,* ***after hearing the petition and taking evidence, if necessary****, confirm, set aside, modify or vary the certificate as he deems fit."*

10. Power to amend certificate by addition, omission or substitution of parties - Subject to the law of limitation*, the Certificate Officer may at any time and shall upon receipt of intimation, if any, under Sub-section (3) of section 4* ***amend the certificate*** *by addition, omission or* ***substitution*** *of the name of any certificate-holder or* ***certificate-debtor****, or by alteration of the amount claimed therein, as the case may be:*

Provided that when any such amendment is made a fresh notice and copy shall be issued as provided in section 6.

13. When certificate may be executed *– No step in execution of a certificate shall be taken until the period of thirty days has elapsed since the date of the service of notice required by Sections 6 and 10 or,* ***when a petition has been duly filed under Section 8, until such petition has been heard and determined****:*

Provided that where the whole or any part of the movable property of the certificate-debtor is liable to attachment under this Act, the Certificate Officer may, at any time for reasons to be recorded in writing direct an attachment of the whole or any part of such movable property.

37. Power to arrest and detention *- (1) No order for the arrest and detention in civil prison of a certificate-debtor in execution of a certificate shall be made unless the Certificate Officer has issued and served a notice upon the certificate-debtor calling upon him to appear before him on a day to be specified in the notice and to show cause why he should not be committed to civil prison, and unless the Certificate Officer, for reasons recorded in writing, is satisfied-*

(a) that the certificate-debtor, with the object or effect of obstructing or delaying the execution of the certificate has, after the filing of the certificate in the office of Certificate Officer, dishonestly transferred, concealed, or removed any part of his property; or

(b) that the certificate-debtor has or had since the date of the filing of the certificate, the means to pay the amount for which the certificate has been issued, or some substantial part of such amount and refuses or neglects or has refused or neglected to pay the same.

Explanation *-In the calculation of the means of the certificate-debtor for the purpose of this clause there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the certificate.*

(2) Notwithstanding anything contained in sub-section (1), if the Certificate Officer is satisfied –

(a) that the property of the certificate-debtor or any part thereof is likely to be dishonestly transferred, concealed or removed; or

(b) that the certificate-debtor refuses or neglects or has refused or neglected to pay the same; or

(c) on enquiry or evidence to be recorded in writing or on affidavit that the certificate-debtor is likely to abscond or leave the local limits of the jurisdiction of the Certificate Officer:

he may issue a warrant for the arrest of the certificate-debtor.

(3) Where appearance is not made in obedience to a notice, issued and served under sub-section (1), the Certificate Officer may issue a warrant for the arrest of the certificate-debtor.

(4) Every person arrested in pursuance of a warrant of arrest issued under subsection (2) or sub-section (3) shall be brought before the Certificate Officer as soon as practicable and in any event within Twenty- four hours of his arrest (exclusive of the time required for journey):

Provided that, if the certificate-debtor or any person on his behalf pays the amount entered in the warrant of arrest as due under the certificate, and the cost of arrest, to the officer arresting him, such officer, shall at once release him.

(5) When a certificate-debtor appears before the Certificate Officer in obedience to a notice to show cause or is brought before the Certificate Officer under sub-section (4), the Certificate Officer shall proceed to hear the certificate-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the certificate-debtor an opportunity of showing cause why he should not be committed to the civil prison.

(6) Pending the conclusion of the inquiry under sub-section (5), the Certificate Officer may, in his discretion, order the certificate-debtor to be detained in the custody of such officer as the Certificate Officer may think fit or release him on his executing a bond with or without security to the satisfaction of the Certificate Officer for his appearance when required.

(7) Upon the conclusion of the inquiry under sub-section (5), the Certificate Officer may subject to the provisions of Section 65 make an order for the detention of the certificate-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give the certificate-debtor an opportunity of satisfying the certificate debt, the Certificate Officer may before making the order of detention leave the certificate-debtor in the custody of the officer arresting him or of any other officer for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Certificate Officer for his appearance at the expiration of the specified period if the certificate debt be not sooner satisfied.

(8) When the Certificate Officer does not make an order of detention under subsection (7), he shall, if the certificate-debtor is under arrest, direct his release.

51. Procedure on death of certificate-debtor -(1) Where a certificate-debtor dies before the certificate has been fully satisfied, the Certificate Officer may, after serving upon legal representative of the deceased a notice in the prescribed form, proceed to execute the certificate against such legal representative; and the provisions of this Act shall apply as if such legal representative were the certificate-debtor and as if such notice were a notice under section 6 :

Provided that where the certificate is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; *and, for the purpose of ascertaining such liability, the Certificate Officer executing the certificate may of his own motion or on the application of the certificate-holder, compel such legal representative to produce such accounts as the Certificate Officer thinks fit.*

(2) For the purposes of this section, property in the hands of a son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor in respect of which a certificate has been filed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative." ***(Emphasis Supplied)***

9. From the provisions under Section 51 of the OPDR Act, 1962, it is amply clear that even if the Certificate-Debtor dies before the certificate has been fully satisfied, Certificate Officer may, after serving upon the legal representatives of the deceased a notice in the prescribed form, proceed to execute the certificate against such legal representatives applying the provisions of the Act, 1962, as if such legal representatives were the Certificate-Debtors and as if such notices were a notice under Section 6 of the Act, 1962.

In the present case, as is revealed from the order sheet, the original Certificate-Debtor (deceased), who was the father of the present Petitioner, was never noticed in terms of Section 6 of the Act, 1962 in the prescribed form.

Section 3 of the Act, 1962 deals with filing of certificate for public demand payable to the Collector, whereas Section 4 of the Act, 1962 deals with requisition of certificate in other cases i.e. when any public demand payable to any person other than the Collector is due, such person may send to the Certificate Officer a written requisition in the prescribed form i.e. Form No.3.

In the present case, the Certificate-Holders are the Director of Industries and Manager (Small Scale) District Industries Centre, Jagatpur, Cuttack. The order sheet of the certificate proceeding, annexed to the Writ Petition as at Annexure-3, reflects that the requisition was received from the Certificate-Holders on 23.12.1977. On the very same day, without being satisfied and issuing certificate to the said effect in Form No.1 in terms of Section 5 of the Act, 1962, the Certificate Officer ordered to issue notice under Section 6 of the Act, 1962 to the Certificate-Debtor. Though the order sheet does not reflect as to service of the said notice in Form No.3 along with certificate in Form No.1, it was ordered to issue Distress Warrant (DW) and it was reflected in the order sheet dated 23.06.1979 that D.W. returned unexecuted and it was reported by the Assistant Nazir from Sukinda Tahasil that the Certificate-Debtor refused to pay the dues. Hence, it was ordered to ask the Certificate-Debtor to supply his immovable property list. Thereafter, matter got adjourned from time to time awaiting for execution of D.W. Finally, on being reported to the Certificate Officer that the Certificate-Debtor is dead, vide Order dated 03.07.1992, the Revenue Officer was asked to furnish the details of the legal representatives of the Certificate-Debtor. Thereafter, a report regarding names of the legal representatives being furnished vide Order dated 04.05.1993, the said legal representatives were substituted in place of Banamali Diwedy (original Certificate-Debtor). It was ordered to issue notice to the said legal representatives through the Tahasildar, Sukinda for service.

From the legal provisions extracted above under the OPDR Act, 1962, it is clear that when the certificate proceeding is initiated against a person arraying him as the Certificate-Debtor by filing certificate in the prescribed form, the Officer, before noticing the Certificate-Debtor in the prescribed form in terms of Section 6 of the Act, 1962, has to be satisfied that the said amount is due and payable to the Certificate-Holder and has to sign the certificate in Form No.1 in terms of Section 5 of the Act, 1962. Thereafter, the Certificate Officer may proceed further by noticing the Certificate-Debtor in Form No.3 in terms of Section 6 of the Act, 1962 along with a certificate in Form No.1 giving him an opportunity to file a Petition denying liability in terms of Section 8 of the Act, 1962 in Form No.4. After the Certificate-Debtor appears and files Petition in terms of Section 8 of the Act, 1962, the Certificate Officer, after hearing the Petition and taking evidence, if any, in terms of Section 9 of the Act, 1962, may confirm, set aside, modify or vary the certificate as he deems fit.

Section 13 of the Act, 1962 bars initiation of execution of certificate until the period of 30 days has elapsed since the date of service of notice required under Sections 6 and 10 of the Act, 1962 or when Petition has been filed under Section 8 of the Act, 1962, until such Petition has been heard and determined.

Section 10 of the Act, 1962 empowers the Certificate Officer to amend certificate by addition, omission or substitution of parties, subject to the law of limitation. To be more specific, in view of the said provision under Section 10 of the

Act, 1962, the Certificate Officer may at any time and upon receipt of intimation, if any, under Sub-section (3) of Section 4 of the Act, 1962 amend the certificate by addition, omission or substitution of the name of any Certificate-Holder or Certificate-Debtor, or by alteration of the amount claimed therein, as the case may be.

10. As is revealed from the order sheet, neither any fresh requisition in terms of Sub-section (3) of Section 4 read with Section 10 of the Act, 1962 was filed before the Certificate Officer nor a notice in the prescribed form, as required under Section 6 of the Act, 1962, was issued to the Petitioner and other legal representatives of late Banamali Diwedy giving them opportunity to file Petition denying liability in terms of Section 8 of the Act. Further, without following due procedure and giving opportunity to file Petition denying liability, the Court below straightway issued Show Cause Notice in terms of Section 37(1) of the Act, 1962 directing the Petitioner to Show Cause as to why warrant of arrest shall not be issued against him. Though notice under Section 37(1) of the Act, 1962 is to be given in Form No.6, it was wrongly mentioned as Form No.1, though the contents of the said form is akin to Form No.6 prescribed under Section 37(1) of the Act, 1962.

11. Needless to mention here that Section 13 of the Act, 1962 mandates that on filing of Petition denying liability in terms of Section 8 of the Act, 1962 until such Petition has been heard and determined, no step in execution of a certificate can be taken until the period of expiry of 30 days has elapsed since the date of service of notice, as required under Sections 6 and 10 of the Act.

12. Further, it is also an admitted fact on record, the same being not denied in the Counter Affidavit filed by the State, as on the date of issuance of Show Cause Notice dated 23.10.2013 to issue warrant of arrest in terms of Section 37(1) of the Act, 1962, the other legal heirs of the original Certificate-Debtor had already died. Without further impleading the legal heirs of the said deceased Certificate-Debtors, which is subject to law of limitation in terms of Section 10 of the Act, 1962, issuance of warrant of arrest is unwarranted and uncalled for, the same being without ensuring sufficient of notice on the said Certificate-Debtors. Pursuant to Order dated 04.05.1993, the Certificate Officer proceeded further without following due procedure. Straightway Show Cause Notice as to why warrant of arrest shall not be issued was sent to the Petitioner. Accordingly, the notice dated 23.10.2013 in Form No.6 (wrongly mentioned as Form No.1), as at Annexure 4 issued under Section 37(1) of the Act, 1962 is hereby set aside.

13. Matter is remitted back to the Certificate Officer, Jajpur with an observation that if the Opposite Party Nos. 1 and 2 files fresh certificate in the prescribed form in terms of Section 10 read with Section 51 of the Act, 1962, subject to law of limitation, the Opposite Party No.3 shall do well to proceed further in accordance with law in terms of the above observations and afford an opportunity to the Petitioner so also other legal representatives, if any, to file Petition in terms of

Section 8 of the Act, 1962 and proceed further in terms of Section 9 of the Act, 1962, giving opportunity of hearing to the substituted Certificate-Debtors, including the Petitioner and take evidence, if necessary, and thereafter, he may confirm, set aside or modify the certificate in accordance with law.

14. As the certificate proceeding is of the year, 1977, to avoid delay, the Petitioner is directed to appear before the Certificate Officer (Opposite Party No.3) along with the certified copy of this judgment within four weeks from the date of receipt of the same. On such appearance, the Certificate Officer shall fix a date and proceed further in accordance with various provisions of the Act, 1962, as detailed above. So far as other legal representatives are concerned, the Certificate Officer as well as Certificate-Holders are directed to strictly follow the procedure prescribed under Sections 10 and 51 of the Act, 1962, before proceeding further in the said matter for recovery of the remaining certificate amount, if any. The money deposited by the Petitioner, pursuant to direction of this Court, shall be adjusted towards the share of the Petitioner in terms of Section 51 of the Act, 1962. Ultimately, if it is found that the same is more than the share of the Petitioner, the excess amount, if any, be refunded to him.

15. The Writ Petition is disposed of with the above observation.

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2023 (III) ILR-CUT-1246

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.16183 OF 2016

THE DIVISIONAL MANAGER,
ORIENTAL INSURANCE CO. LTD. BBSR ……Petitioner

-V-

GHANSYAM PRADHAN & ANR. .....Opp.Parties

MOTOR ACCIDENT CLAIM – Necessary Documents – Petitioner/the insurance company filed an application before Learned Tribunal to direct the claimant/the owner of vehicle to disclose the insurance policy details of the offending vehicle – The Learned Tribunal rejected the application relying on exhibits like seizure list and zimanama – Whether the impugned order is sustainable? – Held No – Without disclosing the policy details of the offending vehicle, arraying the insurance company as one of the Opp.Party is illegal and unjustified – Matter is remitted back to the Court below. (Paras 9 -11)

Case Law Relied on and Referred to :-

1. 1992(2) T.A.C. 576 : New India Assurance Co. Ltd Vs. Ramani Bewa & Ors.

For Petitioner : Mr. G.P. Dutta

For Opp.Parties: Mr. B.K. Behera

JUDGMENT Date of Hearing & Judgment : 14.11.2023

S.K. MISHRA, J.

1. This Writ Petition has been preferred by the Petitioner-Insurance Company against the order dated 02.07.2016 (Annexure-3) passed by the 3rd M.A.C.T.-Cum-Additional District Judge, Bhanjanagar, Ganjam in M.A.C. No.32 of 2010.

2. Vide the said order the Tribunal rejected the prayer made in the petition dated 02.07.2016 of the Petitioner-Insurance Company (O.P. No.2 in the Court below) to direct the Claimant (present Opposite Party No.1) to disclose the insurance policy details or to the owner of the offending vehicle (present Opposite Party No.2) to cause production of the Insurance Policy of the offending vehicle. However, the Court below, relying on Exhibits 3 and 3/a i.e. seizure list and zimanama respectively, rejected the said petition with an observation that the same is devoid of any merit.

3. On being noticed, both the Opposite Party No.1 (Claimant) so also the Opposite Party No.2 (Owner of the offending vehicle), though have rendered appearance, the learned Counsel for the Opposite Party No.2 is absent on call.

4. Since the Court below passed the impugned order relying on Exhibits 3 and 3/a i.e. seizure list and zimanama respectively, and the said documents have not been disclosed in the Writ Petition, in order to ascertain as to whether those two documents disclosed the policy details of the offending vehicle and the Tribunal was justified to pass the impugned order, a query being made by this Court, Mr. Dutta, learned Counsel for the Petitioner files photocopies of the certified copy of those two documents along with a Memo during hearing of this case.

5. Heard learned Counsel for the Petitioner and the Opposite Party No.1.

6. Mr. Dutta, learned Counsel for the Petitioner draws attention of this Court to the petition dated 02.07.2016 filed before the Court below as at Annexure-2 and submits, without inviting any objection, the Court below mechanically rejected the said petition on the very day. He further submits, a prayer was made before the Court below to direct the Petitioner (O.P.No.1 in the present case) to disclose the Insurance particulars of the offending vehicle or cause the owner of the offending vehicle to produce the Insurance Policy. However, while rejecting the said petition, the Court below did not deal with the alternate prayer made in the said petition in the impugned order. The said order has been passed only dealing with the prayer to

direct the Petitioner to disclose the Insurance Policy of the offending vehicle. The Court below also was not justified to reject the said petition on the plea that Insurance Company and validation period have been mentioned in those two documents and such an observation is perverse.

7. That apart, relying on the judgment of this Court reported in 1992 (2) T.A.C. 576 (**New India Assurance Co. Ltd v. Ramani Bewa and others**) and drawing attention of this Court in paragraph no.4 of the said judgment, Mr. Dutta submits, without disclosing the policy details of the offending vehicle, arraying his client as one of the Opposite Parties in M.A.C. No.32 of 2010 is illegal and unjustified. Rightly his client filed an application either to give a direction to the Petitioner (claimant before the Court below) to disclose the policy details of the offending vehicle or to the Opposite Party No-2 to cause production of the insurance policy. The Court below was unjustified to reject the said application and the impugned order is a glaring example of non-application of judicious mind and deserves to be set aside.

8. This Court in **New India Assurance Co. Ltd** (supra), vide Paragraph No.4 held as follows:-

> *"The question is whether the owner should be given an opportunity by establishing that the vehicle was insured with the appellant. As rightly submitted by learned Counsel for appellant, it was the duty of the owner of the vehicle to place materials in support of his plea of insurance with a particular Insurance Company.* ***Without furnishing necessary particular, to require an Insurance Company to say whether the vehicle is insured would tantamount to asking it to locate a needle in a mountain. Lakhs of policies are issued by the Insurance Companies. Mere mention that a vehicle is insured with an Insurance Company without particulars of the policy would be insufficient to prove that the vehicle is really insured. That is why insistence is on the giving of particulars of Insurance policy****. The facilities in finding out whether as a matter of fact, a vehicle is insured or not. In this context, reference to section 151 of the Motor Vehicles Act, 1988 (in short, the 'Act') is necessary. Similarly was the position under section 98 of Motor Vehicles Act, 1930 (in short, the 'old Act'). The statutory prescription is that no person against whom a claim is made shall on demand by or on behalf of the person making the claim to state whether or not he was insured in respect of that liability by any policy issued or would have been so insured if the insurer had not avoided or cancelled the policy not shall he refuses, if he was or would have been so insured to give such particulars with respect to that policy as were specified in the certificate of insurance issue in respect thereof****. The Tribunal should insist on particulars of insurance being given by the insured. The Claimant has the statutory right to get it from the insured. That would help in deciding the question of liability, i.e. whether it is to be discharged by the owner of the vehicle, or any Insurance Company****. In the instant case, except mention of "New India Company, Sambalpur", there is no other material relating to any insurance. In the fitness of things therefore, the owner should get an opportunity to establish that the vehicle was insured, and if it was insured with which Insurance company."* ***(Emphasis Supplied)***

9. On perusal of Exhibits 3 & 3/a, it is ascertained that in Seizure List, under the heading "Article Seized", it has been indicated that "the Oriental Insurance-Company Limited Valid- 06-05/2009". Similar is the noting in Zimanama under the heading "Articles taken in Zima". Admittedly, those two documents do not disclose the policy details of the offending vehicle. From the contents of the Seizure List and Zimanama, which have been marked as Exhibits 3 and 3/a respectively, it is amply clear that those two documents do not disclose the policy details justifying arraying the Petitioner (Insurance-Company) as one of the Opposite Parties to M.A.C. No.32 of 2010.

10. In view of the above, this Court is of the view that, the order dated 02.07.2016 passed in M.A.C. No. 32 of 2010 is liable to be set aside. Accordingly, the order dated 02.07.2016, as at Annexure-3, is hereby set aside.

11. Matter is remitted back to the Court below with a direction to deal with the said petition dated 02.07.2016 of the Petitioner (O.P. No.2 before the Court below) afresh and dispose of the same by passing necessary order as to production /disclosure of the policy details, as prayed therein and proceed further in accordance with law.

12. Mr. Behera, learned Counsel for the Opposite Party No.1 (Claimant before the Court below) submits, because of the interim order, further proceeding in M.A.C. No.32 of 2010 has been stayed since the year 2016. Accordingly, Mr. Behera prays for a direction to the Court below to dispose of the Claim Application within a stipulated period.

13. In view of the said submission made by Mr. Behera, the Court below is directed to deal with and dispose of the M.A.C. No.32 of 2010 within four months from the date of disposal of the application filed by the Petitioner-Insurance Company (O.P. No.2 before the Court below) in terms of the observation and direction, as detailed above.

14. To avoid delay, both the parties are directed to appear before the Claims Tribunal on 4th December, 2023 and produce the certified copy of this judgment enabling the Tribunal to do the further needful, as directed above.

15. With the said observation, the Writ Petition stands allowed and disposed of.

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2023 (III) ILR-CUT-1249

G. SATAPATHY, J.

BLAPL NO. 2635 OF 2023

JAGABANDHU CHAND ……..Petitioner

-V-

DIRECTORATE OF ENFORCEMENT ……..Opp.Party

PREVENTION OF MONEY LAUNDERING ACT, 2002 – Section 45(1) proviso – The medical board after examination of accused, petitioner stated that, there is necessity of "Tracheotomy" – Whether the aforesaid sickness of the petitioner is considered to be sickness as provided in first proviso to section 45(1) of the Act? – Held, Yes.

(Para 10)

Case Laws Relied on and Referred to :-

1. (2022) SCC Online SC 825 : Satender Kumar Antil Vs. Central Bureau of Investigation & Anr.
2. (1989) 4 SCC 286 : Pt. Parmanananda Katara Vs. Union of India & Ors.
3. (2002) 9 SCC 166 : Pawan Alias Tamator Vs. Ram Prakash Pandey & Anr.
4. (2023) SCC Online Delhi 1547 : Kewal Krishnan Kumar Vs. Enforcement Directorate.
5. (2022) SCC Online : Vijay Agrawal Through Parokar Vs. Directorate of Enforcement.

For Petitioner : Mr. J.Pal

For Opp. Party : Mr. G.Agarwal, (E.D.)

JUDGMENT Date of Judgment : 10.10.2023

G. SATAPATHY, J.

1. This is a bail application U/S.439 of Cr.P.C. by the petitioner for grant of bail in connection with Complainant Case (PMLA) Case No.10 of 2022 for commission of offence Under Section 3 of the Prevention of Money Laundering Act, 2002 (In short "PMLA") which is punishable Under Section 4 PMLA pending in the file of learned District and Sessions Judge, Khurda at Bhubaneswar.

2. An overview of the facts involved in this case are on 02.10.2022, one FIR was registered against the Petitioner and others vide Khandagiri PS Case No. 496 of 2022 for commission of offences punishable Under Sections 341 / 328 / 324 / 354-C/ 370 /386 /387/ 388/389/419/420/465/506/120-B of Indian Penal Code (in short IPC), 1860 and Under Section 66-E/67 of the Information Technology Act, 2000(In short the "IT Act"), but before registration of this case, another case was also registered against the co-accused person for similar offences. In the FIR against the Petitioner and others, the Petitioner and other co-accused person had extorted crores of Rupees from different rich people by blackmailing them to get their video footage containing objectionable and inappropriate photographs viral. The aforesaid case was investigated into by the local police, but in the course of investigation, the Assistant Director of Enforcement, Bhubaneswar claiming the offences alleged against the Petitioner and others to be scheduled offences as defined Under Section 2(1y) of the PMLA instituted a complaint against the Petitioner and others before the special Court under PMLA, Bhubaneswar for commission of offence U/S. 3 of PMLA which is punishable U/S. 4 of PMLA. It is stated in the complaint that soon after registration of the aforesaid police case, PMLA Case No.10 of 2022 was recorded against the Petitioner and others for commission of aforesaid offence under PMLA and the matter was investigated into by ED. It is also alleged in the complaint

that the Petitioner and others had generated illegal income of Crores of Rupees through extortion by way of honey trapping rich and influential people and making their nude videos and threatening as well as blackmailing them for lodging false police cases and getting their nude videos viral in social media and, thereby, the income of the Petitioner and others are proceeds of crime as defined Under Section 2(1)(u) of the PMLA. This is how the complaint against the Petitioner and others came to be instituted for commission of offences Under Sections 3/4 of PMLA.

3. Heard, Mr.J.Pal, learned counsel for the Petitioner and Mr. G.Agrawal, learned counsel for the ED extensively. In support of their individual contentions, learned counsels for both the parties have filed short written notes of submission by relying upon the number of decisions, which would be discussed if found relevant in subsequent paragraph. While arguing on merit, learned counsel for the Petitioner has also urged the ground of sickness of the Petitioner to grant him bail by extending the benefit of proviso appended to the mandatory provision of Section 45(1) of the PMLA.

4. Undeniably, the provisions as to bail are founded on the philosophy of protecting the most precious individual liberty of a person which is guaranteed under Article 21 of our sacred Constitution, but grant or refusal of bail to a person accused of offence is the discretion of the Court, however, such discretion should not be arbitrary or whimsical. Article 21 of the Constitution of India always reminds that the personal liberty is paramount and sacrosanct and no person shall be deprived of his personal liberty except according to the procedure established by law. On the other hand, the object of bail is primarily to prevent punishment in the form of imprisonment or incarceration of a person pending investigation, inquiry and trial. Deprivation of personal liberty of a person accused of offence without lawful excuse amounts to pre trial punishment. In ***Satender Kumar Antil Vrs. Central Bureau of Investigation and another; (2022) SCC Online SC 825,*** the apex Court has emphasized the personal liberty in the following words:-

> *"Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization. It is the very quintessence of civilized existence and the essential requirements of a modern man."*

5. Adverting to the rival submissions, this Court at the inception engages itself to answer as to whether the stipulation as contained in Section 45(1) of PMLA can be relaxed to grant regular bail to the Petitioner. Undeniably, right to health is an integral part of right to life as guaranteed under Article 21 of the Indian Constitution, but such right to health cannot be refused to a person facing a criminal charge, even such right cannot be denied to a convict found guilty for graver offence. It is indisputably an obligation of the State to provide adequate and effective medical treatment to every person, even to a under trial or convict. Above view get supports from the decision from ***Pt. Parmanananda Katara Vrs. Union of India and others; (1989) 4 SCC 286***, wherein the Apex Court has emphasized the preservation of life,

both of an innocent person or a criminal liable to be punishment in the following words.

> *"....7. There can be no second opinion that preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man. The patient whether he be an innocent person or* ***be a criminal liable to punishment under the laws*** *of the society, it is the obligation of those who are in charge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished. Social laws do not contemplate death by negligence to tantamount to legal punishment."....*

6. Keeping in view the aforesaid principle, this Court right now focuses to the proviso to Section 45(1) of the PMLA which was in fact carved out as an exception to empower and provide discretion to the Special Court to grant bail on humanitarian and medical grounds and, thereby, relaxing the strict compliance of the twin conditions enumerated in Section 45(1) of the PMLA, but the aforesaid discretion is required to be exercised in a judicious manner. The proviso to Section 45(1) of the PMLA confers discretion on the Court to grant bail to a person who is **under the age of 16 years or is a woman or is sick or infirm**, or is accused either on his own or along with other co-accused of money laundering a sum of less than One Crore Rupees without insisting upon them for strict compliance of the twin conditions of Section 45(1) of PMLA.

7. It is, therefore, clear that an accused person who is sick in terms of proviso to Section 45(1) of PMLA can be granted bail without insisting upon him the strict compliance of the conditions enumerated therein, but who can be considered as a sick or what would be the level of sickness that would bring the accused within the parameters of "sick" has not been precisely defined or explained either in the PMLA or in any other act governing the provisions of bail. Normally, "sick" means suffering from disease or illness or unwell or ill and one who needs medication, but mere sickness, such as suffering from fever or illness which can be treated in the jail without any difficulty cannot be considered as "sick" so as to entitle the accused to bail in view of the exception to Section 45(1) of the PMLA. In this regard, this Court considers it apt to refer to the decision in ***Pawan Alias Tamator Vrs. Ram Prakash Pandey and another***; ***(2002) 9 SCC 166***, wherein the Apex Court while setting aside the order of Allahabad High Court granting bail to the accused *inter-alia* on the ground of ailment of the applicant, has held as under:-

> *"The ailment of the accused was not of such a nature as to require him to be released on bail and the accused can always apply to the jail authorities to see that he gets the required treatment."*

8. In ***Kewal Krishnan Kumar Vrs. Enforcement Directorate; (2023) SCC Online Delhi 1547,*** it has been held by High Court of Delhi as under:-

> "25. xxx *when the sickness or infirmity each of such a nature i.e. life threatening and requires medical assistance that cannot be provided in penitentiary hospitals, then the accused should be granted bail under the proviso to Section 45(1) of the PMLA".*

9. In the backdrop of aforesaid discussions and keeping in view the principle governing the field on this issue, this Court is of the considered view that the sickness which are not only life threatening, but also serious and requires special medical attention and which the jail authority cannot provide in the jail would normally be considered as a ground for grant of bail to an accused by relaxing the strict compliance of Section 45(1) of the PMLA by giving benefit of the proviso appended thereto. Granting bail on mere sickness by extending the proviso appended to Section 45(1) of the PMLA will render the aforesaid proviso otiose. However, the aforesaid proviso may be invoked in genuine cases, where the sickness of the Applicant cannot be treated in jail and such sickness would endanger the life of the applicant.

10. Reverting back to the sickness ground of the Petitioner in this case, it appears that on being agreed by learned counsel for both the parties, this Court by an order requested the AIIMS, Bhubaneswar to constitute a medical board to examine the petitioner as to the necessity of "Tracheostomy" for him and in response to such request of this Court, the AIIMS, Bhubaneswar by showing good gesture for cause of justice had constituted a medical board of seven Doctors under the leadership of Professor Manash Ranjan Sahoo which board after examining the Petitioner and on going through the records co-relating the examination test findings of unanimous conclusion that the "Tracheostomy tube" of the Petitioner can be removed after admission at AIIMS, Bhubaneswar Hospital. It, therefore, very clear that the "Tracheostomy tube" cannot be removed in the jail by taking the help of medical expert. Needless to mention here that "Tracheostomy" is a surgically created hole in the windpipe (Trachea) of a person that provides an alternative airway for breathing. Since Tracheostomy is related to alternative airway for breathing, it is definitely a serious ailment and the medical board report clarifying it being not removable without admission in Hospital, the aforesaid sickness of the Petitioner is considered to be the nature of sickness within the meaning of "sick" as provided in first proviso to Section 45(1) of the PMLA. It is, thus, answered that the Petitioner can be released on bail without insisting upon him the strict compliance of the twin conditions of Section 45(1) of the PMLA Act by way of relaxation in terms of the proviso to Section 45(1) of the PMLA Act.

11. Mr. Agrawal, learned counsel for the ED, however, has relied upon the decision in ***Vijay Agrawal Through Parokar Vrs. Directorate of Enforcement; (2022) SCC Online Delhi 4130*** and the judgment of High Court of Kerala in ***BLAPL No. 2166 of 2023 (M. Sivasankar Vrs. Union of India and another)*** to contend that the Petitioner's sickness may not be considered in terms of the aforesaid proviso, but such submission appears to have no direct bearing in the present case inasmuch as the ailment of the accused in ***Vijay Agrawal (Supra)*** was

not in the nature of the ailment of the Petitioner nor was it life threatening nor was the treatment of the applicant not possible in the jail. Further in ***M. Sivasankar (Supra)***, the High Court of Kerala did not give the benefit of proviso to Section 45(1) of the PMLA to the applicant- Sivasankar by holding that Sivasankar did not have any serious illness and in the earlier time also, he was granted bail by relaxing the rigor of Sec. 45(1) of the PMLA on medical ground, but when he was released on bail, he joined duty and also continued in service till his retirement without undergoing any further treatment.

12. According to the complaint of ED, the details of movable property owned and acquired by Jagabandhu(Petitioner) as alleged was for a value of Rs. 17,49,389/- , besides allegation of assisting his wife in layering and placing the proceeds of crime generated by her as a result of criminal activity relating to schedule offence in his account and the Petitioner and his wife were alleged to have an immovable property i.e. residential building with an investment of Rs. 3.39 Crores whose present market value is assessed at 3.64 Crores and this is the main substratum of allegation against the Petitioner and his wife. The complaint under PMLA also refers to another FIR in Nayapalli P.S. FIR No. 646 of 2022, but the said FIR was registered only against co-accused, but not against the present petitioner and charge sheet was only submitted against co-accused Archana Nag. Besides, it is informed by learned counsel for the ED that the complaint in PMLA now stands posted for execution of warrant issued against co-accused, but the petitioner in the meanwhile has been detained in custody since 13.12.2022 being remanded and the case record against the petitioner has not been separated. Further, the petitioner was subjected to custodial interrogation by the ED. What is more significant is that the other reason that might delay the trial in this case is the fact that co-accused is yet to be arrested. In such situation, it is quite uncertain as to when the trial will commence and how much time it would require for completion. In the aforesaid premises and on a cumulative assessment materials placed on record, this Court has no hesitation to consider that the petitioner has successfully demonstrated his case for relaxation of compliance of Section 45(1) of PMLA by way of the benefit of proviso appended to it.

13. Furthermore, while dealing bail application, three factors are mainly required and the accused is required to satisfy the tripod test:- (i) flight risk, (ii) tampering of evidence and (iii) influencing of witnesses. In the circumstance of the case, the petitioner does not appear to be a flight risk and such apprehension can be arrested by directing the petitioner to surrender his Passport if any. Since the complaint has been filed, there appears little apprehension of tampering evidence by the petitioner and the third one i.e. influencing witnesses can be curbed by imposing appropriate conditions. Further, the petitioner has already remained in custody for near about ten months.

14. A cumulative discussions of facts and allegation as noticed above and taking into consideration the pre trial detention of the Petitioner for near about ten months with uncertainty prevailing about execution of NBWA against co-accused affecting the commencement of the trial and, thereby, conclusion of trial being not possible in near future and regard being had to the nature of "sickness" of the Petitioner which allows him to obviate the rigor of compliance of the provision of Section 45(1) of the PMLA by way of relaxation, this Court considers that the Petitioner has made out a case for grant of bail.

15. The bail application of the petitioner stands allowed and the petitioner may be released on bail on furnishing bail bonds in the sum of Rs.2,00,000/-(Rupees Two lakhs) with two local solvent sureties each for the like amount to the satisfaction of the learned Court in seisin of the case on such terms and conditions as deem fit and proper by it with following additional conditions:-

> (*i) The petitioner shall not commit any offence while on bail and he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Officer of ED or tamper with the evidence,*
>
> (*ii) The petitioner shall appear before the Court in seisin of the case on each and every date of posting without fail unless his attendance is dispensed with and* ***in case the Petitioner fails without sufficient cause to appear in the Court in accordance with the terms of the bail, the learned trial Court may proceed against the Petitioner for offence U/S.229-A of IPC in accordance with law,***
>
> *(iii) The petitioner shall deposit his Passport, if any, in the Court in seisin of the case till conclusion of trial, unless he is permitted to take back such Passport to use for specific purpose during the pendency of case.*
>
> *(iv) The Petitioner shall inform the Court as well as the ED as to his place of residence during the trial by providing his mobile number(s), residential address, e-mail, if any, and other documents in support of proof of residence.*
>
> *(v) In case the petitioner misuses the liberty of bail and in order to secure his presence, proclamation U/S.82 of Cr.P.C. is issued and the petitioner fails to appear before the Court on the date fixed in such proclamation, then, the learned trial Court is at liberty to initiate proceeding against him for offence U/S.174-A of the IPC in accordance with law.*
>
> *(vi) The Petitioner shall appear before the ED as and when required and shall cooperate with the ED in the present case.*

It is clarified that the Court in seisin of the case will be at liberty to cancel the bail of the Petitioner without further reference to this Court, if any of the above conditions are violated or a case for cancellation of bail is otherwise made out.

It is, however, made clear that nothing stated in the order shall be construed as a final expression or opinion on the merits of the case and the trial would proceed independently of the observation made above and such observation has been made purely for the purpose of adjudication of the present bail application. Accordingly, the BLAPL stands disposed of.

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2023 (III) ILR-CUT-1256

G. SATAPATHY, J.

CRLMC NO. 3329 OF 2022

BICHITRA PRADHAN & ORS. ……..Petitioners

-V-

STATE OF ORISSA & ANR. ……Opp.Parties

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 173(2) – The role and duty of a magistrate competent to take cognizance of offence on receipt of police report U/s.173(2) of the code – Enumerated. (Para 6)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – The petitioner challenge the order of cognizance passed by the learned JMFC for the offences punishable U/ss. 498-A/294/323/313/328/417 /506/34 of IPC r/w Section 4 of DP Act for the second time in 1CC case – Whether cognizance of offence can be taken twice? – Held, No – Taking cognizance of offence in the protest petition in 1CC case subsequently after taking cognizance of offence on police report in the G.R case is not legally tenable and liable to be set aside.

Case Law Relied on and Referred to :-

1. (2014) 3 SCC 306 : Dharam Pal & Ors.Vs. State of Haryana & Anr.

For Petitioners : Mr. D.K. Sahoo

For Opp.Parties : Mrs. S.R. Sahoo, ASC, Mr. A.Mishra

JUDGMENT Date of Judgment : 11.10.2023

G. SATAPATHY, J.

1. This application U/S. 482 of the code of criminal procedure, 1973 (in short the "Code") by the Petitioners seeks to challenge the order passed on 16.05.2022 by learned JMFC, Rajnagar, Kendrapara in 1CC Case No. 6 of 2022 taking cognizance of offences punishable U/Ss. 498-A/294/323/313/328/417/506/34 of IPC read with Section 4 DP Act.

2. It appears from the record that pursuant to an FIR, Rajnagar PS Case No. 283 of 2021 was registered against the Petitioners for commission of offences punishable U/Ss. 498-A/294/323/307/417/ 506/34 of IPC read with Section 4 DP Act and the matter was accordingly investigated into, resulting in submission of charge-sheet against the Petitioners for offences punishable U/Ss. 498-A/294 /323 /506/ 406/34 of IPC read with Section 4 DP Act. Accordingly, cognizance was taken for aforesaid charge sheet offences and the learned JMFC,Rajnagar, Kendrapara by an order passed on 12.04.2022 in G.R. Case No.331 of 2021 framed charge against the Petitioners for aforesaid offences. While the matter stood thus, on 20.04.2022 the

Informant in Rajnagar PS Case No.283 of 2021 being dissatisfied with the result of the investigation filed a protest petition in 1CC Case No. 6 of 2022 and the learned NGN-cum-JMFC, Rajnagar, Kendrapara recorded the initial statement of the complainant and the statement of three witnesses in the enquiry U/S. 202 Cr.P.C. After being satisfied with the materials placed on record in the complaint together with initial statement and statement of witnesses in 1CC Case No.06 of 2022, the learned NGN-cum-JMFC, Rajnagar, Kendrapara again took cognizance of offences punishable U/Ss.498-A/294/323/313/328/417/506/34 of IPC read with Section 4 DP Act by the impugned order which is under challenge in this CRLMC.

3. Mr. D.K. Sahoo, learned counsel for the Petitioners has submitted that law is very well settled that cognizance of offence can be taken once in a case, but not twice and, thereby, the impugned order passed by the learned NGN-cum-JMFC, Rajnagar, Kendrapara being unsustainable in the eye of law is required to be set aside.

4. On the other hand, Mr. A. Mishra, learned counsel appearing for OP No.2 has submitted that since the Investigating Agency has not investigated the matter properly necessiting the Informant to file the complaint in which the learned NGN-cum-JMFC, Rajnagar, Kendrapara after recording the initial statement of the complainant and statement of witnesses in enquiry U/S. 202 Cr.P.C. has considered the material placed on record in proper prospective and, thereby, taking cognizance of offences which was earlier not taken because of the improper investigation cannot be legally questioned. Mr. Mishra, accordingly, has submitted that there is no question of illegality being committed by the learned NGN-cum-JMFC, Rajnagar, Kendrapara and the impugned order, therefore, cannot be set aside or varied. Mr. Mishra, has, accordingly, prayed to dismiss the CRLMC.

5. Be it noted, the matter was earlier heard by this Court, but today the same was listed under the heading of "to be mentioned" on being mentioned by learned counsel for OP No. 2 to further argue the matter.

6. In criminal jurisprudence, the role and duty of a Magistrate competent to take cognizance of offence on receipt of police report U/S. 173(2) Code of Criminal Procedure, 1973 (In short, "Cr.P.C.") has been objectively outlined by the Cr.P.C since such Magistrate is normally the interface between the investigating wing and the Court at first point of time irrespective of the offence being triable by Magistrate or Court of Session,but not for an offence under Special Act. One or more of the situations detailed below which is not exhaustive, however, may arise before a Magistrate competent to take cognizance of offence on receipt of police report as referred to above,

> *(i) FIR is registered against one or some persons, but police report U/S. 173(2) of Cr.P.C is submitted against one or more of the said persons or other person(s).*
>
> *(ii) FIR is registered against some persons, but final report U/S. 173(2) of Cr.P.C is submitted against those persons.*

(iii) FIR is registered for some offences, but police report U/S. 173(2) of Cr.P.C is submitted for some other offences or lesser offence.

In dealing with aforesaid three situations, the competent Magistrate may have three alternative options, either to agree with the police report or disagree with such report or direct further investigation in the matter, but whatever may be the situations, the informant is entitled to know the result of the investigation in terms of Section 173(2)(ii) of the Cr.P.C. Additionally, in case the Magistrate disagrees with the police report in situation No. (i) or accepts the police report in situation No.(ii) indicated above, and decides not to take cognizance of offence(s) and to drop the proceedings by concluding that no offence is found to have committed upon consideration of the police report or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the FIR as contemplated in situation No.(i), he(Magistrate) is required to give notice to the informant and provide the informant an opportunity of being heard at the time of consideration of the report. However, the Magistrate without giving notice to the informant, may take cognizance of offence(s) and issue process against the accused person(s), whose name(s) commonly find place both in the FIR and police report, if he agrees with it in situation No.(i), but if the Magistrate disagrees with the police report in situation No. (ii) and considers upon consideration of police report that offence has been committed, he may take cognizance of offence(s) without giving notice to the informant. In situation No.(iii), the Magistrate upon consideration of police report may take cognizance of offence(s), which is/are constituted, but in such situation, the informant may take objection against the result of investigation as to the offence in final report by way of protest petition till cognizance is taken or in case cognizance is set aside or varied by higher forum, however, the objection as to the offence(s) by way of protest petition may not be entertained after cognizance is taken since cognizance is taken once in a criminal case.

7. The object of notice as discussed above or the communication of result of investigation in terms of Section 173(2)(ii) of the Cr.P.C. is to afford an opportunity to the informant to take objection to the situations by which the informant may be aggrieved. In a criminal case, the Magistrate is sufficiently empowered by the Cr.P.C. to take cognizance of offence(s) in a situation even after submission of final report in which investigation by police has not found out commission of any offence against the accused person and in such case, the Magistrate is not bound to follow the procedure laid down in Section 200 & 202 of Cr.P.C. which are although available to him, but the Magistrate may act upon the aforesaid provisions on the protest petition of the complainant. Besides, the Magistrate is not debarred to take cognizance of offence(s) on a protest petition merely because he had earlier refused to take cognizance of offence(s) upon receipt of police report, but he may not take cognizance of offence(s), if the informant upon being noticed accepts the results of the investigation. However, in case the informant files a protest petition after acceptance of final report, the Magistrate on being satisfied with the materials

produced before him upon following the provision of Section 200 & 202 of Cr.P.C. may take cognizance of offence(s) (***AIR 2002 SC 483***).

8. Admittedly, two cognizance orders have been passed by the same Court on different dates in the present case. Firstly, the learned NGN-cum-JMFC, Rajnagar, Kendrapara on receipt of charge-sheet in Rajnagar PS Case No. 283 of 2021 had taken cognizance of offences punishable U/Ss. 498-A/294/323/506/406/34 of IPC read with Section 4 DP Act by way of an order passed on 15.12.2021 in G.R. Case No. 331 of 2021 and on 12.04.2022 charge was framed against the Petitioners for said offences by the same Court. Pursuant to framing of charge and being dissatisfied with the result of the investigation, the Informant filed protest petition in 1CC Case No. 6 of 2022 in which the learned JMFC vide his order passed on 16.05.2022 again took cognizance of the offences punishable U/Ss. 498-A/ 294/ 323/ 313/ 328/ 417/506/34 of IPC read with Section 4 DP Act and tagged the GR Case record No. 331 of 2021 with the case record in 1CC Case No. 06 of 2022 and directed the complainant to file requisites for issuance of process against the Petitioners, out of whom Mitanjali Pradhan, Sujata Pradhan and Rabindra Pradhan, whose names were included in the FIR, but they were not charge sheeted in G.R. Case No. 331 of 2021. It is also strange that the learned NGN-cum-JMFC, Rajnagar although directed the complainant by the impugned order in a cryptic way to file requisites for issuance of processes against said accused persons without mentioning their names, but the same creates confusion since earlier charge was framed against three accused persons. Neither the complainant-OP No.2 challenged the earlier order taking cognizance of offence in any forum nor did produce any materials in the present case to indicate that the informant was not noticed from the Court while not proceeding against the three persons named in the FIR, but not included in Col. No.2 of police report U/S. 173(2)(i)(d) of the Cr.P.C.

9. Law is fairly well settled that cognizance of offence can be taken once in a case, but it is not permissible to take cognizance of offences for multiple times and the best stage to add or substract the offences is at the time of consideration of charge. Besides, Section 216 of Cr.P.C. provides for alteration or addition of charge at any time before pronouncement of judgment, but in this case, the learned NGN-cum-JMFC, Rajnagar, Kendrapara misapplied the law by taking cognizance of offence in the protest petition in ICC No. 06 of 2022 subsequently after taking cognizance of offence on police report in G.R. Case No. 331 of 2021 in the same case. Whether taking cognizance of offence for second time without the same being set aside or varied was settled by the Apex Court in the decision in ***Dharam Pal & Others Vrs. State Of Haryana & Another; (2014) 3 SCC 306***, wherein a Constitutional Bench of five judges of the Apex Court has held as under:-

> *"39. Xxx xxx It is well settled that* ***cognizance*** *of an offence can only be* ***taken once****. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of* ***taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law****. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session". Xxx xxx*

10. In the aforesaid backdrops,especially when cognizance has been taken twice in this case, the cognizance of offence taken by the Magistrate subsequently is not legally tenable and liable to be set aside. It is, however, open to the Court to consider and frame charge against the accused persons after taking into consideration the materials placed on record and even charge can be altered or modified at any time before pronouncement of judgment. In this case, the learned NGN-cum-JMFC, Rajnagar, Kendrapara took cognizance of offence second time in the same case on a protest petition filed by the Informant, but the complaint was filed subsequent to framing of charge against the Petitioner Nos. 1 to 3 and had there been any materials justifying the commission of offences of which cognizance was not taken, the learned NGN-cum-JMFC, Rajnagar, Kendrapara would have resorted to Section 216 of Cr.P.C. for alteration of the charge, but he could not have taken cognizance of offence twice. Further, after framing of charge, there is no provision in the Code to add accused person till the stage of Section 319 of the Code, but the learned NGN-cum-JMFC, Rajnagar has added petitioner Nos. 3 to 6 as an accused in the case after framing of charge which is not permissible in the eye of law inasmuch as petitioner Nos. 3 to 6 although named in the FIR, but not charge sheeted, and upon receipt of charge sheet and agreeing to it, the learned NGN-cum-JMFC, Rajnagar after applying his mind had taken cognizance of offences and issued processes only against petitioner Nos. 1 to 3. Hence, the impugned order passed on 16.05.202 taking cognizance of offence subsequently being unsustainable in the eye of law is hereby set aside.

11. In the result, the CRLMC stands allowed on contest to the extent indicated above, but in the circumstance there no order as to costs.

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2023 (III) ILR-CUT-1260

CHITTARANJAN DASH, J.

CRLMC NO. 4571 OF 2023

BHAGIRATHI DAS & ANR. .....Petitioners

-V-

STATE OF ODISHA .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – The petitioner prayed for quashing of the proceeding on the ground that all the co-accused have been acquitted from the charges for the offences U/ss. 341/323/294/427/506/321 of IPC – Whether acquittal of co-accused should consider as a ground to quash the proceeding? – Held, No – Mere acquittal of large number of co-accused does not *per se* entitle

others to be acquitted – The Court has duty in such cases to separate grain from chaff. (Paras 6-7)

Case Laws Relied on and Referred to :-

1. 2004 SCC (Crl.) 58 : In Megha Singh Vs. State of Punjab.
2. AIR 2004 SC 1169 : Gorle Section Naidu Vs. State of A.P.

For Petitioners : Mr. Debasis Panigrahi

For Opp.Party : Mr. Shashanka Patra, ASC

ORDER Date of Order : 02.11.2023

CHITTARANJAN DASH, J.

1. Heard learned counsel for the Petitioners and the State.

2. By means of the present application, the Petitioner seeks indulgence of this Court praying to quash the proceeding in G.R. Case No.1520 of 1999 in Trial No.576 of 2009 pending in the court of the learned Nyayadhikari,Gramya Nyayalaya,Puri.

3. The background facts of the case are that, on 28.11.1999 at about 1.00 AM while the informant was returning to Puri in his Truck bearing Registration No. OR-X-6711, the present Petitioners along with their associates detained the Truck of the informant at Satyabadi and forcibly asked the informant to give lift to them upto Puri in his Truck. When the informant denied to that, the accused Petitioners abused him in filthy languages and also assaulted him by means of fist blows and forcibly travelled in that Truck. On the way near Bira-Narsinghpur the accused persons asked the informant to stop the Truck and when the informant did not stop the vehicle, the accused persons assaulted the informant as well as the Helper of the vehicle and damaged the vehicle. On the basis of the F.I.R. lodged by the informant-injured, Chandanpur P.S. Case No.119 of 1999 was registered and investigation was commenced. After completion of the investigation, the police submitted charge-sheet on 30.11.1999 against the present Petitioners along with others for the offences under Sections 341/323/294/427/506/34, I.P.C.

4. While the matter stood to trial, the case was split up against the present Petitioners and the trial commenced against the co-accused persons namely Nabal Kishor Kedia, Narasingh Patra and Nandi Ranjay Mohapatra. The learned Nyayadhikari, Gramya Nyayalaya, Puri vide judgment dated 01.02.2018 acquitted the above-named co-accused persons from all the charges as alleged.

5. Learned counsel for the Petitioners, inter alia, submits that, during the trial in the aforesaid G.R. Case No.1520 of 1999, it is observed by the learned court in the said judgment that P.W.2, who is the informant in the case, admitted that he is not aware of the contents of the F.I.R., and basing upon that the said statement, the learned court below found the prosecution to have failed to prove its case.

6. Upon perusal of the impugned judgment dated 01.02.2018 it is found that the learned court below did not analyze / appreciate the evidence of the informant-injured in toto but in piece meal thereby seems to have reached a different conclusion. In his evidence the informant/injured has categorically stated in detail about the manner in which the incident occurred, the assault made to him and the injuries sustained, the damage caused to the vehicle. The medical officer has well proved the injury on the injured in consonance with the version of the injured that goes unchallenged. Consequently, it is difficult to accept the submission made by the learned counsel for the Petitioners that by such observation of the learned court below a similar view would also be expected in favour of the Petitioners. In ***Megha Singh v. State of Punjab 2004 SCC (Crl.) 58*** the Apex Court held that the acquittal of the co-accused does not by itself entitle the other accused in the same case to acquittal as a single significant detail may alter the entire aspect. Further, in ***Gorle Section Naidu v. State of A.P. AIR 2004 SC 1169*** the Apex Court referring to Section 3 of the Evidence Act and credibility of evidence, held that mere ***acquittal*** of large number of ***co-accused*** does not per se entitle others to ***acquittal***. The court has duty in suit cases to separate grain from chaff. The Apex court further held as follows:

> "(vi) On the basis of materials placed before the High Court in proceedings under Section 482 of the Code of Criminal Procedure (which materials can be placed before the court in appropriate proceedings before the subordinate courts) such extraordinary inherent powers under Section 482 of the Code of Criminal Procedure cannot normally be invoked, unless such materials are of an unimpeachable nature which can be translated into legal evidence in the course of trial.
>
> (vii) The judgment of **acquittal** of a **co-accused** in a criminal trial is not admissible under Sections 40 to 43 of the Evidence Act to bar the subsequent trial of the absconding **co-accused** and cannot hence be reckoned as a relevant document while considering the prayer to quash the proceedings under Section 482 Cr.P.C. Such judgments will be admissible only to show as to who were the parties in the earlier proceedings or the factum of acquittal.
>
> (ix) The fact that the **co-accused** have secured **acquittal** in the trial against them in the absence of absconding **co-accused** cannot by itself be reckoned as a relevant circumstance while considering invocation of the powers under Section 482 of the Code of Criminal Procedure.
>
> (x) A judgment not inter parties cannot justify the invocation of the doctrine of issue estoppel under the Indian law at present.
>
> (xi) Conscious of the above general principles, the High Court has to consider in each case whether the powers under Section 482 of the Code of Criminal Procedure deserve to be invoked. Judicial wisdom, sagacity, sobriety and circumspection have to be pressed into service to identify that rare and exceptional case where invocation of the extraordinary inherent jurisdiction is warranted to bring about premature termination of proceedings subject of course to the general principles narrated above."

7. Above being the position of law, considering the facts as discussed above, this Court finds no merit in the application of the Petitioners, which is accordingly rejected. Considering the age of the case, the Petitioners are directed to surrender before the court in seisin over the matter and move a motion for bail, in which event the court concerned shall pass appropriate order in admitting the Petitioners to bail, if any and further the trial in accordance with law.

8. The CRLMC stands disposed of accordingly.

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2023 (III) ILR-CUT-1263

SIBO SANKAR MISHRA, J.

W.P.(C) NO. 21793 OF 2021

NIHAR RANJAN CHOUDHURY .....Petitioner

-V-

STATE OF ODISHA & ANR. .....Opp.Parties

SERVICE LAW – Scope of Promotion during pendency of Vigilance Proceeding – The DPC has recommended the case of the petitioner for the promotion since 2014 which has been kept in sealed cover – The vigilance proceeding was initiated in the year 2001 – The proceeding is moving in the snail pace nearly about 25 years – Effect of – Held,for a delinquent /government servant impeding such delay trial is indeed a case of double jeopardy – State/Opp.Parties are directed to give promotion to the petitioner from the date of his juniors and batch mates got such promotion subject to the condition that in the event the petitioner is convicted in the impeding criminal case, he shall be reverted back down the hierarchy. (Paras 8-10)

Case Laws Relied on and Referred to :-

1. (1991) 4 SCC 109 : Union of India & Ors. Vs. K.V. Jankiraman & Ors.
2. W.P.(MD) No. 21879 of 2019 (D.O.J -11.11.2019) Jaber Sadiq Vs. The District Collector, Dindigul District
3. (1995) 2 SCC 570 : State of Punjab & Ors. Vs. Chaman Lal Goyal.

For Petitioner : Mr. S. K. Das, Mr. P. K. Behera, Mr. N. Jena

For Opp. Parties : Mr. A. K. Nanda, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 30.10.2023 : Date of Judgment : 06.11.2023

SIBO SANKAR MISHRA, J.

1. The Petitioner has filed the present Writ Petition under Article 226 of the Constitution of India *inter alia* seeking writ against the Opposite Parties to give promotion to him to the post of Deputy Executive Engineer, Executive Engineer and

Superintendent Engineer from the date of his immediate juniors got such promotion and to grant him all consequential service benefits.The Petitioner is facing a criminal prosecution initiated in the year 2001, therefore, although DPC has recommended his case for promotion but sealed cover procedure has been adopted owing to the pendency of the criminal prosecution against him. There is no disciplinary proceeding initiated by the department against him.

2. The said Writ Petition indeed was heard at length on 05.08.2021. The Coordinate Bench of this Court after hearing both parties was pleased to allow the Writ Petition. Relevant is to reproduce the order dated 05.08.2021 passed by learned Single Judge :-

> "Heard learned counsel for the parties.
>
> The petitioner has filed this application seeking direction to the opposite parties to give him promotion to the post of Deputy Executive Engineer from 30.06.2014, Executive Engineer from 03.09.2014 and Superintending Engineer from 16.07.2021, i.e. the date from which his immediate juniors got such promotions, and to grant all consequential service and financial benefits including further promotion within a stipulated time.
>
> Moot question involves if a promotion of employee can be withheld for indefinite period on the premises of pendency of vigilance proceeding over a period of decades.
>
> This Court considering such situation has already settled the position of law keeping the sealed cover promotion aspect in view of pendency of the Disciplinary Proceeding and/or Vigilance Proceeding for decades becomes bad.
>
> Fact involving the case reveals that there is no disciplinary proceeding pending against the petitioner except the vigilance proceeding pending in the court of Special Judge, Vigilance, Cuttack in T.R. Case No. 333 of 2007 arising out of Cuttack Vigilance P.S. Case No. 20 of 2001. Involving the allegation against the petitioner, it appears the Vigilance Proceeding initiated in the year 2001, but charge-sheet involving the Vigilance case was submitted in the year 2007. However the said vigilance case is yet to be disposed of. Pleading also further made clear that no Disciplinary Proceeding initiated against the petitioner. In this background of case an allegation is made that promotion of the petitioner taking effect in the year 2014 has been kept in sealed cover only on the premises that a vigilance proceeding involving the petitioner is pending since 2001. For the settled position of law, this Court in disposal of the writ petition observes, petitioner cannot suffer for the long pendency of the vigilance proceeding. It is also not known when the Vigilance Proceeding initiated in the year 2001 will come to end. It is keeping in this view, this Court in disposal of the writ petition directs the Principal Secretary to Govt. of Odisha, Water Resources Department, Bhubaneswar-O.P. No.1 to give promotion to the petitioner to the rank of Deputy Executive Engineer (Civil) , Executive Engineer(Civil) and Superintending Engineer (Civil) from the date of his juniors and batchmates got such promotions. However the promotions of the petitioner as per direction of this Court shall be subject to the ultimate outcome in the Vigilance Proceeding. Further it is also clarified that the promotion given to the petitioner to different ranks shall not confer equity in the event, he will ultimately lose the Vigilance Proceeding. Entire exercise shall be completed within four weeks from the

> date of communication of this direction. It is also clarified that upon promotion, petitioner shall also be entitled to all consequential benefits.
>
> Writ the above observation, the writ petition thus stands disposed of.
>
> Issue urgent certified copy as per rules."

3. The Opposite Parties preferred intra-court Appeal against the judgment of the Coordinate Bench dated 05.08.2021 being W.A. No.402 of 2023 contending therein that they were not given opportunity to file counter and contest the writ petition. The Division Bench of this Court was pleased to allow the Writ Appeal,set aside the order of the learned Single Judge and remanded the matter back to the learned Single Judge to decide afresh by giving opportunity to the Opposite Parties to file counter affidavit. The Division Bench also was pleased to fix time line for filing reply by the Opposite Party by 01.05.2023 and allowed the Writ Petitioner to file rejoinder before 15.05.2023. Relevant is to quote the order of the Division Bench:-

> "On the short ground that the impugned order dated 5th August, 2021 in W.P.(C) No.21793 of 2021 passed on the very first day of the hearing without opportunity to the State Counsel to file its reply to the writ petition, the impugned order is hereby set aside and the matter is remanded to the roster Bench of the learned Single Judge where it will be listed on 15th May, 2023. The State will file its para-wise reply to the writ petition by 1st May, 2023 and the rejoinder will be filed by the Writ Petitioner before 15th May, 2023. No further time will be granted for that purpose.
>
> The learned Single Judge is requested to proceed with the writ petition on merits and dispose it of as expeditiously as possible.
>
> The status quo as of today shall be maintained till disposal of the writ petition.
> The writ appeal is disposed of in the above terms."

After relegation, the matter was heard by the learned Single Judge on 15.05.2023, 05.07.2023, 12.09.2023 and lastly on 30.10.2023. Despite a time bound direction given by the Division Bench to file the counter, the Opposite Parties further avail more than four opportunities to file the counter affidavit, but preferred not to file the same, hence the matter was heard.

4. Heard Mr. S.K. Das, learned counsel for the Petitioner and Mr. A. K. Nanda, learned Additional Government Advocate for the Opposite Parties.

5. Mr. Nanda, learned Additional Government Advocate vehemently opposes the prayer made by the Petitioner and contended that no ad-hoc promotion pending vigilance proceeding could be given to the Petitioner in view of the judgment of the Division Bench of this Court passed on 11.05.2023 in W.A.No.805 of 2021 and batch of Writ Appeals.

6. Per contra, Mr. S.K. Das, learned counsel for the Petitioner relied upon the judgment of the Division Bench of this Court passed on 06.05.2022 in W.P.(C) No.18500 of 2015, which squarely covers his case. In the said case as well, pending vigilance proceedings although the DPC had recommended the promotion of the

Petitioner, but the same was withheld keeping the result in the sealed cover. Therefore, the Division Bench of this Court had directed to open the sealed cover and grant promotion accordingly.

7. The judgment relied upon by learned counsel for the State is clearly distinguishable from the fact of the present case. In those cases the Petitioners appears to have contended that in the guise of pendency of the criminal proceeding in the vigilance court, no promotion is being granted to them. Therefore, the Petitioners in those cases urged that at least they should have been granted adhoc promotion awaiting the outcome of the criminal prosecution. The Division Bench thus held that there is no legal basis to support the claim of ad-hoc promotion and accordingly disallowed the prayer of the Petitioners in those batch of cases. But in the instant case the factual scenario is quite distinguishable from the facts of those cases. In the present case, the Petitioner is claiming promotion for which DPC has already recommended his case for promotion, however, it's not given effect to and sealed cover procedure has been adopted owing to the pendency of the criminal proceedings.

An employee has no right to promotion. He has only a right to be considered for promotion. Having considered for the promotion by DPC, the result could not have been withheld awaiting the conclusion of disciplinary proceeding/criminal prosecution indefinitely. In this regard the Department of Personnel & Training (DO & PT), the Ministry of Personnel, Public Grievances and Pensions Government of India have issued updated guidelines on 30.08.2022 advising the methodology to be followed in the cases where sealed cover procedure have been adopted and promotion of the Government employees have .been withheld because of the pendency of disciplinary proceeding/criminal prosecution, which reads as under:-

> "SIX MONTHLY REVIEW OF "SEALED COVER" CASES
>
> 4. It is necessary to ensure that the disciplinary case/criminal prosecution instituted against any Government servant is not unduly prolonged and all efforts to finalize expeditiously the proceedings should be taken so that the need for keeping the case of a Government servant in a sealed cover is limited to the barest minimum. It has, therefore, been decided that the appointing authorities concerned should review comprehensively the cases of Government servants, whose suitability for promotion to a higher grade has been kept in a sealed cover on the expiry of 6 months from the date of convening the first Departmental Promotion Committee which had adjudged his suitability and kept its findings in the sealed cover. Such a review should be done subsequently also every six months.The review should, inter alia, cover the progress made in the disciplinary proceedings/criminal prosecution and the further measures to be taken to expedite their completion."

In the present case since 2014, the DPC has recommended the case of the Petitioner for promotion, which has been kept in the sealed cover without even once subjecting the same to review. This is nothing but adding insult to the injury.

8. Moreover, in the instant case, the vigilance proceeding was initiated way back in the year 2001 being Vigilance P.S. Case No.20 of 2001 corresponding T.R. Case No.333 of 2007. Although charge-sheet was filed, but the trial of the proceeding is moving in the snail's pace since last about 25 years. The prayer of the Petitioner regarding the consideration for promotion is his time bound right and delay at the instance of the State would cause serious deprival from his rightful claim.

Unexplained prolongation of criminal trial violates the constitutional rights of an accused and denial of statutory or any other rights, for that matter, for a delinquent officer/government servant impending such delayed trial is indeed a case of double jeopardy.

9. Faintly matching the facts of the present case, the Hon'ble Supreme Court while dealing with the issues in subject has been pleased to held in the matter of ***Union of India and others Vrs. K.V. Jankiraman and others reported in (1991) 4 SCC 109*** that irrespective of pendency of criminal cases, the Petitioner has continued to serve and mere pendency of criminal case cannot be taken as ground to delay the promotion to the Petitioner nor the Competent Authority can withheld the recommendation of the Petitioner indefinitely on the ground of adopting the sealed cover procedure during the pendency of criminal proceedings.

Confronted with exactly a similar situation the Madras High Court in its judgment dated 11.11.2019 in W. P.(MD) No.21879 of 2019 in the case of ***Jaber Sadiq vs. The District Collector, Dindigul District*** relied upon the judgment of the Hon'ble Supreme Court reported in ***(1995) 2 SCC 570*** in the case of ***State of Punjab and others vs. Chaman Lal Goyal*** and has been pleased to rule as under:-

> "7. From the materials on record, it is seen that the petitioner was arrested on 07.04.2015 by the Inspector of Police, Vigilance and Anti-Corruption, Dindigul and final report is also filed in the criminal case. In addition to that, the charge memo dated 28.08.2017 was issued to the petitioner and disciplinary proceedings are pending from that date onwards. From the above facts, it is seen that for the alleged offence committed by the petitioner on 07.04.2015, both the criminal case as well as the disciplinary proceedings are pending against the petitioner and the petitioner is deferring promotion, in view of the pendency of these two proceedings. This issue was already considered by the Full Bench of this Court in the judgment reported in 2011 (3) CTC 129 W.P.(MD) No.21879 of 2019 (Deputy Inspector General of Police Vs. P.Rani), wherein, it has been held that when criminal proceedings and disciplinary proceedings are pending for long time, an employee can be promoted, after getting an affidavit of undertaking to the effect that in the event of his failure in the criminal case, he can be reverted to the lower post. Again, this issue was considered by this Court, by the order dated 19.08.2016, in W.P.No.28925 of 2016, after considering the judgment of the Full Bench of this Court referred to above and the judgment of the Hon'ble Apex Court reported in 1995 (2) SCC 570 (State of Punjab and others Vs. Chaman Lal Goyal).
>
> 8. The judgments referred to above are squarely applicable to the facts of the present case. The petitioner cannot be denied promotion, in view of the pendency of the criminal case and disciplinary proceedings.

> 9. For the above reason, the impugned order of the respondent, dated 03.07.2019, is set aside. The respondent is directed to include the name of the petitioner in the panel for promotion to the post of Block Development Officer for the year in W.P.(MD) No.21879 of 2019 2019-2020, if he is otherwise eligible and on obtaining an affidavit of undertaking from the petitioner that he can be reverted back to the post of Deputy Block Development Officer, if any adverse orders are passed against him in the criminal case as well as in the disciplinary proceedings. The respondent is also directed to pass orders, within a period of four weeks from the date of receipt of a copy of this order."

In ***Chaman Lal Goyal*** (supra), while observing that the principles enunciated therein were broadly applicable to the pleas of delay both in criminal prosecution proceedings and the disciplinary proceedings alike, in Para-11 inter alia held:-

> "11. The principles to be borne in mind in this behalf have been set out by a Constitution Bench of this Court in A.R.Antulay v. R.S.Nayak & Anr. (1992 (1) S.C.C.225).Though the said case pertained to criminal prosecution, the principles enunciated therein are broadly applicable to a plea of delay in taking the disciplinary proceedings as well. In paragraph 86 of the judgment, this court mentioned the propositions emerging from the several decisions considered therein and observed that "ultimately the court has to balance and weigh the several relevant factors - balancing test or balancing process - and determine in each case whether the right to speedy trial has been denied in a given case". It has also been held that, ordinarily speaking, where the court comes to the conclusion that right to speedy trial of the accused has been infringed, the charges, or the conviction, as the case may be, will be quashed. At the same time, it has been observed that that is not the only course open to the court and that in a given case, the nature of the offence and other circumstances may be such that quashing of the proceedings may not be in the interest of Justice. In such a case, it has been observed, it is open to the court to make such other appropriate order as it finds just and equitable in the circumstance of the case.

10. Therefore, for the foregoing reasons I feel it appropriate to allow the Writ Petition directing the State-Opposite Parties to give promotion to the Petitioner to the rank of the Deputy Executive Engineer (Civil), Executive Engineer (Civil) and Superintendent Engineer (Civil) from the date of his juniors and batch-mates got such promotion subject to the condition that in the event the Petitioner is convicted in the impeding criminal case, he shall be reverted back down the hierarchy. It is accordingly, made clear that the promotion of the Petitioner would be subject to the outcome of the vigilance proceeding, which is pending in the Court of the Special Judge (Vigilance), Cuttack in T.R. Case No.333 of 2007.

11. With the above direction, the Writ Petition stands disposed of.

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2023 (III) ILR-CUT-1269

SIBO SANKAR MISHRA, J.

W.P.(C) NO. 33496 OF 2021

SURATH CHANDRA MALLICK …….Petitioner

-V-

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

SERVICE LAW – Departmental Proceeding – Delay in initiation – The department did not initiate the proceeding against the petitioner for ten years rather granted three promotions – All of a sudden issued memo, just 14 days before his name was considered for promotion to the IAS cadre – Whether such initiation of Departmental Proceeding is sustainable under law ? – Held, No – It is not only hit by delay and latches but also poised with mala fide intention. (Para 15)

Case Laws Relied on and Referred to :-

1. AIR 1990 SC 1308 : State of Madhya Pradesh Vs. Bani Singh & Anr.
2. 2006 (5) SCC 88 : M. Bijlani Vs. Union of India.

For the Petitioner : Mr. Sameer Kumar Das
For the Opp.Parties : Mr. A.K. Sharma, AGA

JUDGMENT Date of Hearing:30.10.2023 : Date of Judgment:06.11.2023

SIBO SANKAR MISHRA, J.

1. In the instant petition filed under Article 226 of the Constitution of India, the petitioner explores for the following reliefs:

> *"to quash the departmental proceeding instituted against the petitioner in Office Memorandum No.26999/Gen. dated 03.12.2020 of the opposite party No.1 under Annexure-6 and direct the opposite party No.1 to grant the consequential service benefits to the petitioner within a stipulated period as deem fit and proper."*

2. Meanwhile, the petitioner had also approached the learned Central Administrative Tribunal, Cuttack Bench, Cuttack by filing Original Application bearing O.A.No.260/00344 of 2021, inter alia, praying for direction to the respondents/opposite parties to appoint him on promotion to the IAS cadre from the date of his batch-mates have been given such promotion i.e. from 26.03.2021 with all consequential service and financial benefits.

Learned Central Administrative Tribunal, Cuttack Bench, Cuttack vide its judgment dated 31.01.2023 has been pleased to allow the original application of the petitioner and issued the following operative direction.

> *"6. In the peculiar facts and circumstances of the matter, the respondents are directed to notify the name of the applicant for appointment on promotion by way of Regularion-1955 against the Select List- 2019 with effect from the date other 19 SCS Officers were appointed on promotion to IAS cadre vide Notification dated 26.03.2021 with* ***all consequential service and financial benefits."***

3. In view of the foregoing, the petitioner is confining this writ petition to a singular prayer regarding quashment of the departmental proceeding initiated against him vide Office Memorandum No.26999/Gen. dated 03.12.2020 by the opposite parties under Annexure-6 to the writ petition.

4. The facts as averred in the petition under the shade and cover of which the aforementioned relief is being claimed are that the petitioner being an Scheduled Caste candidate selected for appointment to OAS-II cadre in the Government on 01.07.1989. He was posted at different places in different capacities and earned unblemished track record.Owing to his unblemished service record, he was also promoted to the OAS grade-A and then super time scale and superior administrative grade. Eventually he was promoted to OAS (Special Secretary) grade in the Government on 15.07.2020. The petitioner was considered for promotion to the cadre of IAS. The petitioner's name was recommended for promotion to the IAS cadre from Odisha Civil Service by the UPSC, as the petitioner was found eligible and selected for the said promotion in the IAS cadre in the year 2019. The said recommendation was made on 17.12.2020. The relevant portion of the recommendation of the selection committee constituted under Regulation-3 of the Indian Administrative Service (Appointment by Promotion) Regulation, 1955 dated 17.12.2020 is reproduced below:

> *"9. On the basis of the above assessment, the Committee selected the Officers whose names are indicated below, as suitable for promotion to the Indian Administrative Service of Odisha Cadre and placed them in the following order:*

Sl. No.	Name (S/Shri/Smt.)	Date of Birth
1	Ashok Kumar Naik	*28.03.1962*
2	Ganesh Chandra Patra	20.07.1963
3	Sasadhara Nayak	21.01.1965
4	Bikash Chandra Mohapatra	15.05.1963
5	Biswa Mohan Ray	03.03.1963
6	Bratati Harichandan	19.11.1963
7	Manoj Kumar Pattnaik	02.07.1963
8	**Surath Chandra Mallic (Petitioner in the present writ petition)**	20.04.1963
9	Sadananda Nayak	05.05.1963
10	Mary Lakra	14.08.1964
11	Dayanidhi Nayak	21.06.1963
12	Srinibas Behera	07.05.1964
13	Yudhisthir Nayak	14.06.1964
14	Udaya Narayan Das	24.05.1965
15	Sujata Sahoo	30.06.1964
16	Gangadhar Sahoo	08.06.1963
17	Aswini Kumar Mishra	06.10.1964
18	Ramasis Hazra	15.01.1963
19	Susanta Kumar Mohanty	15.07.1963
20	Jyoti Prakash Das	08.07.1965
21	Sitansu Kumar Rout	21.04.1963
22	Krushna Prasad Pati	13.02.1963

> *The names at S. Nos.1, 5 and 8 have been included in the list provisionally subject to clearance in the disciplinary proceedings pending against them."*

5. Although 22 Officers were recommended to be promoted to the IAS cadre, but only 19 out of them were given promotion vide Notification dated 26.03.2021. The case of the petitioner was dropped only because fourteen days prior to the recommendation for promotion made by the opposite party i.e. on 03.12.2020 a memo was issued to the petitioner for initiation of a departmental proceeding. The recitation of article of charges indicates that the alleged irregularity committed by the petitioner way back in 2010 became the cause for initiation of the proceeding. For ready reference, the imputation of misconduct reflected in article of charges dated 03.12.2020 is reproduced below:

> *"That Sri Suratha Chandra Mallick during his service period from 01.07.1989 to 12.10.2010, neither obtained prior permission nor intimated to his disciplinary authority regarding acquisition/ purchase of valuable properties both immovable/movable in his name and in the name of his family members, details of which are furnished below. Such act violated Rule-21(1) & (3) of OGS Conduct Rule, 1959.*

Sl.	Description of Property	Value in Rs.
1	Purchased a piece of land vide Plot No.1122,Khata No.486, Mouza- Ahiyas under JajpurTahasil in the year 1994	7,000.00
2	Purchased a piecce of land vide Plot No.272,Khata No.09, Mouza- Dubagadia, PS- Tahasil,Dharmasala, Dist.- Jajpur in the year 1997	9,000.00
3	One double box pattern bed purchased in the year 2009.	15,000.00
4	One LG Flat TV purchased in the year 2004	20,000.00
5	5 One LG Washing Mahine purchased in the year 2008.	12,000.00
6	One double door LG Fridge purchased in the year 2009.	10,000.00
7	One Inverter purchased in the year 1995	10,000.00
8	One box pattern double bed cut purchased in the year 2005	20,000.00

> *That delinquent officer Sri Suratha Chandra Mallick, OAS did not submit his Property Statement as required under Rule-21(4) of O.G.S. Conduct Rule, 1959 regarding acquisition of properties in his name or in the name of his family members during his service period from 01.07.1989 to 12.10.2010. Such act reveals his lack of honesty and integrity. Rather he submitted his property statement and revised property statement showing acquisition of immovable & movable properties vide letter No.218 dated 25.01.2012 and letter No.378 dated 08.02.2012 after his house search on 12.10.2010, which were received on 01.02.2012 & 25.02.2012 respectively in G.A. Department, Government of Odisha, Bhubaneswar.*
>
> *As such, lapses, omissions and commissions on the part of Sri Suratha Chandra Mallick, OAS discussed above, constitute his misconduct and violation of Rule-3 OGS Conduct Rules, 1959."*

6. It is contended by learned counsel for the petitioner that the imputation of charges is completely false and manufactured one, because the petitioner has been submitting his property statement regularly from his date of entering into the service till 12.10.2010 when the search and seizure was conducted by the Vigilance Department.

7. It is borne out of the record that lastly on 15.09.2009, the petitioner had indeed submitted his property statement for the period from 01.07.1989 till date. However, on 12.10.2010, the Vigilance Department made a house search of the petitioner and registered an F.I.R. being Cuttack Vigilance P.S. Case No.55 of 2011 corresponding to VGR Case No.55 of 2011. Surprisingly albeit the criminal law was set in motion against the petitioner but till date no charge sheet has been filed by the Vigilance Department, hence there is no question of commencement of trial.

8. On the self-same allegations, a departmental proceeding has been initiated after more than a decade and just 14 days before the name of the petitioner was considered for promotion to the IAS cadre. After registration of the Vigilance Case pursuant to the raid conducted on 12.10.2010, three promotions were given to the petitioner namely from OAS Grade-A Senior Branch to OAS (super time scale) in the Government on 02.08.2012, from OAS (super time scale) grade to Superior Administrative Grade in Government on 01.07.2017 and from OAS (SAG) grade to OAS (Special Secretary) grade in the Government on 15.07.2020. However, when the next promotion to the IAS cadre was scheduled, all of a sudden, a departmental proceeding was initiated for the irregularities alleged to have been committed ten years back.

9. On the basis of the aforementioned factual scenario, the petitioner seeks quashment of the departmental proceeding.

10. The petitioner has demitted the office on attaining the age of superannuation on 30th April, 2023. The petitioner has also succeeded before the learned Central Administrative Tribunal. Therefore, notional promotion to the cadre of IAS under Regulation 55 has been directed to be granted and the consequential service and financial benefits has been restored. The only grievance left to be addressed in the writ petition is the tenability of the long pending departmental proceeding.

11. Mr. Sameer Kumar Das, learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in ***State of Madhya Pradesh vs. Bani Singh and another****, reported in* ***AIR 1990 SC 1308*** wherein, it has been held by the Hon'ble Supreme Court that the long pending departmental proceeding is liable to be quashed because of the unexplained delay and latches on the part of the department to conclude the same. Learned counsel for the petitioner also relied upon the judgment of the Hon'ble Supreme Court in ***M.Bijlani vs. Union of India reported in 2006 (5) SCC 88*** to buttress his argument regarding termination of long pending departmental proceeding.

12. Learned counsel for the State opposed the prayer made by the petitioner and contended that as per Rule-21 of the Odisha Government Servant Conduct Rules, 1959, every Government Officer is bound to submit the property statement triennially. Failing to submit the property statement may entail the erring officer to a major penalty of dismissal from service. He has strongly emphasized sub-rule(4) of

Rule-21 of the Odisha Government Servant Conduct Rules, 1959 which reads as under:

> *"21(4) Every Government servant is required to make a true and complete declaration before the end of January at an interval of every three years of all his assets movables and immovable and the value thereof as on the 31st December of the previous year in the form given in the Appendix 'A'. The declaration shall contain detailed particulars of the officer's assets and must include and specify the assets which are held by or in the name of his wife, children, other dependants or benamidars. The declaration shall be written by the officer in his own hand and submitted in a sealed cover to the authority as directed by the Government and such authority shall be responsible for its careful preservations. [It shall be obligatory on the part of the Government servants to submit the declarations in every three years and in the event of their failure to do so in time they shall be liable to disciplinary action. An officer making a declaration found to be materially incomplete, misleading or false shall be liable for disciplinary action and even for dismissal from Government service.]"*

13. I have perused the materials on record. The undisputed facts borne out of the record indicates that on 15.09.2009, the petitioner had lastly submitted his property statement. In the writ petition, it is averred that the petitioner has been continuously submitting his property statement to his superior officer and lastly, he has submitted the property statement on 15.09.2009 for the entire period from 01.07.1989 till date. This averment has not been controverted by the opposite parties in the counter affidavit in express terms. Besides that, the RTI information placed on record by the petitioner also fortifies the said averment in the writ petition. However, nothing has come on record to give an indication as to whether the petitioner has periodically submitted the property statement every three years as required under Rule 21(4) of the Odisha Government Servant Conduct Rules, 1959.

14. Be that as it may, by the time the Vigilance Department carried out the house search on 12.10.2010, the upto date property statement of the petitioner had already been filed on 15.09.2009. Moreover, the vigilance case registered against the petitioner in the year 2011 has not even progressed an inch. Even the charge sheet has not yet been filed. Three promotions meanwhile have been given to the petitioner. It is trite to say that the disciplinary proceeding must be conducted soon after the alleged irregularities are committed or soonafter discovery of the irregularities. That cannot be initiated after lapse of considerable time. It would not be fair to the delinquent officer. Such delaya lso makes task of proving the charge difficult for the department. As such, it is also not in the interest of the administration. Delayed initiation of proceeding is bound to give room for allegation of bias, malafide and misuse of power. If the delay is too long and is unexplained, the Court should interfere and quash the entire proceeding. But how long a delay is too long is the question stares on the face of record of every case.

15. In the instant case, delay of the initiation of the departmental proceeding is about ten years. That apart, the timing of initiation of the proceeding also smacks malafide intention. The departmental proceeding was initiated on 03.12.2020 whereas,

the petitioner's name was recommended for promotion to the IAS cadre on 17.12.2020.The department chose not to initiate the proceeding against the petitioner for ten years, rather granted three promotions meanwhile and all of a sudden, issued memo just 14 days before his name was considered for promotion to the IAS cadre. Therefore, initiation of the departmental proceeding is not only hit by delay and latches but also poised with malafide intention. Hence, this Court considers it appropriate to quash the departmental proceeding initiated against the petitioner.

16. For the foregoing reasons, the writ petition deserves merit. As a result, the writ petition is allowed and the departmental proceeding initiated againstthe petitioner vide Memorandum dated 03.12.2020 (Annexure-6 to the writ petition) is quashed.

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2023 (III) ILR-CUT-1274

A. C. BEHERA, J.

C.R.A NO.124 OF 1995

DULLABHA PALTIA …….Appellant

-V-

STATE OF ORISSA .....Respondent

SCHEDULE CASTE AND SCHEDULE TRIBE (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3(1)(XII) – The victim is a girl of more than 16 years was indulged in repeated sexual intercourse with the accused in secret places for a long duration and both were taking pleasure out of their relationship – Whether the allegation that the accused has sexually exploited the victim by "dominating her will" and offence U/s. 3(1)(XII) of the Act is sustainable? – Held, No – Judgment of conviction and order of sentence set aside.

Case Laws Relied on and Referred to :-

1. (2007) 1 Crimes 452 : Praveen Ku. Sahu Vs. State of Chhatisgarh.
2. (2014) 59 OCR 207 : Anil Kumar Vs. State of U.P.
3. (2012) 3 Crimes 430 : Ramnath Vs. State of Chhatisgarh.
4. (2010) 3 Crimes 613 : Madrass Udaiyappan@Chelladurai Vs. State.
5. (2008) 3 Crimes 456 : Mahesh Jatav Vs. State of M.P.

For Appellant : Mr. D.P. Dhal, Sr. Adv. & Mr. A. Roy

For Respondent: Mr. T.K. Praharaj, Standing Counsel.

JUDGMENT Date of Hearing : 03.10.2023 : Date of Judgment : 10.11.2023

A. C. BEHERA, J.

1. The appellant, by preferring the appeal has called in question to the Judgment of conviction and order of sentence dated 13.04.1995 passed by the

Sessions Judge-cum-Special Judge, Balangir-Sonepur, Balangir in Sessions Case No.88 of 1994 arising out of G.R. Case No.147 of 1993.

The appellant (accused) has been convicted for the offence under Section 3 (1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989.

For the above conviction, he (Appellant/accused) has been sentenced to undergo R.I. for a period of 3 (three) years and to pay a fine of Rs.500/- in default to undergo R.I. for six months for the offence under Section 3 (1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989.

Prosecution Case

2. The case of the prosecution basing upon the story narrated in the F.I.R. vide (Ext.6) during trial before the trial court was that, the victim (P.W.5) belongs to Tiara by caste, which is a scheduled caste. The accused belongs to Dumal by caste, which is not a scheduled caste or scheduled tribe. The accused and the victim both being the persons of same village, they were well-known to each other from their respective childhoods. After reaching their respective age of adolescence, whenever the victim was going to fetch water from the village Chuan, the accused was meeting her and was expressing before her (victim) that, he (accused) is interested to marry her. When the accused promised to marry the victim, then, she (victim) allowed the accused to have sex with her. Accordingly, the accused and the victim were indulged with sexual intercourse in many occasions. So, due to such frequent sexual intercourse between them, the victim conceived. While the victim was carrying two months of her pregnancy, she (victim) disclosed about the same before the accused, but the accused advised her (victim) not to go before any doctor for termination of her pregnancy, because he (accused) will accept her (victim) as his wife.

Subsequent thereto, when, he (accused) took the victim to his house to keep her as his wife, the father of the accused did not allow her (victim), rather bolted the door from inside in order to prevent the victim from entering into his house. So, without getting any way, the victim sat on the verandah of the accused and cried. For which, many persons gathered there. At night, there was a Panch, wherein she (victim) narrated the entire episode. Though the accused attended that Panch, but denied all the allegations alleged by the victim against him. So, on its next day, the victim came to the police station with her father along with one Sankar Meher and lodged the F.I.R. (vide Ext.6) before the O.I.C. Binika P.S. (P.W.10) against the accused.

3. Basing upon such F.I.R. vide Ext.6, the O.I.C. Binika P.S. registered Binika P.S. Case No.43 of 26.08.1993 and he (O.I.C. Binika P.S.) himself took up the investigation of the case.

During investigation, he (I.O.) examined the victim, recorded her statements, examined her father along with other witnesses, sent the victim through requisition for her medical examination and accordingly, victim was medically

examined. He (I.O.) visited the spot, examined other witnesses, arrested the accused and sent him through requisition for his medical examination and accordingly, the accused was medically examined and then forwarded him (accused) to the court. He (I.O.) seized one admission register of Sarguna Government U.P. School (Ext.11) and received the medical examination report of the accused and the victim. He (I.O.) made a prayer before the S.D.J.M. Sonepur for recording of the statements of the victim U/s 164 of the Cr.P.C. and accordingly, her statements U/s 164 of the Cr.P.C. were recorded.

On completion of the investigation, he (I.O) submitted final form placing the accused for trial U/s 376 of the IPC, 1860 and Section 3 (1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989.

Accordingly, the accused faced trial before the court of learned Sessions Judge-cum-Special Judge, Balangir-Sonepur, Balangir in Sessions Case No.88 of 1994 having been charged under Section 376 of the IPC, 1860 and under Section 3 (1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989.

4. The plea of the defence was one of complete denial and false implication of the accused.

The specific plea/case of the defence as per the statements of the accused recorded under Section 313 of the Cr.P.C was that, he (accused) has not committed rape on the victim and he (accused) was not in a dominating position to dominate the will of the victim and he (accused) has not exploited the victim sexually by dominating her will.

In order to substantiate the aforesaid charges against the accused before the trial court, prosecution examined altogether 10 numbers of witnesses, but whereas, the defence examined none on its behalf.

5. Out of the 10 witnesses of the prosecution, P.Ws.1, 2 and 8 are the three Doctors, those had medically examined the victim. P.Ws.3 & 4 are two independent witnesses, those have not supported the case of the prosecution. P.W.9 is a witness to the seizure. P.W.5 is the victim herself and P.W.7 is her father. P.W.6 is the cousin of the victim. P.W.10 is the sole investigating officer of the case i.e. O.I.C. Binika Police Station, who has submitted charge sheet against the accused on completion of the investigation.

6. After conclusion of hearing and on perusal of the materials and evidence available in the record, the learned Trial Court found the accused not guilty for the offence under Section 376 of the IPC, 1860 and acquitted him (accused) from the offence under Section 376 of the IPC, 1860, but whereas found the accused guilty for the offence under Section 3 (1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989 and convicted him (accused) for that offence under Section 3 (1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989 and sentenced him (accused) there under as afore-stated vide judgment dated 13.04.1955 passed in Session Case No.88 of 1994.

7. I have already heard from the learned counsel for the appellant and the learned Standing Counsel for the State.

8. In order to assail the impugned judgment of conviction and order of sentence passed by the Trial Court against the accused, the learned counsel for the accused (appellant) contended that, when the trial court acquitted the accused from the offence under Section 376 of the IPC, 1860, then the trial court should not have convicted the accused for the offence U/s 3(1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989, for which, the judgment of conviction and order of sentence passed by the trial court against the accused for the offence under Section 3 (1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989 cannot be sustainable under law.

According to the learned counsel for the appellant, there is no material in the record to fulfil the essentials of Section 3 (1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989 for penalizing him (accused) under the said offence. Therefore, the impugned Judgment of conviction and order of sentence passed against the accused (appellant) is liable to be interfered through this appeal filed by him (accused).

9. On the contrary, the learned Standing Counsel for the State argued in support of the Judgment of conviction and order of sentence passed against the accused by the trial court and contended that, the well corroborated testimonies of P.Ws.5,6 and 7 is justifying the Judgment of conviction and order of sentence passed against the accused by the trial court for the offence under Section 3 (1) (XII) of the S.C. & S.T. (P.A) Act, 1989, which cannot be interfered with.

10. On perusal of the Judgment of the trial court, it appears that, the accused was facing trial for the offences under Section 376 of the IPC, 1860 and Section 3 (1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989.

The trial court has acquitted the accused from the offence under Section 376 of the IPC, 1860 by giving observations in Para No.7 of the Judgment that, "*as per the materials and documents available in the record, at the time of the incident, the victim (P.W.5) was not below 16 years, for which, the mischief of commission of rape as defined under Section 376 of the IPC, 1860 is not attracted. Therefore, the accused cannot be made liable for the offence under Section 376 of the IPC, 1860*."

The trial court has convicted the accused under Section 3 (1) (XII) of the S.C. & S.T. (P.A.) Act, 1989 by giving observations in Para No.9 of the Judgment that, "*the accused and victim (P.W.5) are persons of the same hamlet and they were well-known to each other from their childhood days and as such, they had intimacy and admittedly the accused is elder than the victim. Both of them had reached their adolescence. So, from the above circumstances, there is reason to believe that, the accused was in a position to dominate the will of the victim and used that position by giving her false promise to marry and he (accused) exploited her (victim) sexually,*

to which she (victim) could not have otherwise agreed. Therefore, mischief of Section 3(1)(XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989 has been attracted against the accused and the accused is liable for the said offence under Section 3(1)(XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989 and accordingly, he (accused) is found guilty for the offence under Section 3(1)(XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989, though, he (accused) is not found guilty for the offence under Section 376 of the IPC, 1860."

11. It is unambiguously clear from the above findings made in Judgment of the trial court that, the victim (P.W.5) was not below 16 years and she (victim) and the accused both had intimacy with each other and they both were adolescent.

She (victim) P.W.5 has deposed in Para No.2 of her examination-in-chief that, *he (accused) had sexual intercourse with her on so many occasions*.

12. The above evidence of the victim itself is going to show that, there was sexual intercourse between them in secret places for several times i.e. on so many occasions for a long duration.

On that aspect, the propositions of law has already been clarified in the ratio of the following decisions:

(i) 2007 (1) Crimes-452-Praveen Kumar Sahu Vs. State of Chhattishgarh-S.C. & S.T. (Prevention of Atrocities) Act, 1989 Section 3(1) (XII).

"First condition for attracting offence under Section 3(1) (XII) of the S.C. & S.T. Prevention Act, 1989 is that, accused must be in a position to dominate the will of a woman, who belongs to a particular caste or tribe and he used such position to exploit victim sexually, to which, she would not have otherwise agreed.

(ii) 2014 (59) OCR Page-207-Anil Kumar Vs. State of U.P.-S.C. & S.T. (Prevention of Atrocities) Act, 1989 Section 3(1) (XIII)

"The word 'position' to dominate-means commanding and controlling position-the position of the accused coupled with the use of such position to exploit the victim women sexually are the important criteria apart from the caste/tribe factor of the victim/accused."

(iii) 2012 (3) Crimes-430-Ramnath Vs. State of Chhattisgarh-SC & ST (Prevention of Atrocities) Act, 1989-Section 3(1)(XII)

"If a girl gives consent for repeated sexual intercourse up to a long duration, an offence under Section 3(1) (XII) could not be made out only on the ground that, the girl had happened to be a member of S.T. community

(iv) 2010 (3)-Crimes Page-613-Madrass-Udaiyappan@Chelladurai Vs. State-Indian Penal Code, 1860-Section 417,506,493 and Section 3(1) (xii) SC and ST Act.

"Where sexual intercourse by accused with prosecutrix was not concern through illicit and there was nothing to show that it was on account of prosecutrix belong to Scheduled Caste-conviction under Section 3(1) (XII) of the S.C. & S.T. Prevention Act, 1989 could not be sustained."

(v) 2008 (3) Crimes Page 456-Madhya Pradesh-Mahesh Jatav Vs. State of M.P. & Others-S.C. & S.T. (Prevention of Atrocities) Act, 1989 Section 3 (1) (XII).

"No material that, act of rape was committed only because the victim was scheduled caste, offences under the Act were not made out."

13. Here in this case at hand, when it is forthcoming from the above evidence of the victim (P.W.5) that, she being a girl of more than 16 years was indulged in repeated sexual intercourse with the accused in secret places for a long duration and they both were taking pleasure out of their such sexual intercourses, then at this juncture, by applying the principles of law enunciated in the ratio of the decisions referred to supra, it cannot be held that, the accused has sexually exploited the victim by dominating her will.

14. On analysis of the materials on record, as per the decisions and observations made above, it is held that, prosecution has not become able to establish the charge/offence under Section 3(1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989 against the accused beyond reasonable doubt. For which, the impugned Judgment of conviction and order of sentence passed by the trial court against the accused (Appellant) under Section 3 (1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989 cannot be sustainable. So, there is justification under law for making interference with the same through this appeal filed by the appellant. Therefore, the appeal filed by the appellant must succeed.

15. In the result, the appeal filed by the appellant is allowed.

16. The Judgment of conviction and order of sentence passed on dated 13.04.1995 in Sessions Case No.88 of 1994 under Section 3 (1) (XII) of the S.C. & S.T. (P.A.) Act, 1989 against the accused (appellant) by the Sessions Judge-cum-Special Judge, Balangir-Sonepur, Balangir is set aside.

17. The accused(appellant) is acquitted from the offence/charge under Section 3 (1) (XII) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989.

18. Accordingly, the accused (appellant) is directed to be set at liberty forthwith after being discharged from the bail bonds.

19. Accordingly, the appeal is disposed of finally.

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2023 (III) ILR-CUT-1279

A.C. BEHERA, J.

R.S.A. NO. 356 OF 2008

SAURI BEHERA & ORS. …….Appellants

-V-

NILAMANI BEHERA & ORS. .....Respondents

(A) INDIAN EVIDENCE ACT, 1872 – Section 32(5) & 6 – The exhibit A,E and D are the sale deed of the years 1935, 1960 and 1982 by the parties – From the recitals it appears that defendant no.1 is the son of 1st husband of the mother Sara – In the year 1998 the plaintiff filed the suit for a declaration that the defendant is not the son of 1st husband – Whether the claim of plaintiff is sustainable? – Held, No – While appreciating the evidence the court must give importance to those material which came into existence prior to the rising of cause of action, the sale deed have been executed much prior to the institution of the suit and the executant thereof are not alive, the statement of dead persons in the sale deed regarding status of parties is admissible and acceptable under law. (Paras 10-12)

(B) PROPERTY LAW – Injunction – Permanent injunction – The consolidation authority have prepared RORs in the year 1990 in respect of suit land indicating there in that defendant no.1 is the son of Sobani (1st husband of the mother of plaintiff) – Such final published RORs of the consolidation authorities have not been challenged since its publications – Whether the suit for declaration and permanent injunction is maintainable? – Held, No – Without setting aside the consolidation RORs which have been prepared much prior to institution of suit, the prayer for declaration and injunction filed by plaintiff is not entertainable under law. (Para 15)

Case Laws Relied on and Referred to :-

1. (2012) 114 CLT 799 : Sanjukta Mallik Vs. Bharati Sethi.
2. AIR (38) 1951 Orissa 337 : Subarna Bissoiani Vs. Arjuno Bissoi.
3. (2018) 2 CLR 951 : Harekrushna Dash Vs. Sadasiva Dash.
4. (2019) 1 OJR 358: Amina Bibi & Ors. Vs. Sk.Md.Hanif & Ors.
5. (2009) 107 CLT 320 : Murali Rana Vs. Jasoda Rana & Anr.
6. (2019) 1 CLR 1078 : Bisakha Pradhan & Anr. Vs. Collector, Cuttack & Anr.
7. (2015) 1 CLR 360 : Chintamani Kandi(dead) & his LRs. Para Dei & Ors. Vs. Arjuna Kandi & Ors.

For Appellant : Mr. S.S. Mohapatra, Mr. B. Bhuyan

For Respondent : Mr. Nirod Kumar Sahu

JUDGMENT Date of Hearing : 11.10.2023 : Date of Judgment : 10.11.2023

A.C. BEHERA, J.

1. This appeal has been preferred against the confirming Judgment.

The appellants were the plaintiffs in the suit vide T.S. No.204 of 1998 and were the appellants in RFA No.14 of 2003.

The respondents were the defendants in the suit vide T.S. No.204 of 1998 and were the respondents in RFA No.14 of 2003.

2. The suit vide T.S. No.204 of 1998 was a suit for declaration and permanent injunction.

3. The case of the plaintiffs against the defendants was that, their common ancestor was one Bhikei. The said Bhikei died leaving behind one son and one daughter namely, Dukhei & Sara. Dukhei died leaving behind his only daughter i.e. Radhi, who married to Karuni.

Sara married Sobani. Out of the wedlock of Sara and Sobani, Chintamani was born.

The branch of Radhi was extinct. For which,Chintamani succeeded to the undivided interest left by Radhi. Chintamani as swell as his father Sobani both died on the same day and their interest in the suit properties devolved upon Sara. After the death of the husband of Sara i.e. Sobani, Sara married for the second time to the younger brother of Sobani i.e. Abhina.

Two sons were born through Sara and Abhina i.e. Nilamani (defendant No.1) and Bholi (Plaintiff).

After the death of Sara, all the interest of Sara over the properties devolved upon her two sons i.e. Nilamani and Bholi and accordingly, Nilamani and Bholi possessed the suit properties along with other properties jointly as co-sharers and mutated all the properties left by Sara including the suit properties into their names and paid rents to the Government. Nilamani was looking after the land affairs, as Bholi was illiterate. For which, in the revenue records, Nilamani had managed to record his father's name as Sobani and so also had managed to record the father's name of Bholi as Abhina. By taking the advantage of such recording in the revenue records of the suit properties, he (Nilamani, defendant No.1) created disturbances in the joint possession of the suit properties with Bholi and made inconveniences to Bholi. For which, without getting any way, Bholi approached the civil court by filing the suit vide T.S. No.204 of 1998 being the plaintiff against the defendants including the defendant No.1 (Nilamani) praying for the declaration that, the defendant No.1 (Nilamani) is the son of Abhina and to injunct the defendants permanently by restraining them from dispossessing him (Bholi) and from interfering with his joint possession over the suit properties in any manner along with other reliefs, to which he is entitled for.

4. But, during the pendency of the suit vide T.S. No.204 of 1998, the sole plaintiff i.e. Bholi expired, for which, his LRs were substituted as plaintiff Nos.1(a) to 1(e) in his place.

5. Having been noticed from the court in T.S. No.204 of 1998, the defendant No.1 (Nilamani) challenged the suit of the plaintiff by filing his written statement after taking his stands inter alia therein that, the suit of the plaintiff is not maintainable having no cause of action for the same. The suit properties are not

properly identified. The suit of the plaintiff is bad for non-joinder of necessary parties. The suit properties are grossly under-valued. He (defendant No.1) also disputed to the above family pedigree stated by the plaintiff in his plaint and pleaded in his written statement that, he (defendant No.1 Nilamani) was born out of wedlock of Sara and Sobani and he is the son of Sobani through Sara, but, he is not the son of Abhina through Sara.

According to him, Bhikei was their common ancestor. That Bhikei had one son and two daughters namely, Dukhei, Sara and Hara. Sara had married Sobani. Sobani had two sons through Sara, they are Chintamani and Nilamani (defendant No.1).

The share of Dukhei was purchased by his elder brother i.e. Chintamani through his father guardian sobani as per registered sale deed dated 04.06.1935. His elder brother Chintamani, died in the year 1936, while he was at the age of 08 years. One day after the death of his elder brother Chintamani, his father Sobani died leaving behind him (defendant No.1, Nilamani).

Abhina had married first to a lady of Nayagarh and after the death of his first wife, he married to another lady namely,ulla and she (ulla) also expired subsequently. Thereafter, Abhina married to his widow mother-in-law Sara for the third time, which was much prior to 1956. Due to remarriage of his widow mother Sara to Abhina much prior to 1956, Sara was divested from her all interests in the suit properties. Therefore, he (defendant No.1) has become the exclusive owner over the suit properties left by his brother Chintamani as well as his father Sobani. Therefore, the plaintiff is not entitled for the decree of declaration of his status (status of defendant No.1) as the son of Abhina and he (plaintiff) is not entitled for the decree of permanent injunction against him (defendant No.1) in respect of the suit properties.

6. The defendant Nos.4 to 6 and 13 and 16 filed separate written statements taking the identical stands like the defendant No.1 in their respective written statements.

7. The defendants i.e. defendant Nos.2,3,9 and 10 filed their written statements supporting the case of the plaintiffs. But the rest other defendants were set ex parte without filing any written statement.

8. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 9 Nos. of issues were framed by the trial court and the said issues are;

Issues.

"1. Is the suit maintainable in law?

2. Have the plaintiffs any cause of action to file the suit?

3. Is the suit bad for non-joinder of necessary party?

4. Is the suit properly valued?

5. Has this Court got pecuniary jurisdiction to adjudicate the suit?

6. Whether Nilamani Behera is the son of Abhina Behera or Sobani Behera?

7. Whether the plaintiffs are entitled to a decree of permanent injunction against the defendants restraining them from interfering with their joint possession with them in respect of the suit properties?

8. Whether the vested right of Sara can be divested by her re-marriage?

9. To what other relief the plaintiffs are entitled?"

9. In order to substantiate the aforesaid reliefs sought for by the plaintiffs against the defendants, 5 witnesses were examined on behalf of the plaintiff including the plaintiff No.1(a) as D.W.5 and several documents were exhibited on their behalf vide Ext.1 to 8.

On the contrary, the defendants examined 6 witnesses from their side including the defendant No.1 as DW 6 and proved some documents on their behalf vide Ext.A to F.

After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial court answered issue No.6 against the plaintiffs and held that, defendant No.1 (Nilamani) is the son of sobani and he is not the son of Abhina and on the basis of such findings, the trial court answered rest other issues against the plaintiffs and finally, dismissed the suit of the plaintiffs on contest vide its Judgment and decree dated 29.01.2003 and 11.02.2003 respectively.

10. On being dissatisfied with the said Judgment and decree of dismissal of the suit of the plaintiffs by the trial court, the plaintiffs challenged the same by preferring the 1st appeal vide RFA No.14 of 2003 being the appellants against the defendants by arraigning them (defendants) as respondents.

After hearing from both the sides, the 1st Appellate Court dismissed the RFA No.14 of 2003 of the plaintiffs and confirmed to the Judgment and decree of dismissal of the suit passed by the trial court.

On being aggrieved with the above confirming Judgment passed by the 1st Appellate Court in RFA No.14 of 2013, the plaintiffs challenged the same by preferring this 2nd Appeal against the defendants.

11. The 2nd Appeal has been admitted on formulation of the substantial questions of law about the sustainability and justifiability of the Judgments and decree of the trial court and the 1st Appellate Court.

It appears from the recitals/reflections/indications in the sale deeds vide Exts.A,E & D of the year 1935, 1960 & 1982 by the parties to the said sale deeds (those were the successors of their common ancestor Bhikei and those have expired subsequent to the execution of the said sale deeds vide Ext.A,E & D including original plaintiff Bholi) that, defendant No.1 (Nilamani) is the son of Sobani and Bholi is the son of Abhina. The said admissions of Bholi in the sale deeds itself is an

estoppel under law against the plaintiffs (those are the successors of Bholi) to challenge subsequently by filing the suit in the year, 1998 praying for a declaration that, Nilamani (defendant No.1) is not the son of Sobani.

The above recitals/reflections/indications in the aforesaid sale deeds, (those were executed much prior to the institution of the suit) about the status of defendant No.1 (Nilamani) as the son of Sobani and the status of the plaintiff Bholi as the son of Abhina are admissible as per Sub clause 5 and 6 of Section 32 of Indian Evidence Act, 1872.

On that aspect, the propositions of law has already been clarified by the Hon'ble Courts in the ratio of the following decisions:

> **(i) 114 (2012) CLT Page—799—Sanjukta Mallik Vs. Bharati Sethi—Evidence—Appreciation.**
>
> *"While appreciating the evidence, the court must give importance to those materials which came into existence prior to the rising of cause of action. The documents which came into existence after the cause of action arose, such documents should be viewed with suspicion and such documents have far less probative view then, the materials which have come into existence much prior to the time, when the cause of action arose in the case."*
>
> **(ii) AIR (38) 1951 Orissa—Page 337—Subarna Bissoiani Vs. Arjuno Bissoi—Evidence Act—-Section—32(5)**
>
> *"Unregistered gift deed is admissible with reference to collateral matters—Executant dead—Statement that, donee is his legally married wife is admissible under clause (5) of Section 32—It raises presumption of marriage—Burden to prove contrary is on him, who so asserts."*

12. Here in this suit at hand, the aforesaid sale deeds vide Exts-A,E & D have been executed much prior to the institution of the suit and the executants thereof are not alive. The statements of the dead persons in the sale deeds vide Ext.A,E & D regarding the status of the plaintiff Bholi, defendant No.1 (Nilamani), Sara, Sobani and Chintamani is admissible and acceptable under law in view of the principles of law enunciated in the ratio of the aforesaid decisions.

In two consolidation RoRs vide Exts.B & C, the consolidation authorities have specifically indicated that, defendant No.1 (Nilamani) is the son of Sabani and the plaintiff (Bholi) is the son of Abhina. The said consolidation RoR's were prepared in the year 1990, which is much prior to the institution of the suit by the plaintiff (Bholi). Because, the suit was filed by Bholi in the year 1998.

The above reflections by the consolidation authorities in the finally published R.o.Rs vide Exts.B & C in the year 1990 about the status of Nilamani (defendant No.1) as the son of Sobani and Bholi (plaintiff) as the son of Abhina have not been challenged before any competent higher forum of the consolidation either by Bholi or by his successors i.e. the present plaintiffs (those have been substituted in place of Bholi)

The law relating to the value of indication of status of a party in the finally published consolidation R.o.Rs like Exts.B & C has already been clarified in the ratio of the following decision:

> **2018 (2) CLR Page-951-Harekrushna Dash Vs. Sadasiva Dash-Consolidation RoR-Evidentiary Value-Indication of status of recorded owner therein.**
>
> *"In deciding the right title and interest in the property, the power also remains with the consolidation authority to decide the status of the party having direct nexus with claim/counter claim relating to the right title and interest over the property."*

In view of the aforesaid settled propositions of law enunciated in the ratio of the decision referred to Supra, heavy weight gets attached to the reflection of father's name of the plaintiff in the finally published RoRs by the consolidation authorities. Because, such finally published RoRs of the consolidation authorities have not been challenged since its publications. For which, the reflections made in the RoRs vide Exts.B & C by the consolidation authorities regarding the father's name of the plaintiff and defendant No.1 is acceptable under law.

It appears from the Judgment of trial court and 1st Appellate Court that, the voter identity card vide Ext.G has been issued by the Election Commission of India indicating that, the defendant No.1 (Nilamani) is the son of Sobani.

On that aspect, the following decision can be referred to:

> **2019 (1) OJR 358—Amina Bibi and others Vs. Sk. Md. Hanif & Others—Voter Identity Card and Aadhaar Card**
>
> *"When it is revealed from the voter identity card and Aadhaar card that, the names of the persons indicated therein are the LRs of the proforma defendant No.5, for which, there is no reason to disbelieve the voter identity card and Aadhaar card, which are public documents regarding their status as the sons and the LRs of the proforma defendant No.5."*

13. So, by applying the principles of law enunciated in the ratio of the aforesaid decision of the Hon'ble courts, it can also be held on the basis of the voter identity card vide Ext.G that, the defendant No.1 (Nilamani) is also the son of Sobani, but not the son of Abhina.

14. It is the undisputed case of the parties that, Sara (mother of the plaintiff and defendant No.1) had become widow much prior to the coming into force of Hindu Succession Act, 1956 i.e. much prior to 1956.

15. Sara being the widow of Sobani had married to Abhina for the Second time before the year 1956.

When it is the undisputed case of the parties that, Sara being a widow had remarried Abhina (father of Bholi) much before 1956, then at this juncture, in order to be clarified about her right over the suit properties after her remarriage to Abhina, I thought it proper to refer the following decision of the Hon'ble courts.

107 (2009) CLT Page—320-Murali Rana Vs. Jasoda Rana and another (Para-4)—Hindu Widows Remarriage Act, 1856—Hindu Succession Act, 1956—Hindu Law.

"After death of husband, widow remarried before commencement of Hindu Succession Act, 1956— She lost her right of succession with her son born from 2nd husband. Only daughter born from 1st husband can succeed her father's estate."

Here in this suit at hand, when the consolidation authorities have prepared the RoRs in respect of the suit properties indicating therein that, Nilamani (defendant No.1) is the son of Sobani and the said consolidation RoRs vide Exts.B & C were prepared in the year, 1990 i.e. much prior to institution of the suit deciding the right, title, interest and status of the parties and the said RoRs have not been challenged by Bholi and his sons and that consolidation RoRs have also not been set aside as yet, then, at this juncture, without setting aside the said consolidation RoRs, the suit for declaration and injunction filed by Bholi as a plaintiff is not entertainable under law.

On that aspect, the propositions of law has already been clarified in the ratio of the following decisions:

2019 (1) CLR Page 1078—Bisakha Pradhan and Another Vs. Collector, Cuttack and Another—(Part-II) CPC—1908—Section 9 read with Specific Relief Act, 1963—Section 37 and 38—Injunction-permanent injunction

"In absence of prayer to set aside the RoR published by the consolidation Authority, the simple suit for injunction is not maintainable."

2015 (1) CLR Page 360---Chintamani Kandi (dead) & his LRs. Para Dei and Others Vs. Arjuna Kandi & Others (Para-13)

"RoR prepared by the consolidation Authority value thereof—Consolidation RoR is necessary to pronounce the Judgment, because the consolidation authority having decided appellant's title in the suit land have recorded it in the name appellant. It proves the title and possession of the appellant over the suit land."

16. Here in this suit at hand, when there is no prayer for setting aside the consolidation RoRs and when the consolidation authorities have prepared the RoRs much prior to the suit deciding the status and title of the parties and when defendant No.1 (Nilamani) has born from Sara through her first husband Sobani and when Sara being the widow wife of Sobani had remarried Abhina much prior to 1956 and when after her remarriage, the plaintiff (Bholi) had born from Sara through her second husband Abhina, then, by applying the principles of law enunciated in the ratio of the aforesaid decisions, it cannot be held that, the findings and observations made by the trial court and as well as the 1st Appellate Court that, defendant No.1 (Nilamani) is not the son of Abhina, but he (defendant No.1 Nilamani) is the son of Sobani and plaintiff Bholi is the son of Abhina and the present plaintiffs (substituted legal heirs of Bholi) are not entitled for the decree of permanent injunction cannot be held erroneous in any manner.

17. As per the discussions and observations made above, when it is held that, the Judgments and decrees of the trial court and as well as the 1st Appellate Court are not erroneous in any manner, for which, the question of interfering with the same through this 2nd Appeal filed by the appellants/plaintiffs does not arise. So, the 2nd Appeal filed by the plaintiffs must fail.

18. In the result, the appeal filed by the appellants is dismissed on contest, but without cost.

19. The Judgment and decree passed by the 1st Appellate Court in RFA No.14 of 2003 confirming the Judgment and decree of dismissal of the suit passed by the trial court are hereby confirmed.

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2023 (III) ILR- CUT-1287

A.C. BEHERA, J.

S.A. NO.188 OF 1988

BRUNDABATI JENA & ORS. ……...Appellants

-V-

MAHENDRA SENAPATI & ORS. …….Respondents

PARTITION – Tank – It is the undisputed case of the parties that, the suit plot No.455, Ac 0.97 decimal is a tank – The 1st Appellate Court in final findings declared the plaintiffs as owners with respect of Ac 0.32⅓ decimals land from the northern side out of Ac 0.97 decimal of the disputed plot No.455 – Whether the finding of 1st Appellate Court is sustainable under law? – Held, No – When it is the settled propositions of law that, a tank is impartible/indivisible in nature, because a tank containing water cannot be divided physically through measurement and when the embankment or the Bandha of the tank is also impartible being included within tank, then at this juncture the final finding of the 1st Appellate Court cannot be sustained under law. (Para 9)

Case Laws Relied on and Referred to :-

1. 2014(II) CLR1217 : Susanta Kumar Jena & Anr. Vs. Smt. Basanti Sethi & Ors.
2. AIR 1957 (Patna) 278 : Sobharam Mahato Vs. Raja Mahton & Ors.
3. 2022 (1) CLR-25 : Anu Charan Swain Vs. Prahallad Swain
4. (2020) 19 SC 57 : Nazir Mohamed vs. J. Kamala & Others.
5. (2018) 18 SCC317: Illoth Valappil Ambunhi (dead) by legal representatives Vs. Kunhambu Karanavan.
6. AIR 1958 Orissa 26 : Ramakrushna Mohapatra & Ors. Vs. Gangadhar Mohapatra & Ors.

For Appellant : Mr. D. Nayak
For Respondent : Mr. Avijit Pal, Mr. B.Pal

JUDGMENT Date of Hearing :07.11.2023: Date of Judgment :24.11.2023

A.C.BEHERA, J.

1. This 2nd Appeal has been preferred against the reversing Judgment.

2. The appellants in this 2nd Appeal were the defendants in the suit vide C.S No65/84 of 1981-79-I and they were the respondents in the 1st Appeal vide M.A. No.21/8 of 1983/82-I.

The respondent Nos.3 and 4 of this 2nd Appeal were the defendant Nos.9 and 10 in the suit vide C.S No65/84 of 1981-79-I and they were the respondent Nos.9 and 10 in the 1st Appeal vide M.A. No.21/8 of 1983/82-I.

The respondent Nos.1 and 2 of this 2nd Appeal were the plaintiffs in the suit vide C.S No.65/84 of 1981-79-I and they were the appellants in the 1st Appeal vide M.A. No.21/8 of 1983/82-I.

3. The suit of the plaintiffs vide C.S No.65/84 of 1981-79-I was a suit for declaration, delivery of possession and damages.

4. The case of the plaintiffs as per the averments made in their plaint was that, the suit land appertaining to Khata No.115, Plot No.455 Ac.0.97 decimals is a tank. That suit tank was under the ex-intermediary estate of the Ex-landlord Samanta Radha Prasanna Das of Balasore. On 15.03.1943, the land lord Samanta Radha Prasanna Das granted three sets of Amalnama patta in respect of that Ac.0.97 decimals of Plot No.455 having 1/3rd share therein for each set of Amalnama patta. Babu Jena and Golak Jena were granted 1/3rd share from that suit Plot No.455 through one set of Amalnama patta vide Ext.2 by the Ex-landlord Samanta Radha Prasanna Dash.

5. After getting 1/3rd interest/share from the suit tank vide Plot No.455 through Amalnama patta dated 15.03.1943 vide Ext.2 from the Ex-landlord Samanta Radha Prasanna Dash, the said Babu Jena and Golaka Jena were enjoying the suit tank. Subsequent thereto, Babu Jena died issuless. Thereafter Golaka Jena died leaving behind his wife Gedi Bewa and one son i.e. Krutibash. After the death of Babu and Golaka, Gedi Bewa and Krutibash being their successors, they were enjoying 1/3rd interest of Babu Jena and Golaka Jena in the suit tank. While Gedi Bewa and Krutibash were enjoying their 1/3rd interest in the suit tank, they transferred their said 1/3rd interest i.e. Ac.0. $32\frac{1}{3}$ decimals out of Ac.0.97 decimals of suit plot No. 455 to the plaintiffs by executing and registering the sale deed vide Ext.1 on dated 26.11.1951.

After purchasing the said 1/3rd share of Gedi and Krutibash in the suit tank, the plaintiffs possessed the same and excavated that tank and reared fish therein.But,

suddenly on 16.05.1979, the defendant Nos.1 to 8 damaged to the northern side ridge of the suit tank and forcibly caught the fish from the suit tank. For which, the plaintiffs approached the civil court by filing the suit vide C.S. No.65/84 of 1981-79-I against the defendants praying for declaration of their right, title and interest over the suit plot No.455 and for delivery of possession of their 1/3rd share of the suit tank and also for damages.

6. Having been noticed from the court, in the suit vide C.S. No.65/84 of 1981-79-I filed by the plaintiffs, the defendant Nos.1 to 8 contested the same by filing their written statements after taking their stands *inter alia* therein that:

The Ex-landlord of the suit land i.e. Samanta Radha Prasanna Das had not issued any Amalanama patta in respect of the suit plot No.455 in favour of Babu Jena and Golak Jena. But the Ex-landlord Samanta Radha Prasanna Das had granted an Amalanama patta in respect of the entire suit plot No.455 in their favour on dated 11.08.1941 and after getting the entire suit plot No.455 through Amalnama patta on dated 11.08.1941 from the Ex-landlord, they (defendant Nos.1 to 8) have been possessing and enjoying the entire suit tank vide plot No.455, in which Babu Jena and Golaka Jena had no interest. For which, Gedi Bewa and Krutibash as well as the plaintiffs have no interest in the suit plot No.455.

It was the specific case of the defendant Nos.1 to 8 in their written statement was that, the so-called Amalnama patta dated 15.03.1943 vide Ext.2 relied upon by the plaintiffs said to have been issued in favour of the vendors of the plaintiffs i.e. Babu Jena and Golaka Jena in respect of 1/3rd share of the suit plot No.455 is a forged and fabricated Amalnama patta. Through the said forged and fabricated Amalnama patta, neither the predecessors of the vendors of the plaintiffs nor the vendors of the plaintiffs or the plaintiffs are entitled to get any interest in the suit plot No.455. They (defendants) are the owners of the whole suit plot No.455, but the plaintiffs have no interest in the same. Therefore, the suit of the plaintiffs is liable to be dismissed.

The defendant Nos.9 and 10 were set ex-parte.

7. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 7 numbers of issues were framed by the trial court in C.S. No.65/84 of 1981-79-I and the said issues are:

Issues

"1. Have the plaintiffs any cause of action to bring the suit?

2. Is the suit maintainable in the present for?

3. Is the suit bad for non-joinder of parties?

4. Is the Amalnama patta genuine?

5. Have the plaintiffs any right, title and interest over the disputed land or tank?

6. Is the suit maintainable for non-payment of proper court fee and for proper jurisdiction of this court?

7. What relief, if any, the plaintiffs are entitled to?"

8. In order to substantiate the aforesaid reliefs sought for by the plaintiffs against the defendants, they (plaintiffs) examined 6 witnesses from their side including the plaintiff No.1 as P.W.1 and relied upon several documents on their behalf vide Exts.1 to 5.

On the contrary, the contesting defendant Nos.1 to 8 examined 5 witnesses from their side including the defendant No.6 as D.W.1 and relied upon series of documents on their behalf vide Ext.A to D.

After conclusion of hearing and on perusal of the materials and evidence available in the record, the learned trial court answered all the issues except issue No.6 against the plaintiffs and in favour of the defendants and basing upon the findings and observations made by the trail court in the issues against the plaintiffs, the trial court dismissed the suit of the plaintiffs vide C.S. No. 65/84 of 1981-79-I on contest against the defendant Nos.1 to 8 and Ex-parte against the defendant Nos.9 & 10 vide its Judgment and decree dated 15.12.1981 and 22.12.1981 respectively assigning the reasons that, the so called Amalnama patta vide Ext.2 relied upon by the plaintiffs in respect of the suit land is not a genuine one, but, whereas the Amalnama patta vide Ext.B relied upon by the defendants in respect of the suit land is genuine one. For which, the plaintiffs have no interest at all in the suit land.

On being dissatisfied with the aforesaid Judgment and decree of the dismissal of the suit vide C.S. No.65/84 of 1981-79-I of the plaintiffs passed by the trial court, they (plaintiffs) challenged the same by preferring the 1st Appeal vide M.A. No.21/8 of 1983/82-I being the appellants against the defendants by arraying them (defendants) as respondents.

After hearing from both the sides, the 1st Appellate Court allowed that 1st Appeal vide M.A. No.21/8 of 1983/82-I of the appellants (plaintiffs) on contest against the respondents (defendants) and set aside the Judgment and decree of dismissal of the suit passed by the trial court and declared that, the plaintiffs are the owners in respect of 1/3rd share i.e. in respect of Ac.0. $32\frac{1}{3}$ decimals from the northern side of suit plot No.455 out of Ac.0.97 decimals and they (plaintiffs) be put in possession on the same through the process of the court vide its Judgment and decree dated 17.03.1988 and 30.03.1988 respectively.

On being aggrieved with the aforesaid Judgment and decree passed by the 1st Appellate Court in M.A. No.21/8 of 1983/82-I against the defendant Nos.1 to 8 and in favour of the plaintiffs, they (defendant Nos.1 to 8) challenged the said Judgment and decree of the 1st Appellate Court by preferring this 2nd Appeal being the appellants against the plaintiffs by arraying them (plaintiffs) as respondent Nos.1 and 2 and also arraying the defendant Nos.9 and 10 as respondent Nos.9 and 10.

9. This 2nd Appeal has been admitted vide Order No.3 dated 29.09.1988 to adjudicate the substantial questions of law i.e. the correctness of the findings and observations of the 1st Appellate Court i.e. creation of interest of the plaintiffs in the suit plot No.455 on the basis of the Amalnama patta vide Ext.2 issued by the Ex-landlord in favour of the predecessors of the vendors of the plaintiffs followed by the payment of rent by them (plaintiffs) to the Government.

I have already heard from the learned counsels of both the sides.

In support of the Judgment and decree of the 1st Appellate Court, the learned counsel for the respondent Nos.1 and 2 (plaintiffs) relied upon the following decisions:

(I) (2020) 19 Supreme Court Cases 57-Nazir Mohamed vs. J. Kamala & Others.

(II) (2018) 18 Supreme Court Cases 317-Illoth Valappil Ambunhi (dead) by legal representatives Vs. Kunhambu Karanavan.

(III) AIR 1958 Orissa 26-Ramakrushna Mohapatra and Others Vs.Gangadhar Mohapatra and Others.

It appears from the records of the trial court and as well as the 1st Appellate Court that, on the basis of Amalnama patta vide Ext.2 in favour of Babu Jena and Golaka Jena in respect of 1/3rd share of suit tank vide plot No.455 and the sale deed vide Ext.1 executed by successors of Babu Jena and Golaka Jena i.e. Gedi and Krutibash in favour of the plaintiffs, they (plaintiffs) have been paying rent to the Government in respect of their 1/3rd share of suit plot as per Ext.3 series by mutating the suit plot into their names on the basis of Exts.2 and 1 since the year, 1953 without any objection to their payment of rent by the defendants.

One of the contesting defendant i.e. Bhanu Charan Jena (defendant No.1) has been examined as P.W.3 from the side of the plaintiffs and the said defendant No.1 (P.W.3) has deposed in his evidence by stating that, "*he was in possession of Ext.2 (Amalanama patta) and he has handed it over to the plaintiffs. So, Ext.2 (Amalanama patta) has been filed and proved by the plaintiffs after bringing the same from proper lawful custody. The said defendant No.1 (P.W.3) has also deposed that, Gedi Bewa and Krutibash had 1/3rd share in the suit tank vide plot No.455 being the successors of Babu Jena and Golaka Jena.*"

The plaintiffs have been paying rent in respect of their 1/3rd share of the suit plot through proper rent receipts to the Government since the year, 1953 without any objection to the same by the defendants.

The aforesaid payment of rent to the Government by the plaintiffs in respect of their purchased 1/3rd share from the suit plot No.455 after mutating the same to their names since the year, 1953 after abolition of ex-intermediary system on the basis of preparation of tenancy ledger and R.o.R in their favour is going to show that, the after abolition of the ex-intermediary system, the state has recognized the tenancy of the plaintiffs in respect of their 1/3rd share in the suit tank vide plot No.455.

The law on this aspect has already been clarified by the Hon'ble courts in the ratio of the following decision:

> ***2014 (II) CLR1217—Susanta Kumar Jena & Another Vs. Smt. Basanti Sethi & Others***—Tenancy—Creation of—Abadjogya Anabadi land recorded in the name of State of Orissa.
>
> *"Claim of lease by the Ex-intermediary in favour of Kameswar—Tenants ledger stood in the name of Kameswar and State accepted rent from him after vesting.*
>
> *Kameswar sold land to G in 1966 and G sold a portion of it to F in the year1978. A (who was the widow of F) sold the land purchased by her husband to O.P. No.1 in the year, 1983.*
>
> *Again, G sold portions of his purchased land to O.P. Nos.1 and 2 in the year, 1983.*
>
> *Dispute raised during the consolidation operation challenging the title of "K" and the transferees. Held, since Kameswar was paying rent from the date of operation of the tenancy ledger and thereafter, the tenants of respondents (O.P. Nos.1 and 2) from the date of their purchase and subsequent thereto by respondent Nos.1 and 2 to the State Government after vesting, it clearly substantiated that, tenancy had been created in favour of Kameswar even in absence of any proof of any original lease.*
>
> *Once tenancy was created in favour of Kameswar and the State after vesting recognized his tenancy, right accured in favour of respondents (O.P. Nos.1 & 2) to continue as recorded tenants and they were entitled to enjoy the disputed plot in question."*

Here in this suit at hand, when the plaintiffs have been paying rent in respect of their 1/3rd share of the suit tank vide plot No.455 to the Government since the date of preparation of the tenancy ledger and R.o.R in their favour through mutation as per Ext.3 series then, in view of the propositions of law enunciated in the ratio of the aforesaid decision, tenancy of the plaintiffs in the suit plot No.455 had been created after vesting due to the recognition of their tenancy by the State through acceptance of rent from them directly since the year, 1953.

When the names of the plaintiffs have been continuing as the recorded owners of the suit tank vide plot No.455 in respect of their 1/3rd share therein, for which, they (plaintiffs) are entitled to enjoy the suit tank in respect of their 1/3rd share.

Therefore, it cannot at all be held that, the findings and observations made by the 1st Appellate Court about the creation of tenancy of the plaintiffs in the suit tank vide plot No.455 in respect of their 1/3rd share therein is erroneous.

As the suit plot No.455 Ac.0.97 decimals is a tank, for which, I thought it proper to clarify the components of a tank and its nature and character through the following decisions of the Hon'ble Courts:

> (I) **AIR 1957 (Patna) 278—Sobharam Mahato Vs. Raja Mahton & Others**
>
> *"Tank-All the following three together namely, (i) the underground or the land underneath, on which the water is stored, (ii) the embankment or the bandh which serves*

the purpose of keeping the water confined within its boundary and (iii) the bed or pet of the tank, is known as tank."

(II) **2022 (1) CLR-25 Anu Charan Swain Vs. Prahallad Swain (Para-8) "TANK—Its nature—to be not partible**."

When it is the undisputed case of the parties that, the suit plot No.455 Ac.0.97 decimals is a tank and when it is the settled propositions of law that, a tank is impartible/indivisible in nature, because a tank containing water cannot be divided physically through measurement and when the embankment or the Bandha of the tank is also impartible being included within tank, then at this juncture, the final findings of the 1st Appellate Court that the plaintiffs are declared as owners with respect to Ac.0. $32\frac{1}{3}$ decimals land from the northern side out of Ac.0.97 decimals of the disputed plot No.455 and they (plaintiffs) be put in possession of the said Ac.0. $32\frac{1}{3}$ decimals of land from the northern side out of Ac.0.97 decimals through the process of the court cannot be sustainable under law.

10. As per the discussions and observations made above, when it is held that, the suit plot No.455 Ac.0.97 decimals is a tank, in which, the plaintiffs have 1/3rd share and the physical division of the suit tank between the parties in their share wise is impossible, then at this juncture, the Judgment and decree passed by the 1st Appellate Court declaring that, the plaintiffs are the owners in respect of 1/3rd share of suit plot No.455 i.e. in respect of Ac.0. $32\frac{1}{3}$ decimals out of Ac.0.97 decimals cannot be unsustainable under law.

But, whereas, the Judgment and decree passed by the 1st Appellate Court entitling the plaintiffs to get Ac.0. $32\frac{1}{3}$ decimals of land from the northern side of suit plot No.455 out of Ac.0.97 decimals and they (plaintiffs) be put in possession of that Ac.0. $32\frac{1}{3}$ decimals of land from the northern side of that suit plot No.455 through the process of court cannot be sustainable under law.

11. When it is held that the Judgment and decree passed by the 1st Appellate Court in toto is not sustainable under law and the same is interferable to a limited extent as clarified above through this appeal filed by the appellants, for which, there is some merit in the appeal of the appellants. Therefore, this 2nd Appeal filed by the appellants is to be allowed in part.

12. *In the result, the appeal filed by the appellants (defendant Nos.1 to 8) is allowed in part on contest, but without cost.*

The Judgment and decree dated 17.03.1988 and 30.03.1988 respectively passed by the 1st Appellate Court in M.A. No.21/8 of 1983/82-I entitling the plaintiffs (appellant Nos.1 and 2 in the 1st Appeal) to get Ac.0. $32\frac{1}{3}$ *decimals of land from the northern side out of Ac.0.97 decimals of suit tank plot No.455 and they (plaintiffs) be*

put in possession on that Ac.0. $32\frac{1}{3}$ decimals from the northern side of suit tank through the process of the court are set aside.

But, whereas the Judgment and decree passed by the 1st Appellate Court in M.A. No.21/8 of 1983/82-I declaring that the plaintiffs are the owners in respect of 1/3rd share of suit plot No.455 is confirmed.

The Judgment and decree of the dismissal of the suit of the plaintiffs vide C.S No65/84 of 1981-79-I passed by the trial court are set aside.

The suit be and the same vide C.S No65/84 of 1981-79-I filed by the plaintiffs is decreed in part on contest against the defendant Nos.1 to 8 and ex-parte against the defendant Nos.9 and 10.

The right, title and interest of the plaintiffs in respect of their 1/3rd share in the suit tank Plot No.455 is declared.

As the plaintiffs have been declared as the co-owners of the suit tank vide Plot No.455 with the defendants and as the suit joint tank cannot be divided physically in share wise being impartible in nature, for which, the prayers of the plaintiffs for delivery of possession to their 1/3rd share from the suit tank as well as damages are refused.

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