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Susanta Ku. Samantaray & Anr. -V- State Of Odisha (Vig.)
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Hadu@Kusaleswar -V- State of Odisha.
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INDIAN PENAL CODE, 1860 – 302 – Accused/appellant convicted under the section – Conviction has been made on basis of the deposition of P.W.9 who was a Co-villager, whose house was situated nearly 10 to 12 feet away from the place of occurrence, though P.W.9 had not seen the axe/actual blow on the deceased but was a witness to the pre-occurrence, i.e. both deceased and accused were taking liquor on the courtyard of the deceased and also witness to post occurrence, i.e. after hearing the sound of axe blow, rushed to the spot found that, accused was holding an axe and deceased laying with injury on head & body and the children of deceased were crying and all of sudden accused thrown away that axe after seeing to him – Accused took plea that, the place of occurrence was dark, where as the prosecution took stand that a 'Dibiri' light was there and clearly the place of occurrence was visible – The evidence of P.W.9 no way demolished by the accused/defendant – Hence this court considering the evidence of P.W.9 & medical evidence as well as other corroborative evidence confirmed the conviction.

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Susanta Ku. Samantaray & Anr. -V- State Of Odisha (Vig.)
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MATRIMONIAL APPEAL – Custody of Muslim minor child – Muslim personal law prescribe that, father is the natural guardian of minor child though mother has right to custody till attainment of puberty – In the Present case, mother is seeking custody of minor child whereas the child is in custody

of her father and she is being brought up and maintained properly without any negligence – In the circumstances above, whether mother is entitled to retain custody of child? – Held, deciding a complex question as to custody of minor, a court of law should keep in mind relevant statutes and right flowing therefrom – But such cases cannot be decided solely by interpreting legal provisions – It is a humane problem & required to be solved with human touch – Though the mother is entitled to custody till the child attains 15 years of age, but the Court did not deliver the custody keeping in view of the all round welfare of the child – However the right to visit was granted to the mother.

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MINES & MINERALS (DEVELOPMENT & REGULATION) AMENDMENT ACT, 2015 – Section 8A, Sub-section 4 r/w Rule 12(1)(ff) of the Minerals (other than Atomic & Hydrocarbons Energy Minerals) Concession Rule, 2016 – The right of the petitioners/lessee to carry out the mining activities based on the original agreement was stand terminated after completion of 50 years, i.e. on 20.02.2024 – The petitioner was not allowed by the State functionaries to operate the mining activities from 09.01.2012 to 05.11.2015 despite submission of all requisite clearances – Whether the period for which the lessee was not allowed to operate the lease will come within the definition of "*force majeure*" as per Rule, 12(1)(ff) of 2016 Rule & the period of such delay shall be added to the period for the lease ? – Held, No case is made out for the addition of period beyond 50 years applying *force majeure* clause – The lease shall be put up for auction as per the procedure specified in the MMDR Act.

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ODISHA CIVIL SERVICE (PENSION) RULE, 1992 – Rule 7(2)(C) and explanation(b) & Rule, 66 – The petitioner was a member of the selection committee during his incumbency as District Welfare Officer – A vigilance case was registered against the members of the committee including the petitioner – Whether withholding of the retiral as well as pensionary benefit on the basis of vigilance case is justified? – Held, No – The departmental proceeding was initiated after retirement – On the date of retirement, such proceeding was not in existence – The writ petition disposed of with certain direction.

fpra Ch. Das -V- State of Odisha & Ors.
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ODISHA DEVELOPMENT AUTHORITIES (RETIREMENT BENEFIT OF EMPLOYEES) RULE, 2015 – Rule 4(1) r/w Articles 14, 16 of the Constitution of India – Whether the employee appointed prior to 01.01.2005 is entitle to get pension as it is being availed by the similarly situated employees under the state government? – Held, Yes.

Bhuban Mohan Dash -V- State of Odisha & Ors.
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ODISHA EXCISE ACT, 2008 – Sections 47, 47(4) – The authority issued an order/letter for cancellation of license of "on shop" issued in favor of petitioner without assigned any reason & without giving any opportunity of hearing as mandated in the statute – Whether the order of cancellation is sustainable? – Held, No – The cancellation of license issued in favor of petitioner cannot be sustained in the eyes of law.

Padmabati Jena -V- State of Odisha & Ors.
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ORISSA ESTATE ABOLITION ACT, 1951 – Section 8(1) – The plaintiff instituted the suit for declaration of her occupancy right over the suit schedule land and permanent injunction against the respondent on the basis of order passed in R.F case instituted U/s. 8(1) of the Act – The Trial Court decreed the suit – The 1st Appellate Court interfered in the decree – Whether the 1st Appellate Court was justified in not taking cognizance of recognition of the occupancy status of the plaintiff as per Section 8(1) of OEA Act, so declared by the authority concerned? – Held, Yes –Section 8(1) of the Act makes no provision for any such application to be entertained and for the said purpose no enquiry is contemplated.

Smt. Banashree Mahakud -V- Executive Engineer (R&B)Bhadrak & Ors.
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ODISHA MEDICAL EDUCATION SERVICE IN STATE'S SCALE OF PAY (METHOD OF RECRUITMENT CONDITIONS OF SERVICE) RULE, 2009 – Rule 4(1) – Requisite qualification – On the last date for receipt of application for the post of Asst. Professor, speciality in Anatomy, the Opp. Party did not possess requisite qualification with three years of experience – The last date for making application was 28.11.2018 but the Opp. Party obtain required experience certificate on 08.03.2019 – Whether Opp.Party is eligible for the post? – Held, No – If any condition stipulated in the advertisement, it should be strictly followed by the authority, in no case it will be deviated.

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Rohita Samal -V- Bilash @ Bilasini Mohanty & Anr.

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Aishwarya Sahoo -V- Government Of India & Anr.
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Sk.Sadab Kadir & Ors. -V- Saher Saniya
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PUBLIC INTEREST LITIGATION – Article 226 of Constitution of India – Due to unauthorized encroachment of the alloted land the funds available with the Saheed Laxman Nayak Medical College & Hospital for developmental works have not been utilized, hence, petitioner filed present PIL – Whether PIL is maintainable? – Held, No – We don't find any exceptional circumstance in the present case to exercise our extra ordinary writ jurisdiction when the statutory provisions like section 133 of Cr.P.C & Sections 3 & 7 of OPLE Act provide jurisdiction and procedure to deal with the situation.

Trinath Panda -V- Commnr.-cum-Secy., H & Fw Dept., BBSR
2024 (I) ILR-Cut…… 396

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

Pemmi Venkataramana & Anr. -V- UIO
2024 (I) ILR-Cut…… 529

REGULATION OF THE BOARD OF SECONDARY EDUCATION – Regulation 39 – Change of date of birth – The petitioner, after opening of service book in the year 2019, came to know about the wrong entry of date of birth – The authority rejected the same relying on the provisions contained under regulation 39 – Whether the rejection is sustainable? – Held, No – Petitioner, when came to know that his date of birth has been wrongly recorded in the service book, he approached the authority immediately, for

which this court direct the authority to issue a fresh certificate.

Rajkishore Patra -V- State Of Odisha & Ors.

2024 (I) ILR-Cut…… 600

RIGHT OF PERSON'S WITH DISABILITY ACT, 2016 – Section 2(r) r/w Resolution & Corrigendum dated 05.09.2017 & 16.07.2018 respectively – Whether the authority can issue resolution/corrigendum contravening the statute? – Held, No – Resolution made by State Govt. being contrary to the statute is bad & deserve interference.

Anushrav Gantayat -V- State of Odisha & Ors.

2024 (I) ILR-Cut…… 655

SERVICE LAW – Appointment – Whether the petitioner after knowing fully well about the eligibility criteria so also terms of advertisement & participating in the recruitment process, can challenge the same at a subsequent stage on technical ground that one of such terms of advertisement is contrary to the statute? – Held, Yes – In a situation where a candidate alleges misconstruction of statutory rules & discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it – The candidate by agreeing to participate in the selection process only accepts the prescribed procedure not the illegality in it.

Anushrav Gantayat -V- State of Odisha & Ors.

2024 (I) ILR-Cut…… 655

SERVICE LAW – Disciplinary Proceeding – The Court set aside an order of punishment on the ground that, the enquiry was not properly conducted and re-instate the employee – Whether the Appellate court has empowered to pass the order of reinstatement? – Held, No – It must remit the case to the disciplinary authority, to conduct the enquiry from the point it stood vitiated and conclude the same.

Xavier Institute of Management -V- Ruturaj Pattnaik & Anr.

2024 (I) ILR-Cut…… 467

SERVICE LAW – Double Jeopardy – Due to pendency of criminal proceeding the petitioner's case was not considered for promotion although DPC had recommended for promotion – Sealed cover procedure has been adopted – Whether non-completion of proceeding amounts to double Jeopardy? – Held, Yes – Un-explained prolongation of criminal trial not only violate the constitutional rights of an accused but also the statutory and other rights, for that matter a delinquent officer/government servant impending such delayed trial is indeed a case of double Jeopardy.

Dr. Kshetrabasi Thatoi -V- State of Odisha & Anr.

2024 (I) ILR-Cut…… 694

SERVICE LAW – Leave – Petitioner had undergone treatment for functional endoscopy sinus surgery with septoplasty as outdoor patient in ENT department of DHH Bolangir from 26.05.2022 to 07.06.2022 –The authority without treating

the aforesaid period as 'leave' treated it as "No Pay"– The ground of rejection was that, the petitioner had not undergone any surgical procedure and treated only as outdoor patient – Whether the order of rejection is sustainable? – Held, No – It is not a rule of law that in order to be eligible for sick leave, the concerned employee must undergo a surgical procedure.

Jeetendra Sahu -V- State of Odisha& Ors.

2024 (I) ILR-Cut…… 557

SERVICE LAW – Regularization – The authority rejected the representation for regularization of service primarily on the ground that, the petitioner is irregularly engaged without going through the rigorous of regular recruitment process – Whether the ground for rejection is sustainable? – Held, No – "Irregular appointment" cannot be a ground for rejection of petition for regularization – Case law discussed.

Ranjan Kumar Rout -V- State of Odisha & Ors.

2024 (I) ILR-Cut…… 595

SERVICE LAW – Suppression of vital document – Effect of – Held, suppression of vital document amounts to fraud – A person whose case is based on falsehood has no right to approach the Court.

Smt. Sujata Mahanta -V- Collector-cum-Chief Executive Zilla Parishad, Mayurbhanj & Ors.

2024 (I) ILR-Cut…… 630

SERVICE LAW – Regularization – Petitioners were engaged as attendant on daily wage basis in between 2006 to 2008 with the approval of competent authority – The authority without considering the case of petitioners for regularization issued advertisement to fill up 62 posts of Attendant on contractual basis – Whether the petitioners are eligible to absorb as against the 62 sanctioned posts? – Held, Yes – Reason indicated with reference to the case laws.

Prabira Kumar Pattnaik & Ors. -V- State of Odisha & Ors.

2024 (I) ILR-Cut…… 609

TRANSFER OF PROPERTY ACT, 1882 – Section 44 r/w Section 4 of Partition Act, 1893 – The suit plot was/is neither the undivided qua dwelling house of the plaintiffs and defendant No. 3 nor the defendant No. 1 and 2 are the purchasers of the undivided dwelling house of the defendant No. 3 – Whether the plaintiffs now entitled for decree of permanent injunction as per section 44 of the Act? – Held, No – The suit plot is situated at some distance from the houses of the plaintiffs and defendant No.3 being intervened by so many plots belonging to outsiders, the provisions of section 44 of the Act are not attracted.

Gandharba Pradhan & Ors. -V- Bishnu Charan Pradhan & Ors.

2024 (I) ILR-Cut…… 718

WORDS & PHRASES – "Custody" – Connotation of the word "custody" discussed.

Susanta Ku. Samantaray & Anr. -V- State of Odisha (Vig.)

2024 (I) ILR-Cut…… 588

2024 (I) ILR-CUT-383

CHAKRADHARI SHARAN SINGH, C.J & D. DASH, J.

W.P(C) NO. 11475 OF 2023

JDL LIME STONE & DOLOMITE MINES & ANR. ……..Petitioners

-V-

STATE OF ODISHA (DEPT.OF STEEL & MINES, BHUBANESWAR) & ORS. ……..Opp.Parties

MINES & MINERALS (DEVELOPMENT & REGULATION) AMENDMENT ACT, 2015 – Section 8A, Sub-section 4 r/w Rule 12(1)(ff) of the Minerals (other than Atomic & Hydrocarbons Energy Minerals) Concession Rule, 2016 – The right of the petitioners/lessee to carry out the mining activities based on the original agreement was stand terminated after completion of 50 years, i.e. on 20.02.2024 – The petitioner was not allowed by the State functionaries to operate the mining activities from 09.01.2012 to 05.11.2015 despite submission of all requisite clearances – Whether the period for which the lessee was not allowed to operate the lease will come within the definition of "*force majeure*" as per Rule, 12(1)(ff) of 2016 Rule & the period of such delay shall be added to the period for the lease ? – Held, No case is made out for the addition of period beyond 50 years applying *force majeure* clause – The lease shall be put up for auction as per the procedure specified in the MMDR Act.

Case Laws Relied on and Referred to :-

1. (2003) 1 SCC 726 : Beg Raj Singh vs. State of U.P. & Ors.
2. ILR (1988) II Delhi 71 : Dharam Veer v. Union of India.
3. W.P(C) No.21564 of 2019 (19.11.2019) : Ramesh Prasad Sao v. State of Odisha & Ors.
4. (2020) 4 AIR Kant R 660 : 2020 SCC Online Kar 414 : Shantipriya Minerals Pvt. Ltd. vs. State of Karnataka.

For Petitioners : Mr. Pitambar Acharya, Sr. Adv, Mr. S.S.Tripathy.

For Opp.Parties : Mr. Ashok Ku. Parija, A.G & Mr. P.P.Mohanty, AGA

JUDGMENT Date of Judgment : 20.02.2024

CHAKRADHARI SHARAN SINGH, C.J.

1. A mining lease was executed on 21.02.1974 by the Collector, Sundargarh on behalf of the State of Odisha in favour of the late Ram Avatar Jalan, in accordance with the Mines and Minerals Concessions Rules, 1960 in respect of the land having description in Part-I of the schedule to the said lease of limestone and dolomite ore over an area of 573.0536 hectares in village Dharuara, Lanjiberna, Kukuda, Bihabandh and Falsakani under Sadar Sub-Division of Sundargarh Districts for 20 years i.e. upto 20.02.1994. After expiry of the validity period of said lease deed, the lessee continued with mining operation under the deemed extension provision of

Section 8 of the Mines and Minerals (Development and Regulation) Act, 1957 (in short, 'MMDR Act'), admittedly, with the permission of the competent authority under the State, in terms of an interim order of this Court dated 11.02.2015 passed in Miscellaneous Case No. 18700 of 2014 arising out of W.P.(C) No. 21203 of 2014.

2. The petitioner No.2 in the present proceeding is the son and thus legal heir of the late Ram Avatar Jalan. Certain amendments came to be introduced in the MMDR Act by Mines and Minerals (Development and Regulation) Amendment Act, 2015 (Act 10 of 2015) with effect from 12.01.2015 including the insertion of Section 8-A therein, Sub-Section 3 thereof contemplates that all the mining leases granted before the commencement of the Act 10 of 2015 shall be deemed to have been granted for 50 years.

3. Manifestly, invoking the provision under Sub-Section (3) of Section 8-A of the MMDR Act, the validity period of the original lease dated 21.02.1974 has been extended in the case of the lessee to 20.02.2024, by a supplementary deed executed on 30.03.2016. Petitioner No.2, who is the legal heir of late Ram Avatar Jalan, has approached this Court by filing the present writ application, primarily seeking a direction that he should be allowed to conduct mining operations based on the original lease deed dated 21.02.1974 read with Section 8-A (3) of the MMDR Act for an additional period equivalent to the period (09.01.2012 to 05.11.2015) for which the petitioner could not conduct the mining operations because of interruptions/disruptions caused by the State authorities, which the lessee could not reasonably prevent or control. The *force majeure* clause (Clause 4 of Part-F) of the lease agreement read with Rule 12 (1)(ff) of the Minerals (Other than Atomic and Hydro Carbons Energy Mineral) Concession Rules, 2016 (in short, 'Rules of 2016') is the substratum of the petitioners' claim.

4. We have heard Mr. Pitambar Acharya, learned Senior Counsel appearing on behalf of the petitioners assisted by Mr. S.S. Tripathy, learned counsel and Mr. Ashok Kumar Parija, learned Advocate General of the State assisted by Mr. P.P. Mohanty, learned Additional Government Advocate for the State/opposite parties.

5. The facts in this case are not at all in dispute which need to be taken note of, at the outset before dealing with the issues raised and submissions advanced on behalf of the rival parties.

6. The mining lease for Limestone and Dolomite over an area of 573.0536 hectares was granted in favour of the lessee, as noted above, with effect from 21.02.1974. The original lessee had surrendered a part of the lease area which was consequently reduced to 39.42 hectares of land. Before the expiry of the said lease period, an application was filed by the lessee seeking the first renewal of the lease in accordance with the provisions under Rule 24-A of the Minor Mineral Concession Rules, 1960 (in short, 'Rules of 1960') made by the Central Government in the exercise of its power conferred under Section 13 of the MMDR Act. The renewal

application remained pending before the State Government. The lessee, however, continued the mining operations by virtue of Sub-Rule 6 of Rule 24-A of the Rules of 1960 till 07.11.2009. Therefore, the lessee was asked by the Deputy Director of Mines, Rourkela by an office letter No. 14247 (25) Mines dated 07.11.2009 to stop the mining operations on the ground of non-availability of statutory clearances. The lessee is said to have intimated the Deputy Director of Mines, Rourkela, upon obtaining all statutory clearances namely:- (i) duly approved valid mining plan/scheme, (ii) forest clearances, (iii) environmental clearances in respect of the mining lease, and (iv) a consent by the State Pollution Control Board (SPCB), to restart the mining operations.

7. The Deputy Director of Mines, Rourkela recommended to the Director of Mines on 16.01.2013 for the resumption of the mining operation. The Additional Secretary to the Government of Odisha was apprised of the compliance of statutory clearances regarding the mining lease area by the Director of Mines, Odisha with a recommendation for resumption of the mining operations. On 16.05.2012 the lessee was asked to appear for a personal hearing by the Additional Secretary to the State Government on the application filed by the lessee for resumption of the mining lease. Another date was fixed for a personal hearing on 28.12.2012. In the meanwhile, the lessee filed a revision application before the Central Government under Section 30 of the MMDR Act challenging the order dated 25.06.2012 of the Director of Mines, Odisha rejecting the Mining Dues Clearance Certificate (MDCC) application filed by the lessee on 30.05.2012 which was registered as Revision Application No. 22(53)/2012/RC. On 07.01.2014 the revision application of the lessee was disposed of with a direction to the State Government to allow the resumption of the mining operation till the expiry of the current lease period i.e. up to 20.02.2014 (20 years) from 20.02.1994. The Revisional Authority in its order mentioned that the State Government might take appropriate measures for recovery of legally recoverable dues from the petitioners.

8. In the background of the submissions and the counter submissions which have been advanced on behalf of the parties, it is deemed apt to reproduce the relevant portion of the said order dated 07.01.2014 :

> "*16. This revision petition is not about determining the correctness or otherwise of the demand of Rs.2,10,23,401/- raised by the state Government on the basis of the report of the Accountant General, Odisha. It is for the State Govt. to give a complete account and particulars of the dues which the revisionist is liable to pay and the revisionist may submit appropriate representation in case he wants to dispute the demand raised by the State Government. If the dues are legally recoverable the State Government may refuse or reject the grant of MDCC which will dis-entitle the revisionist from getting the RML in future. The State Government may, however, take into consideration the provisions of newly inserted Rule 2(iia) of the MC Rules as amended by the Mineral Concession (Amendment) Rules, 2012 which defines "illegal mining".*
>
> *17. The Revisionist, at the time of hearing and also in his written arguments that he has subsequently filed, has pressed to declare this amount as "not recoverable under the*

law", but since the issue of recoverability or otherwise of this amount is not a fact-in issue of this Revision Petition, it is not necessary to decide the matter at this stage.

18. There can be no doubt that the current lease period which started on 21.02.1994 will continue till 20.02.2014. The mining operation was suspended for want of environmental clearance of the MoEF and since that clearance has been obtained and filed by the revisionist there should be no bar on his resuming the mining operations during the subsistence of the lease period.

19. In view of the observation above, the State Government is directed to allow the resumption of the mining operation till the expiry of the current lease period i.e. up to 20.02.2014. In the meantime, the State Government may take appropriate measures for recovery of any legally recoverable dues from the revisionist. With these observations and directions the above revision petition is disposed of."

9. The lessee was allowed to resume of mining operation through a letter dated 08.10.2014 issued by the Department of Steel and Mines under the signature of the Addl. Secretary, Government of Odisha.

10. As has been noted hereinabove, Section 8-A came to be inserted in the MMDR Act with effect from 12.01.2015 which reads as under:

*"**8-A. Period of grant of a mining lease for minerals other than coal, lignite and atomic minerals**.--(1) The provisions of this section shall apply to minerals other than those specified in Part A and Part B of the First Schedule.*

(2) On and from the date of the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, all mining leases shall be granted for the period of fifty years.

(3) All mining leases granted before the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015 shall be deemed to have been granted for a period of fifty years.

(4) On the expiry of the lease period, the lease shall be put up for auction as per the procedure specified in this Act:

Provided that nothing contained in this section shall prevent the State Governments from taking an advance action for auction of the mining lease before the expiry of the lease period.

(5) Notwithstanding anything contained in sub-sections (2), (3) and sub-section (4), the period of lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, where mineral is used for captive purpose, shall be extended and be deemed to have been extended up to a period ending on the 31st March, 2030 with effect from the date of expiry of the period of renewal last made or till the completion of renewal period, if any, or a period of fifty years from the date of grant of such lease, whichever is later, subject to the condition that all the terms and conditions of the lease have been complied with.

(6) Notwithstanding anything contained in sub-sections (2), (3) and sub-section (4), the period of lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, where mineral is used for other than captive purpose, shall be extended and be deemed to have been extended up to a period ending on the 31st March, 2020 with effect from the date of expiry of the period

of renewal last made or till the completion of renewal period, if any, or a period of fifty years from the date of grant of such lease, whichever is later, subject to the condition that all the terms and conditions of the lease have been complied with.

(7) Any holder of a lease granted, where mineral is used for captive purpose, shall have the right of first refusal at the time of auction held for such lease after the expiry of the lease period.

(7A) Any lessee may, where mineral is used for captive purpose, sell mineral up to fifty per cent of the total mineral produced in a year after meeting the requirement of the end use plant linked with the mine in such manner as may be prescribed by the Central Government and on payment of such additional amount as specified in the Sixth Schedule:

Provided that the Central Government may, by notification in the Official Gazette and for the reasons to be recorded in writing, increase the said percentage of mineral that may be sold by a Government company or corporation:

Provided further that the Central Government may, by notification in the Official Gazette and for reasons to be recorded in writing, amend the Sixth Schedule so as to modify the entries mentioned therein with effect from such date as may be specified in the said notification.

(8) Notwithstanding anything contained in this section, the period of mining leases, including existing mining leases, of Government companies or corporations shall be such as may be prescribed by the Central Government:

Provided that the period of mining leases, other than the mining leases granted through auction, shall be extended on payment of such additional amount as specified in the Fifth Schedule:

Provided further that the Central Government may, by notification in the Official Gazette and for reasons to be recorded in writing, amend the Fifth Schedule so as to modify the entries mentioned therein with effect from such date as may be specified in the said notification.

Explanation.--For the removal of doubts, it is hereby clarified that all such Government companies or corporations whose mining lease has been extended after the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015 (10 of 2015), shall also pay such additional amount as specified in the Fifth Schedule for the mineral produced after the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2021.

(9) The provisions of this section, notwithstanding anything contained therein, shall not apply to a mining lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015 (10 of 2015), for which renewal has been rejected, or which has been determined, or lapsed."

11. In consonance with the provisions of sub-section (3) of Section 8-A of the MMDR Act, it was recommended by the State Government for extension of the lease period of the lessee up to 20.02.2024, being 50 years from the date of the original lease. Accordingly, a supplementary lease deed came to be executed on 30.03.2016 by the Collector, Sundargarh on behalf of the State of Odisha in favour of the lessee. Since the controversy raised in the present proceeding largely revolves around, the said supplementary lease deed, the contents of the same are being reproduced hereinbelow:

"WHEREAS the lessee/lessees has/have executed a mining lease deed on date ***21/02/1974*** *in accordance with the Mineral Concession Rules, 1960 (hereinafter referred to as the said Rules), in respect of the land and described in Part 1 of the schedule of the said lease of* ***Limestone & Dolomite Ore over an area of 573.0536 hects, in village Dharuara, Lanjiberna, Kukuda, Bihabandh and Falsakani under Sadar Sub-Division of Sundargarh District, which has been registered vide original No.377 & duplicate No.378, Book No.I, Volume-10, Pages 47 to 143 in the office of District Sub-Registrar, Sundargarh on date 11.03.1974 (hereinafter referred to as the said lease);***

AND, WHEREAS the period of the said lease deed was valid from ***21.02.1974 to 20.02.1994.***

AND WHEREAS after expiry of the validity period of the said lease deed, the lessee had continued to conduct mining operations in the said lease under the deemed extension provisions of section 8 of the Mines and Minerals (Development and Regulations) Act, 1957 (hereinafter referred as the MMDR Act) with the permission of the party of the First Part till date as per interim order dtd.11.02.2015 passed in Misc. Case No.18700 of 2014 arising out of W.P.(C) No.21203 of 2014 of Hon'ble High Court of Odisha.

AND, WHEREAS the MMDR Act has been amended with effect from 12.01.2015 and section 8A has been inserted in the said Act, providing for extension of validity period of lease granted in the past under the provisions of the said Act, subject to fulfillment of conditions provided therein;

AND WHEREAS, the Lessee surrendered the area over 533.633 hects. and the Government accepted it from 30.10.1989 and the Government of Odisha has decided to extend the validity period of the lease upto 20th February, 2024 over an area of 39.42 hects. vide letter No.III (LD) SM-13/2010-46/SM, dt. 04.01.2016 of Govt. in Department of Steel & Mines, Odisha in village Dharuara under Sadar Sub-Division of Sundargarh District."

12. Without raising any dispute about the period of the lease and the date of termination of such lease as contemplated in the said supplementary lease deed, the lessee continued with the mining operation, apparently under the said lease deed which is coming to an end on 20.02.2024. It is the petitioners'/lessee's own case that more than 6 years after the execution of the lease deed on 30.03.2016, he made a representation on 04.07.2022 before the Principal Secretary, Department of Steel and Mines, Odisha, Bhubaneswar for restoring the mining lease for a period of 3 years and 10 months in the light of clause 4 of Part-IX of the lease deed dated 21.02.1974, akin to clause 4 of Part-IX of Form-K of the Mineral Concession Rules read with Rule 12(1)(ff) of the Rules of 2016, thus, invoking *force majeure* clause. Clause 4 of Part-IX of the original lease deed dated 21.02.1974 reads as under:

"4. Failure on the part of the lessee to fulfil any of the terms and conditions of this lease shall not give the Central or State Government any claim against the lessee/lessees or be deemed a breach of this lease, in so far as such failure is considered by the said Government to arise from force majeure, and if through force majeure the fulfillment by the lessee of any of the terms and conditions of this lease be delayed, the period of such delay shall be added to the period fixed by this lease. In this clause the expression "Force Majeure" means Act of God, war, insurrection, riot, civil, commotion, strike,

> earthquake, tide storm, tidal wave, flood, lightening, explosion, fire, earthquake and *any other happening which the lessee could not reasonably prevent or control*."
>
> (Emphasis supplied)

13. Rule 12(1)(ff) of the Rules of 2016 has also a similar *force majeure* clause, which reads thus:

> "**12. Terms and conditions of a mining lease:- (1)**
>
> xxx xxxx xxxx xxxx
>
> (ff). failure on the part of the lessee to fulfill any of the terms and conditions of the Act and rules made thereunder or under the mining lease shall not give the Central Government or State Government any claim against the lessee or be deemed a breach of the lease, in so far as such failure is considered by the relevant Government to arise from force majeure. In the event of any delay by the lessee to fulfill any of the terms and conditions of the Act and rules made thereunder or under the mining lease on account of a force majeure event, the period of such delay shall be added to the period fixed by these rules or the mining lease.
>
> In this clause the expression "force majeure" means act of God, war, insurrection, riot, civil commotion, strike, earth quake, tide, storm, tidal wave, flood, lightning, explosion, fire, earthquake and *any other happening which the lessee could not reasonably prevent or control."* (Emphasis supplied)

14. It is precisely, the petitioners' case that despite submission of all requisite clearances, the State of Odisha functionaries did not allow the lessee to carry out the mining activities from 09.01.2012 to 05.11.2015. Inaction on the part of the State Government granting permission to resume the mining operation after submission of the statutory clearance certificates qualifies for the expression "any other happening which the lessee could not reasonably prevent or control"; and comes within the definition of *force majeure* under Clause 4 of Part-IX of the lease agreement read with Rule 12(1)(ff) of the Rules of 2016.

15. It is also the petitioners' case that because of the lapses on the part of the State Government, as the petitioners could not carry out the mining operation for the period from 09.01.2012 to 05.11.2015 that period should be directed to be added to the period fixed in the lease.

16. Mr. Pitambar Acharya, learned Senior Counsel on behalf of the petitioners has strenuously argued that the period of lease for which a lessee has to carry out mining activities is statutory given the clear mandate of Section 8-A of the MMDR Act, sub-section 3 of which in no uncertain terms lays down that the mining lease granted before commencement of the said Act shall be "deemed to have been granted for a period of 50 years". By operation of the said provision, the petitioners had a right to carry out the mining activities for the full total period of 50 years beginning from the date of the first lease deed i.e. 21.02.1974. He contends that there were apparent lapses/laches on the part of the lessor in allowing the lessee to carry out the mining work from 09.01.2012 to 05.11.2015 and, therefore, in terms of the *force majeure* clause of the agreement read with Rule 12(1)(ff) of the Rules of

2016, it was obligatory on the part of the competent authority to extend the period of lease beyond 20.02.2024, in a manner that the petitioners can avail total 50 years of the mining operation. He has placed reliance on the decision of the Supreme Court in the case of ***Beg Raj Singh vs. State of U.P. and Others,*** reported in ***(2003) 1 SCC 726*** and a Division Bench decision of Delhi High Court in the case of ***Dharam Veer v. Union of India,*** reported in ***ILR (1988) II Delhi 71,*** to bolster his contentions. He has argued that the State Government has wrongly considered the supplementary lease deed to be a renewal of the lease granted to the lessee earlier, rather it was a simple case of resumption of the mining activities in continuation with the first lease executed on 21.02.1974 by operation of sub-section (3) of Section 8-A of the MMDR Act. He submits that the State-opposite parties caused an unlawful interruption in carrying out the mining activities by the lessee in the present case for the period from 09.01.2012 to 05.11.2015.

Relying on the decision in the case of ***Dharam Veer (supra)*** he has argued that on analogous principles, this case may not appear to be a case of *force majeure*, but the unlawful interruption of enjoyment has been caused to the lessee which was beyond his control. The doctrine of *force majeure* applies by virtue of its definition in the original lease deed read with Rule 12(1)(ff) of the Rules of 2016. Similar arguments have been advanced by him, referring to the decision of the Supreme Court in ***Beg Raj Singh (supra).***

17. Mr Ashok Kumar Parija, learned Advocate General representing on behalf of the State-opposite parties, *per contra*, has argued that the decision rendered by the Supreme Court in the case of ***Beg Raj Singh (supra)*** and that by the Delhi High Court in ***Dharam Veer (supra)*** have no application in the facts and circumstances of the present case, firstly for the reason that the said decisions were rendered before coming into force of the Act 10 of 2015 with effect from 12.01.2015 whereby Section 8-A of the MMDR Act was introduced, having a deeming clause to the effect that all mining lease activities granted before commencement of the MMDR Act shall be deemed to have been granted for a period of 50 years. He contends that the right of the petitioners/lessee to carry out the mining activities based on the original agreement dated 21.02.1974 will stand terminated after completion of 50 years i.e. 20.02.2024, by operation of law.

He has argued that sub-section (4) of Section 8-A of the MMDR Act stipulates “auction of lease as per the procedure specified in this Act on the expiry of the lease period”. He contends that if the submissions which have been advanced on behalf of the petitioners are to be accepted, the statutory mandate under Section 4 of the MMDR Act will come to a halt. He has placed heavy reliance on a coordinate Bench decision of this Court dated 19.11.2019 rendered in ***W.P.(C) No.21564 of 2019 (Ramesh Prasad Sao v. State of Odisha and Others)*** where this Court, after having taken note of the decisions in ***Beg Raj Singh (supra)*** and ***Dharam Veer (supra),*** has held that the lessee in that case after having accepted the supplementary

lease without any demur in 2015 could not raise any objection for the period before execution of the lease deed. Relying on the aforementioned decision in the case of ***Ramesh Prasad Sao (supra)*** he has argued that the lease period having been accepted by the lessee and the lessor in consonance with the Act 10 of 2015, the petitioners cannot be allowed to operate the mines beyond 31.03.2020.

He has also drawn our attention to the Division Bench decision rendered by the Karnataka High Court in the case of ***Shantipriya Minerals Pvt. Ltd. vs. State of Karnataka,*** reported in ***(2020) 4 AIR Kant R 660 : 2020 SCC Online Kar 414*** in which the Karnataka High Court has dealt extensively with the provisions of Section 8-A of the MMDR Act. He has submitted that after having taken note of the legislative background, the Karnataka High Court has held that the intention of the legislature is reflected there in Sub-section (4) of Section 8-A of the MMDR Act which clearly provides that on the expiry of the lease period, the lease shall be put up for auction as per the procedure prescribed in the said Act. Therefore, on expiry of the extended lease period, the lease has to be put up for auction which is consistent with the objects and reasons and the legislative intent of coming out with the amendment Act to introduce auction as the only method of disposal of mineral concessions. He has argued that with the coming into force of the notification issued by the Government of India in the exercise of powers conferred by clause (e) of Section 3 of the MMDR Act, the mineral 'Dolomite' has been declared to be a minor mineral. He submits that there is no provision *pari materia* with Rule 12(1)(ff) of the Rules of 2016 under the Odisha Minor Minerals Concession Rules, 2016 (in short, 'OMMC Rules, 2016') containing *force majeure* provision. The 'Dolomite' having been declared the minor mineral, the Rules of 2016 shall have no application which has been made in the exercise of the power conferred by Section 13 of the MMDR Act given the clear language of Section 14 thereof. He contends that even on facts, the petitioners have not been able to make out a case to fall within the *force majeure* clause of the original lease deed which deals primarily with failure on the part of the lessee to fulfil any of the terms and conditions of the lease.

He submits, with reference to the chain of events that admittedly, the petitioners did not have the requisite statutory clearances because of which the Deputy Director of Mines stopped the mining operations on 07.11.2009 and there was no mining operation for the period from 07.11.2009 to 06.11.2011. Therefore, by operation of sub-section 4 of Section 8-A of the MMDR Act, the lease lapsed. The petitioners/lessee had in the meanwhile made an application under Rule 28(2) of the Mineral Concessions Rules, 1960 (in short „Rules, 1960"). In the aforesaid background, a notice was issued to the petitioners under Rule 26(1) of the Rules, 1960 directing the lessee to appear for a personal hearing on his application for renewal. The lessee appeared for a personal hearing and also applied for issuance of MDCC on 30.05.2012 which was rejected by the Director of Mines on 25.06.2012 noticing dues of Rs. 2,10,23,461/- on account of excess production beyond the statutory limit prescribed under Section 21(5) of the MMDR Act. The lessee had

made a revision application against the said order under Section 30 of the MMDR Act before the Central Government.

The revision application was finally heard by the revisional authority which was disposed of by an order dated 07.01.2014 whereby it directed the State Government to allow the resumption of the mining operation till the expiry of the current lease period i.e. up to 20.02.2014. In such view of the matter, the petitioners claim that there were lapses on the part of the State for the period from 09.01.2012 to 07.01.2014, which caused disruption in mining operation, in any case, is untenable. Further, in any event, the petitioners cannot claim by way of the right to carry out the mining activities, under the supplementary lease deed beyond the statutory period prescribed under Section 8-A of the MMDR Act and subsequent supplementary lease deed signed by him without any demur.

He submits that the lessee, after having entered into the lease agreement to carry out the mining activities up to 20.02.2024, cannot now turn around to claim that he should be allowed an additional period beyond 20.02.2024, relying on the events before execution of the supplementary lease deed. He has further submitted that apart from the fact that the lessee is estopped by the doctrine of acquiescence to raise a claim for carrying out the mining activities beyond 20.02.2204, his claim is also untenable in view of the clear stipulation under Section 8-A of the MMDR Act.

18. In reply, Mr Pitambar Acharya, learned Senior Counsel for the petitioners has submitted that the coordinate Bench of this Court in the case of ***Ramesh Prasad Sao (supra)*** has no application in the present case which related to sub-section (6) of Section 8-A of the MMDR Act whereas the petitioners' case lies under sub-section (3) thereof. He has also argued that as a matter of fact, the "No Dues Certificate" was issued by the Director of Mines on 23.08.2012 itself (Annexure-10) and, therefore, it was highly arbitrary on the part of the State-opposite parties to have stopped the petitioners from carrying out the mining operations. For the same reason, the Division Bench decision of the Karnataka High Court in the case of ***Shantipriya Minerals Pvt. Ltd. (supra)*** has no application in the background of the present set of facts, he contends.

19. We have carefully perused and examined the rival pleadings on record and have given thoughtful consideration to the rival submissions advanced on behalf of the parties.

20. Before dealing with the rival contentions, it would be profitable to notice briefly the legislative history leading to the enactment of Act 10 of 2015 with effect from 12.01.2015 whereby various amendments were made in the MMDR Act including insertion of Section 8-A therein.

21. On a close reading of the "Statement of Objects and Reasons", it can be easily discerned that the legislature thought that the MMDR Act as it then existed did not permit auctioning of mineral concessions. Further, in the opinion of the

legislature, auctioning of the mineral concessions would improve the transparency in allocation and the Government would also get an increased share of the value of mineral resources. It was noticed that certain provisions of law relating to the renewal of mineral concessions were found to be wanting in enabling quick decisions with a resultant slowdown in the grant of new concessions and renewal of the existing ones.

22. It was in this background, *inter alia*, Mines and Minerals (Development and Regulation) Amendment Ordinance, 2015 was promulgated on 12.01.2015 which later became an Act, i.e., Act 10 of 2015. One of the salient features of the MMDR Amendment Bill 2015 as mentioned in the statement of objects and reasons was the removal of discretion in the procedure for allowing mineral concessions. Sub-clause (1) of para-6 of the statement of objects and reasons reads as under:

> "6. The salient features of MMDR Amendment Bill, 2015 are as follows:
>
> (i) Removal of discretion : auction to be sole method of allotment : The amendment seeks to bring in utmost transparency by introducing auction mechanism for the grant of mineral concessions. The tenure of mineral leases has been increased from the existing 30 years to 50 years. There is no provision for renewal of leases.
>
> (ii) xxx xxx xxx"

23. Referring to the statement of objects and reasons behind the enactment of the Act 10 of 2015, the Karnataka High Court in the case of ***Shantipriya Minerals Pvt. Ltd.*** (*supra*) has held that one of the basic objects of the Act 10 of 2015 was to make auction as the only mode of grant of mining concession as the existing provisions of the MMDR Act did not permit auctioning of mineral concessions. Another object was to eliminate discretion and improve transparency in the allocation of mineral resources. Another salient feature, *inter alia,* of Act 10 of 2015 was 'removal of discretion' and the introduction of the auction to be the sole method of allotment of mineral concession. By the amendment, the tenure of the mining lease was extended from 30 years to 50 years. We respectfully concur with the view taken by the Division Bench of the Karnataka High Court in the case of ***Shantipriya Minerals Pvt. Ltd.*** (*supra*) while referring to the basic objects of Act 10 of 2015.

24. After having observed so, the Karnataka High Court in case of ***Shantipriya Minerals Pvt. Ltd.*** (*supra*) has viewed that by virtue of sub-Section 4 of Section 8-A of the MMDR Act, 1957, wherever extension of mining lease is granted under any of the provisions of Section 8-A on expiry of the extended lease period, the lease had to be put up for auction and, extension beyond the period provided in sub-Section 6 of Section 8-A of the Act cannot be granted. We are in respectful agreement with the said view also of the Karnataka High Court in the case of ***Shantipriya Minerals Pvt. Ltd.*** (*supra*).

25. The division Bench of this Court in the case of ***Ramesh Prasad Sao*** (*supra*) had the occasion to deal with a similar circumstance where the petitioner of that case claimed restoration of lost period relying on clause-4 of Form-K, Part-IX of Mineral Concessions Rules, 1960, the *force majeure* clause on the similar ground that interruption/disruption were caused for a considerable period of 10 months and 20 days, mainly, on account of the act or omission on the part of the authorities of the State Government and pendency of the various legal proceedings before this Court and the Supreme Court in respect of mines in question in that case. This Court, after having referred to the decisions in the case of ***Beg Raj Singh*** (*supra*) and ***Dharam Veer*** *(supra)* concluded in paragraph 13.1 which reads as under:

> "13.1 In view of MMDR Amendment Act, 2015, and more particularly there is no extension on record after 2013 and the petitioner having accepted the supplementary lease deed of 2015 up to 31st March, 2020, in our considered opinion, it would not be appropriate to extend the lease period or grant the petitioner 45 months and 9 days contrary to Section 8A(6) of the MMDR Act. x x x x x x x x x x x x. Having accepted the supplementary lease, without any demur in 2015, the petitioner cannot possibly raise any objection for the period prior to execution of the said lease."

26. We find substance in the submissions made by Mr. Parija, learned Advocate General that the present case is squarely covered by the coordinate Bench decision of this Court in the case of ***Ramesh Prasad Sao*** *(supra).* We see no reason, based on the submissions advanced on behalf of the petitioners to take a different view than what was taken by this Court in the case of ***Ramesh Prasad Sao*** *(supra).*

27. It would be pertinent at this juncture to notice that admittedly, the supplementary lease deed was executed on 30.03.2016. Under an order passed by the Director of Mines, the lessee was allowed to resume the mining operation from 05.11.2015. The original lessee, without any demur, accepted the terms of the lease deed which not only mentioned the date, i.e., 20.02.2024 up to which the validity period of the lease was being extended, but it contained specific reasons why such extension was being granted up to 20.02.2024 with reference to Section 8-A of the MMDR Act. The lessee continued its mining operation on the strength of the said supplementary lease deed without raising any objection and, thus, knowing it fully well that the validity period of the lease was up to 20.02.2024.

28. As has been noted above, it is not the case of the lessee that there was any disruption or interruption in carrying out the mining activities after resumption from 05.11.2015 till date. The lessee knew that by virtue of Section 8-A of the MMDR Act, the validity period of the lease was being extended up to 20.02.2024 upon completion of 50 years from the date of the original lease, i.e., 21.02.1974. It transpires from the pleadings on record that more than 06 years after execution of lease deed, the lessee made a representation on 04.07.2022 before the Principal Secretary to Department, Department of Steel and Mines (opposite party No.1) to restore the mining lease period for 03 years and 10 months invoking clause-4 of Part-IX of the original lease deed dated 21.02.1974 read with Rule 12(1)(ff) of the Rules of 2016).

29. The lessee, in our considered opinion, cannot be permitted to raise a grievance now after having specifically agreed to the validity period of the lease up to 20.02.2024. After having agreed to the terms and conditions of the supplementary lease deed and acted thereupon, the lessee cannot turn around and raise a grievance in relation to the period before the execution of the supplementary lease deed, which the lessee had not raised at any point in time. The doctrine of acquiescence is an equitable doctrine, which applies when a party having a right stands by and sees another dealing in a manner inconsistent with that right, while the act is in progress and after violation is completed, which conduct reflects his assent or accord. He cannot afterwards complain. (See ***Pravakar v. Joint Director, Sericulture Department and another*** reported in ***(2015) 15 SCC 1***.) The term acquiescence means silent assent, tacit consent, concurrence, or acceptance.

30. It is noteworthy that an argument has been advanced on behalf of the petitioners that there cannot be any estoppel against the law and the period during which the lessee was not allowed to continue mining operation, was required to be added beyond the period of 50 years by operation of *force majeure* clause in the original lease deed read with Rule 12(1)(ff) of the Rules of 2016. We do not find any force in such submission. Firstly, for the reason that we have concurred with the view taken by a Division Bench of the Karnataka High Court in the case of ***Shantipriya Minerals Pvt. Ltd.*** (*supra*) to the effect that the period of a lease cannot be extended beyond that prescribed period under the provisions of Section 8-A of the MMDR Act. Further, the case of lessee cannot be distinguished from the case of ***Ramesh Prasad Sao*** (*supra*) on the ground that was a case of an extension under sub-Section 6 of Section 8-A of the MMDR Act. Sub-Section 6 of Section 8-A is not a *non-obstante* clause and applies in such cases where the mineral is used other than captive purpose and provides that in such circumstance, the same shall be extended and be deemed to have been extended up to a period ending on 31.03.2020 with effect from the date of the expiry of renewal of lease made or till completion of renewal period, if any, or a period of 50 years from the date of grant of such lease, "whichever is later" subject to the condition that all the terms and the conditions of the lease have been complied with. Sub-section 3 of Section 8-A of the Act is clear in its expression and states that the mining lease granted before the commencement of the Act of 2015 shall be deemed to have been granted for a period of 50 years. On the expiry of the lease period, Section 4 in no certain terms, stipulates that the lease shall be put up for auction as per the procedure specified in the MMDR Act.

31. Keeping in mind the statement of objects and reasons for the enactment of Act 10 of 2015 and the lessee"s tacit consent at the time of execution of the lease deed for a period up to 20.02.2024, we are of the opinion that no case is made out for the addition of period beyond 50 years, i.e., beyond 20.02.2024 applying *force majeure* clause, in the present proceeding under Article 226 of the Constitution of India.

32. We, therefore, do not find any merit in the writ petition, which is, accordingly, dismissed.

33. There shall, however, be no orders as to the costs.

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2024 (I) ILR-CUT-396

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

W.P.(C) NO. 3385 OF 2024

TRINATH PANDA .... Petitioner

-V-

COMMISSIONER-CUM-SECRETARY,
(H & F.W. DEPT), GOVT. OF ODISHA & ORS. .... Opp.Parties

(A) PUBLIC INTEREST LITIGATION – Article 226 of Constitution of India – Due to unauthorized encroachment of the alloted land the funds available with the Saheed Laxman Nayak Medical College & Hospital for developmental works have not been utilized, hence, petitioner filed present PIL – Whether PIL is maintainable? – Held, No – We don't find any exceptional circumstance in the present case to exercise our extra ordinary writ jurisdiction when the statutory provisions like section 133 of Cr.P.C & Sections 3 & 7 of OPLE Act provide jurisdiction and procedure to deal with the situation. (Para 26)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 133 r/w Sections 3 & 7 of OPLE Act, 1972 – Duty of statutory authorities – Described and general direction issued to the concerned authorities. (Paras 12-25)

Case Laws Relied on and Referred to :-

1. AIR 1980 S.C.1622 : Municipal Council, Ratlam Vs. Vardhichand & Ors.
2. (2021) 1 SCC 152 : Gurusimran Singh Narula Vs. Union of India & Anr.

For Petitioner : Mr. Ghanashyam Dash

For Opp.Parties : Mr. Lalatendu Samantray, AGA

JUDGMENT Date of Judgment : 21.02.2024

CHAKRADHARI SHARAN SINGH, CJ.

1. We have noticed disturbing trend of the people approaching this Court by filing writ petitions under Article 226 of the Constitution of India in the nature of Public Interest Litigation (hereinafter referred to as 'PIL') concerning such matters,

which could be duly addressed by the functionaries of the State (within the meaning of Article 12 of the Constitution of India) including those, who have been vested with clear statutory powers under the provisions of the Code of Criminal Procedure (hereinafter referred to as the 'Code') and other provisions. Because numerous cases in the shape of PIL are being filed in this Court seeking direction for removal of encroachments from public places or removal of obstruction or nuisance from public places and also for removal of substances, injurious to health, maintenance of hygiene, etc., coupled with admitted inaction, in the majority of the cases, on the part of the officials, we have formed a *prima facie* impression, in our mind, that it is largely because the authorities have failed to exercise the powers conferred upon them under Section 133 of the Code and other mandatory statutory provisions and thereby omitting to perform their corresponding duties imposed upon them under Section 133 of the Code, rendering the said provisions irrelevant, redundant and otiose. This, possibly, maybe the reason why the litigants, who could have otherwise approached the District Magistrate, the Sub-Divisional Magistrates concerned seeking to invoke their powers under Section 133 of the Code, which deals with the removal of unlawful obstructions and nuisances, etc, are thus, being, advertently or inadvertently, made to approach this Court for the exercise of extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

2. Exercise of jurisdiction, that too in PIL, cannot be made a routine affair, particularly when an alternative efficacious remedy is statutorily available. The present case is one such example where the petitioner has approached this Court seeking a direction to the opposite parties for eviction of encroachers residing over the land allotted in favour of the Dean and Principal of Saheed Laxman Nayak Medical College and Hospital (hereinafter referred to as 'SLNMCH'), Koraput. It has been stated in the writ petition that the said SLNMCH has been established by the Government. For its infrastructure and other facilities, the Government has provided about 21.43 acres of land in favour of the Dean and Principal of SLNMCH (opposite party no.6). It has been asserted that some people have encroached upon the allotted land and some of them have even constructed their houses. The opposite party no.6 had written to the Collector, Koraput (opposite party no.2) for eviction of the encroachers from the allotted land, and the opposite party No.2, in turn, had requested the Sub-Collector, Koraput (opposite party No.3) to evict the encroachers from the allotted land. Thereafter, the Sub-Collector, Koraput asked the Dean and Principal of SLNMCH (opposite party no.6) to furnish the list of encroachers, who had occupied the land unauthorisedly. It is the petitioner"s grievance that opposite party No.6 has not supplied the list of encroachers to the Sub-Collector, which is the consequence of blocking the developmental works of SLNMCH. This has caused a serious obstacle in the way of proper utilization of funds pending with the Dean and Principal of SLNMCH (opposite party no.6) for the construction of B.Sc. Nursing College attached to SLNMCH. The petitioner claims that after having sent the aforesaid letters and seen the inaction of opposite party No.6, he addressed a letter to

The Commissioner-cum-Secretary, Health and Family Welfare Department, Government of Odisha, for eviction of encroachers, who have unauthorisedly occupied the allotted land in favour of opposite party No.6. He again made a representation to opposite party No.2 requesting therein for eviction of encroachers for utilization of funds and construction of the project for the benefit of common people at large, but all in vain.

3. The sum and substance of the case of the petitioner in the present PIL are that the petitioner is a social activist, who has learnt about a certain portion of public land allotted to SLNMCH has been unauthorisedly encroached upon by certain encroachers because of which the funds available with the SLNMCH for developmental work have not been utilized and despite the representations filed by him before the authorities, no action has been taken.

4. While passing the present order, we have kept in mind the observations made by the Supreme Court in the case of ***Municipal Council, Ratlam v. Vardhichand and Ors.,*** reported in ***AIR 1980 S.C. 1622***, which have been followed in a Division Bench decision of Patna High Court rendered on 24.11.2015 in Civil Writ Jurisdiction Case No.4309 of 2015 (***Sanjay Jha vs. State of Bihar and others***).

5. In the wake of the facts noted above and keeping in mind the position that umpteen cases seeking similar reliefs are being filed before this Court, we have considered it desirable to deal with, a little elaborately, the scheme under Section 133 of the Code and other provisions connected thereto. We have also taken into account the provisions under the Odisha Prevention of Land Encroachment Act, 1972 ('OPLE Act' for short).

6. The relevant provisions of Section 133 of the Code are extracted hereinbelow:-

> "133. Conditional order for removal of nuisance.-(1) Whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, *on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers-*
>
> *(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or*
>
> (b) … … … …
> (c) … … … …
> (d) … … … …
> (e) … … … …
> (f) … … … …
>
> Such Magistrate may make a *conditional order* requiring the person, causing such obstruction or nuisance, within a time to be fixed in the order,-
>
> (i) *to remove such obstruction or nuisance;* or
> (ii) … … … …
> (iii) … … … …

> (iv) … … … …
> (v) … … … …
> (vi) … … … …
>
> *Or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.*
>
> (2) No order, duly made by a Magistrate under this Section, shall be called in question in any Civil Court."

7. We find that sub-Section (1) of Section 133 of the Code lays down in clear terms that whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate, specially empowered in this behalf by the State Government, considers, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel, which is or may be lawfully used by the public, the Magistrate may make a *conditional order* requiring the person, causing such obstruction or nuisance, to remove such obstruction or nuisance within a time to be fixed by the order and, if he (i.e., the person proceeded against) objects to do so, then, to appear before the Magistrate, or any other Magistrate subordinate to him, at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the *conditional order* should not be made *absolute*.

8. It is manifest from the provisions of Section 133 of the Code that before the District Magistrate, Sub-Divisional Officer, or any other Executive Officer, duly empowered in this behalf by the State Government, makes a *final order* requiring removal of obstruction or nuisance from a public place, he is required to call upon the person against whom the order is being passed to either remove the obstruction or nuisance, as the case may be, or show cause against the direction for removal of such obstruction.

9. We may pause here to point out that according to Section 134 of the Code, service of notice of the *conditional order*, passed under the provision of sub-section (1) of Section 133 of the Code, shall be in the manner provided for service of summons or notified by proclamation, published in such manner as the State Government may, by rules, direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

10. What the person, against whom a *conditional order* is made, shall do is embodied in Section 135 of the Code, which lays down that the person against whom a *conditional order* is made shall (a) perform, within the time and in the manner specified in the *conditional order*, the act as directed thereby; or (b) appear following such *conditional order* and show cause against the same.

11. Thus, Section 135 of the Code obliges the proceedee to either obey the *conditional order*, which has been made by the Magistrate, or appear, per such order,

and show cause as to why the *conditional order* be not made *absolute,* that is to say, why the *conditional order* shall not be forced to be complied with. If a proceedee fails to obey the *conditional order* and does not also appear in the proceeding and shows cause against a *conditional order,* he will, in the light of the provisions of Section 136 of the Code, expose himself to prosecution under Section 188 of the Indian Penal Code. In the event of failure of a proceedee to appear and show cause, the Magistrate concerned shall make *absolute* the *conditional order*.

12. What follows from the above discussion is that if a proceedee does not perform the act as warranted by the *conditional order* or fails to appear and show cause against the *conditional order*, he shall be liable to prosecution under Section 188 of the Indian Penal Code and in that case the *conditional order* shall be made *absolute*.

13. Section 137 of the Code, while prescribing the procedure, when existence of public right is denied by a proceedee, states that where a *conditional order* is made under Section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the *conditional order* was made, question him as to whether he (i.e., the proceedee) denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under Section 138, inquire into the matter and, if in such inquiry, the Magistrate finds that there is any *reliable evidence* in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent court; but if the Magistrate finds that there is no such *reliable evidence*, he (Magistrate) shall proceed as laid down in Section 138 of the Code.

14. When Section 133 and Section 137 of the Code are read together, the scheme becomes clear that when a District Magistrate or a Sub Divisional Magistrate or any other Executive Magistrate, specially empowered in this behalf by the State Government, on the basis of report of a police officer or on the basis of other information and on taking such evidence, if any, as the Magistrate thinks fit, considers that any unlawful obstruction or nuisance should be removed from any public place or any way, river or channel, which is or may be lawfully used by the public, the Magistrate may make a *conditional order* requiring the person, who is alleged to have caused obstruction or nuisance, to remove the obstruction or nuisance or to appear before the Magistrate at the time and place to be fixed by the *conditional order* and show cause as to why the *conditional order* should not be made *absolute.* On receiving the notice of the *conditional order*, the proceedee shall appear before the Magistrate, who shall question the proceedee as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if the proceedee so denies, the Magistrate shall hold an enquiry and, if the Magistrate finds, in the enquiry, that there is any *reliable evidence* in support of such

denial, then, he shall stay the further proceedings until the matter is decided by a competent court. However, if the Magistrate finds that there is no *reliable evidence* in support of the proceedee‟s denial as regards encroachment or obstruction in respect of any way, river, channel or place, he (Magistrate) shall proceed in the manner as provided in Section 138 of the Code, which provides that the Magistrate shall, in such a case, take evidence in the matter as in a *summons-case* and, if the Magistrate is satisfied that the *conditional order,* either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the *conditional order* shall be made absolute without modification or, as the case may be, with such modification as deemed necessary, but if the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

15. Section 141 of the Code makes it clear that when a *conditional order* has been made *absolute*, the Magistrate shall give notice of the same to the proceedee and require him to perform the act directed by the order within a time to be fixed in the notice and also inform the proceedee that in case of disobedience, he (proceedee) shall be liable to be prosecuted under Section 188 of the Indian Penal Code. If such an act is not performed by the proceedee within the time fixed, Section 141 of the Code empowers the Magistrate to get the work performed and recover the costs of performing the act in the manner, which has been provided in Section 141 of the Code. Sub-section (3) of Section 141 of the Code also makes it crystal clear that no suit shall lie in respect of anything done in good faith under this section.

16. It is worthwhile noting that according to Section 142 of the Code, if a Magistrate, who makes a *conditional order,* considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter and, in default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury, but no suit shall lie in respect of anything done in good faith by a Magistrate under this section.

17. It would be relevant at this juncture to notice the Supreme Court's observation in the case of ***Municipal Council, Ratlam v. Vardhichand and Ors.*** (supra)**,** wherein the Court held that the provisions, embodied under Section 133 of the Code, must go into action, whenever there is public nuisance inasmuch as the public power of the Magistrate, as conferred upon him under Section 133 of the Code, is a public duty to the members of the public, who are victims of the nuisance, and the Magistrate must, therefore, exercise his power under Section 133, when the jurisdictional facts are present. Paragraph 9 of the said decision reads thus:

> *"9. So the guns of Section 133 go into action wherever there is public nuisance. The public power of the Magistrate under the Code is a public duty to the members of the public who are victims of the nuisance, and so he shall exercise it when the jurisdictional*

> *facts are present as here. "All power is a trust – that we are accountable for its exercise – that, from the people, and for the people, all springs, and all must exist."(1) Discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise."* (Emphasis is added)

18. The Supreme Court in ***Municipal Council, Ratlam*** (supra), has also made it abundantly clear that a Municipal Commissioner or other Executive Authorities are bound by an order, which may be passed by a Magistrate under Section 133 of the Code, and in case of any disobedience of such order either by the Municipal Commissioner or any other Executive authorities, the penal consequences, as embodied in Section 188 of the Indian Penal Code, shall follow. The relevant observations made in this regard in Paragraph 13 of the aforementioned judgment read thus:

> *"13. .... The Magistrate's responsibility under S. 133 Cr.P.C. is to order removal of such nuisance within a time to be fixed in the order. This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a punishment contemplated by S. 188, I.P.C. Therefore, the Municipal Commissioner or other executive authority bound by the order under S. 133, Cr.P.C. shall obey the direction because disobedience, if it causes obstruction or annoyance or injury to any persons lawfully pursuing their employment, shall be punished with simple imprisonment or fine as prescribed in the Section. The offence is aggravated if the disobedience tends to cause danger to human health or safety. The imperative tone of S. 133, Cr.P.C. read with the punitive temper of S. 188, I.P.C. makes the prohibitory act a mandatory duty."*
> (Emphasis is supplied)

19. What crystallizes from the above discussion is that under Section 133 of the Code, a Magistrate has the statutory duty to proceed to make a *conditional order*, as contemplated by subsection (i) of Section 133 of the Code, if the report of a police officer or other information requires the exercise of the powers under sub-Section (i) of Section 133 of the Code. "Other information", occurring in Section 133 of the Code, would obviously mean information given to the Magistrate by any person, or taken cognizance of by the Magistrate *suo motu*, as regards the existence of public nuisance/unlawful obstruction causing annoyance or injuries to health or physical comfort of a community or other factors as enumerated in Section 133 of the Code.

20. In our opinion, once it is brought to the notice of the Magistrate, or if he, otherwise, comes to know about existence of obstruction/public nuisance, etc., as enumerated in Section 133 of the Code, he (Magistrate) is legally duty bound to swing into action at once inasmuch as his duties, in this regard, are directly concerned with public nuisance/unlawful obstruction, which may be injurious to health or physical comfort of public.

21. The Supreme Court in the case of ***Gurusimran Singh Narula vs. Union of India and Another***, reported in ***(2021) 1 SCC 152*** has held as follows:

> *"40. When a statute confers power on authority and that power is to be exercised for the benefit of the people in general, the power is coupled with the duty. This Court in*

Commr. of Police v. Gordhandas Bhanji, AIR 1952 SC 16, speaking through Vivian Bose, J., had laid down the oft quoted proposition in para 39:

"39. The discretion vested in the Commissioner of Police under Rule 250 has been conferred upon him for public reasons involving the convenience, safety, morality and welfare of the public at large. An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor can it be evaded; performance of it can be compelled under Section 45."

41. This Court again in L. Hirday Narain v. CIT, (1970) 2 SCC 355, reiterated the same principle in the following words:

"14....if a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right—public or private—of a citizen."

42. V.R. Krishna Iyer, J. had elaborately dealt the above principle in Municipal Council, Ratlam v. Vardichan, (1980) 4 SCC 162. The above case was a case where Municipal Council, Ratlam was entrusted with certain duties to the public which was sought to be enforced by the residents through Section 133 Cr.P.C. where Magistrate issued certain directions to the Municipal Corporation which came to be challenged in this Court. Krishna Iyer, J. quoting Benjamin Disraeli, in para 9 of the judgment stated:

"9…. 'All power is a trust—that we are accountable for its exercise – that, from the people, and for the people, all springs, and all must exist.' Vivian Grey, Bk. VI Ch. 7, Benjamin Disraeli Discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise."

43. With regard to the judicial process, important observations were made by this Court in the above Vardichan case (1980) 4 SCC 162 that affirmative action taken in the judicial process is to make remedy effective failing which the right becomes sterile. In para 16 of the judgment (Vardichan case (1980) 4 SCC 162 (1980) 4 SCC 162), following observations have been made:

"16...The nature of the judicial process is not purely adjudicatory nor is it functionally that of an umpire only. Affirmative action to make the remedy effective is of the essence of the right which otherwise becomes sterile."

44. Krishna Iyer, J. also laid down that improvement of public health is the paramount principle of governance. In para 24, the following has been observed: (Vardichan case (1980) 4 SCC 162)

"24. ...The State will realise that Article 47 makes it a paramount principle of governance that steps are taken 'for the improvement of public health as amongst its primary duties'." (Emphasis in original)

22. It is also to be noted that the OPLE Act has been enacted to address the issues pertaining to unauthorized occupation of lands, which are the property of the Government. The property of the Government is defined under Section 2 of the OPLE Act, which reads as under:

*"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 an Indian State merged with the State of Orissa, Zamindar, Proprietor, Sub-Proprietor, Landlord, Jagirdar, Khoropshdar 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;

(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, 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 Government; or

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

23. Section 7 of the OPLE Act has made provision for summary eviction of a person unauthorisedly occupying a Government land. The OPLE Act is a self-contained Code and also provides that a person unauthorisedly occupying any land, which is the property of the Government, shall be liable to pay levy by way of assessment to be carried out by a Tahasildar.

24. There being clear statutory provisions under the Code and OPLE Act, we are of the view that once any unauthorized occupation of the property of the Government is brought to the notice of the Magistrate or if he otherwise comes to know about the existence of obstruction/public nuisance as enumerated under Section

133 of the Code, he (Magistrate or Tahasildar) is legally duty bound to swing into action.

25. Accordingly, we deem it proper to issue general directions to be followed by all concerned in the following terms:

> (i) Once a District Magistrate or Sub-Divisional Magistrate or any other Executive Magistrate, specially empowered in this regard by the State Government, receives an information, on the basis of a report of a police officer or otherwise, that condition precedent for exercise of power under sub-Section (i) of Section 133 of the Code are present, the Magistrate shall at once make a *conditional order* for removal of obstruction or nuisance from public place and it will be the bounden duty of the person—who may be a natural person or a juristic person, such as, a Municipal Body or a Gram Panchayat—to either comply with the order or appear in the proceeding and, upon appearance of the proceedee, the Magistrate shall be duty bound to ask the proceedee if he (the proceedee) wishes to deny the existence of facts leading to the *conditional order* and if the proceedee denies existence of any unlawful obstruction or nuisance on any public place or from any way, river or channel, which is or may be lawfully used by the public, and gives *reliable evidence* in support of such denial, the Magistrate shall stay further proceedings until a competent court decides; but if the proceedee fails to give any *reliable evidence* in respect of denial of the existence of the facts leading to making of *conditional order*, the Magistrate shall order the proceedee to comply with the *conditional order* and, if the *conditional order* is not complied with and obeyed, penal consequences, as embodied in Section 188 of the Penal Code, shall follow.
>
> (ii) It will be the duty of the Chief Executive Officer or any other Officer, specially authorized by him/Head of the local body, by whatever name he may be called, to inform or cause to be informed the District Magistrate, Sub-Divisional Magistrate or any other Magistrate, specially empowered in this behalf by the State Government, as regards existence of obstruction/nuisance and other factors, enumerated under Section 133 (1) of the Code. The Officer-in-charge of the concerned police station shall also have similar duty to inform the Magistrate concerned under Section 133 of the Code. In the event, any public nuisance or unlawful obstruction of the nature, as provided under Section 133 (1) of the Code, is found to be existing without any information to the concerned Magistrate, the Officer-in-charge of the concerned police station and the Chief Executive Officer or any other Officer, authorized on his behalf of the local body, shall be jointly responsible for inaction and will be liable for disciplinary action accordingly.
>
> (iii) The Magistrate, upon receiving information, in the manner as aforesaid, shall proceed at once in accordance with Section 133 (1) of the Code and pass appropriate order as required of him under the said provision. Any inaction or dereliction of duty by the Magistrate in this regard shall make him liable for disciplinary action.
>
> (iv) A *conditional order*, if not objected to, or an order, which has been made *absolute*, shall have to be obeyed by all concerned and any disobedience of the order shall attract penal provisions of Section 188 of the Indian Penal Code.
>
> (v) The Tahasildar, within the meaning of Section 3(c) of the OPLE Act, shall also be duty-bound to act in accordance with the provisions of the OPLE Act once any case of unauthorized occupation of Government property is brought to his notice.

> (vi) This order must be followed with utmost scruples and without any demur. Any person, who is found to be not complying with the present order, shall be liable for disciplinary/criminal action apart from contempt of this Court.

26. There is no gainsaying that this Court, in exceptional circumstances, may pass appropriate orders in a proceeding in the nature of PIL if so warranted. We do not find any exceptional circumstance in the present case to exercise our extraordinary writ jurisdiction when the statutory provisions provide jurisdiction and procedure to deal with the situation as in the present case.

27. Before parting with the present order, we are tempted to quote the opinion of Justice V. Krishna Aiyer, J., in the case of ***Municipal Council, Ratlam*** (supra) expressed in his own inimitable style:-

> ***"All power is a trust – that we are accountable for its exercise – that, from the people, and for the people, all springs, and all must exist." (1) Discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise."***
> (Emphasis added)

These golden words need to be taken as the guiding principle for the authorities vested with statutory powers which cast corresponding duties.

28. In the result, we dispose of this writ petition with a liberty to the petitioner, who is an advocate by profession, to invoke the provisions embodied under the Code or the OPLE Act. If he does so, we see no reason why the concerned Magistrate/Tahasildar shall not proceed in accordance with the law and in the light of what has been held hereinabove in the present judgment.

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2024 (I) ILR-CUT-406

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

W.P(C) NO. 18559 OF 2015

BHUBAN MOHAN DASH ....Petitioner

-V-

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

(A) THE ODISHA DEVELOPMENT AUTHORITIES (RETIREMENT BENEFIT OF EMPLOYEES) RULE, 2015 – Rule 4(1) r/w Articles 14, 16 of the Constitution of India – Whether the employee appointed prior to 01.01.2005 is entitle to get pension as it is being availed by the similarly situated employees under the state government? – Held, Yes.

(B) DOCTRINE OF ULTRA VIRES – The petitioner seeks to hold the Odisha Development Authorities (Retirement Benefit of Employees) Rules, 2015 more specifically Rule 4(1) as *ultra-vires* to the provision of

Odisha Development Authority Act, 1982 – What constitute a provision to be declared as *ultra-vires*? – Explained with reference to case laws.

Case Laws Relied on and Referred to :-

1. 2007 (Supp.I) OLR 543 : Bidyadhar Mishra Vs. State of Orissa.
2. O.J.C No. 384/1990 (29.10.1990) : Krupasindhu Barik v. State of Orissa & Ors.
3. AIR 1983 SC 130 : D.S. Nakara Vs. Union of India.
4. AIR 1991 SC 1933 : State of Sikkim Vs. Dorjee Tsfter-ing Bhatia & Ors.
5. (2010) 12 SCC 405 : Union of India (UOI) and Anr. Vs. P.N. Natarajan and Ors.
6. AIR 1984 SC 1905 : Salabuddin Mohamed Yunus Vs. State of Andhra Pradesh.
7. AIR 2011 SC 1974 : Pepsu Road Transport Corporation, Patiala v. Mangal Singh.
8. AIR 2016 SC 5436 : State of H.P. & Ors Vs. Rajesh Chandra Sood & Ors.
9. AIR 2006 SC 3716 : Air India Employees Self Contributory Superannuation Pension Scheme v. Kuriakose Vs. Cherian & Ors.
10. 1995 (II) OLR 655 : Bidyadhar Bhuyan v. State of Orissa & Ors.
11. 2014 (Supp.-I) OLR 754 : Shri Anand Dash & Seven Ors. v. State of Orissa & Ors.
12. 2009 (Supp.-II) OLR 447 : Cuttack Development Authority v. Regional Provident Fund Commissioner.
13. AIR 1990 SC 1782 : Krishena Kumar v. Union of India.
14. (1976) 1 All E.R.1039 (H.L.) : Daymond v. S.W. Water Authority.
15. (1969) 2 All E.R. 582 H.L. : Hotel Industry Board v. Automobile Ltd.
16. (1969) 2 All E.R. 1039 : McEldowney v. Forde.
17. AIR 1966 S.C. 1209 : Durga Prasad v. Suptd.
18. (1892) 144 U.S. 677 : U.S. v. Eaton
19. (1911) 220 U.S. 506 : U.S. v. Grimand.
20. (1877) 95 U.S. 571 : U.S. v. Two Hundred Barrels of Whiskey
21. AIR 1966 SC 629 : Venkateswara v. Govt. of A.A.
22. (2008) 2 SCC 254 : Karnataka Bank Ltd. v. State of A.P.
23. (2008) 5 SCC 33 : Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat
24. (1985) 1 SCC 641 : AIR 1986 SC 515 : Indian Express Newspapers v. Union of India.
25. (2007) 13 SCC 673 : J.K. Industries Limited v. Union of India.
26. AIR 1988 SC 1737: (1988) 4 SCC 59 : State of Uttar Pradesh v. Renusagar.
27. AIR 1995 SC 691: (1995) 1 SCC 732 : Indian Council of Legal Aid & Advice v. Bar Council of India.
28. (2004) 3 SCC 402 : AIR 2004 SC 1896 : Om Prakash v. State of U.P.
29. (1999) 6 SCC 418 : Laghu Udhyog Bharati v. Union of India.
30. 1995 Supp (1) SCC 707 : Goodricke Group Ltd. V. State of West Bengal.
31. 1995 Supp(1) SCC 596: AIR 1995 SC 142 : Jilubhai Nanbhai v. State of Gujarat.
32. AIR 1984 SC 1905 : Salabuddin Mohamed Yunus v. State of Andhra Pradesh.
33. (1983) 1 SCC 322 : D.S. Nakara v. Union of India.
34. AIR 1985 SC 1196 : (1985) 3 SCC 345 : Poornamal v. Union of India.
35 AIR 1971 SC 1409 : Deakinandan Prasad v. State of Bihar.
36. AIR 2003 SC 3966 : Kerala State Road Transport Corporation v. K.O. Varghese.
37. (2020) 8 SCC 106 : V. Sukumaran v. State of Kerala.
38. (2006) 11 SCC 709 : Col. B.J. Akkara v. Govt. of India.
39. (2006) 9 SCC 630 : U.P. Raghavendra Acharya v. State of Karnataka.
39. 2021 (II) OLR 362 : Sujata Mohanty v Berhampur University & Ors.
40. A.I.R. 1997 SC 3828 : Chairman, Railway Board & Ors. v. C.R.Rangadhamaiah & Ors.
41. (2010) 12 SCC 538 : State of Madhya Pradesh & Ors. v. Yogendra Shrivastava
42. O.J.C. No.768 of 1990 (29.10.1990) : Krupasindhu Barik v. State of Orissa & Ors.

For Petitioner : M/s. S.K. Dash, A.K. Otta, A. Dhalsamanta, B.P. Dhal & S. Das

For Opp.Parties : Mr. S. Nayak, ASC, M/s.D.Mohapatra,M.Mohapatra, G.R. Mohapatra & D.Dash

JUDGMENT Date of Hearing : 20.11.2023 : Date of Judgment: 04.12.2023

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

The petitioner, who was the employee of Cuttack Development Authority, has filed this writ petition to declare the Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015 under Annexure-6 as ultra vires to the provisions contained in the Odisha Development Authorities Act, 1982 as well as Articles 14 and 16 of the Constitution of India; and further to direct the opposite party-authorities to declare that since the petitioner is an employee appointed prior to 01.01.2005, he is entitled to get pension, as has been granted to similarly situated State Government employees.

2. The factual matrix of the case, in brief, is that the erstwhile employees under the Greater Cuttack Improvement Trust were brought forward to Cuttack Development Authority by virtue of Section 128-2(a) of the Odisha Development Authorities Act, 1982 (for short "Act, 1982"). The Greater Cuttack Improvement Trust, in its resolution no.11/48, dated 08.02.1971 had adopted Odisha Service Code, which in terms regulated the retirement & pensionary benefits of its employees. Cuttack Development Authority subsequently also adopted other Rules of the Government of Odisha relating to service conditions of its employees. Even the employees of Greater Bhubaneswar Regional Improvement Trust were treated as employees of Bhubaneswar Development Authority and became amenable to the Rules framed by the Government for its employees and adopted by the Authority. The petitioner, having joined prior to 01.01.2005, has been subjected to the schemes under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 notwithstanding the fact that the employees, who joined prior to 01.01.2005 under the State Government are getting the benefit under the Odisha Civil Services (Pension) Rules, 1992.

2.1. Under a mistake of fact or misconception, the Cuttack Development Authority was covered under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 from the year 1982. But the Authority, vide letter no.16498 dated 27.07.2001 and letter no.25137 dated 27.11.2001, approached the Regional Provident Fund Commissioner for exemption under Section 17 of the E.P.F. and M.P. Act, 1952 with an undertaking to constitute separate funds for pension and provident fund for its employees. The Regional Provident Fund Commissioner, Odisha, vide letter dated 30.01.2002, intimated opposite party no.3 for production of certain documents for grant of exemption under Section 17 of the E.P.F. & M.P. Act, 1952. Opposite party no.3, by letter no. 15898 dated 19.06.2010, requested the Under Secretary to the Government in Housing and Urban Development Department,

Odisha for approval of the draft Rules of the year, 1991 in terms of Section 83 of the Odisha Development Authorities Act, 1982. The E.P.F. and M.P. Act, 1952 is not applicable to the employees of the Cuttack Development Authority in view of the Section 16(c) of E.P.F. and M.P. Act, 1952.

2.2. Consequentially, a meeting was convened on 23.08.2010 under the Chairmanship of the Chief Secretary to the Government of Odisha, wherein Principal Secretaries to Government, Housing & Urban Development Department, Finance Department as well as Law Department were present. It was decided in the said meeting to initiate steps for formulation of the Rules regarding pensionary benefit of the employees of the Development Authorities constituted under the Odisha Development Authorities Act, 1982, within a period of six months, keeping in view the new pension scheme of the State Government. Accordingly, an affidavit was filed in W.P.(C) No. 552 of 2010 through the Project Director-cum-Joint Secretary to Government in Housing and Urban Development Department. Further, in its 7th meeting held on 31.10.2013 headed by the Financial Advisor-cum-Additional Secretary to the Government, Housing and Urban Development Department, it was decided that the employees of Development Authorities shall get their pensionary benefit at par with the State Government employees, which is extracted below:

> "The Committee recommended that :
>
> *(1) The employees of the Development Authorities shall get their pensionary benefits at par with the State Govt. employees.*
>
> *(2) Pension burden shall be borne by the respective Development Authorities.*
>
> *(3) Secretary, BDA, Bhubaneswar and Finance Member, BDA Suggested that at the time of financial crisis while implementing pension rules, Government shall come to the rescue of Development Authorities. This was discussed. But the proposal of BDA was not accepted.*
>
> *(4) Pension fund shall be managed by the respective Development Authorities.*
>
> *(5) The Authority should resolve to pay the pension to their staff at par with Govt. from their own source. There will not be any financial burden On the State Government.*
>
> *(6) A common draft regulation for payment of pensionary benefits formulated by Town planning Authority Section and the same shall be communicated to all Development Authorities for placing the same in their respective authorities before vetting by Finance Department and Law XX Department.*
>
> *xxx xxx xxx"*

2.3. The Government of Odisha in Housing and Urban Development Department, without approving the draft Rules framed under Section 83 of the Odisha Development Authorities Act, 1982, issued another draft Rules in exercise of its purported authority for laying down general Rules for carrying out the purposes of the Act under Section 123 of the Odisha Development Authorities Act, 1982, vide notification dated 14.07.2015, inviting objections or suggestions from any person or authority within fifteen days from the date of publication of the same in the Orissa Gazette.

2.4. In response to same, more than 100 employees including Commissioner-cum-Secretary Government of Odisha, Housing and Urban Development Department, sought withdrawal of the said draft Rules on various grounds and demanded immediate steps for approval of the Development Authority Employees' Pension Rules, which has remained pending with the Government since 1991 for approval in terms of Section 83(2) of the Odisha Development Authorities Act, 1982. Despite objection filed by the employees of the Cuttack Development Authority within the stipulated period, the same was not considered by the appropriate Government. Rather, vide notification dated 11.08.2015, in exercise of the purported authority under Section 123 read with Sub-section (1) of Section 83 of the Odisha Development Authorities Act. 1982, the Government of Odisha, Housing and Urban Development Department made the draft Rules absolute, by stating therein that it is promulgated with consent of Development Authorities, whereas no such consent was at all invited from the Development Authorities, as would be evident from the information received under the Right to Information Act, 2005. Hence, this writ petition.

3. Mr. S.K. Dash, learned counsel appearing for the petitioner vehemently contended that this Court in successive writ petitions observed regarding the statutory duty of the Development Authority to provide pension and provident fund to its employees. The Government of Odisha has utterly failed to make timely approval of the Draft Pension Rules, 1991. It is contended that in **Bidyadhar Mishra V. State of Orissa**, 2007 (Supp.I) OLR 543 approving the earlier Judgment dated 29.10.1990 rendered in 0.J C. No. 384 of 1990 in the case of **Krupasindhu Barik v. State of Orissa and Ors.**, this Court held that it has jurisdiction to issue necessary direction for implementation of the provisions, as the right to pension and the benefit of provident fund is statutory in nature. It is further contended that the Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015 have been made by opposite party No.1 without any authority, inasmuch as Section 83 of the Orissa Development Authorities Act, 1982 clearly vests such power with the Development Authority to constitute the Fund. The anomalous situations thus created by the said Rules include total discrimination in the matter of those employed prior to 01.01.2005 under the State Government and those employed under the Development Authority. It is further contended that the Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015 presupposes that there are two different classes of employees under the Development Authority, those joining prior to 01.01.2015 to be brought under the Rules applicable for factory establishments and the rest are at par with Government employees. While Odisha Civil Services (Pension) Rules, 1992 were in vogue, so far as those employed under the State Government prior to 01.01.2005 were brought under the Rules in terms of Sub-rule (4) of Rule 3 inserted therein by way of amendment, and those who were employed under the Development Authority prior to 01.01.2005 were sought to be brought under the provisions of the Schemes

constituted under the E.P.F. & M.P. Act, 1952. Consequentially, the petitioner would be getting a paltry amount in terms of the E.P.F. and M.P. Act, 1952 in lieu of pension.

3.1. It is further contended that prior to these Rules, the employees under the Development Authority were getting their pension under the Odisha Civil Services Pensions Rules, 1992 and it was decided that employees under the Development Authority are entitled to get their pension at par with the employees under the State Government. It is further contended that Rule-5 of the Odisha Development Authorities Rules, 1983 provides that posts under the Authority shall be classified into four categories and shall carry the same scale of pay as applicable to similar categories of posts in the State Government from time to time. Pension is one of the very important terms and conditions of employment which is earned by an employee by rendering requisite period of service and its receipt is one of the incidents of employment. Payment of pension is part of the consideration for the services rendered by the employee. Thereby, the benefit by way of pension and gratuity are in the nature of deferred wages which are paid at the time of retirement or thereafter. Thus, opposite party no.1 has acted contrary to the objectives of the Act, inasmuch as it is not available to fathom that on the one hand each of the categories of employees under the Authority will receive the corresponding time scale of pay as that of their counterparts in the State Government from time to time, but will thoroughly be discriminated in the matter of disbursement of the dues for their past services. It is further contended that the Development Authority under the pervasive control of the State are not profiteering institutions and it will be absurd to suggest that financial constraints of such bodies will stand as a determinative factor for providing the salary or pension to the employees. Disparities in that regard will not be conducive, when ours is a welfare State and the employees work according to their duties. State cannot absolve its responsibilities altogether by shirking its responsibility that it is the Development Authority, who has to raise fund for the salary or pension to its employees and all such steps would certainly be dubbed as arbitrary, illegal and unconstitutional. Thereby, the petitioner has filed this writ petition seeking to declare the Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015 as ultra vires to the provisions contained in the Odisha Development Authorities Act, 1982 as well as Articles 14 & 16 of the Constitution of India, more specifically confines to Clause-4(1) of the notification dated 11.08.2015.

3.2. To substantiate his contentions, learned counsel for the petitioner has relied upon the decisions in the cases of **D.S. Nakara v. Union of India**, AIR 1983 SC 130; **State of Sikkim v. Dorjee Tsfter-ing Bhatia and others**, AIR 1991 SC 1933; **Union of India (UOI) and Anr. V. P.N. Natarajan and Ors.,** (2010) 12 SCC 405; **Salabuddin Mohamed Yunus v. State of Andhra Pradesh**, AIR 1984 SC 1905; **Pepsu Road Transport Corporation, Patiala v. Mangal Singh**, AIR 2011 SC 1974**; State of H.P. and Ors v. Rajesh Chandra Sood and Ors**., AIR 2016 SC

5436; **Air India Employees Self Contributory Superannuation Pension Scheme v. Kuriakose V. Cherian and others**, AIR 2006 SC 3716; **Bidyadhar Bhuyan v. State of Orissa and others**, 1995 (II) OLR 655; **Shri Anand Dash and Seven others v. State of Orissa and others**, 2014 (Supp.-I) OLR 754; **Cuttack Development Authority v. Regional Provident Fund Commissioner**, 2009 (Supp.-II) OLR 447; **Krupasindhu Barik v. State of Orissa and others**, vide O.J.C. No.768 of 1990 disposed of on 29.10.1990; **Bidyadhar Mishra v. State of Orissa**, 2007 (Suppl-I) OLR 543; **Employees' Provident Fund Organization v. M/s. Raipur Development Authority** (Writ Petition (L) No. 2326 of 2010 disposed of on 05.12.2014) and **Krishena Kumar v. Union of India**, AIR 1990 SC 1782.

4. Mr. S. Nayak, learned Addl. Standing Counsel appearing for the State-opposite parties contended that the matter is between the petitioner and the opposite party-Cuttack Development Authority and, as such, the relief sought against opposite party no.1 to the extent that opposite party-State is concerned, it is contended that the provisions of Section 123 of the Odisha Development Authorities Act, 1982 empowers the State Government to make Rules after consultation with the Development Authority to carry out all or any of the purposes of the said Act. Some of the employees of the Development Authority had filed writ petitions before this Court for interference of State Govt. regarding formulation of pension rules for the employees of the Development Authority, as there was no such Rules. As such, this Court has passed orders with a direction to the State Govt. to make Rules to the said effect. In obedience to the orders of this Court, Finance Department and Law Department were consulted in the matter and it was decided to make uniform retirement benefit Rules for the employees of all the Development Authorities. Accordingly, in exercise of the powers conferred by Section 123 read with Sub-section (1) of Section 83 of the Odisha Development Authorities Act, 1982 (Act 14 of 1982) in due consultation with the Development Authorities, the Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015 have been framed. It is further contended that while formulating the Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015, the Finance Department, Law Department and the Development Authorities were consulted. The objections & suggestions received in respect of the Draft Rules were duly considered. That apart, it was also considered that the employees of the Authorities can be classified into (a) Employees, who have been retired; (b) Employees employed prior to 01.01.2005 and continuing; and (c) Employees entered into services in the Development Authorities on or after 01.01.2005. Employees, who have already been retired from service of the Authorities are in receipt of Provident Fund (PF) and pension, as per Employees Pension Scheme, 1995, and they have availed the benefits under Employees Provident Fund (EPF) Scheme. Employees, who have been employed prior to 01.01.2005 and continuing shall get the benefits as provided in EPF scheme including P.F and Pension. The Government of Odisha have already introduced New Pension Scheme for the employees w.e.f. 01.01.2005,

which has been extended to the employees of all autonomous and local bodies. In the light of the above, the Odisha Development Authorities Conditions of Service (Retirement Benefit) Rules, 2015 were formulated under Section 123 of the Odisha Development Authorities Act, 1982. Thereby, no illegality or irregularity has been committed in framing the Rules, 2015 so as to cause interference of this Court at this stage.

5. Mr. D. Mohapatara, learned counsel appearing for the opposite party-Cuttack Development Authority contended that admittedly Cuttack Development Authority is a creature of the Odisha Development Authorities Act, 1982. Section 83 of the Odisha Development Authorities Act, 1982 specified the provisions to bring the P.F. and Pension Scheme by Government. The Government in exercise of powers conferred under the Act framed the Rules, 2015. It is further contended that since date of coverage of C.D.A. under the EPF & MP Act the contributions are deducted and paid to the EPF Authority and, as such, there would be no impediment/prejudice caused to the employees in payment of EPF pension consequent upon implementation of the Rules. The Authority, being a creature under the statute, is bound by the provisions/rules framed by the Government and accordingly implemented the rules. It is further contended that though CDA prepared a draft Pension Rules, the same were not approved by the Government and pending decision of the Government the retired employees were extended provisional pension. After implementation of the Rules, 2015, the provisional benefits were discontinued, as they are covered under the existing Rules. Such discontinuance of the benefit was the subject-matter of challenge in W.P.(C) No.18558 of 2015 and the same was dismissed by a reasoned and well discussed judgment, with reference to various citations, which the petitioner being the appellant challenged in Writ Appeal No. 509 of 2016. It is further contended that so far as reference made to the decisions in **Krupasindhu Barik** and **Bidyadhar Mishra** (supra) are concerned, in **Bidyadhar Mishra** (supra) the case of **Krupasindhu Barik** (supra) has been referred to. But on perusal of the judgment in **Krupasindhu Barik** (supra), it would reveal that the finding is to the extent of entitlement of pension, but has not decided the manner, mode and scope of benefit of pension at par with the Government and the same is not the subject-matter of this writ petition so as to take into consideration to pass order in the present case. Therefore, the claim made by the petitioner cannot be sustained in the eye of law and accordingly, the writ petition is liable to be dismissed.

6. This Court heard Mr. S.K. Dash, learned counsel appearing for the petitioner; Mr. S. Nayak, learned Addl. Standing Counsel appearing for the State-opposite parties and Mr. D. Mohapatra, learned counsel appearing for opposite party-Cuttack Development Authority 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. For a just and proper adjudication of the case, Sections 83 and 123 of the Odisha Development Authorities Act, 1982 are quoted hereunder:-

> *"83. Pension and provident fund. –*
>
> *(1) The Authority shall constitute for the benefits of its whole-time paid members and of its officers and other employees in such manner and subject to such conditions as may be prescribed by rules such pensions and provident funds as it may deem fit.*
>
> *(2) Where any such pension or provident fund has been constituted the State Government may declare that the provisions of the Provident Fund Act, 1925 (Act 19 of 1925) shall apply to such fund as if it were a Government provident fund.*
>
> *xxx xxx xxx*
>
> *123. Power of State Government to make rules. –*
>
> *(1) The State Government, after consultation with the Authority, may make rules to carry out all or any of the purposes of this Act and prescribe forms for any proceedings for which it considers that a form should be provided :*
>
> *Provided that consultation with the Authority shall not be necessary on the first occasion of the making of the rules under this section, but the State Government shall take into consideration any suggestion which the Authority may make in relation to the amendment of such rules after they are made.*
>
> *(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :*
>
> *xxx xxx xxx*
>
> *(xxxiii) the manner in and conditions subject to which the Authority shall constitute provident fund under Sub-section (1) of Section 83;*
>
> *xxx xxx xxx*
>
> *(xxxviii) any other matter which has to be, or may be prescribed by rules."*

8. Similarly, the Housing and Urban Development Department issued the notification dated 11.08.2015, which is extracted hereunder:-

> *"S.R.O No. 377/2015- Whereas, the draft of Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015 was published as required by Section 125 of the Odisha Development Authorities Act, 1982 (Odisha Act, 14 of 1982) in an Extraordinary issue No.1079 dated the 14th July, 2015 of the Odisha Gazette issued under the Notification of the Government of Odisha in the Housing & Urban Development Department No.17740/HUD., dated the 14th July.2015 bearing S.R.O. No. 321/2015 inviting objections and suggestions from all persons likely to be affected thereby till the expiry of the period of 15 (fifteen) days from the date of publication of the said notification in the Odisha Gazette;*
>
> *And, whereas, the objections and suggestions received in respect of the said draft during the period specified above have been duly considered by the State Government;*
>
> *Now, therefore, in exercise of the powers conferred by Section 123 read with sub-section (1) of Section 83 of the Odisha Development Authorities Act, 1982 (Odisha Act 14, of 1982) in due consultation with the Development Authorities, the State Government do hereby make the following rules namely:*
>
> *1. Short Title and Commencement.-*

(1) These rules may be called the Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015.

(2) They shall come into force from the date of their publication in the Odisha Gazette.

2. Application. They shall apply to the employees working under any Authority constituted under the Act.

3. Definition, -- (1) In these rules, unless the context, otherwise requires,

(a) 'Act' means the Odisha Development Authorities Act, 1982 (Odisha Act, 14 of 1982):

(b) 'Employees' means the employee appointed under the provisions of Act and the Rules made thereunder;

(c) 'Government' means the Government of Odisha.

(2) All other words and expressions used but not defined in these Rules shall have the same meaning as respectively assigned to them in the Act and Odisha Development Authorities Rules, 1983.

4. Provident Fund and Pension Schemes. - (1) Employees who have been employed in an Authority prior to 1st January, 2005 shall be covered under the provisions of the Employees Provident Fund Scheme, 1952 and Employee Pension Scheme, 1995 made under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952.

(2) Employees who have joined in an Authority on or after 1st January, 2005 shall be covered under the New Restructured Defined Contribution Pension Scheme administered by Pension Fund Regulatory and Development Authority.

[No.20268-13591500082014/HUD]
By Orders of the Governor
G. MATHIVATHANAN
Commissioner-cum-Secretary to Government"

9. This Court in successive writ petitions observed regarding the statutory duty of the Development Authorities is to provide pension and provident fund to its employees. The Government of Odisha has utterly failed to make timely approval of the Draft Pension Rules, 1991.

10. In **Bidyadhar Mishra v. State of Orissa**, 2007 (Suppl-I) OLR 543, approving the earlier judgment dated 29.10.1990 rendered in O.J C. No. 384 of 1990 in the case of **Krupasindhu Barik v. State of Orissa and Ors**, this Court held as follows:-

"8. Learned Counsel for the Petitioner drew my attention to the Judgment dated 29. 10. 1990 rendered in 0.J C. No. 384 of 1990 Krupasindhu Barik v., State of Orissa and Ors. in which this Court dealt with a similar question and held as follow:

"Payment of pension and making provision for provident fund are statutory duties of the Development Authority. The provisions are substantive and absolute. The framing of rules are merely procedural in nature so as to provide the manner in which and conditions under which the payment of pension is to be made and the provident fund is to be provided for. The right to pension and to the benefit of provident fund being statutory, the Court would undoubtedly have the jurisdiction to issue necessary direction for implementation of the provisions."

11. Therefore, the petitioner seeks to hold that the Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015 under Annexure-6 to the writ petition is *ultra vires* to the provisions contained in the Odisha Development Authorities Act, 1982 as well as Articles 14 and 16 of the Constitution of India and more particularly to hold that Rule 4 (1) of the Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015 is *ultra vires* to the provisions of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952, which is not applicable to the employees of the Development Authority, as has already been held by this Court. It has been specifically urged that the applicability of Provident Fund and Pension Scheme under Rule 4 (1) of the Rules, 2015 specifically mentions that the employees who have been employed in an Authority prior to 1st January, 2005 shall be covered under the provisions of the Employees Provident Fund Scheme, 1952 and Employee Pension Scheme, 1995 made under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. Therefore, Rule 4 (1) of the Rules, 2015, is without any authority, inasmuch as, Section 83 of the Odisha Development Authorities Act, 1982, which clearly vests such power with the Development Authority to constitute the Fund, the anomalous situations thus created by the said Rules include total discrimination in the matter of those employed prior to 01.01.2005 under the State Government and those employed under the Development Authority. The Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015 presupposes that there are two different classes of employees under the Development Authority, those joining prior to 01.01.2015, to be brought under the Rules applicable for factory establishments and the rests are at par with Government employees. While the Odisha Civil Services Pension Rules, 1992 were in vogue so far as those employed under the State Government prior to 01.01.2005 in terms of Sub-rule (4) of Rule 3 inserted therein by way of amendment, those who were employed under the Development Authorities prior to 01.01.2005 are sought to be brought under the provisions of the Schemes constituted under the EPF & MP Act, 1952. Therefore, it is vehemently urged that Rule 4 (1) is ultra vires to the provisions contained in the Odisha Development Authorities Act, 1982 as well as Article 14 and 16 of the Constitution of India.

12. With regard to declaration of Rule 4 (1) of 2015 Rules as *ultra vires*, it is to be understood, what constitutes a provision to be declared as ultra vires.

13. In **P.R. Aiyar, Advanced Law Lexicon**, Vol.4 (2005) 4796 and **Encyclopedic Law Lexicon**, Vol. 4 (2009) 4838-4839 the expression "*ultra vires*" has been defined to mean beyond power or authority or lack of power. An act may be said to be "ultra vires" when it has been done by a person or a body of persons which is beyond his, its or their power, authority or jurisdiction.

14. **Wade & Forsyth, Administrative Law** (2009) states "*ultra vires*" relates to capacity, authority or power of a person to do an act. It is not necessary that an act

to be "*ultra vires*" must also be illegal. The act may or may not be illegal. The essence of the doctrine of "ultra vires" is that an act has been done in excess of power possessed by a person.

15. **D.D. Basu, Administrative Law** (1993) 94 states that whenever any person or body of persons, exercising statutory authority, acts beyond the powers conferred upon him or them by statute, such act becomes ultra vires and, accordingly, void. In other words, substantive ultra vires means the delegated legislation goes beyond the scope of the authority conferred on it by the parent statute. Therefore, it is a fundamental principle of law that a public authority cannot act outside the powers, i.e. ultra vires, and it has been rightly described as "the central principle" and "foundation of large part of administrative law". Thereby, an act which is for any reason in excess of power is *ultra vires*.

16. **Schwartz Administrative Law** (1984) states as follows:

> *"If an agency acts within the statutory limits (intra vires), the action is valid; if it acts outside (ultra vires), it is invalid. No statute is needed to establish this; it is inherent in the constitutional position of agencies and courts".*

Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted and on relevant consideration of material facts. All his decisions must be in harmony with the Constitution and other laws of the land.

17. In **Daymond v. S.W. Water Authority**, (1976) 1 All E.R. 1039 (H.L.), it is held that in order to determine whether the subordinate legislation exceeds the power granted by the Legislature, the Court has to interpret the enabling statue.

The above view has also been taken in **Hotel Industry Board v. Automobile Ltd.** (1969) 2 All E.R. 582 **H.L. and McEldowney v. Forde**, (1969) 2 All E.R. 1039.

18. In **Durga Prasad v. Suptd.,** AIR 1966 S.C. 1209, the apex Court held that where the authority to make a Rule is conferred for exercising a particular power, the Court would not construe the Rule in such manner as to include a separate and independent power.

19. In **U.S. v. Eaton,** (1892) 144 U.S. 677, it is held that subordinate law-making body cannot go beyond the policy laid down in the statue, so as to alter or amend the law.

The same view has also been taken in **U.S. v. Grimand**, (1911) 220 U.S. 506.

20. In **U.S. v. Two Hundred Barrels of Whiskey**, (1877) 95 U.S. 571, it is held that the purpose of subordinate legislation is to carry into effect the existing law and not to change it.

The same view has also been taken by the apex Court in **Venkateswara v. Govt. of A.A.,** AIR 1966 SC 629.

21. There is always a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; “to doubt the constitutionality of a law is to resolve it in favour of its validity". Where validity of a statute is questioned and there are two interpretations, one of which will make the law valid and the other void, the former must be preferred and the validity of the law upheld.

22. In **Karnataka Bank Ltd. v. State of A.P**., (2008) 2 SCC 254, the apex Court held in pronouncing on the constitutional validity of a statute, the Court is not concerned with the wisdom or un-wisdom, the justice or injustice of the law. If that which is passed into law is within the scope of the power conferred on a Legislature and violates no restrictions on that power, the law must be upheld whatever a Court may think of it. The parent act may be unconstitutional on several grounds, i.e. (i) excessive delegation; or (ii) breach of a Fundamental Right; or (iii) on any other ground such as, distribution of powers between the Centre and the State.

23. In **Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat**, (2008) 5 SCC 33, the apex Court held that there is presumption in favour of constitutionality of statutes as well as delegated legislation and it is only when there is clear violation of constitutional provision (or of a parent statute, in the case of delegated legislation) beyond reasonable doubt that the Court should declare it to be unconstitutional.

24. In **Indian Express Newspapers v. Union of India**, (1985) 1 SCC641 : AIR 1986 SC 515, the apex Court held as follows:

> *“A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary”.*

25. In **J.K. Industries Limited v. Union of India**, (2007) 13 SCC 673, relying upon the aforesaid judgment in the case of **Indian Express Newspaper** (supra), the apex Court held that, any inquiry into its vires must be confined to the grounds on which plenary legislation may be questioned, to the grounds that it is contrary to the statute under which it is made, to the grounds that it is contrary to other statutory provisions or on the ground that it is so patently arbitrary that it cannot be said to be inconformity with the statute. It can also be challenged on the ground that it violates Article 14 of the Constitution. The apex Court also further held that a subordinate legislation may be struck down as arbitrary or contrary to the statute if it fails to take into account the vital facts which expressly or by necessary implication are required

to be taken into account by the statute or the Constitution. This can be done on the ground that the subordinate legislation does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19 of the Constitution.

It is also further clarified in the said judgment that where the validity of subordinate legislation is challenged, the question to be asked is whether the power given to the rule making authority is exercised for the purpose for which it is given. Before reaching the conclusion that the Rule is intra vires, the court has to examine the nature, object and the scheme of the legislation as a whole and in that context, the Court has to consider, what is the area over which powers are given by the section under which the Rule Making Authority is to act. However, the Court has to start with the presumption that the impugned Rule is intra vires. This approach means that, the Rule has to be read down only to save it from being declared ultra vires if the court finds in a given case that the above presumption stands rebutted. The basic test is to determine and consider the source of power, which is relatable to the rule. Similarly, rule must be in accordance with the parent statute as it cannot travel beyond.

26. In **State of Uttar Pradesh v. Renusagar**, AIR 1988 SC 1737: (1988) 4 SCC 59, the apex Court held that if the exercise of power is in the nature of subordinate legislation, the exercise must conform to the provisions of the statute. All the conditions of the statute must be fulfilled.

27. The doctrine of "*ultra vires*" has two aspects, (1) substantive *ultra vires* and (2) procedural *ultra vires*. In view of law laid down by the apex Court in Indian Express Newspapers (supra), it becomes clear that a delegated legislation may be challenged on the ground of substantive ultra vires in the following circumstances:

"1.Where parent Act is unconstitutional;
2.Where parent Act delegates essential legislative functions;
3. Where delegated legislation is inconsistent with parent Act;
4. Where delegated legislation is inconsistent with general law;
5. Where delegated legislation is unconstitutional is unconstitutional;
6. Where delegated legislation is arbitrary;
7. Where delegated legislation is unreasonable;
8. Where delegated legislation is mala fide;
9. Where delegate further delegates (sub delegation);
10. Where delegated legislation excludes judicial review; and
11. Where delegated legislation operates retrospectively".

28. In **Indian Council of Legal Aid and Advice v. Bar Council of India**, AIR 1995 SC 691: (1995) 1 SCC 732, the apex Court held that to apply the doctrine of substantive *ultra vires*, the Court first interprets the relevant statutory provisions to determine the scope of delegation of power and then interprets the impugned delegated legislation and finally adjudge whether the same is within, or without, the statutory power conferred.

29. In **Lohia Machines Ltd. v. Union of India**, AIR 1985 SC 421: (1985) 2 SCC 197, the apex Court held that declaring delegated legislation *ultra vires* also becomes difficult because of judicial attitude. The judicial policy generally is to interpret the delegating provision rather broadly.

30. In **Om Prakash v. State of U.P.,** (2004) 3 SCC 402 : AIR 2004 SC 1896, basing reliance on **H.C. Suman v. Rehabilitation Ministry Employees' Cooperative Housing Building Society Ltd.** (1991) 4 SCC 485 : AIR 1991 SC 2160, the apex Court held that Courts should be slow to interfere with byelaws made by public representative bodies unless they were manifestly partial and unequal in operation or unjust, mala fide or effect unjustified interference with liberty.

31. In **Kunj Behari Lal Butail v. State of Himachal Pradesh**, AIR 2000 SC 1069 : (2000) 3 SCC 40, the apex Court held that often the rule-making power is conferred without specifying the purposes as such, but generally "for carrying out the purposes of the Act." This is a general delegation without laying down any guidelines. This power cannot be so exercised in such a way as to bring into existence substantive rights or obligations or disabilities not contemplated by the parent Act itself.

32. In **Laghu Udhyog Bharati v. Union of India** (1999) 6 SCC 418, it was held by the apex Court that when the Act confers rule making power for carrying out purposes of the Act, rules cannot be so framed as not to carry out the purpose of the Act or be in conflict with the same. Legal effect of the formula is to confer a plenary power on the delegate to make rules subject to the overall requirement that the rules made ought to have a nexus with the purpose of the Act.

33. In **Kerala Samsthana Chethu Thozhilali Union v. State of Kerala**, (2006) 4 SCC 327 : AIR 2006 SC 3480, the apex Court considered the Court's power and held when such a power is given, the Court seeks to ascertain the purpose of the enactment and then to ascertain whether the rules framed further that purpose. A rule may be held as *ultra vires* if it has no nexus with the purpose of the parent Act or if it scuttles the same.

34. The efficacy of judicial control of delegated legislation is very much dependant on how broad is the statutory formula conferring power of delegated legislation on the delegate. Usually, the application of the ultra vires rule becomes very difficult in practice because of three main reasons;

(1) Powers are usually delegated in broad language;
(2) Generally speaking, the courts interpret the enabling provision rather broadly;
(3) The courts adopt a deferential, rather than a critical, attitude towards delegated legislation and, thus, lean towards upholding the same.

35. In **Goodricke Group Ltd. V. State of West Bengal**, 1995 Supp (1) SCC 707, the apex Court held that "entries in the Seventh Schedule to the Constitution are legislative heads or fields of legislation. The legislature derives its power from

Article 246 of the Constitution and not from the respective entries. The language of the respective entries, therefore, should be given widest meaning. It is well-recognized that where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation, the rule of "pith and substance" has to be applied to determine the competence of the legislature. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it".

36. In **Jilubhai Nanbhai v. State of Gujarat**, 1995 Supp (1) SCC 596: AIR 1995 SC 142, the apex Court held as follows:

> *"It must be remembered that we are interpreting the Constitution and when the Court is called upon to interpret the Constitution, it must not be construed in any narrow or pedantic sense and adopt such construction which must be beneficial to the amplitude of legislative powers. The broad and liberal spirit should inspire those whose duty is to interpret the Constitution to find whether the impugned Act is relatable to any entry in the relevant list". (Emphasis supplied)*

37. In State of A.P. v McDowell, AIR 1996 SC 1627 : (1996) 3 SCC 709, the apex Court held that the law made by the Central or State Legislation can be struck down only on the following grounds;

> *"(a) the legislative competence of the Legislature in question; or*
>
> *(b) violation of any fundamental right; or*
>
> *(c) violation of any other constitutional provision. Similar view has also been taken by the apex Court in the case of State of Kerala v, Peoples Union for Civil Liberties, (2009) 8 SCC 46."*

38. On examination of the aforesaid provisions with the provisions of Rule 4(1) of the Rules, 2015 and the provisions contained under the Odisha Development Authority Rules, 1983, it is made clear that Rule 5 provides that posts under the Authority shall be classified into four categories and shall carry the same scale of pay, as applicable to similar categories of posts in the State Government from time to time. Therefore, pension is one of the very important terms and conditions of employment which is earned by an employee by rendering requisite period of service and its receipt is one of the incidents of employment. The payment of pension is part of the consideration for the services rendered by the employee. In a sense, the benefit by way of pension and gratuity are in the nature of deferred wages which are paid at the time of retirement or thereafter. The meaning of pension has been considered by the apex Court time again laying emphasis that an employee is entitled to get under law.

39. In **Salabuddin Mohamed Yunus v. State of Andhra Pradesh**, AIR 1984 SC 1905, the apex Court held that the payment of pension does not depend upon the discretion of the State but is governed by the rules made in that behalf and a Government servant coming within such rule is entitled to claim pension.

40. The concept of 'pension' is now well known and has been clarified by the apex Court time and again. It is not a charity or bounty nor is it gratuitous payment solely dependent on the whim or sweet will of the employer. It is earned for rendering long service and is often described as deferred portion of compensation for past service. It is in fact in the nature of a social security plan to provide for the December of life of a superannuated employee. Such social security plans are consistent with the socio-economic requirements of the Constitution when the employer is a State within the meaning of Article 12 of the Constitution.

41. Rule-33 (3) of the Odisha Service Code prescribes "Pension", which reads as under:-

> *"(3) Pension & Gratuities:- In case of employees who have retired on or after 1.7.86, the dearness pay shall count as emoluments for pension and gratuity in terms of Rule 73 of the Orissa Pension Rules 1977. The doses of temporary increase totaling to 8% of the pension subject to minimum of Rs.25/- and maximum of Rs.80/- will not however be admissible in these cases. These pensioners shall be entitled to further dose of temporary increase as may be declared effective after 1.1.86 from time to time. If however, the pension admissible without taking into account the dearness pay but the adhoc increase in pension is more favourable that the benefit under this order the individual can be granted the former. The dearness pay will also count as pay for the purpose of Family Pension Scheme, as amended from time to time."*

42. Rule-(2)(p) of Odisha Civil Services (Pension) Rules, 1992 reads as under:-

> *"(p) "Pension" includes gratuity except where the term pension is used in contradiction to gratuity."*

43. Taking into account the broad meaning of "pension", as mentioned above, pension is nothing but a periodical payment of money for past service.

44. In **D.S. Nakara v. Union of India**, (1983) 1 SCC 322, the apex Court held as follows:-

> *"Pension" is neither a bounty nor a matter of grace depending upon the sweet will of the employer, nor an ex gratia payment but it is a payment for the past service rendered; and it is social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on as assurance that in their old age they would not be left in lurch. Pension as a retirement benefit is in consonance with and furtherance of the goals of the Constitution. The most practical raison d'etre for pensions is the inability to provide for oneself due to old age. It creates a vested right and is governed by the statutory rules such as the Central Civil Services (Pension) Rules which are enacted in exercise of power conferred by Articles 309 and 148(5) of the Constitution."*

45. In **Poornamal v. Union of India**, AIR 1985 SC 1196 : (1985) 3 SCC 345, the apex Court referring to the judgment in **Deakinandan Prasad v. State of Bihar**, AIR 1971 SC 1409, held that "Pension" is not merely a statutory right but it is the fulfillment of a constitutional promise, inasmuch as it partakes the character of public assistance in case of unemployment, old-age, disablement or similar other

cases of undeserved want. Relevant rules merely make effective the constitutional mandate. Pension is a right not a bounty or gratuitous payment.

46. In **Kerala State Road Transport Corporation v. K.O. Varghese**, AIR 2003 SC 3966, it has been held that the title 'pension' includes pecuniary allowances paid periodically by the Government to persons who have rendered services to the public or suffered loss or injury in the public service, or to their representative; who are entitled to such allowances and rate and amount thereof; and proceedings to obtain and payment of such pensions. Pension means a periodical payment or lump sum by way of pension, gratuity or superannuation allowance as respects which the secretary of State is satisfied that it is to be paid in accordance with any scheme of arrangement having for its object or one of its objects to make provision in respect of persons serving in particular employments for providing with retirement benefits and, except in the case of such a lump sum which had been paid to the employee.

In the aforesaid judgment the word 'pension' has also been analyzed, which reads as under:-

> *"On analysis of the word 'pension' three things emerge; (i) that the pension is neither bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to the statute, if any, holding the field; (ii) that the pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is social welfare measure rendering socio-economic justice to those who in the 'hey days' of their life ceaselessly toiled for employers on an assurance that in their ripe old age they would not be left in lurch. It must also be noticed that the quantum of pension is a certain percentage correlated to the emoluments earlier drawn. Its payment is dependent upon additional condition of impeccable behavior even subsequent to retirement. Pension is not a bounty of the State. It is earned by the employee for service rendered to fall back, after retirement. It is a right attached to the office and cannot be arbitrarily denied. Conceptually, pension is a reward for past service. It is determined on the basis of length of service and last pay drawn. Length of service is determinative of eligibility and quantum of pension."*

47. In **V. Sukumaran v. State of Kerala**, (2020) 8 SCC 106, it has been held that pension is succor for post retirement period, which is not a bounty payable at will, but social welfare measure as post-retirement entitlement to maintain dignity of employee.

48. In **Col. B.J. Akkara v. Govt. of India**, (2006) 11 SCC 709, the apex Court held that the pay of an employee does not remain static. This is almost an universal rule in public services. An employee starts with a particular pay (commonly known as initial pay); then journeys through periodical increases (commonly known as increments) to reach the highest point that he is entitled to (commonly known as the ceiling). This is what a pay scale signifies. A 'pay scale' has basically three elements. The first is the minimum pay or initial pay in the pay scale. The second is the periodical increment. The third is the maximum pay in the pay scale. An employee starts with the initial pay in the pay scale and gets periodical increases

(increments) and reaches the maximum or ceiling in the pay scale. Each stage in the pay scale starting from the initial pay and ending with the ceiling in the pay scale, when applied to an employee is referred to as 'basic pay' of the employee. Whenever the Government revises the pay scales, a fitment exercise takes place as per the principle of fitment (formula) provided in the rules governing the revision of pay so that the basic pay in the old scale is converted in to a "basic pay" in the revised pay scale.

49. In **Gurupal Tuli v. State of Punjab**, 1984 (Supp) SCC 716 : AIR 1984 SC 1901, the apex Court held that to be entitled to draw a particular pay scale the employee must fulfill the eligibility conditions whether by way of qualification or otherwise.

50. In **State of Kerala v. Padmanabhan Nair**, AIR 1985 SC 356, the apex Court observed that pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but are valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment.

51. In **Vasant Gangaramsa Chandan v. State of Maharashtra**, (1996) 10 SCC 148, the apex Court held that pension is not bounty of the State. It is earned by the employee for service rendered to fall back, after retirement. It is a right attached to the office and cannot be arbitrarily denied.

52. In **State of Punjab v. Justice S.S. Dewan**, (1997) 4 SCC 569, the apex Court held that conceptually, pension is a reward for past service. It is determined on the basis of length of service and last pay drawn. Length of service is determinative of eligibility and quantum of pension. The same view has also been reiterated in **Dr. Uma Agarwal v. State of U.P.**, AIR 1999 SC 1212.

53. In **Kerala State Road Transport Corporation v. K.O. Varghese**, (2003) 12 SCC 293, referring to corpus juris secundum, it is stated that the title 'pension' includes pecuniary allowances paid periodically by the Government to persons who have rendered services to the public or suffered loss or injury in the public service, or to their representative; who are entitled to such allowances and rate and amount thereof; and proceedings to obtain and payment of such pension.

54. Further, referring to **Halsbury's Law of England 4th Edn. Reissue, Vol.16**, in the very same judgment in Kerala State Road Transport Corporation (supra), the apex Court held as follows:

> *"'Pension' means a periodical payment or lump sum by way of pension, gratuity or superannuation allowance as respects which the secretary of state is satisfied that it is to be paid in accordance with any scheme of arrangement having for its object or one of its objects to make provision in respect of persons serving in particular employments for providing with retirement benefits and, except in the case of such a lump sum which had been paid to the employee."*

55. Considering the meaning attached to the word 'pension', as stated above, and on analysis of the same, three things emerge; (i) that the pension is neither bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to the statute, if any, holding the field; (ii) that the pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is social welfare measure rendering social economic justice to those who in the "heydays" of their life ceaselessly toiled for employers on an assurance that in their ripe old age they would not be left in lurch. It must also be noticed that the quantum of pension is a certain percentage correlated to the emoluments earlier drawn. Its payment is dependent upon additional condition of impeccable behaviour even subsequent to retirement.

56. In **U.P. Raghavendra Acharya v. State of Karnataka**, (2006) 9 SCC 630, the apex Court held that 'pension' is treated to be a deferred salary. It is not a bounty. It is akin to right of property. It is correlated and has a nexus with the salary payable to the employees as on date of retirement.

57. Similar view has also been taken by this Court in the case of **Sujata Mohanty v Berhampur University & others**, 2021 (II) OLR 362, in which one of us (Dr. B.R. Sarangi, ACJ) was the member.

58. In view of the law laid down by the apex Court, as discussed above, a right has been accrued in favour of the employees of the Cuttack Development Authority to get pension and provident fund in conformity with the provisions contained under Section 83 of the Odisha Development Authorities Act, 1982 and for that under Section 123 of the Odisha Development Authorities Act, 1982 Act, the State Government has been vested with the power to make Rules.

59. In the Constitution Bench decision in the case of **Chairman, Railway Board and others v. C. R. Rangadhamaiah and others**, A.I.R. 1997 SC 3828, the Apex Court was considering the amendment brought into Rule-2544 of the Indian Railway Establishment Court, Vol. II (Fifth Reprint) which was given retrospective effect. The said Rule was amended by Notification No. G.S.R. 1143 (E) with effect from 1st January, 1973 and by Notification No. G.S.R. 1144 (E), the amendment was made with effect from 1st April, 1979. The apex Court, in paragraph - 20 of the said judgment held as follows:-

> *"20. It can, therefore, be said that a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retrospectively as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively".*

Again in paragraph 24 of the said judgment in the case of **Chairman, Railway Board and others** (supra), it was held thus :-

"24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (AIR 1967 SC 1889) (supra); B.S. Yadav (AIR 1981 SC 561) (supra) and Raman Lal Keshav Lal Soni (AIR 1984 SC 161) (supra)".

60. Ultimately, it was held by the apex Court that the impugned amendments in so far as they have been given retrospective operation are violative of the rights guaranteed under Articles 14 & 16 of the Constitution on the ground that they are unreasonable and arbitrary since the said amendments have the effect of reducing the amount of pension that has become payable to the employees, who had already retired from service on the date of issuance of the notifications as per the provisions contained in Rule 2544 that were in force at the time of their retirement.

61. The aforesaid Constitution Bench decision, therefore, has emphasized with regard to the right of an employee, which has accrued in his favour on the date he retired and such right cannot be taken away by amending the Rules retrospectively prior to his retirement.

62. In the case of **State of Madhya Pradesh and others v. Yogendra Shrivastava**, (2010) 12 SCC 538, the apex Court was considering the amendment brought to Madhya Pradesh Employees' State Insurance Service (Gazetted) Recruitment Rules, 1981 by Notification dated 20.05.2003 giving it a retrospective effect from 14.10.1982. By the said amendment, the earlier provision in the Rule prescribing payment of None Practicing Allowance @ 25% of pay was amended to the effect that "NPA at such rates as may be fixed by the State Government from time to time by the orders issued in this behalf" in place of words "NPA @ 25% of the pay" wherever they occurred in the Rules.

63. On considering the said question, the apex Court, in paragraph 15 of the said judgment in the case of **State of Madhya Pradesh** (supra) held as follows :-

15. It is no doubt true that Rules made under Article 309 can be made so as to operate with retrospective effect. But it is well settled that rights and benefits which have already been earned or acquired under the existing Rules cannot be taken away by amending the Rules with retrospective effect. (See N.C. Singhal v. Armed Forces Medical Services ; K.C. Arora v. State of Haryana and T.R. Kapur v. State of Haryana). Therefore, it has to be held that while the amendment, even if it is to be considered as otherwise valid, cannot affect the rights and benefits which had accrued to the employees under the unamended rules. The right to NPA @ 25% of the pay having accrued to the respondents

under the unamended Rules, it follows that respondent employees will be entitled to the non-practicing allowance @ 25% of their pay up to 20-5-2003."

64. In a large number of cases, the apex Court has categorically laid down that the right of an employee, which accrued in his favour on the date of appointment, cannot be taken away by the amending provisions of the Rules concerning the service with retrospective effect. An employee, while entering into service, is subjected to the condition of service as on the date, when he joins. Any right given to such employee under the provision of any Act or Rules governing the employment, if taken away by amending such Rules with retrospective effect, the same would amount to violating the Rules under Articles 14 & 16 of the Constitution.

65. Eligibility for liberalized pension scheme of 'being in service on specified date and retiring subsequent to that date' in impugned memoranda, violates Article 14 of the Constitution and is unconstitutional and is to be struck down.

66. In **D.S. Nakara v. Union of India**, AIR 1983 SC 130, the apex Court held as follows:-

49. But we make it abundantly clear that arrears are not required to be made because to that extent the scheme is prospective. All pensioners whenever they retired would be covered by the liberalised pension scheme, because the scheme is a scheme for payment of pension to a pensioner governed by 1972 Rules. The date of retirement is irrelevant. But the revised scheme would be operative from the date mentioned in the scheme and would bring under its umbrella all existing pensioners and those who retired subsequent to that date. In case of pensioners who retired prior to the specified date, their pension would be computed afresh and would be payable in future commencing from the specified date. No arrears would be payable. And that would take care of the grievance of retrospectivity. In our opinion, it would make a marginal difference in the case of past pensioners because the emoluments are not revised. The last revision of emoluments was as per the recommendation of the Third Pay commission (Raghubar Dayal Commission). If the emoluments remain the same, the computation of average emoluments under amended Rule 34 may raise the average emoluments, the period for averaging being reduced from last 36 months to last 10 months. The slab will provide slightly higher pension and if someone reaches the maximum the old lower ceiling will not deny him what is otherwise justly due on computation. The words "who were in service on 31st March, 1979 and retiring from service on or after the date" excluding the date for commencement of revision are words of limitation introducing the mischief and are vulnerable as denying equality and introducing an arbitrary fortuitous circumstance can be severed without impairing the formula. Therefore, there is absolutely no difficulty in removing the arbitrary and discriminatory portion of the scheme and it can be easily severed.

65. That is the end of the journey. With the expanding horizons of socio-economic justice, the socialist Republic and welfare State which we endeavour to set up and largely influenced by the fact that the old men who retired when emoluments were comparatively low and are exposed to vagaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs, we are satisfied that by introducing an arbitrary eligibility criteria: 'being in service and retiring subsequent to the specified date' for being eligible for the liberalised pension scheme and thereby

dividing a homogeneous class, the classification being not based on any discernible rational principle and having been found wholly unrelated to the objects sought to be achieved by grant of liberalised pension and the eligibility criteria devised being thoroughly arbitrary, we are of the view that the eligibility for liberalised pension scheme of being in service on the specified date and retiring subsequent to that date' in impugned memoranda, Exhibits P-I and P-2, violates Art. 14 and is unconstitutional and is struck down. Both the memoranda shall be enforced and implemented as read down as under: In other words, in Exhibit P-1, the words:

"that in respect of the Government servants who were in service on the 31st March, 1979 and retiring from service on or after that date" and in Exhibit P-2, the words:

"the new rates of pension are effective from 1st April 1979 and will be applicable to all service officers who became/become non-effective on or after that date."

are unconstitutional and are struck down with this specification that the date mentioned therein will be relevant as being one from which the liberalised pension scheme becomes operative to all pensioners governed by 1972 Rules irrespective of the date of retirement. Omitting the unconstitutional part it is declared that all pensioners governed by the 1972 Rules and Army Pension Regulations shall be entitled to pension as computed under the liberalised pension scheme from the specified date, irrespective of the date of retirement. Arrears of pension prior to the specified date as per fresh computation is not admissible. Let a writ to that effect be issued. But in the circumstances of the case, there will be no order as to costs.

67. In the case of **State of Sikkim v. Dorjee Tsfter-ing Bhatia and others**, AIR 1991 SC 1933, the apex Court at paragraph-15 of the judgment held as follows:-

"The executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provisions, is without jurisdiction and is a nullity. But in this case we are faced with a peculiar situation. The Rules, though enforced, remained unworkable for about five years. The Public Service Commission, which was the authority to implement the Rules, was not in existence during the said period. There is nothing on the record to show as to why the Public Service Commission was not constituted during all those five years. In the absence of any material to the contrary we assume that there Were justifiable reasons for the delay in constituting the Commission. The executive power of the State being divided amongst various function- arise under Article 166(3) of the Constitution of India there is possibility of lack of co-ordination amongst various limbs of the Government working within their respective spheres of allocation. The object of regulating the recruitment and conditions of Service by statutory provisions is to rule out arbitrariness, provide consistency and crystilise the rights of employees concerned. The statutory provision's which are unworkable and inoperative cannot achieve these objectives. Such provisions are non-est till made operation- al. It is the operative statutory provisions which have the effect of ousting executive power of the State from the same field. When in a peculiar situation, as in the present ease, the statutory provisions could not be operated there was no bar for the State Government to act in exercise of its executive power. The impugned notification to hold special selection 'was issued almost four years after the enforcement of the Rules. It was done to remove stagnation and to afford an opportunity to the eligible persons to

enter the service. In our view the State Government was justified in issuing the impugned notification in exercise of its executive power and the High Court fell into error in quashing the same."

68. In **Union of India (UOI) and Anr. V. P.N. Natarajan and Ors.,** (2010) 12 SCC 405, the apex court observed as follows:-

11. We have considered the respective submissions and carefully scrutinized the records. Although, neither the learned Single Judge nor the Division Bench considered the issue of violation of the rules of natural justice, having given serious thought to the entire matter, we are convinced that the retiral benefits payable to the Respondents could not be revised to their disadvantage without giving them action oriented notice and opportunity of hearing. By virtue of the option exercised by them under Section 12A(4)(b) and Consequential action taken by the competent authority to fix their pension etc., the private Respondents acquired a valuable right to accordingly receive the financial benefits and the same could not have been reduced without Complying with one of the basic rules of natural justice that no one shall be condemned unheard. The rule of audi alteram partem has been treated fundamental to the system established by rule of law and any action taken or order passed without complying with that rule is liable to be declared void --State of Orissa v. Dr. Binapani Dei (Misa) MANU/SC/ 0332/1967: A.I.R. 1967 S.C. and Ors. 1269 and Sayeedur Rehman v. State of Bihar and Ors. MANU/SC/0053/1972: (1973)3 S.C.C. 333.

12. It is not in dispute that before directing revision of the pension etc., payable to the private Respondents, the Central Government did not give them action oriented notice and opportunity of showing cause against the proposed action. Therefore, it must be held that the direction given by the Central Government to revise the retiral benefits including the pension payable to the Respondents Was nullity."

69. In **Salabuddin Mohamed Yunus v. State of A.P.,** AIR 1984 SC 1905, the Appellant was employed in the service of the former Indian State of Hyderabad prior to coming into force of the Constitution of India. On coming into force of the Constitution, the Appellant continued in the service of that State till he retired from service on 21.01.1956. The Appellant claimed that he was entitled to be paid the salary of a High Court Judge from 01.10.1947 and also claimed that he was entitled to receive pension of Rs. 1000 a month in the Government of India currency, being the maximum pension admissible under the rules. The said claim of the Appellant was negatived by the Government. He filed a writ petition in the High Court of Andhra Pradesh. During the pendency of the said writ petition, the relevant Rule was amended by notification dated 03.02.1971 with retrospective effect from 01.10.1954 and the expression "Rs. 1000 a month" in Clause (b) of Sub-rule (1) of Rule 299 substituted by the expression "Rs. 857. 15 a month". This amendment was made in exercise of the power conferred by the proviso to Article 309 read with Article 313 of the Constitution. The said amendment was struck down by this Court as invalid and inoperative on the ground that it was violative of Articles 31(1) and 19(1) (f) of the Constitution.

Relying upon the decision in **Deokinandan Prasad v. State of Bihar and others,** [1971] Supp. S.C.R. 636, the apex Court observed as follows :-

The fundamental right to receive pension according to the rules in force on the date of his retirement accrued to the Appellant when he retired from service. By making a retrospective amendment to the said Rule 299 (1) (b) more than fifteen years after that right had accrued to him, what was done was to take away the Appellant's right to receive pension according A to the rules in force at the date of his retirement or in any event to curtail and abridge that right. To that extent, the said amendment was void.

70. In **Pepsu Road Transport Corporation, Patiala v. Mangal Singh**, AIR 2011 SC 1974, the apex Court held as follows:-

"48. The concept of pension has also been considered in Corpus Juris Secundum, Vol. 70, at pg. 423 as thus:

"A pension is a periodical allowance of money granted by the government in consideration or recognition of meritorious past services, or of loss or injury sustained in the public service. A pension is mainly designed to assist the pensioner in providing for his daily wants, and it presupposes the continued life of the recipient."

71. In **State of H.P. and Ors v. Rajesh Chandra Sood and Ors**., AIR 2016 SC 5436, the apex Court at paragraph-48 of the said judgment held as follows:-

"48. Having given our thoughtful consideration to the aforesaid submission, we are of the view, that such of the employees who had exercised their option to be governed by 'the 1999 Scheme', came to be regulated by the said scheme, immediately on their having submitted their option. In addition to the above, all such employees who did not exercise any option (whether to be governed, by the Employees' Provident Funds Scheme, 1995, or by 'the 1999 Scheme'), would automatically be deemed to have opted for 'the 1999 Scheme'. All new entrants would naturally be governed by 'the 1999 Scheme'. All those who had moved from the provident fund scheme to the pension scheme, would be deemed to have consciously, foregone all their rights under the Employees' Provident Funds Scheme, 1995. It is of significance, that all the concerned employees by moving to 'the 1999 Scheme', accepted, that the employer's contribution to their provident fund account (and the accrued interest thereon, upto 31.3.1999), should be transferred to the corpus, out of which their pensionary claims, under 'the 1999 Scheme' would be met. It is therefore not possible for us to accept, that the concerned employees would be governed by 'the 1999 Scheme' only from the date on which they attained the age of superannuation, and that too - subject to the condition that they fulfilled the prescribed qualifying service, entitling them to claim pension. Every fresh entrant has the statutory protection under the Provident Fund Act. All fresh entrants after the introduction of 'the 1999 Scheme', were extended the benefits of 'the 1999 Scheme', because of the exemption granted by competent authority under the Provident Fund Act. They too, therefore possessed similar rights as the optees.

49. With effect from 1.4.1999, the employees who had opted for 'the 1999 Scheme' (or, who were deemed to have opted for the same) were no longer governed by the provisions of the Provident Fund Act (under which they had statutory protection, for the payment of provident fund). Consequent upon an exemption having been granted to the concerned corporate bodies by the competent authority under the Provident Fund Act, the Employees Provident Funds Scheme, 1995, was replaced, by 'the 1999 Scheme'. All direct entrants after 1.4.1999, were also entitled to the rights and privileges of 'the 1999 Scheme'. We are therefore of the considered view, that the submissions advanced on behalf of the State of Himachal Pradesh premised on the assertion, that no vested right

accrued to the employees of the concerned corporate bodies, on the date when 'the 1999 Scheme' became operational (with effect from 1.4.1999), or to the direct entrants who entered service thereafter, cannot be accepted. In this behalf it would also be relevant to emphasize, that as soon as the concerned employees came to be governed by 'the 1999 Scheme', a contingent right came to be vested in them. The said contingent right created a right in the employees to claim pension, at the time of their retirement. Undoubtedly, the aforesaid contingent right would crystalise only upon the fulfillment of the postulated conditions, expressed on behalf of the appellants (on having rendered, the postulated qualifying service). However, once such a contingent right was created, every employee in whom the said right was created, could not be prevented or forestalled, from fulfilling the postulated conditions, to claim pension. Any action pre-empting the right to pension, emerging out of the conscious option exercised by the employees, to be governed by 'the 1999 Scheme' (or to the direct entrants after the introduction of 'the 1999 Scheme'), most definitely did vest a right in the respondent-employees."

72. In **Air India Employees Self Contributory Superannuation Pension Scheme v. Kuriakose V. Cherian and others**, AIR 2006 SC 3716, the apex Court held that amendment could not be applied to the employees who had retired before the date of amendment and such employees would continue to receive pensionary benefits as before, namely, the benefits which existed at the time of amendment. it has been held as follows:-

"xxx 9. The High Court by the impugned judgment held that the impugned amendment to the Trust Deed to the extent it applies in future is legal and valid but the amendment cannot apply to the employees who have retired before the date of amendment and such employees shall continue to receive pensionary benefits as before, namely, the benefits which existed at the time of amendment.

Xxx xxx xxx

58. In our opinion, the view of the High Court is unassailable. In the result, all appeals are dismissed."

73. In **Bidyadhar Bhuyan v. State of Orissa and others**, 1995 (II) OLR 655, this Court at paragraph-46 of the judgment observed as follows:-

"46. Paragraph 2.3 of the resolution is regarding pensionary benefits. It is indicated that pensionary and other retirement benefits admissible to State Government servants shall be admissible to such employees for the period of their service under Government with effect from 7-6-1994. The remaining aided service shall be governed by the Orissa Aided Educational Institution Employees Retirement Benefit Rules, 1981. What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such artificial division or retirement pre and post a certain date? The Supreme Court has considered these questions in the case of D.S. Nakara v. Union of India, AIR 1983 SC 130. The Supreme Court in the said case has observed that the antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nanden Prasad v. State of Bihar, AIR 1971 SC 1409, wherein the Supreme Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government

servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was re-affirmed in State of Punjab v. Iqbal Singh, AIR 1976 SC 667. There are various kinds of pensions and there are equally various methods of funding pension programmes. The present enquiry in the instant case is as to whether by the decision of Government to take-over management of the aided schools, the erstwhile empolyees, namely, the teaching and non-teaching staff are affected. The better or beneficial scheme to get larger pension should not be curtailed by virtue of the impugned resolution, and in particular by paragraph 2.3 thereof. The artificial two limbs made in the said clause are not appreciated by this Court. In the first limb it is provided that pensionary and other retirement benefits admissible to State Government servants shall be admissible to such employees for the period of their service under Government with effect from 7-6-1994. The second limb is that the remaining aided service shall be governed by the Orissa Aided Educational Institutions' Employees Retirement Benefit Rules, 1981. By implementation of such provisions there will be various anomalies and the inconsistencies have been demonstrated by the petitioners in making a graphic chart how a person having shorter period of service after the take-over will be prejudiced and the persons having longer period of service after the takeover will have a different answer. By introduction of a new scheme, the consistent policy and scheme available to the erstwhile employees to get larger pensionary benefits should not be in jeooardy. Considering this aspect fully, we are of the view that the State Government has not properly applied its mind while providing for the pensionary, benefits in paragraph 2.3 of the impugned resolution. The State Government will have to consider the detailed advantages and disadvantages of the erstwhile employees, namely, the teaching and non-teaching staff of the aided schools, their scheme for pensionary benefits, the impact of the Government scheme for pension as in the case of Government employees if made applicable to them and their eligibility criteria, their period of service to get the larger amount of pension and various other factors should also be taken notice of and a proper scheme has to be framed for pension. Until such scheme is framed, the petitioners, namely, the teaching and non-teaching staff of the erstwhile aided schools will get their pensionary benefits under the prevailing rules applicable to them. On this limited aspect, the provisions of paragraph 2.3 cannot be sustained. This paragraph is found to be irrelevant, inconsistent and irrational and is thus struck down."

74. In the case of **Shri Anand Dash and Seven others v. State of Orissa and others**, 2014 (Supp.-I) OLR 754, the apex Court held as follows:-

"16. In the case at hand, as already stated above, all the petitioners joined in their due assignment on 02.04.2005 by which date, the amended Rules were not existing. The said amended Rules, which were introduced by Notification dated 31.08.2007 and 17.09.2005 there could not have been given retrospective effect by stating that they will come into operation from 01.01.2005, which is prior to the date, when the petitioners joined in their new assignments.

17. We are, therefore, of the considered view that the said amendments brought to the General Provident Fund (Orissa) Rules, 1938 and the Orissa Civil Service (Pension) Rules, 1992 will not apply to the petitioners, who will be governed by the said Rules as it existed on the date of their joining in service.

We also find that the opposite parties - State has discriminated the petitioners by allowing the benefits under the old Pension Rules and General Provident Fund (Orissa) Rules in the case of 13 regularly recruited OES officers, though they have been appointed on 14.02.2005 and joined the Government much after 01.01.2005. The said action on the part of the State also amounts to discrimination violating Articles 14 & 16 of the Constitution of India.

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

75. The aforesaid decision of this Court formed the subject matter of Special Leave Petition (C) Nos. 35462-35464 of 2014 before the Apex Court, which stood dismissed by order dated 09.03.2018 with an observation that there exist no cogent reason to entertain the petitions/appeal and that the judgment impugned does not warrant any interference.

76. In the case of **Cuttack Development Authority v. Regional Provident Fund Commissioner**, 2009 (Supp.-II) OLR 447, this Court held as follows.

"10. Addressing to the question as to whether the C.D.A. is exempted from the application of the provisions of the Act, 1952, a bare reading of Section 16 (1) (c), as quoted above, clearly establishes that the C.D.A. having been constituted/established under the O.D.A. Act and its employees having been made entitled to the benefit of old age pension in accordance with the resolution of the C.D.A. referred to above, the said establishment of the C.D.A. is clearly exempted from the application of the provisions of the Act, 1952."

77. In the case of **Krupasindhu Barik v. State of Orissa and others**, vide O.J.C. No.768 of 1990 disposed of on 29.10.1990, this Court held as follows:-

"5. x x x Payment of pension and making provision for provident fund are statutory duties of the Development Authority. The provisions are substantive and absolute. The framing of rules are merely procedural in nature so as to provide the manner in which and conditions under which the payment of pension is to be made and the provident fund is to be provided for. The right to pension and to the benefit of provident fund being statutory, the Court would undoubtedly have the jurisdiction to issue necessary direction for implementation of the provisions."

78. In **Bidyadhar Mishra v. State of Orissa and others**, 2007 (Supp.-1) OLR 543, this Court held as follows:-

"8. Learned counsel for the petitioner drew my attention to the judgment dated 29.10.1990 rendered in O.J.C. No.768 of 1990 (Krupasindhu Barik Vs. State of Orissa and others) in which this Court dealt with a similar question and held as follow: -

"xxx Payment of pension and making provision for provident fund are statutory duties of the Development Authority. The provisions are substantive and absolute. The framing of

rules are merely procedural in nature so as to provide the manner in which and conditions under which the payment of pension is to be made and the provident fund is to be provided for. The right to pension and to the benefit of provident fund being statutory, the Court would undoubtedly have the jurisdiction to issue necessary direction for implementation of the provisions. xxx"

79. In **Employees' Provident Fund Organization v. M/s. Raipur Development Authority** (Writ Petition (L) No. 2326 of 2010 disposed of on 05.12.2014), the High Court of Chhattisgarh observed as follows:-

"27. Thus, on the basis of aforesaid analysis, it is held that the employees of the RDA are entitled for the benefit of Contributory Provident Fund under the M.P. Contributory Provident Fund Rules, 1955 by virtue of Rule 27 of the Madhya Pradesh Development Authority Services (Officers and Servants) Recruitment Rules, 1987.

28. Accordingly, the respondent-RDA is fulfilling both the requirements for exemption under Section 16 (1)(c) of the EPF Act, 1952 and, therefore, provision of the EPF Act, 1952 would not be applicable to the respondent herein. Thus, it is held that EPF Appellate Tribunal, New Delhi has not committed any illegality in holding that respondent-RDA is exempted from the operation of the EPF Act, 1952 and absolutely justified in granting the appeal filed by respondent authority by setting aside the order passed by the Assistant Regional Provident Fund Commissioner holding the EPF Act applicable to the respondent/RDA."

The aforesaid judgment was challenged in Writ Appeal No. 162 of 2015, which stood dismissed vide order dated 30.03.2015.

80. In **Krishena Kumar v. Union of India**, AIR 1990 SC 1782, the apex Court held as follows:-

"30. In Nakara it was never held that both the pension retirees and the P.F. retirees formed a homogeneous class and that any further classification among them would be violative of Art. 14. On the other hand the Court clearly ob- served that it was not dealing with the problem of a "fund". The Railway Contributory Provident Fund is by definition a fund. Besides, the Government's obligation towards an employee under C.P.F. Scheme to give the matching contribution begins as soon as his account is opened and ends with his retirement when his rights qua the Government in respect of the Provident Fund is finally crystallized and thereafter no statutory obligation continues. Whether there still remained a moral obligation is a different matter. On the other hand under the Pension Scheme the Government's obligation does not begin until the employee retires when only it begins and it continues till the death of the employee. Thus, on the retirement of an employee Government's legal obligation under the Provident Fund account ends while under the Pension Scheme it begins. The rules governing the Provident Fund and its contribution are entirely different from the rules governing pension. It would not, therefore, be reasonable to argue that what is applicable to the pension retirees must also equally be applicable to P.F. retirees. This being the legal position the rights of each individual P.F. retiree finally crystallized on his retirement where after no continuing obligation remained while on the other hand, as regards Pension retirees, the obligation continued till their death. The continuing obligation of the State in respect of pension retirees is adversely affected by fall in rupee value and rising prices which, considering the corpus already received by the P.F. retirees they would not be so adversely affected ipso facto. It cannot, there- fore, be said

that it was the ratio decidendi in Nakara that the State's obligation towards its P.F. retirees must be the same as that towards the pension retirees An imaginary definition of obligation to include all the Government retirees in a class was 'not decided and could not form the basis for any classification for the purpose of this case. Nakara cannot, therefore, be an authority for this case. Stare decisis et non guieta movere. To adhere to precedent and not to unsettle things which are settled. But it applies to litigated facts and necessarily decided questions. Apart from Art. 141 of the Constitution of India, the policy of courts is to stand by precedent and not to disturb settled point. When court has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same. A deliberate and solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy unless there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. It should be invariably applied and should not ordinarily be departed from where decision is of long standing and rights have been acquired under it, unless considerations of public policy demand it. But in Nakara it was never required to be decided that all the retirees formed a class and no further classification was permissible.

31. The next argument of the petitioners is that the option given to the P.F. employees to switch over to the pension scheme with effect from a specified cut-off date is bad as violative of Art. 14 of the Constitution for the same reasons for which in Nakara the notification were read down. We have extracted the 12th option letter. This argument is fallacious in view of the fact that while in case of pension retirees who are alive the Government has a continuing obligation and if one is affected by dearness the others may also be similarly affected. In case of P.F. retirees each one's rights having finally crystallized on the date of retirement and receipt of P.F. benefits and there being no continuing obligation thereafter they could not be treated at par with the living pensioners. How the corpus after retirement of a P.F. retiree was affected or benefitted by prices and interest rise was not kept any track of by the Railways. It appears in each of the cases of option the specified date bore a definite nexus to the objects sought to be achieved by giving of the option. Option once exercised was told to have been final. Options were exercisable vice versa. It is clarified by Mr. Kapil Sibal that the specified date has been fixed in relation to the reason for giving the option and only the employees who retired after the specified date and before and after the date of notification were made eligible. This submission appears to have been substantiated by what has been stated by the successive Pay Commissions. It would also appear that corresponding concomitant benefits were also granted to the Provident Fund holders. There was, therefore, no discrimination and the question of striking down or reading down clause 3.1 of the 12th Option does not arise.

81. In view of the discussions, as above, the Odisha Development Authorities (Retirement Benefit of the Employees) Rules, 2015 under Annexure-6 to the writ petition is hereby declared ultra vires to the provisions contained in the Odisha Development Authorities Act, 1982 as well as Articles 14 & 16 of the Constitution of India, 1950 and as a logical corollary, the following consequences ensue:

i. Employees working under any Development Authority constituted under the Odisha Development Authorities Act, 1982, who are in receipt of the pensionary benefit at par

with their counterparts in State Government cannot be affected by any subsequent Rule; and

ii. In the light of the judgment in the case of **Shri Ananda Dash** (supra), the employees, who had joined in service prior to 17.09.2005, i.e, the date of notification of the amendment in Sub-Rule (4) of Rule (3) of the Odisha Civil Services (Pension) Rules, 1992, are to get their retiral benefits at par with their counter parts in the Government inasmuch as they cannot be equated with the employees working in an industry or factory establishment in view of the ratio of the decision of the co-ordinate Bench in the case of **Cuttack Development Authority Vs. Regional Provident Fund Commissioner** (Supra) and **Employees Provident Fund Organization Vs. Raipur Development Authority** (Supra); and

iii. Employees working under any Development Authority, who have joined after 17.09.2005, would be entitled to the benefits under the new structured defined contribution pension scheme as applicable to their counterparts in the State Government in terms of the Odisha Civil Services (Pension) Rules, 1992.

Accordingly, it is held that the petitioner, being an employee appointed prior to 01.01.2005, is entitled to get pension, as is being availed by the similarly situated employees under the State Government. Let the retrial benefits be disbursed in favour of the petitioner, who is stated to have been retired on superannuation during the pendency of the writ petition, in accordance with law, within a period of the three months from the date of receipt of the copy of judgment."

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

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2024 (I) ILR-CUT-436

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

W.P(C) NO. 9478 OF 2022

PADMABATI JENA ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

(A) ODISHA EXCISE ACT, 2008 – Sections 47, 47(4) – The authority issued an order/letter for cancellation of license of "on shop" issued in favor of petitioner without assigned any reason & without giving any opportunity of hearing as mandated in the statute – Whether the order of cancellation is sustainable? – Held, No – The cancellation of license issued in favor of petitioner cannot be sustained in the eyes of law.

(B) NATURAL JUSTICE – The essential requirements for compliance of natural justice – Explain with reference to case law.

Case Laws Relied on and Referred to :-

1. AIR 1974 SC 87 : Union of India v. Mohan Lal Capoor
2. AIR 1981 SC 1915 : Uma Charan v. State of Madhya Pradesh

3. 2017 (I) OLR 5 : Patitapaban Pala v. Orissa Forest Development Corporation Ltd. & Anr.
4. 2017 (I) OLR 625 : Banambar Parida v. Orissa Forest Development Corporation Limited
5. 1967 1 All ER 226 (DC) : HK (An Infant) in re.
6. 1976 2 All ER 865 (HL) : Fairmount Investments Ltd. v. Secy. of State for Environment
7. 1977 3 All ER 452 : R. v. Secy.of State for Home Affairs,ex p.Hosenball,Geoffrey Lane, LJ.
8. (1963) 2 SLL RT 66 : Ridge v. Baldwin.
9. (1958) All ER 579 : Byrne v. Kinematograph Renters Society Ltd
10. (1949) 1 All ER 109 : Russel v. Duke of Norfolk
11. (1993) 4 SCC 10 : AIR 1993 SC 2115:Rattan Lal Sharma v Managing Committee.
12. (1943) AC 627 : General Medical Council v. Spackman
13. AIR 1970 SC 150 : (1969) 2 SCC 262:A.K. Kraipak and others v. Union of India
14. AIR 1978 SC 597 : (1978) 1 SCC 248:Maneka Gandhi v. Union of India
15. AIR 1981 SC 818 : Swadeshi Cotton Mills v. Union of India
16. (1998) 8 SCC 194 : Basudeo Tiwary v Sido Kanhu University and others.
17. (2008) 16 SCC 276 : Nagarjuna Construction Company Ltd v. Govt of Andhra Pradesh
18. AIR 2009 SC 2375 : Uma Nath Panday and others v State of U.P. and others
19. AIR1978 SC 851 : (1978) 1 SCC 405 : Mohinder Singh Gill v. The Chief Election Commissioner
20. AIR 1965 SC 1767 : (1965) 3 SCR 218:Bhagwan v. Ramchand
21. AIR 1975 SC 1331 : (1975)1 SCC 421:Sukdev Singh v Bhagatram
22. (2006) 10 SCC 1 : Reliance Airport Development Authorities v. Airport Authority
23. (1997) 5 SCC 536 : Mafatlal Industries Ltd. v. Union of India
24. AIR 1962 SC 1621 : Smt. Ujjam Bai v. State of U.P. (Constitution Bench)
25. AIR 1969 SC 823 : Official Trustee West Bengal v. Sachindranath Chatterji & Ors.
26. AIR 1965 SC 1449 : Raja Soap Factory v. S.P. Shantharaj
27. AIR 1973 SC 2602 : Hari Prasad Mulshankar Trivedi v. V.B. Raju
28. AIR 1988 SC 1531 : A.R. Antulay v. R.S. Nayak
29. (2007) 13 SCC 387 : Harpal Singh v. State of Punjab
30. (2004) SCC 597 : CIT v. Pearl Mech. Engg. & Foundry Works (P.) Ltd.
31. AIR 2000 Del 103 : J.U. Mansukhani & Co. v. Presiding Officer

For Petitioner : M/s. D. Panda, S. Panda, A. Mehta & D.K. Panda
For Opp.Parties : Mr. S. Nayak, Addl. Standing Counsel

JUDGMENT Date of Hearing : 08.01.2024 : Date of Judgment : 11.01.2024

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

1. The petitioner, by means of this writ petition, seeks to quash the letter dated 16.12.2021 under Annexure-6 issued by opposite party no.1-Secretary to Govt. of Odisha, Excise Department, Bhubaneswar in cancelling the license of South City IMFL Hotel 'ON' Shop at Bhagabanpur Industrial Area, Tamando in the district of Khurda for the year 2021-22; and further to issue direction to the opposite parties to consider renewal of the license of South City IMFL Hotel 'ON' shop for the current excise year.

2. The brief facts, which led to filing of this writ petition, are that the petitioner was issued with IMFL 'ON' shop license in respect of Hotel South City (with Lodging) on 07.04.2021 by opposite party no.4-Superintendent of Excise, Bhubaneswar with validity from 01.04.2021 to 30.04.2021 on payment of license fee of Rs. 2,00,000/- through challans dated 06.04.2021 and the currency of the said

license was extended up to 30.09.2021. Apart from that, the petitioner has also deposited license fee of Rs.3,00,000/ through chalans dated 09.09.2021 after adjustment of relaxation amount of Rs.2,25,000/-, which was deposited in the excise year 2020-21 towards license fee for the year 2021-22.

2.1. On 11.10.2021, opposite party no.5-IIC, Tamando P.S, Bhubaneswar wrote to opposite party no.4, by way of requisition, to take action against the petitioner alleging that the Bar used to remain open till late night, i.e., 3 AM to 4 AM or more, and that the Dance Bar Room is too small but the licensee is allowing huge congregation, which violated the terms and conditions of the license and the COVID guidelines. Basing on the alleged requisition, without making any enquiry to the said allegations by the concerned Inspector of Excise as well as opposite party no.4, a show cause notice was issued to the petitioner on 16.10.2021 by opposite party no.4, by order of opposite party no.3-Collector, Khurda, to submit an explanation within 7 days as to why her license shall not be cancelled for violation of license conditions and COVID Pandemic guidelines, failing which action shall be taken for cancellation of license, as per the provisions of law.

2.2. On 22.10.2021, S.I., Tamando P.S lodged an FIR alleging that he got an information that one employee of South City Hotel was illegally selling foreign liquor bottles to customers at the reception counter of the said Hotel. It was further alleged that owner of the Hotel, namely, Pradyumna Jena and his partners, including the petitioner, were running the Hotel till late hours of night violating guidelines and restrictions. The said FIR was registered for alleged commission of offences under Sections 269 /270 /168 /385 /506/ 120-B of the IPC read with Section 52(a) of Odisha Excise Act, 2008, Section 96 of the Odisha Urban Police Act, 2003, Section 3 of Epidemic Diseases Act, 1897 and Section 5 of the Odisha Fire Works and Loud Speaker (Regulation) Act, 1958. As a consequence thereof, the husband of the petitioner, namely, Pradyumna Kumar Jena was arrested on 23.10.2021 and was released on bail, vide order dated 05.11.2021 passed by the learned Addl. Sessions Judge-cum-Spl. Judge, CBI II, Bhubaneswar.

2.3. Though the petitioner received show-cause notice on 18.10.2021, she could not file any reply within 7 days, as her only son was under treatment at Chennai because his liver was not functioning and her husband was arrested in connection with Tamando P.S Case No.221 of 2021 arising out of C.T. Case No.5865/2021 pending on the file of learned S.D.J.M., Bhubaneswar. Then, opposite party no.3, vide letter dated 17.01.2021, recommended to opposite party no.1 for cancellation of license of the petitioner, as per Section 47 (c) of 2008 Act on the ground of illegal opening of 'ON' shop till late night, illegal operation of dance bar and allowing huge congregation. Opposite party no.1, vide letter No.6033/Ex, dated 16.12.2021, cancelled South City IMFL Hotel 'ON' shop license for the year 2021-22, as per Section 47 of the Odisha Excise Act, 2008. Hence, this writ petition.

3. Mr. D. Panda, learned counsel appearing for the petitioner vehemently contended that cancellation of the South City IMFL 'ON' shop license of the petitioner for the year 2021-22 under Section 47 of the Odisha Excise Act, 2008, vide order/letter dated 16.12.2021 under Annexure-6, cannot be sustained in the eye of law, as the same was issued/passed without assigning any reason and without any notice in writing and without offering an opportunity of hearing to her, as required under Section 47 (4) of the Odisha Excise Act, 2008 and without following the principle of natural justice. It is further contended that on the requisition of Tamando Police dated 11.10.2021 under Annexure-3 that the Bar was used to open till late night and dance bar room is too small and the licensee was allowing huge congregation violating the terms and conditions of license and COVID guidelines are totally incorrect and baseless. As such, no enquiry has been conducted by the Excise Officials as well as opposite party no.4 to know about the correctness of the allegations, but, basing on the false allegations of Tamando Police, opposite party no.4 issued show cause notice dated 16.10.2021 under Annexure-4, and the opposite party no.1, without giving any opportunity of hearing to the petitioner, passed the order impugned cancelling the license of South City IMFL Hotel 'ON' shop, which cannot be sustained in the eye of law. It is further contended that opposite party no.1 could have compounded the alleged offences, as provided under Section 75 of Odisha Excise Act, 2008, as first offence, by imposing fine under Section 64 (c) of the Odisha Excise Act, 2008 for breach of any regulatory/license conditions and operation of 'ON' shop against COVID guidelines, as in similar circumstances the Excise Commissioner, Odisha, Cuttack, vide order dated 12.08.2020 in Excise Appeal Case Nos.2, 3, 4, 5, 6 and 7 of 2020 allowed revival of licenses. It is further contended that as per the excise law in vogue, the State Government in Excise Department is the competent authority and has jurisdiction to issue show cause notice and decide cancellation of license, as per Section 47 of the Odisha Excise Act, 2008. But, in the present case, opposite party no.4, by order of opposite party no.3-Collector, Khurda, being not the competent authority and without any jurisdiction, issued show cause notice dated l6.10.2021 under Annexure-4, whereby opposite party no.1 has taken decision illegally for cancellation of license of the petitioner without issuing show cause notice, as per Section 47 (4) of 2008 Act. Therefore, it is contended that the order/letter dated 16.12.2021 under Annexure-6 issued by opposite party no.1 cancelling the license of the petitioner cannot be sustained in the eye of law and consequentially seeks for quashing of the same.

4. Mr. S. Nayak, learned Additional Standing Counsel appearing for the State-opposite parties vehemently contended that the action taken against the petitioner is well within the jurisdiction of the authority concerned and, as such, although the petitioner was continuing South City IMFL Hotel 'ON' shop, being a license holder, but, in view of the allegations made, the license of the petitioner was cancelled vide letter/order dated 16.12.2021 of the State Government for the Excise Year 2021-22. It is further contended that the petitioner has not approached this Court with clean

hands and has suppressed the true state of affairs. Therefore, she is not entitled to get any relief, as prayed in the writ petition. It is further contended that since the petitioner violated the terms and conditions of the license, which virtually caused harm to the peaceful citizens of the locality and destroyed the sanctity of the locality, which is violative of the provisions contained in Section 47 (c) of the Odisha Excise Act, 2008, the license of the petitioner was cancelled. It is further contended that while cancelling the license, sufficient opportunity of hearing to the petitioner was given to disprove the allegations and, therefore, the question of violation of Section 47(4) of the Odisha Excise Act, 2008 does not arise. It is further contended that as per the provisions contained under Section 47(4) of the Odisha Excise Act, 2008, the petitioner was issued with notice to show cause vide letter dated 16.10.2021, as per the order of the Collector, Khurda. It is further contended that the Officer-in-Charge of Bhubaneswar-III Excise Station also issued a show cause notice, vide letter dated 14.10.2021. Both the notices were received by the licensee on 18.10.2021. Even though such notices were issued, the petitioner did not give any reply within the stipulated period, i.e., by 09.11.2021. It is further contended that though the petitioner is obliged under law to abide by the terms and conditions of the license, she failed to discharge her duty, as during late hours of the night, she was selling liquor in the licensed premises as well as in other premises. Thereby, there is violation of the licence conditions as well as the provisions contained in the Odisha Excise Act, 2008, for which the Inspector in-Charge, Tamando Police Station registered a case vide Tamando P.S Case No.221 dated 27.10.2021 for the offences punishable under Sections 269, 270, 168, 385, 386, 506, 120(B) of the IPC, Section 52(A) of the Odisha Excise Act, 2008, Section 96 of the Odisha Urban Police Act, Section 3 of the Epidemic Disease Act, 1897 and Section 5 of Odisha Fireworks Loud Speaker Act. Since the petitioner violated the terms and conditions of the license, action has been taken as per the provisions contained under Section 47(C) of the Act, 2008.

5. This Court heard Mr. D. Panda, learned counsel appearing for the petitioner and Mr. S. Nayak, learned Additional Standing Counsel appearing for the State-opposite parties in hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. For just and proper adjudication of the case, the provisions of Sections-20, 47 and 48 of the Odisha Excise Act, 2008, being relevant, are extracted hereunder:-

> "***20. Grant of exclusive privilege of manufacture and sale of foreign liquor, India made foreign liquor and country liquor or other intoxicants etc***.*:–(1) The State Government may grant to any person on such conditions and for such period as it may think fit, the exclusive privilege–*
>
> *(i) of manufacturing, or of supplying by wholesale, or of both;or*
> *(ii) of selling by wholesale or by retail; or*

(iii) of manufacturing or of supplying by wholesale, or of both, and of selling by retail, any liquor or other intoxicant within any specified local area :

Provided that public notice shall be given of the intention to grant any such exclusive privilege under the preceding sub-section and that any objections made by any person residing within that area shall be considered before an exclusive privilege is granted.

(2) The State Government may, by notification, confer on any officer the power mentioned in Sub-section (1).

(3) No grantee of any privilege under Sub-section (1) shall exercise the same unless or until he has received a licence in that behalf from the Collector or the Excise Commissioner.

xxx xxx xxx

47. ***Power to cancel or suspend licence, permit or pass*** *:– (1) Subject to such restrictions as may prescribed, the authority granting any exclusive privilege, licence, permit or pass under this Act may cancel or suspend it irrespective of the period to which the same relates –*

(a) if it is transferred or sublet by the holder thereof without the permission of the said authority; or

(b) if any duty or fee payable by the holder thereof has not been paid; or

(c) in the event of any breach by the holder thereof or by any of his servants, or by any one acting on his behalf, with his express or implied permission, of any of the terms or conditions thereof; or

(d) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue or of any cognizable and non-bailable offence: or

(e) Where a licence, permit or pass has been granted on the application of the holder of an exclusive privilege granted under Section 20 on the requisition in writing of such holder; or

(f) if the conditions of the exclusive privilege, licence, permit or pass provide for such cancellation or suspension at will.

(2) When an exclusive privilege, licence, permit or pass held by any person is cancelled under clause (a), (b), (c) or (d) of Sub-section (1), the authority aforesaid may cancel any other exclusive privilege, licence, permit or pass granted to such person under this Act, or under any other law for the time being in force relating to Excise.

(3) The holder of an exclusive privilege, licence, permit or pass shall not be 1. Substituted vide Odisha Gazatte Ext. No. 2008, Dt. 07.11.2016 18 THE ODISHA EXCISE ACT, 2008 entitled to any compensation for its cancellation or suspension under this Section, or to the refund of any fee or consideration money paid or deposit made, in respect thereof.

(4) Before cancellation of the exclusive privilege, licence, permit or pass the authority cancelling it shall give to the grantee at least seven days' notice in writing of his intention to cancel it and offer an opportunity to him to show cause within the said period as to why his exclusive privilege, licence, permit or pass should not be cancelled.

xxx xxx xxx

48. ***Power to withdraw licences*** *:–(1) Whenever the authority granting any licence or exclusive privilege under this Act considers that the licence or exclusive privilege should be withdrawn for any cause other than those specified in Section 47, it shall remit a sum*

equal to the amount of the fees or consideration money payable in respect thereof for fifteen days, and may withdraw the licence either –

(a) on the expiration of fifteen days' notice in writing of its intension to do so, or

(b) forthwith, without notice.

(2) If any licence or grant of an exclusive privilege is withdrawn under clause (a) of Sub-section (1), the Excise Commissioner may, in special circumstances, direct the payment of such compensation as he may consider fit, in addition to the remission of the fee to the licensee or grantee of an exclusive privilege as aforesaid.

(3) When a licence or grant of an exclusive privilege is withdrawn under Subsection (1),any fee paid in advance, or deposit made, by the licensee or grantee of an exclusive privilege in respect thereof shall be refunded to him, after deducting the amount, if any, due to the State Government.

(4) For the purpose of calculating the amount due to the State Government mentioned in Sub-section (2), the amount of fee or consideration money payable on account of the licence or exclusive privilege, as the case may be, for the period during which it was in force shall be taken to be the sum bearing the same proportion to the total fee or consideration money, for the whole period for which the licence or exclusive privilege was settled, as the period during which the licence or exclusive privilege was in force bears to the full period for which the licence or exclusive privilege was settled or granted."

7. On perusal of the aforementioned provisions of the 2008 Act, it is made clear that for grant of exclusive privilege of manufacture and sale of foreign liquor, India made foreign liquor and country liquor or other intoxicants, etc., the State Government may grant to any person on such conditions and for such period as it may think fit, the exclusive privilege in respect of manufacturing, or of supplying by wholesale, or of both; or of selling by wholesale or by retail; or of manufacturing or of supplying by wholesale, or of both, and of selling by retail, any liquor or other intoxicant within any specified local area. Section 47 of the Act deals with power to cancel or suspend licence, permit or pass subject to sub-section (4) of Section 47 of the Act which contains that before cancellation of the exclusive privilege, licence, permit or pass the authority cancelling it shall give to the grantee at least seven days' notice in writing of his intention to cancel it and offer an opportunity to him to show cause within the said period as to why his exclusive privilege, licence, permit or pass should not be cancelled. Therefore, it is a mandate that the authority can cancel the license and for that the authority shall have to give the grantee at least seven days' notice in writing of his intention to cancel it and offer an opportunity to him to show cause within the said period. But nothing has been placed on record showing that observing the provisions contained in Section 47(4) of the Odisha Excise Act, due opportunity of hearing to the petitioner was given while cancelling the license granted in her favour.

8. The letter/order dated 16.12.2021 shows that it was the proposal for cancellation of license issued in favour of the petitioner for the year 2021-22, which reads as follows:

> *"Sir,*
> *I am directed to invite a reference to your letter No.10437 dated 02.12.2021 on subject cited above and to say that Government, after careful consideration, have been pleased to accord approval for cancellation of licence of South City IMFL Hotel 'ON' Shop issued in favour of Smt. Padmabati Jena situated at Bhagwanpur Industrial Area, P.S- Tamandao, Dist-Khordha for the year 2021-22 under section 47 of Odisha Excise Act, 2008."*

On perusal of the aforesaid letter/order, it appears that no reason has been assigned in cancelling the license. Since no reason has been assigned, the order/letter so issued on 16.12.2021 under Annexure-6 cannot be sustained in the eye of law.

9. Reasons being a necessary concomitant to passing an order, the authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority.

In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87, it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in ***Uma Charan v. State of Madhya Pradesh***, AIR 1981 SC 1915, ***Patitapaban Pala v. Orissa Forest Development Corporation Ltd. & another***, 2017 (I) OLR 5 and in ***Banambar Parida v. Orissa Forest Development Corporation Limited***, 2017 (I) OLR 625.

10. Learned counsel appearing for the petitioner emphatically stated that while cancelling the license of the petitioner, no opportunity of hearing was given to her, though Section 47(4) of the Odisha Excise Act categorically mandates that before cancellation of license opportunity of being heard has to be given to the grantee.

11. In view of such position, since no opportunity of hearing was given to the petitioner while order/letter dated 16.12.2021 under Annexure-6 was issued cancelling her license, as required under Section 47 (4) of the Act, it amounts to violations of the principles of natural justice.

12. The essential of compliance of natural justice is nothing but a duty to act fairly. Natural justice is an antithesis of arbitrariness. It, therefore, follows that audi alteram partem, which is facet of natural justice is a requirement of Art.14.

12.1. The word 'nature' literally means the innate tendency or quality of things or objects and the word 'just' means upright, fair or proper. The expression 'natural justice' would, therefore, mean the innate quality of being fair.

12.2. Natural justice, another name of which is common sense of justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that fundamental quality of fairness which being adopted, justice must not only be done but also appears to be done.

12.3. The soul of natural justice is "fair play in action".

13. In ***HK (An Infant)*** in re, 1967 1 All ER 226 (DC), Lord Parker, CJ, preferred to describe natural justice as 'a duty to act fairly'.

13.1. In ***Fairmount Investments Ltd. v. Secy. of State for Environment***, 1976 2 All ER 865 (HL), Lord Russel of Killowen somewhat picturesquely described natural justice as 'a fair crack of the whip'.

13.2. In ***R. v. Secy. Of State for Home Affairs***, ex p. Hosenball, Geoffrey Lane, LJ, 1977 3 All ER 452 (DC & CA), preferred the homely phrase 'common fairness' in defining natural justice.

13.3. In ***Ridge v. Baldwin***, (1963) 2 SLL RT 66 at 102, Lord Morris of Borth-y-Gest observed that "it is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet ... My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case".

13.4. In ***Byrne v. Kinematograph Renters Society Ltd***, (1958) All ER 579, while considering the requirements of natural justice, Justice Narman, J said. "........First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thereby, of course, that the tribunal should act in good faith. I do not think that there really is anything more".

13.5. In ***Russel v. Duke of Norfolk***, (1949) 1 All ER 109, Tucker, LJ, observed that one essential is that the person concerned should have a reasonable opportunity of presenting his case. The view of Tucker, LJ, in Russell's case (supra) has been approved by the Supreme Court of India in Rattan Lal Sharma v Managing Committee, (1993) 4 SCC 10 : AIR 1993 SC 2115.

13.6. In ***General Medical Council v. Spackman***, (1943) AC 627, Lord Wright pointed out that it should give a full and fair opportunity to every party being heard.

13.7. In ***A.K. Kraipak and others v. Union of India***, AIR 1970 SC 150: (1969) 2 SCC 262, is a landmark in the growth of this doctrine. Speaking for the Constitution Bench, Hegde, J. observed thus:

"If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have far reaching effect than a decision in a quasi-judicial enquiry".

In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597 : (1978) 1 SCC 248, law has done further blooming of this concept. This decision has established beyond doubt that even in an administrative proceeding involving civil consequences doctrine of natural justice must be held to be applicable.

13.8. In ***Swadeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, the meaning of 'natural justice' came for consideration before the apex Court and the apex Court observed as follows:-

"The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, "natural justice" has been used in a way "which implies the existence of moral principles of self evident and urarguable truth". "Natural justice" by Paul Jackson, 2nd Ed., page-1. In course of time, judges nurtured in the traditions of British jurispruduence, often invoked it in conjuction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural justice" was considered as "that part of natural law which relates to the administration of justice."

13.9. In ***Basudeo Tiwary v Sido Kanhu University and others*** (1998) 8 SCC 194, the apex Court held that natural justice is an antithesis of arbitrariness. It, therefore, follows that audi alteram partem, which is facet of natural justice is a requirement of Art.14.

13.10. In ***Nagarjuna Construction Company Limited v. Government of Andhra Pradesh***, (2008) 16 SCC 276, the apex Court held as follows:

"The rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice. Thus, whenever a man's rights are affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice. It is important to note in this context the normal rule that whenever it is necessary to ensure against the failure of justice, the principles of natural justice must be read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principles of natural justice, but in that event, the validity of that rule may fall for consideration."

13.11. The apex Court in ***Uma Nath Panday and others v State of U.P. and others***, AIR 2009 SC 2375, held that natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

13.12. In ***Mohinder Singh Gill v. The Chief Election Commissioner***, AIR1978 SC 851 : (1978) 1 SCC 405, the apex Court held that natural justice is treated as a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of Authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed, from the legendary days of Adam-and of Kautilya's Arthasastra-the rule of law has had this stamp of natural justice which makes it social justice.

13.13. In ***Bhagwan v. Ramchand***, AIR 1965 SC 1767: (1965) 3 SCR 218, the apex Court held that the rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice.

13.14. In ***Sukdev Singh v Bhagatram***, AIR 1975 SC 1331: (1975)1 SCC 421, the apex Court held that whenever a man's rights are affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice.

14. A contention was raised by learned counsel for the petitioner that the authority, who has passed the order impugned, has no jurisdiction to cancel the license of the petitioner. According to him, as per the provisions contained in Section 20 of the Odisha Excise Act, 2008, the State Government may grant to any person on such conditions and for such period as it may think fit, the exclusive privilege in respect of manufacturing, or of supplying by wholesale, or of both; or of selling by wholesale or by retail; or of manufacturing or of supplying by wholesale, or of both, and of selling by retail, any liquor or other intoxicant within any specified local area. On perusal of the letter/order dated 16.10.2021 under Annexure-4, it would appear that show cause notice was issued by order of the Collector, Khurda and under the signature of the Superintendent of Excise, Bhubaneswar. The notice of show cause was issued on the allegation of violation of terms and conditions of the license and COVID guidelines. Neither the Collector, Khurda, nor the Superintendent of Excise, Bhubaneswar is the competent authority to issue such show cause notice for cancellation of license of the petitioner for violation of terms and conditions of the license and COVID guidelines. Therefore, an incompetent person, having no jurisdiction, has issued notice of show cause dated 16.10.2021 under Annexure-4, which cannot be sustained in the eye of law.

15. ***Butterworths'*** Words and Phrases Legally Defined, Vol.3 at page-113, states succinctly "by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision".

15.1. In ***Black's Law Dictionary***, 6th Ed., the word 'jurisdiction' is defined as 'a term of comprehensive import embracing every kind of judicial action'.

15.2. In ***Halsbury's Laws of England***, 4th Ed. Vol.1(1) pp.113-122, it is stated as follows;

> *"The inferior Court or tribunal lacks jurisdiction if it has no power to enter upon an enquiry into a matter at all; and it exceeds jurisdiction if it nevertheless enters upon such an enquiry or, having jurisdiction in the first place, it proceeds to arrogate an authority withheld from it by perpetrating a major error of substance, form or procedure, or by making an order or taking action outside its limited area of competence. Not every error committed by an inferior Court or tribunal or other body, however, goes to jurisdiction. Jurisdiction to decide a matter imports a limited power to decide that matter incorrectly.*
>
> *A tribunal lacks jurisdiction if (1) it is improperly constituted, or (2) the proceedings have been improperly instituted, or (3) authority to decide has been delegated to it unlawfully, or (4) it is without competence to deal with a matter by reason of the parties, the area in which the issue arose, the nature of the subject-matter, the value of that subject-matter, or the non-existence of any other pre-requisite of a valid adjudication. Excess of jurisdiction is not materially distinguishable from lack of jurisdiction and the expressions may be used interchangeably.*
>
> *Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue, or as jurisdictional.*
>
> *There is a presumption in construing statutes which confer jurisdiction or discretionary powers on a body, that if that body makes an error of law while purporting to act within that jurisdiction or in exercising those powers, its decision or action will exceed the jurisdiction conferred and will be quashed. The error must be one on which the decision or action depends. An error of law going to jurisdiction may be committed by a body which fails to follow the proper procedure required by law, which takes legally irrelevant considerations into account, or which fails to take relevant considerations into account, or which asks itself and answers the wrong question.*
>
> *The presumption that error of law goes to jurisdiction may be rebutted on the construction of a particular stature, so that the relevant body will not exceed its jurisdiction by going wrong in law. Previously, the courts were more likely to find that errors of aw were within jurisdiction; but with the modern approach errors of law will be held to fall within a body's jurisdiction only in exceptional cases. The Court will generally assume that their expertise in determining the principles of law applicable in any case has not been excluded by Parliament.*
>
> *Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof".*

The same has been referred in ***Reliance Airport Development Authorities v. Airport Authority***, (2006) 10 SCC 1.

15.3. ***Wade's Administrative*** Law 7th Ed. (1994) Chapter 9, states as follows:

> "The Court will quash for any decisive error, because all errors of law are now jurisdictional".

The same has been taken note by the apex Court in ***Mafatlal Industries Ltd. v. Union of India***, (1997) 5 SCC 536.

15.4. In ***Smt. Ujjam Bai v. State of U.P.*** (Constitution Bench), AIR 1962 SC 1621, the apex Court held that 'jurisdiction' is the power to hear and determine, it does not depend upon the regularity of the exercise of that power or upon correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly.

15.5. In ***Official Trustee West Bengal v. Sachindranath Chatterji & Ors.,*** AIR 1969 SC 823, the apex Court, while considering Section-9 of the Code of Civil Procedure, held that 'jurisdiction' means the legal authority to administer justice according to the means which the law has provided and subject to the limitations imposed by that law upon the judicial authority.

15.6. In ***Raja Soap Factory v. S.P. Shantharaj***, AIR 1965 SC 1449, the apex Court held that by "jurisdiction" is meant the extent of the power which is conferred upon the Court by its Constitution to try a proceeding.

15.7. In ***Hari Prasad Mulshankar Trivedi v. V.B. Raju***, AIR 1973 SC 2602, the apex Court held that the word "jurisdiction" is an expression which is used in a variety of senses and takes its colour from its context. Whereas the 'pure' theory of jurisdiction would reduce jurisdictional control, to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lose something of its logical symmetry.

15.8. In ***A.R. Antulay v. R.S. Nayak***, AIR 1988 SC 1531, the apex Court held that jurisdiction is the authority or power of the Court to deal with a matter and make an order carrying binding force in the facts.

15.9. In ***Harpal Singh v. State of Punjab***, (2007) 13 SCC 387, the apex Court held that 'jurisdiction' means the authority or power to entertain, hear and decide a case and to do justice in the case and determine the controversy. In absence of jurisdiction the Court has no power to hear and decide the matter and the order passed by it would be a nullity.

15.10. In ***CIT v. Pearl Mech. Engg. & Foundry Works (P.) Ltd***., (2004) SCC 597, the apex Court held that the word 'jurisdiction' implies the Court or tribunal with juridical power to hear and determine a cause, and such tribunal cannot exist except by authority of law.

15.11. In ***J.U. Mansukhani & Co. v. Presiding Officer***, AIR 2000 Del 103, the High Court Judicature at Delhi held that the term "Jurisdiction" is normally understood as the authority to decide a matter or dispute.

16. Taking into consideration the meaning of 'jurisdiction', as prescribed in various dictionaries as well as decisions of different Courts of the country including the apex Court, it can be safely concluded that so far as the question of 'jurisdiction' is concerned it would relate to initiation of the proceeding by an authority. In the instant case, basing upon the intimation received from the IIC, Tamando Police Station, cancellation of the license was made without following due procedure and without complying with the principles of natural justice, which cannot be sustained in the eye of law.

17. On the basis of the facts and law, as discussed above, this Court is of the considered view that the order/letter dated 16.12.2021 passed by the Under Secretary to Government of Odisha, Excise Department under Annexure-6 approving the cancellation of license issued in favour of the petitioner in respect of South City IMFL Hotel 'ON' Shop situated at Bhagwanpur Industrial Area, P.S. Tamandao, District-Khurda for the year 2021-22 cannot be sustained in the eye of law. Thereby, the same is liable to be quashed and is hereby quashed. The matter is remitted back to opposite party no.1 for being adjudicated afresh by passing a reasoned and speaking order in accordance with law in compliance of the principles of natural justice by affording opportunity of hearing to the petitioner.

18. In the result, therefore, the writ petition is allowed. But, however, under the facts and circumstances of the case, there shall be no order as to costs.

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2024 (I) ILR-CUT-449

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

MATA NO. 144 OF 2022

SUREIYA KHATUN RUHI ….Appellant

-V-

Md. TOUSIF ALAM ….Respondent

MATRIMONIAL APPEAL – Custody of Muslim minor child – Muslim personal law prescribe that, father is the natural guardian of minor child though mother has right to custody till attainment of puberty – In the Present case, mother is seeking custody of minor child whereas the child is in custody of her father and she is being brought up and maintained properly without any negligence – In the circumstances above, whether mother is entitled to retain custody of child? – Held, deciding a complex question as to custody of minor, a court of law

should keep in mind relevant statutes and right flowing therefrom – But such cases cannot be decided solely by interpreting legal provisions – It is a humane problem & required to be solved with human touch – Though the mother is entitled to custody till the child attains 15 years of age, but the Court did not deliver the custody keeping in view of the all round welfare of the child – However the right to visit was granted to the mother.

Case Laws Relied on and Referred to :-

1. (2008) 9 SCC 413 : Nil Ratan Kundu v. Abhijit Kundu

For Appellant : Mrs. Ruchi Rajgarhia

For Respondent : Mr. M.K. Chand

JUDGMENT Date of Hearing & Judgment : 07.12.2023

ARINDAM SINHA, J.

1. Mrs. Rajgarhia, learned advocate appears on behalf of appellant. She submits, the appeal has been preferred against impugned judgment dated 10th May, 2022 denying her client custody. Two grounds were held against her. Firstly, she did not have the means to support the girl child and secondly, the girl child might have attained puberty. The financial degradation has been compounded by respondent-husband's non-compliance of order for payment of maintenance. The girl has just become ten years old and studying in class-IV.

2. She submits, though in Mahomedan law father alone is the natural guardian but the mother is entitled to custody of her female child until she attains puberty. The girl was born on 2nd November, 2013 and she has already achieved 10 years age. Any further delay in granting her client custody would defeat her claim. She refers to internal page 8 of impugned judgment dated 10th May, 2022 to submit, reason for denying her client custody was on surmise that by the end of the matrimonial dispute the minor daughter might attain her puberty. Hence, it is imperative that there be an order for granting custody of the girl child to her client.

3. Mr. Chand, learned advocate appears on behalf of respondent-husband. He submits, appellant has purported claim for custody. This has been seen through by the Court below on, inter alia, delayed approached by her. He submits, his client had come to this Court's premises, for filing affidavit. He was arrested and taken to Sambalpur for production, in a case initiated on complaint by appellant. The arrest was three months back and he was in custody for one day. He opposes the appeal.

4. We, being desirous of examining the parties and the child, all of whom live in Sambalpur, made direction in our order dated 1st December, 2023 by paragraph 4 therein, reproduced below.

> *"4. The Registry is directed to arrange for separate examination by Court of appellant-wife, respondent-husband and the minor daughter. The examination will be by video conference. The persons to be examined will present themselves in the District Court at*

Sambalpur at 3:00 P.M. on 7th December, 2023. It must be ensured that appellant-wife, respondent-husband and the minor daughter are to be separately examined without conference amongst any one of them."

5. We examined the child and his father separately. Their depositions are reproduced below.

<u>Examination of Alisha Fatima (child)</u>
<u>To Court</u>

(i) Where are you studying?
Ans.- Vedic International School.

(ii) In which class?
Ans.- 4th Class.

(iii) How do you go to school?
Ans.- By school bus.

(iv) Who drops you at the bus stop?
Ans.- Papa.

(v) Who picks you up on return from the school?
Ans.- Papa.

(vi) What does your father do?
Ans.- He is working at office.

(vii) When do you go to school?
Ans.- 7 in the morning.

(viii) When do you return?
Ans.- 2.40 PM.

(ix) Who all are there in your home?
Ans.- Papa, Mummy and my sister.

(x) What is the name of your sister?
Ans.- Aayt Naaz. She is two years old.

(xi) Do you have any relative in Sambalpur?
Ans.- Yes, my aunt and her name is Hena.

(xii) Do you have maternal grandmother?
Ans.- Yes.

(xiii) Where does she stay?
Ans.- Balasore.

We are told, the maternal grandmother is mother of the second wife.

<u>Examination of Md. Tousif Aslam (father)</u>
<u>To Court</u>

(i) How long has the child been with you?
Ans.- Seven years.

(ii) Why have you not allowed the child to meet her natural mother?
Ans.- She did not take responsibility in the beginning. The child has always been with me. I have looked after her.

(iii) Is the child aware that she has a natural mother?
Ans.- Yes.

6. Mrs. Rajgarhia relies on judgment of the Supreme Court in **Nil Ratan Kundu v. Abhijit Kundu**, reported in **(2008) 9 SCC 413**. She submits, in that case

the father was denied custody. Facts were, mother of the child (a boy), had died. The death was in suspicious circumstances. There was investigation. Inter alia, the paternal grandmother had absconded on happening of the death. The child was found sick. The trial Court had directed custody to be given to the father. The High Court on appeal had confirmed the order. The maternal grandfather was appellant before the Supreme Court. In the judgment a passage from the High Court's judgment stands reproduced. We too reproduce it below.

> *"We have gone through the evidence adduced by both sides and also heard the child in order to decide the question of the welfare of the said child. During our conversation with the child we have observed with great anxiety that the child has been tutored to make him hostile towards his father. In this connection it is worth mentioning here that the learned Court below also held that the O.P's wanted to wipe out the existence and identity of father from the mind of the petitioner's son and if it so, then it may be disastrous for the future of the petitioner's son"*

In context of the judgments, both of the High Court and the trial Court having been set aside, we reproduce paragraph 84 from judgment of the Supreme Court.

> *"84. We have called Antariksh in our chamber. To us, he appeared to be quite intelligent. When we asked him whether he wanted to go to his father and to stay with him, he unequivocally refused to go with him or to stay with him. He also stated that he was very happy with his maternal grand-parents and would like to continue to stay with them. We are, therefore, of the considered view that it would not be proper on the facts and in the circumstances to give custody of Antariksh to his father-respondent herein."*

7. Having examined the child, we could not elicit from her that she was aware she had a natural mother or another mother. She seemed very happy in her situation of going to school and staying with her step-mother and step-sister. Mr. Chand submits, pursuant to direction by earlier coordinate Bench, parties and the child had travelled to Cuttack and presented themselves before the Court. The child refused to even talk to appellant. Mrs. Rajgarhia submits, the child was not allowed to talk with her client, her natural mother.

8. We have put questions to respondent-husband. He was categoric in saying his daughter is aware of her natural mother yet we could not elicit it from her. It is clear, the daughter is aware and does not want to be removed from where she is. That is the impression we have got.

9. Mrs. Rajgarhia points out, according to Muslim law, minority of Muslims terminate on attainment of puberty, which according to Sunni law, is presumed on completion of the fifteenth year. Conclusion is inevitable that having been with her father for last seven years she has been in a surrounding away from her natural mother. How and why this has happened is not the question to be decided here. Result of it is the child does not know or want to acknowledge existence of her natural mother. It is a tragedy but in the facts and circumstances we will not interfere to remove the child from where she wants to be, to give custody to the mother.

10. Reverting back to ***Nil Ratan Kundu*** (supra), the Supreme Court said, in deciding a complex question as to custody of minor, a Court of law should keep in mind relevant statutes and rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. Relying on said declaration, though appellant is entitled to custody till the child attains 15 years of age, we are not inclined to interfere in appeal with impugned judgment. However, the father must bear in mind that it is also to welfare of the child to be aware and understand as and when she can, she does have a natural mother, who also loves her.

11. Power of appellate Court allows for passing any order which ought to have been passed or made as well as to make such further order as the case may require. We direct for appellant to have visitation right, to be exercised on the husband bringing the child to Centre of The Child Welfare Committee Office, Sambalpur, Collectorate Building, Sambalpur to meet with appellant every Sunday between 4.00 P.M and 6.00 P.M without presence of respondent-husband in the meeting chamber. This direction will subsist till the child achieves 15 years age. After 6 months from date appellant will be at liberty to approach the family Court for variation of the direction on basis of need arisen by compliance thereof.

12. The appeal is disposed of.

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2024 (I) ILR-CUT-453

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

MATA NO. 353 OF 2023

ANUBHAV MOHANTY ……Appellant

-V-

VARSHA PRIYADARSHINI ……Respondent

HINDU MARRIAGE ACT, 1955 – Section 13(1)(i-a) – Non consummation and denial of physical intimacy were pleaded by the appellant/husband – Whether the appellant/husband is entitle for decree of divorce on the ground of mental cruelty? – Held, Yes – The appellant has proved the ground under clause (i-a) of sub-section (1) in Section 13 of the Act.

Case Laws Relied on and Referred to :-

1. (2007) 4 SCC 511 : Samar Ghosh Vs. Jaya Ghosh.
2. (2011) 6 SCC 555 : Janak Dulari Devi Vs. Kapildeo Rai.
3. AIR 2023 SC 4920 : Nirmal Singh Panesar Vs. Paramjit Kaur Panesar.

For Appellant : Mr. Lalitendu Mishra, Mrs. Chandana Mishra, Mr. S. Acharya, Mr. S.K. Singh, Ms. J. Sahoo, Ms. S. Patnaik

For Respondent : Mrs. Sujata Jena, Mrs. B. Sahu, Mrs. S. Panda.

JUDGMENT Dates of Hearing :23.11, 06.12 & 21.12.2023 : Date of Judgment : 21.12.2023

ARINDAM SINHA, J.

1. Appellant-husband being aggrieved with judgment dated 22nd September, 2023 of the family Court is before us in appeal. Mr. Mishra, learned advocate appears on behalf of appellant and submits, by the judgment his client's civil proceeding for dissolution of the marriage was dismissed. The dismissal was in face of also dismissed counter claim of respondent-wife for restitution of conjugal rights. The contradiction is apparent.

2. He submits, several grounds were taken in the petition. In appeal his client is urging only ground of non-consummation of the marriage and denial of physical intimacy as mental cruelty. He relies on judgment of the Supreme Court in **Samar Ghosh v. Jaya Ghosh**, reported in **(2007) 4 SCC 511**, paragraph 101, illustration-(xii).

3. We had heard this appeal on 23rd November, 2023 and 6th December, 2023. Text of orders made on those days, for notice to parties, are reproduced below.

> ***<u>23rd November, 2023</u>***
>
> *"1. Mr. Mishra, learned advocate appears on behalf of appellant-husband and Ms. Jena, learned advocate for respondent-wife.*
>
> *2. We have heard opening submissions of Mr. Mishra. We have perused parts of the petition, written statement and paragraph 80 from deposition of cross-examination of respondent-wife held on 11th April, 2023.*
>
> *3. By consent list on 6th December, 2023."*
>
> ***<u>6th December, 2023</u>***
>
> *"1. Mr. Mishra, learned advocate appears on behalf of appellant-husband, who is aggrieved because the family Court did not grant divorce. Ms. Jena, learned advocate appears on behalf of respondent-wife. We have heard them.*
>
> *2. We have perused, inter alia, paragraphs-5(g) and 5(h) in the petition. The allegation therein has been dealt with in paragraph-14(g) of the written statement. It appears therefrom respondent-wife alleged consummation on 9th February, 2014 but thereafter she was afraid of intimacy.*
>
> *3. We have also seen deposition in cross-examination of respondent-wife, inter alia, paragraph-60, questions 69 and 70, paragraph-71 and 79 to 81.*
>
> *4. Mr. Mishra relies on judgment of the Supreme Court in **Samar Ghosh vs. Jaya Ghosh,** reported in **(2007) 4 SCC 511**, paragraph-101 illustration-(xii).*
>
> *5. List on 20th December, 2023."*

4. Mrs. Jena, learned advocate appears on behalf of respondent-wife and submits, she has several points. Firstly, case of non-consummation of the marriage required petitioner to apply for annulment under section 12 in Hindu Marriage Act, 1955. If it was a case of non-consummation, petitioner would have applied within prescribed period. He not having had applied in the period is first presumption against him that his allegation is incorrect. Secondly, no amount of evidence contrary

to pleading can be looked into. It is a well-settled position. When her client had stated the marriage was consummated and thereafter appellant had his way with her, evidence to the contrary cannot be looked into. She relies on **Janak Dulari Devi v. Kapildeo Rai**, reported in **(2011) 6 SCC 555**, paragraph 9. Thirdly, she reiterates, there are clear statements in her client's written statement that the marriage was consummated and, appellant always had his way with her client without caring for her feelings. The family Court correctly appreciated the situation that allegation of unsatisfactory physical intimacy must lead to presumption that there was physical intimacy but may not have been satisfactory from point of view of appellant. That does not make his allegation of non-consummation of marriage to be proved as a fact. Furthermore, her client tendered prints of conversations between appellant and herself on social media platform WhatsApp. It was tendered as ext.B. She relies on section 14 in Family Courts Act, 1984 and submits, the documents were duly exhibited. Perusal of the kind of messages appellant had sent to her client will clearly show that there was consummation and physical intimacy.

5. She relies on another judgment of the Supreme Court in **Nirmal Singh Panesar v. Paramjit Kaur Panesar**, reported in **AIR 2023 SC 4920**, inter alia, paragraph 19. We reproduce the paragraph below.

> *"19. So far as the facts of the present case are concerned, as stated earlier, the appellant-husband is aged about 89 years and respondent-wife is aged about 82 years. The respondent all throughout her life has maintained the sacred relationship since 1963 and has taken care of her three children all these years, despite the fact that the appellant-husband had exhibited total hostility towards them. The respondent is still ready and willing to take care of her husband and does not wish to leave him alone at this stage of life. She has also expressed her sentiments that she does not want to die with the stigma of being a "divorcee" woman. In contemporary society, it may not constitute to be stigma but here we are concerned with the respondent's own sentiment. Under the circumstances, considering and respecting the sentiments of the respondent wife, the Court is of the opinion that exercising the discretion in favour of the appellant under Article 142 by dissolving the marriage between parties on the ground that the marriage has irretrievably broken down, would not be doing "complete justice" to the parties, would rather be doing injustice to the respondent. In that view of the matter, we are not inclined to accept the submission of the appellant to dissolve the marriage on the ground of irretrievable break down of marriage."*

6. The Supreme Court in **Samar Ghosh** (supra) gave several illustrations enumerated from instances of human behaviour, which may be relevant in dealing with cases of mental cruelty. Some illustrations were given in paragraph 101, as was said to be not exhaustive. On behalf of appellant reliance has been on illustration-(xii). The illustration is reproduced below.

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

We understand that refusal to have intercourse for considerable period without any physical incapacity or valid reason, on unilateral decision, may amount to mental cruelty. Therefore, we must satisfy ourselves one way or other on the issue of

whether respondent-wife took unilateral decision to refuse intercourse for considerable period without suffering any physical incapacity nor having a valid reason.

7. On going through the exhibits tendered in the Court below, as available from the lower Court record produced before us, including ext.B (WhatsApp messages), it emerges that appellant was always seeking intimacy. The WhatsApp messages are at best expressions of appellant wanting physical intimacy. They are not and cannot be proof of actual physical intimacy. We have not been shown anything in them to be an account of what already happened. It is unfortunate that such private messages were brought on record. Be that as it may, paragraphs 5 (g), (h) and (i) in the petition and paragraph 14(g) in the written statement are respectively reproduced below.

> *Petition*
>
> *"5(g) That the Respondent always said to the petitioner that she fears about the pain while thinking about having sexual intercourse as such* ***she never allowed the petitioner to consummate their marriage. Whenever the petitioner tried to have physical touch or make relation with the respondent, she never allowed for the same****. This kind of behavior of the respondent made the petitioner uncomfortable, unhappy and the petitioner never felt that he is married as the respondent never gave him the pleasure of being married.*
>
> *(h) That the Respondent did not allow the petitioner to establish physical relationship on their first night after marriage and clearly told the petitioner that she is going to take 3-4 months to get comfortable and would allow him to make physical relations with her.* ***The petitioner appreciated the feelings of Respondent and gave time to the respondent for being comfortable in her matrimonial house as well as in her married life. But by the time, the Petitioner felt that how can a woman stop herself to intimate with her husband living together and sleeping together as a husband and wife****.*
>
> *(i) That on June 2014, the petitioner got elected as a Member of Parliament uncontested from Rajya Sabha in the age of 32 only. After becoming the Member of Parliament, the petitioner started residing at Delhi along with the respondent. The Petitioner again tried to get comfortable with the respondent for consummating their marriage but she refused it clearly being uncomfortable in making any kind of physical relationship with the petitioner."*
>
> *Written Statement*
>
> *14(g) That the averments made in sub para (g) of para-5 of the petition regarding physical relationship between the parties and subsequent events are not only false but also baseless. The petitioner belongs to karan by caste. As per the tradition and culture and custom of karan caste in Odisha the marriage is supposed to be consummated just after return of groom and bride to the in-law's house of bride****. But here in the case in hand the couple returned to the house of the petitioner after marriage on 9th morning February, 2014. On the same night the marriage of both the parties were consummated. Considering the petitioner definitely the Respondent was in fear at the time of consummation everyday thereafter****. But the Respondent never complained any where regarding consummation either in the in-law's family or to her mother or married sisters in any manner at any point of time. In the mean time from the date of marriage till filling of divorce application more than 6 years has passed.* ***The presumption is very***

> ***clear under such circumstances the marriage between petitioner and Respondent have consummated****. The petitioner has taken such a false plea on the divorce application regarding consummation considering the mentality of Respondent and after studying the mind of Respondent. The idea of petitioner is the Respondent can never face such type of allegations. Even if the Respondent fearing herself without carrying her the petitioner was proceeded in consummating his marriage on the next day of marriage.* ***The question of allow by the Respondent for consummation does not arise. The process of consummation by the petitioner was continued and whenever the petitioner wanted to have sex with the Respondent became successful by any manner. The petitioner never care for listening anything from the Respondent in any matter as he was not in a mood due to heavy drinking. The Respondent never objected at any point of time in any manner to the petitioner because the petitioner was not in a mood to hear anything, hence the question of allow to touch and make relationship does not arise****. The petitioner is an habituated drunker who was drinking wine in his bedroom everyday over night with the help of his assistants who is a male person, overnight the Respondent was in a fearing mood and was thrumbling initially which was became habit subsequently. The Respondent never slept a night in her stay in in-laws house. Still the Respondent never expressed her difficulties in her bedroom any where considering her social prestige and keeping the prestige of both the families. Besides it, both the parties are eminent cine artist in Odisha and very popular among the young stars of Odisha. The petitioner is put to strict proof of the same." (Emphasis supplied)*

8. Our appreciation of the pleadings is that there was assertion of non-consummation and denial of physical intimacy as also appears from, inter alia, paragraph 5(n) in the petition. On the other hand, respondent-wife categorically asserted consummation of marriage and subsequent intimacy at instance of appellant, without him waiting for her 'allow' him. The pleadings being at variance, issue arises on whether there was consummation of the marriage and thereafter physical intimacy.

9. Proceeding to the evidence adduced by the parties, it would be appropriate for us to reproduce below paragraphs 60, questions 69 and 70, paragraphs 71 and 79 to 81 from deposition dated 11th April, 2023 in cross-examination of respondent-wife.

> *"60. It is not a fact that I had promised my husband that I would consummate our marriage for the first time on his birthday after marriage, i.e. 24.12.2014, but I did not do so.* ***The witness volunteers that my marriage had already been consummated on the first night of my marriage as per the tradition of 'karan caste'****.*
>
> *69 Q. Are you ready to get a fitness test done from a gynecologist and psychiatrists to show your fitness for consummation of marriage both physically and/or psychologically?*
>
> *Ans:* ***I am not ready to get a fitness test done from a gynecologist and psychiatrists, as there was/is no need to do so****.*
>
> *70Q. When did Dr. Sidharth Das and Dr. Sujata Mishra, who were our doctors advised you for consummation of marriage and counseling for that purpose on 5-6 occasions and then Dr. Sujata Mishra met you separately also for making the marriage get consummated from soon after your marriage time till 2019 when you separated?*

Ans: Dr. Sidharth Das and Dr. Sujata Mishra have never advised me for consummation of our marriage and they have never counseled me. Dr. Sujata Mishra has never met me separately for making our marriage get consummated.

71. ***It is a fact that Dr. Sujata Mishra is a gynecologist and*** *it is not a fact that she was counseling me with regard to consummation of marriage, as* ***she has also got her separate clinic because my husband was speaking to them about the solution to the non-consummation of marriage.***

79. ***It is a fact that I never consulted any IVF*** *(in virto fertilization)* ***or IUI*** *(intra uterine insemination)* ***for infertility*** *(with objection as not pleaded).* ***The witness volunteers that there was no requirement.***

80. ***It is a fact that I did not consult IUI or IVF experts or clinics because there was no need as I never allowed my husband to consummate the marriage or have sexual intimacy with me****.*

81. It is not a fact that the question of conceiving any child did not arise as I never allowed my husband to have sexual intimacy or intercourse with me."

(Emphasis supplied)

10. Respondent-wife alleged appellant having his way with her and long period must lead to presumption of consummation and physical intimacy. In cross examination she denied suggestion that there was non-consummation of the marriage on assertion that it had been consummated on the first night as per tradition of them in "Karan caste". It also appears from her cross-examination that she was not ready to get the fitness test done from a Gynecologist or Psychiatric as there was or is no need to do so. She denied that Dr. Sidharth Das or Dr. Sujata Mishra had advised her for consummation of the marriage, or they had ever counseled her. She went on to say Dr. Sujata Mishra had never met her separately to make the marriage consummated. She admitted knowledge of Dr. Sujata Mishra being a Gynecologist and admitted that her husband was seeing the doctors about the solution to the non-consummation of the marriage. She also admitted that she never consulted any IVF or IUI for infertility (question 69, paragraphs 79 and 80). She volunteered, there was no requirement. On having thus volunteered she asserted by paragraph-80 that she did not consult such experts nor visited such clinics because there was no need, as she never allowed her husband to consummate the marriage or have sexual intimacy with her. At this point Mrs. Jena submits, there is a typographical error in record of evidence under paragraph-80 in the deposition of her client's cross-examination. It should be read as she had said, 'It is 'not' a fact…'. We must consider this submission in light of preceding answers to question 69 and paragraph 79 in the cross-examination, which were answers to similar questions, on seeing doctors. Furthermore, procedure in the Court below is for the deposition to be signed by the witness on transcription of it. Oral examination of a witness at trial is for the Court to find on fact. In this case there could not have been a third party witness to testify on either consummation of the marriage or physical intimacy of the parties. It follows that utmost importance attaches to what the parties themselves deposed. An admission in deposition of cross-examination cannot be explained by argument. There is nothing on record to show that on behalf of respondent-wife, the learned

Judge was made aware there was a mistake of omission in record of the deposition. Mrs. Jena submits further, on 10th May, 2023 appellant had filed petition under section 340 read with section 195 in Code of Criminal Procedure, 1973 and other sections of Indian Penal Code, 1860. In it appellant had alleged that paragraphs 80 and 81 in deposition dated 11th April, 2023 on cross-examination of her client, the statements were contradictory. This goes to confirm her submission that there was error in recording paragraph 80, on omission of word 'not' for the statement to be, 'It is not a fact…'. We have perused the order sheet. The Court below had recorded that the petition was not served. On query from Court Mrs. Jena submits, copy of it was transmitted by WhatsApp and therefore her client's engaged learned advocate had got it. It appears from order dated 2nd August, 2023 of the Court below that appellant had not pressed the application. Significant however is that respondent-wife thus had her attention drawn to paragraphs 80 and 81 in her deposition dated 11th April, 2023 but still she did not take any step to urge error therein before the learned Judge, who had recorded it. All this appears to be an attempt at explanation of clear admission of respondent-wife on non-consummation of the marriage, leading to inevitable conclusion that there could not have been physical intimacy.

11. We are clear in our minds that pleading of facts regarding non-consummation and denial of physical intimacy were there in the petition. Respondent-wife had notice of petitioner's case. She dealt with the case on categoric assertion of consummation and thereafter physical intimacy against her will. There was no surprise as can be contended on behalf of respondent-wife. **Janak Dulari Devi** (supra) has no application because the declaration of law is that evidence contrary to pleading cannot be relied upon. In that case, plaintiff had pleaded later payment of part consideration but had adduced evidence by the instrument that the consideration had been paid. However, admission to the contrary in cross-examination cannot be said to be reliance on evidence contrary to pleading. Moving on, even if the categoric admission by paragraph 80 in her cross-examination is not taken in isolation and allowing for her expression of 'consummation' to also mean physical intimacy, the answers given to the questions reproduced above leave no doubt in our mind that there was no physical intimacy between the parties. Appellant cannot be faulted for waiting in hope of consummation, causing expiry of the prescribed period for annulment. The private messages exhibited demonstrate his eagerness to get physical with respondent-wife. Hence, his contention of mental cruelty.

12. In view of our finding in preceding paragraphs 10 and 11 and omission of respondent-wife to bring on record physical incapacity, as she had refused or said it was not required for her to visit any doctor or valid reason for withdrawing herself, leads us to conclude that it was unilateral decision on her part to deny her husband. Mrs. Jena submits, there was no pleading in terms of illustration-(xii) in **Samar Ghosh** (supra) and as such the declaration of law by the illustration cannot come to aid of petitioner. We have already stated the facts pleaded and evidence laid. Law need not be pleaded.

13. In view of the aforesaid we are unable to accept the finding of the Court below on consummation of the marriage or physical intimacy. The Court has interpreted appellant's statement of the relation being not satisfying or unsatisfactory to mean that there must have been some contact, which was not to the satisfaction of appellant. This interpretation was used to deal with or rather overlook respondent's clear admissions regarding her awareness of Gynecologist consulted by her husband, particularly regarding non-consummation of the marriage and no physical contact. The finding cannot also otherwise be sustained simply because if respondent-wife is to be believed on her pleading, of continued physical relations without her consent as in there having been no situation of 'allowing' it, dissatisfaction would have to be taken as her grievance, for which she had refused to consult the doctors.

14. **Nirmal Singh Panesar** (supra) has no application to the case in aid of respondent-wife. The Supreme Court refused to exercise discretion in favour of therein appellant-husband under article 142 in the Constitution, to dissolve the marriage between parties on the ground that the marriage had irretrievably broken down as it would not to be doing 'complete justice'. This was because the respondent-wife had expressed her sentiment of not wanting to die with stigma of being a 'divorcee woman'. She was 82 years of age while appellant-husband, 89 years. In the case before us only ground urged in the appeal has been mental cruelty based on illustration-(xii) under paragraph 101 in **Samar Ghosh** (supra). Our finding on analysis of relevant pleadings and evidence has been as aforesaid. The finding is of ground under clause (i-a) under section 13(1) made out by appellant-husband. As such the law provides for us to dissolve the marriage.

15. Impugned judgment is reversed in appeal. We hold ground under clause (i-a) under sub-section (1) in section 13 of the Act proved by appellant-husband. In the premises, the marriage solemnized on 8th February, 2014 is dissolved by the decree of divorce hereby granted. The decree be drawn up expeditiously.

16. The appeal is disposed of.

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2024 (I) ILR-CUT-460

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

CRLA NO.651 OF 2012

MANGAL MUNDA … Appellant

-V-

STATE OF ORISSA … Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Accused/appellant convicted under the section – Conviction has been made on basis of the deposition of P.W.9 who was a Co-villager, whose house was situated nearly 10 to 12 feet away from the place of occurrence, though

P.W.9 had not seen the axe/actual blow on the deceased but was a witness to the pre-occurrence, i.e. both deceased and accused were taking liquor on the courtyard of the deceased and also witness to post occurrence, i.e. after hearing the sound of axe blow, rushed to the spot found that, accused was holding an axe and deceased laying with injury on head & body and the children of deceased were crying and all of sudden accused thrown away that axe after seeing to him – Accused took plea that, the place of occurrence was dark, where as the prosecution took stand that a 'Dibiri' light was there and clearly the place of occurrence was visible – The evidence of P.W.9 no way demolished by the accused/defendant – Hence this court considering the evidence of P.W.9 & medical evidence as well as other corroborative evidence confirmed the conviction.

Case Law Relied on and Referred to :-

1. 2022 (88) OCR SC 655:Raju @Rajendra Prasad Vrs. State of Rajastan.

For Appellant : Mr.B.K. Ragada

For Respondent : Mr.P.K.Mohanty, ASC

JUDGMENT Date of Hearing : 06.10.2023 : Date of Judgment : 04.12.2023

G. SATAPATHY, J.

1. Being aggrieved by the impugned judgment and order passed on 02.06.2011 by the learned Addl. Sessions Judge, Fast Track Court, Sambalpur in S.T. Case No. 225/06 of 2010-2011 convicting the Appellant for offence punishable offence U/S. 302 of IPC and sentencing him to undergo imprisonment for life with fine of Rs. 1,000/- in default whereof, to undergo imprisonment for one month, the convict-Appellant herein has preferred this appeal.

Factual background

2. On 16.05.2010 at about 9 am, while Mangru Khadia (hereinafter referred to as the "deceased") was consuming liquor with convict and convict's wife Bharti Munda in front of the Courtyard of the convict in village Pardesipali, the convict asked his wife for some water and, accordingly, she went to bring water to the nearby tube well. At this time, a quarrel ensued between the convict and the deceased and the convict brought out an axe from his house and assaulted the deceased indiscriminately by said weapon of offence i.e. an axe (MOI). After hearing the incident, PW.9 Jasoda Khadia, whose house situates very close to the house of the convict, came out of her house and found the deceased lying on the ground sustaining with severe bleeding injuries and the convict standing there by holding an axe (MOI). On seeing PW.9, convict threw away the axe to the roof of his house. After hearing commotion, the villagers including mother and sister of the deceased arrived at the spot and an ambulance was arranged to shift the deceased,

but before the deceased could be shifted to the hospital, he succumbed to injuries. The parents and sister of the deceased guarded the dead body in the night.

3. On this incident, on next morning, PW1 Rabi Bhue proceeded to Katarbaga Police Station along with PW 8 Saraswati Khadia and another sister of the deceased and PW1 lodged an FIR under Ext.1 being scribed by PW10 Khirod Kumar Singhdeo before Katarbaga Police Station and, accordingly, in absence of IIC, the ASI of Police PW12 Dayanidhi Biswal registered Katarbaga PS Case No. 28 of 2010 against the convict for offence U/S. 302 of IPC and took up the investigation of the case. In the course of investigation, PW 12 examined the informant and other witnesses, prepared the spot map under Ext. 12 after visiting it, conducted inquest over the dead body of the deceased vide Ext. 2 and dispatched the dead body to VSS Medical College and Hospital, Burla for Post Mortem examination. PW12 got MOI recovered by the convict pursuant to his disclosure statement recorded under Ext.3 and seized MOI under Ext. 4. PW 12 also seized the wearing apparels of the deceased as well as that of the accused together with sample & blood stain earth from the spot and the same were sent by another IO PW 11 Debi Prasad Das to RFSL,Sambalpur and the chemical examination report under Ext.11 was obtained. As usual on completion of investigation, PW 11 submitted a charge-sheet against the convict for offence U/S. 302 of IPC under which cognizance was taken and the charge was framed against the convict for said offence, but the convict did not plead guilty to the charge and he, thereby, came to be tried by the trial Court for the aforesaid offence.

4. In support of the charge, the prosecution examined altogether 13 witnesses and proved document under Exts.1 to 16 as well as identified material objects under MO-I to III as against no evidence whatsoever by the defence.

5. The plea of the convict in the trial was denial simplicitor and false implication, but he took a specific plea of alibi in his statement recorded U/S.313 Cr.P.C.

6. After appreciating the evidence on record upon hearing the parties, the learned trial Court convicted the Appellant by heavily relying upon the circumstance as deposed to by PW 9. This is how the Appellant before this Court in this appeal.

7. In the course of hearing, Mr. B.K. Ragada, learned counsel for the Appellant has submitted that in the facts and circumstance of the case, the learned trial Court has committed serious error in holding the Appellant guilty of the offence because the circumstances as inferred by the learned trial Court do not remotely disclose the guilt of the Appellant for any offence. Mr. B.K. Ragada has also submitted that although the learned trial Court has heavily relied upon the evidence of PW.9 in holding the circumstance to have been firmly and cogently established against the convict, but by no stretch of imagination such circumstance has established the guilt of the Appellant since PW.9 had never seen the Appellant assaulting the deceased

nor her evidence remotely connect the convict with the commission of crime and, thereby, reliance cannot be placed upon the evidence of PW9 in convicting the Appellant. In summing up his argument, Mr. B.K. Ragada, learned counsel for the Appellant has relied upon the decision in ***Raju @ Rajendra Prasad Vrs. State of Rajastan; 2022 (88) OCR SC 655*** to contend that since PW9 had not seen the occurrence, benefit of doubt may be extended to the appellant and, accordingly, learned counsel for the Appellant has prayed to allow the appeal.

8. On the other hand, Mr. P.K. Mohanty, learned ASC has refuted the submission of Mr. Ragada by interalia contending that the circumstance so established against the convict unerringly point towards the guilt of the convict and the circumstances are so complete that there is no escape from the the conclusion that within all human probability, the crime was committed by the Appellant and, accordingly, Mr. Mohanty has prayed to dismiss the appeal.

9. After having considered the rival submissions upon perusal of record, this Court considers it apposite to re-appreciate and scrutinize the entire evidence on record to find out legal sustainability of the impugned judgment of the conviction recorded against the Appellant. At the outset, it is to be reminded, that in case of murder, there are two important issues which need to be answered;firstly, the nature of death i.e. homicidal death and secondly, the person responsible for such homicidal death of the deceased.

10. A cursory glance to the evidence on record would go to indicate that there is no direct evidence by which it can be said that the Appellant was responsible for the murder of the deceased or he committed the murder, but there are circumstance available in evidence on record to find out the legal sustainability of the impugned judgment. Firstly, there is no dispute about the homicidal death of the deceased which is apparent from the medical evidence of PW 13 which inter-alia transpired the following:-

On PM examination, he (PW.13) found

***External Injuries**:-*

(i). Elliptical shaped cut wound measuring 6.8 x 1.5 cm noticed at the right side of head 1cm above the upper pole of pinna, blood and lymph found adherent to the margin, margins were cleanly cut with slight bevelly downwards and brain matter had come out of the wound.

(ii). Cut wound measuring 3 x 0.5 cm placed vertically over right side zygomatic area of face, margins showing slight contusion effect and dried blood and lymph were adhered.

(iii). Abraded contusion of size 3 x 1 cm on right side of corresponding the temporal hair line.

(iv). Cut wound measuring 3 x 1 cm at back of root of right ear and another such cut wound measuring 3 x 0.5 cm at back side of right pinna.

(v). Abraded contusion of size 2 x 1 cm over left side check, brownish in color and 2 number of abraded contusion measuring 1.5x 1 cm each noticed on the left molar prominence.

(vi). Tangential bevelled cut wound directed downward was noticed on the left side of face corresponding the body mandible and measured 4 x 2 cm.

(vii). Cut wound, elliptical in shape measuring 7 x 1.5 cm transversely situated in the midline of back at the interscapular region corresponding T-5 vertebral spine. The wound was deep enough to cut through the lamina of the vertebra, reached up to the spinal canal.

(viii). Cut wound of size 3 x 1 cm at the midline of back of root of neck and limited within the subcutaneous tissue.

(ix). Cut wound of size 6.7 cm in length noticed transversely over blade of right shoulder. It was deep and 1 cm width on the lateral end and was found to be superficial and of gradually decreasing width towards the medial end.

(x). Cut injury of similar shape of length 7 cm was noticed over back of right shoulder and another such wound was noticed on the right side of back 4 cm bellow the spine of scapula.

(xi). Abrasion of size 2 x 2 cm on the lateral aspect of left arm and of size 1 x 0.5 cm, 2 in number on the left side of chest below the nipple.

(xii). Abrasion of size 0.5 cm, 2 in number noticed over right knee.

11. Further on dissection, PW 13 had found interalia,the temporalis muscle was cut which corresponds to the external injury No.i and underline skull bone was so also cut with a piece of wedge shape skull bone measuring 6.8X4X3 cm found to be depressed in words and on the back, the external injury no.vii was involved with T-5 vertebrae & the lamina and spinous processes were cut and the wound was final canal deep. Finally, PW 13 in his opinion had stated that external injuries no. iii,v,xi and xii appears to be non-fatal and could have been caused by impact with hard and rough surface/object and the rest of the injuries along with their internal effects were caused by moderately heavy to heavy sharp cutting weapon and the death was homicidal in nature and all the injuries were fatal to cause death in ordinary course of nature, whereas external injury nos. i and vii were individually sufficient to cause death in ordinary course. PW 13 concluded that the death was due to shock as a result of cranio cerebral injury and spinal injury. The defence has never disputed the homicidal death of the deceased. It is, therefore, clear that finding of the trial Court as to the homicidal death of the deceased is concurred by this Court.

12. Adverting to the next issue as to who was responsible for the death of the deceased, the evidence of PW9 is very much important and crucial, since the evidence of PW9 transpired that she found the deceased, convict and convict's wife consuming liquor sitting in the Courtyard of the house of convict and the place was illuminated by the light of the Dibri at that time and at a little distance a bulb was also glowing in the house of one Chaitu Khadia. After sometime, PW9 heard the convict asking some water from his wife Bharati and, accordingly, his wife Bharati went to bring water from a tube well situated in front of the house of Khirod Singhdeo and again after some time, she heard the sound of the assault and came out of the house immediately and found the deceased Manguru lying on the ground sustaining bleeding injury and the convict standing there by holding an axe (MOI)

and soon the convict threw away MOI to the roof of his house. PW9 also found the children of the convict shouting that their father had killed the deceased and at that time, the deceased was alive and struggling for life. Immediately the mother and sister of the deceased namely Saraswati and Parbati reached at the occurrence spot and she told them about the incident. The defence had, of course, cross-examined PW9, but it ended upon only eliciting that the Courtyard where the convict and deceased were consuming liquor was not visible from the place where she was taking her dinner and the house of the convict situates at a distance of about 10 to 12 feet from her house. It is, therefore, clear that the house of PW9 was very close to the occurrence spot and the deceased and convict together were consuming liquor at that time. Further, it was elucidated from her mouth in cross-examination that the convict threw away the axe to the roof of his house and prior to the arrival of the Police, some villagers had apprehended the convict under a tamarind tree which was nearer to the occurrence spot. The evidence of PW9 is no way demolished by the defence. Further, it is also clear from the evidence of PW12 and PW 3 that the weapon of offence axe (MOI) was seized by PW 12 and the same was also sent to RFSL, Sambalpur as per the evidence of PW11 along with other incriminating materials and the chemical examination report was received vide Ext.11 which disclosed human blood on MOI.

13. Besides, the evidence of PW13 transpired that he had answered to the query of the IO about possibility of the injuries on the deceased by MOI in affirmative way vide Ext. 14/2 by opining that the injuries were possible by MOI.

14. The evidence of PW 1 also transpired that the house of PW9 situated near the house of the convict so also the evidence of PW7 disclosed that the house of PW9 and deceased was situated near the house of convict. PW7 is the mother of the deceased and her evidence disclosed that on hearing the news, she came to the spot and found her deceased-son lying on the ground sustaining severe bleeding injuries on his head and backside and he was also struggling for life and she also found PW9 whose house was nearby to the house of the deceased present there and on her enquiry, PW9 disclosed the fact to her. Similarly, the evidence of PW8 who is the sister of the deceased, disclosed that after hearing the sound, she along with her mother rushed to the spot and found his brother lying on the ground with severe bleeding injury on his head and back side of body and PW9 informed her that convict had assaulted his brother Manguru by means of an axe. Of course, PW Nos.7 and 8 were not the eye witnesses to the occurrence,but one important circumstance comes out of their mouth that the presence of PW9 at the spot. The evidence of PW9 clearly demonstrate the principle of res gestae in terms of Section 6 of the Evidence Act which reveals that facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places. So the evidence of PW 9 is clearly acceptable and the Appellant has not made out any ground/circumstance to disbelieve her evidence.

15. From a cumulative and meticulous analysis of evidence on record, the following circumstance emerged and proved against the convict:-

(i) The convict, her wife and the deceased were consuming liquor sitting in front of the house of the convict at the relevant time.

(ii) Convict sent his wife to bring water at the relevant time.

(iii) On hearing shout/commotion, PW9 rushed to the spot and found the deceased lying on the ground with serious bleeding injury on his person and the convict was standing there holding MOI.

(iv) The convict threw the axe to the roof of his house.

(v) The deceased suffered homicidal death.

(vi) MOI was found stained with human blood.

(vii) PW Nos. 7 and 8 reached to the spot and told about the incident by PW No. 9.

16. The evidence of PW9 clearly established that the deceased and convict were shortly seen by her prior to death of the deceased and the convict was standing there by holding an axe which was strong circumstance and the defence has failed to explain such circumstance. In addition, the plea of alibi taken by the convict for the first time at the crime of recording of his statement U/S. 313 Cr.P.C which was not established nor any evidence was led to establish such facts and such false plea is an additional link to the circumstance to establish the guilt of the convict. A careful reading of the evidence on record would go to indicate that the aforesaid circumstances from which the conclusion of guilt of the convict are sought to be drawn were fully established and the circumstances so established were consistent only with the hypothesis of guilt of the accused and it were incapable of explanation of any other hypothesis except the guilt of the convict. The aforesaid circumstances were not only conclusive in nature, but also had the definite tendency and character unerringly pointing towards the guilt of the convict. The circumstances so taken form a chain so complete that there was no escape from the conclusion that within all human probability, the crime was committed by the convict and none else, and the circumstances so drawn were incapable of any explanation consistent with the hypothesis of innocence of the convict.

17. Although the Appellant draws attention to the evidence of PW9 to contend that since she was not the eye witness to the occurrence, it would not be safe to base conviction of the Appellant and, accordingly, reliance has been placed upon the decision in ***Raju @ Rajendra Prasad*** (supra), but such claim of the Appellant is the figment of his imagination inasmuch as in the decision relied on, the convict was not last seen with the deceased but in this case the convict was not only last seen with the deceased but also were found taking liquor shortly before assault by the deceased which was seen by PW9 . The defence has attacked the prosecution evidence mainly on the ground that it was dark, but the evidence of PW9 had clearly revealed that the spot was illuminated by a Dibri (Kerosene Lamp) which was never demolished by the defence in cross-examination.

18. On a careful scrutiny of the evidence on record together with the impugned judgment, this Court does not find any error apparent in the impugned judgment of conviction, which calls for no interference by this Court in this appeal. Consequently, no ground is made out by the Appellant to interfere with the impugned judgment of conviction and order of sentence.

19. In the result, the appeal stands dismissed. As a logical sequitur, the impugned judgment of conviction and order of sentence passed by the learned Sessions Judge, Fast Track Court Sambalpur in S.T. Case No.225/06 of 2010-2011 are hereby confirmed.

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2024 (I) ILR-CUT-467

D. DASH, J.

RSA NO. 462 OF 2017

XAVIER INSTITUTE OF MANAGEMENT ……Appellant

-V-

RUTURAJ PATTNAIK & ANR. ……Respondents

SERVICE LAW – Disciplinary Proceeding – The Court set aside an order of punishment on the ground that, the enquiry was not properly conducted and re-instate the employee – Whether the Appellate court has empowered to pass the order of reinstatement? – Held, No – It must remit the case to the disciplinary authority, to conduct the enquiry from the point it stood vitiated and conclude the same.

(Para 12)

Case Laws Relied on and Referred to :-

1. MANU/SC/0237/1994 : AIR 1994 SC 1074 : MD, ECIL, Hyderabad & Ors. Vs. B.Karunakr & Ors.
2. (2002) 10 SCC 293 : Hiran Mayee Bhattacharyya Vs. Secretary, S.M. School for Girls & Ors.
3. MANU/SC/2467/2005 : (2005) 8 SCC 246 : U.P.State Spinning C.Ltd. Vs. R.S. Pandey & Anr.
4. MANU/SC/8064/2008 : AIR 2009 SC 161) : Union of India Vs. Y.S. Sandhu, Ex-Inspector.
5. MANU/SC/0223/1963 : (1964) ILLJISC : S.R. Tiwari Vs. District Board, Agra
6. MANU/SC/0499/1969 : (1970) ILLJ32SC: U.P.State Warehousing Corporation Vs. C.K. Tyagi.
7. MANU/SC/0052/1979 : [1976] 2 SCR 1006 : Executive Committee of Vaish Degree College, Shamli & Ors. Vs. Lakshmi Narain & Ors.

For Appellant : Mr. B. Routray, Sr. Adv.

For Respondents : Mr. S. N. Mohapatra

JUDGMENT Date of Hearing : 30.10.2023 : Date of Judgment: 08.01.2024

D.DASH, J.

The Appellant, by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code') has assailed the judgment and decree passed by the learned First Additional District Judge, Bhubaneswar in RFA No.6/19 of 2013-09. The Respondent as the Plaintiff had filed C.S. No.396 of 2006 in the Court of the Civil Judge (Sr. Division), Bhubaneswar arraigning the present Appellant as the Defendant No.1.

The suit was filed to declare the order dated 11.03.2006 passed by the Director of the Appellant (Defendant No.1-Institute) as void and so also the order dated 06.05.2006 passed by the Respondent No.2 (Defendant No.2) as illegal with further prayer to direct the Appellant (Defendant No.1), Respondent No.2 (Defendant No.2) to reinstate the Respondent No.1 (Plaintiff) with all service benefits and permanently injunct the Appellant/Respondent No. 1 (Plaintiff) and Respondent No.2 (Defendant No.2) from taking any steps for realization of the amount from the Appellant/Respondent No. 1 (Plaintiff).

The suit stood decreed in part and, therefore, the Respondent No.1 (Plaintiff) being aggrieved by the same had carried the Appeal under section 96 of the Code. The First Appeal having been allowed, the aggrieved Defendant No.1 has filed this Second Appeal.

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. Plaintiff's case is that he was an employee of the Defendant No.1-Institute and had been appointed as the Project Manager on 01.04.1996 on contractual basis. His service was later on regularized with effect from 01.10.1998 as Research Assistant which was subsequently re-designated as Project Manager. The Plaintiff on 15.01.2001 was transferred to Jeypore. It is stated that when the Plaintiff was functioning as Project Manager, Bhubaneswar during the year 1999, there came the Super Cyclone in the State. For rehabilitation of the affected persons at Astarang Block in the District of Puri, rehabilitation work was undertaken by the Defendant No.1-Institute receiving the funds from outside agencies. The Plaintiff was assigned with the work of rehabilitation which was targeted to be completed on or before 12.12.2000. Thereafter the documents were audited by the Chartered Accountant of the Defendant-Institute. The report came to the effect that the entire money has been utilized on 17.02.2001. The Plaintiff received a letter from the Dean about non-settlement of a sum of Rs.71,670.30. The Plaintiff replied about the utilization of the entire amount. But once again on 03.10.2001, the Defendant No.1-Institute issued another notice asking the Plaintiff to pay a sum of Rs.76,020.40. The Plaintiff again submitted his reply to the said notice and the Management kept silent over the matter

for nearly about four years. On 01.02.2005, the Management, however, issued another notice to the Plaintiff informing the outstanding amount to be paid by him standing at Rs.65,670.30. In this way, communications were exchanged and finally on 08.12.2005, the Plaintiff was placed under suspension and the departmental proceeding was initiated.

It is alleged that the Plaintiff was not supplied with relevant documents despite several representations and without due inquiry and examination of the witnesses on behalf of the parties, the Inquiring Officer submitted the report stating that the charges against this accused have been proved. On 30.01.2006 , the Director of the Institute imposed penalty against the Plaintiff directing him to pay of RS.65,670.30 alongwith interest and further imposed penalty of stoppage of five increments with cumulative effect treating the suspension period. It was mentioned that in case the payment is not made voluntarily, the service of the Plaintiff would be terminated. The Plaintiff soon thereafter made several representations to the Director and ultimately on 11.03.2006, he was served with the notice of termination of his service with immediate effect. The Plaintiff thereafter preferred an Appeal before the Chairman of the Board of Governors of the institute on 21.03.2006 which was dismissed. It is said that both the Disciplinary Authority as well as the Appellate Authority without following the provision contained under Staff (Recruitment and Conditions of Service) Rule, 1993, which governs the service conditions of the employees under the Institute, have illegally terminated the service of the Plaintiff.

4. The Defendants in their written statement raised the issue of jurisdiction of the Civil Court to entertain the suit at the behest of the Plaintiff seeking the reliefs as advanced therein. It is stated that the Civil Court cannot act as Appellate and Revisional court in going to examine the events which had taken place in the disciplinary proceeding. It is further stated that the disciplinary proceeding against the Plaintiff has been properly conducted as per the 1993 Rules and the Plaintiff was supplied with all such documents and he was also allowed to verify and inspect all the documents. As per the case laid in the written statement, an inquiry was conducted strictly in accordance with 1993 Rules by the Inquiring Officer and the Plaintiff delayed the matter by resorting dilatory tactics. The disciplinary proceeding was initiated under Rule 20 of the Rules, 2013 and there was no violation of the Rules in the enquiry. The Plaintiff was given the chance to settle the amount and when he failed to do so, he was visited with the penalty of termination of service taking into account the fact finding report of the Inquiring Officer.

5. The Trial Court on the above rival pleadings having framed six issues finally decreed the suit in part by passing the following order:-

(i) Is the suit maintainable?

(ii) Has the Plaintiff got any cause of action to file the suit?

(iii) Is the Plaintiff entitled to the relief of declaration that the order of the Director dated 11.03.2006 terminating the service of the Plaintiff as null and void?

(iv) Is the order of the Chairman Board of Governor, Xavier Institute of Management dt.06.05.2006 is illegal and void?

(v) Is the Plaintiff entitled to the relief of reinstatement?

(vi) Is the Plaintiff entitled to the relief of permanent injunction restraining the Defendants from realizing the claim amount?

6. The Plaintiff being aggrieved by the same had carried the First Appeal. The First Appellate Court at the end has said as under:-

"On close analysis of the entire evidence and the submissions made, this Court is of view that the finding of learned Civil Judge, Sr. Division, Bhubaneswar that no infirmity has been caused in the procedure adopted by the inquiring officer appointed by the respondents is not sustainable. There has been complete violation of the fundamental principles of natural justice for which the appellant is entitled for a declaration that the order dtd.11.03.2006 and 06.05.06 passed by the respondents are void. The Appellant is further entitled for reinstatement to the post of Project Manager with back wages. However, considering the facts and circumstances of the case, it is held the appellant is not entitled to permanently restrain the Respondents for taking any step for realization of the amount".

7. The Appeal has been allowed by passing the order as under:-

"The Appeal is allowed on contest. The judgment and decree passed by learned Civil Judge, Sr. Division, Bhubaneswar in CS No.396 of 2006 is hereby set aside. The order dtd. 11.03.2006 of the Director, Xavier Institute of Management, Bhubaneswar and the order dtd. 06.05.2006 of the Chairman, Board of Governors of Xavier Institute of Management, Bhubaneswar are hereby declared void and quashed. The respondents are directed to reinstate the appellant to the post of Project Manager forthwith with all financial benefits. Parties to bear their costs."

8. Hence, the present Second Appeal is at the instance of the Defendant No.1.

9. This Appeal has been admitted to answer the following substantial questions of law:-

(i) "Whether the Courts below have erred both on fact and law in assuming the jurisdiction to decide the factual controversies emanating from the pleading and entertain the suit with the reliefs as claimed therein?

(ii) Whether with the finding that there has been gross irregularities in the department proceeding, the First Appellate Court could have gone to the extent of passing an order to reinstate the Appellant with back wages instead of remitting the matter of the disciplinary authority to them enable to take decision afresh taking into consideration, the gravity of the charge involved with respect to whether it may still be required to hold a de novo enquiry, from the stage wherefrom the irregularities have been committed?"

10. Heard Mr. B. Routray, learned Senior Counsel for the Appellant and Mr. S.N. Mohapatra, learned counsel for the Respondent No.1 at length. I have carefully read the judgments passed by the Courts below.

11. It appears that the First Appellate Court having verified the entire record has found that the Enquiring Officer solely relying upon the audit report and without

examining any witness from the side of the Institute accepted the audit report in toto and concluded that the Plaintiff has committed gross delegation of duty. It has also found that no record is available to show that the copy of the inquiry report vide Ext.'Z' was supplied to the Plaintiff prior to the imposition of punishment. Therefore, the First Appellate Court has taken a view that the Trial Court was not right in holding that the proceeding was conducted in a fair manner. The conclusion of the First Appellate Court is also that to the effect that the Enquiring Officer without following the principles of natural justice in a partition manner conducted the inquiry and basing upon the same, the order of punishment has been imposed upon the Plaintiff. In view of that, the First Appellate Court while declaring the order dated 11.03.2006 passed by the Defendants to be void has directed that there be reinstatement of the Plaintiff to the post of Project Manager with full back wages.

12. It is the settled legal proposition, that once the Court sets aside an order of punishment, on the ground that the enquiry was not properly conducted; the Court cannot reinstate the employee. It must remit the concerned case to the disciplinary authority, for it to conduct the enquiry from the point that it stood vitiated, and conclude the same. (vide: Managing Director, ECIL, Hyderabad etc. etc, v. B. Karunakr etc. etc. MANU/SC/0237/1994: AIR 1994 SC 1074; Hiran Mayee Bhattacharyya v. Secretary, S.M. School for Girls and Ors.; (2002) 10 SCC 293; U.P. State Spinning C. Ltd. V. R.S. Pandey and Anr. MANU/SC/2467/2005 : (2005) 8 SCC 246; and Union of India v. Y.S. Sandhu, Ex-Inspector MANU/SC/8064/2008 : AIR 2009 SC 161).

13. The Court while directing the Disciplinary Authority to furnish a copy of the inquiry report to the employee and then permitting him to submit representation/explanation in that final order to be passed has clearly stated that the same would not lead to reinstatement or back wages. The Hon'ble Apex Court has decided in case of Managing Director, ECIL, Hyderabad etc. v. B. Karunakar etc., (1993) 4 SCC 727 that there need be no reinstatement nor back wages need be paid when the Court directs that the principles of natural justice should be followed.

14. The provision of Specific Relief Act, 1963 prohibits the enforcement of contract of personal service. It is trite law that the courts do not ordinarily enforce performance of contracts of personal character, such as a contract of employment. A contract of employment cannot ordinarily be enforced by or against an employer. The remedy is to sue for damages. Section 14 read with section 41 of the Specific Relief Act says that grant of specific performance is purely discretionary and must be refused when not warranted by the ends of justice. Such relief can be granted only on sound legal principles. In the absence of any statutory requirement, courts do not ordinarily force an employer to recruit or retain in service an employee not required by the employer. There are, of course, certain exceptions to this rule, such as in the case of a public servant dismissed from service in contravention of Article 311 of the Constitution; reinstatement of a dismissed worker under the Industrial

law; a statutory body acting in breach of statutory obligations, and the like. (S.R. Tiwari v. District Board, Agra MANU/SC/0223/1963 : (1964) ILLJISC; U.P. State Warehousing Corporation v. C.K. Tyagi MANU/SC/0499/1969 : (1970) ILLJ32SC ; Executive Committee of Vaish Degree College, Shamli and Ors. V. Lakshmi Narain and Ors. MANU/SC/0052/1979 : [1976] 2 SCR 1006; see Halsbury's Laws of England, Fourth Edn., Volume 44, Paragraph 405 to 420.)

15. On the anvil of the aforesaid legal principles, the Courts below are found to have erred in entertaining the suit as laid by the Plaintiff in seeking the reliefs as prayed for. The substantial questions of law are accordingly answered in favour of the dismissal of the suit.

16. In the result, the Appeal stands allowed. No order as to cost.

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2024 (I) ILR-CUT-472

D. DASH, J.

ARBA NO. 7 OF 2020

UNION OF INDIA, [DY.CHIEF ENGINEER (CON)], E.CO.RLY, BHUBANESWAR ....Appellant

-V-

B.B. SENAPATI ....Respondent

ARBITRATION AND CONCILIATION ACT, 1996 – Sections 31, 34(1), 34(2A) and 34(4) – Discretionary power – When can be exercised – Discussed. (Para 14)

Case Law Relied on and Referred to :-

1. 2022 (I) Live Law, (SC) 2 : I-Pay Clearing Services Private Ltd. Vrs. ICICI Bank Ltd.

For Appellant : Mr. P.K. Parhi, Deputy Solicitor General
Mr. J. Nayak, Central Government Counsel

For Respondent : Mr. D. Acharya

JUDGMENT Date of Hearing : 06.11.2023 : Date of Judgment : 08.01.2024

D. DASH, J.

The Appellant, by filing this Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the A&C Act' 1996), has called in question the order dated 18.10.2019 passed by the learned District Judge, Cuttack in ARBP No.87 of 2013. The Respondent as the Petitioner had filed the above numbered application under section-34 of the A & C Act, 1996 for setting aside the award dated 01.02.2013 passed by the Arbitral Tribunal constituted as per the Contract Agreement No.32/CE/C/HQ/BBS/SER/2000 dated 05.05.2000 executed between the Respondent (Petitioner therein) and the Appellant (Opposite Party therein).

The learned District Judge has passed the following orders:-

> "That the petition u/s 34 of the Arbitration & Conciliation Act, 1996 by the Petitioner is allowed on consent against the Opp. Party, however, in the peculiar facts and circumstance without cost. The impugned arbitral Award dated 01.02.2013 is hereby set aside. The matter is remitted back to the Arbitral Tribunal for fresh adjudication at an early date preferably within a period of three months from the date of receiving back the matter keeping in mind the observation made in this order and also the observation made in the order dated 20.04.2012 in ARBP No.205/2008 of this Court.
>
> A copy of this order along with the LCR be returned back to the Railway Authority, i.e., the East Coast Railway from whom the same was received, at the earliest."

2. Brief facts leading to the instant Appeal are as follows:-

The Appellant had taken up the project work relating to execution of the earthwork, minor bridges and other allied work in Sector-V between Km. 481.694 to Km. 484.160 in connection with Rahama-Paradeep Patch doubling of Cuttack-Paradeep section in Khurda Road Division of South Eastern Railway having inviting open/limited tenders for the purpose, the Appellant after negotiation. Pursuant to the acceptance of the tender, the agreement came into being which contained the arbitration clause. The period of completion of work was fifteen (15) months from the date of acceptance of the letter, i.e., 02.03.2001.

According to the Respondent, he was given to understand that the site where he was to work was free from all obstructions. It is also said that it was the obligation of both sides to discharge their obligations without causing any delay for completion of the work within the agreed time period. The Respondent's case is that he was always sincering to complete the work within the time frame by mobilizing sufficient number of man and machineries and collecting the required materials for the purpose. However despite all these above being in readiness the work could not be completed in time due to various other intervening factors, mainly due to devastation on account of Super Cyclone. After the Super Cyclone, there was abnormal rise in the diesel rate as also other materials. The Respondent despite all these started the work with all promptness. But he was not provided with work site free from all obstructions as agreed for which he was compelled to make alternative arrangements by constructing an approach road crossing the railway lines after writing to the Appellant on 07.10.2000 with the knowledge and supervision of the Appellant. Major part of the work was completed by end of June, 2000. However, rest work could not progress due to monsoon followed by heavy rain coming to intervene. So, as per the decision taken in the Progress Review Meeting, the time period to complete the rest of work was extended by further period. Be that as it may to the misfortune of the Appellant, the execution of the rest of work was seriously hampered due to the miscreants creating mischievous activity. The Appellant in this matter totally remained silent and unmoved on being requested by the Respondent to intervene. The Appellant, on the other hand, on 06.11.2000 wrote a letter as to the inaction of the Respondent in completing the work since July, 2000

and then threat was given for termination of the contract. On 28.11.2000 when another notice was served by the Appellant upon the Respondent, the Respondent had given the reply on 0712.2000 explaining all these situation standing as impediment on the way of completion of work. Despite that the Appellant issued notice of termination of contract. The period of completing of work although was extended after negotiation, the same could not be finished for the reason beyond the care and control of the Respondent and it is said that the Appellant without looking those in their proper prospective have abruptly gone for termination of the contract.

3. The Respondent having thus suffered loss demanded the payment of the same from the Appellant. The Appellant instead of settling the dispute raised a counter demand in asserting that the termination of the agreement at the end was just and proper.

The Respondent finally advanced the claims as under:-

1.	**Claim No.1** Final bill amount held up with the Railway Administration	Rs.3,50,000/-
2.	**Claim No.2** Release of Security Deposit in custody of Railway Administration	Rs.3,00,000/-
3.	**Claim No.3** Loss sustained due to idling of men, machinery and establishment. a) Idling of men Rs.18,62,350 b) Idling of machinery Rs.94,38,000 c) Idling of establishment Rs.9,28,000	Rs.1,22,28,350/-
4.	**Claim No.4** Abnormal increase in cost of diesel	Rs.15,18,977/-
5.	**Claim No.5** Loss of Profit	Rs.29,59,000/-
6.	**Claim No.6** Interest	As judged by the Arbitrators
	Total claim	Rs.1,73,56,347/-

4. Insofar as the claim Nos.1 and 2 are concerned, those were not disputed. The Arbitral Tribunal had accepted the claims on those two counts. With regard to Claim No.3, the Arbitral Tribunal while calculating the loss sustained by the Respondent in keeping the man, machineries idle and incurring the establishment expenses/charges has taken those to have occasioned for eight months and there was below consideration of the labour component. In respect of Claim No.4, in the absence of any provision of price variation as a clause in the contract although such a clause is very much there in the agreement, the Arbitral Tribunal has rejected the same. So far as the loss of profit under Claim No.5 and interest under Claim No.6 are concerned, there has been no award and it is said that the rejection of those two items of claim par without any valid reasons. Thus it is said that the award is the outcome of non-application of mind and oppose to public policy.

5. The Respondent being aggrieved by the award passed on 05.08.2008 at the first instance had carried application under section 34 of the A &C Act. The learned District Judge by judgment dated 20.04.2012 having set aside the award dated 05.08.2008 had remitted the matter for fresh adjudication. Accordingly, the Tribunal set over to re-adjudicate the dispute afresh keeping in view the observation made in the judgment and finally passed the award on 01.02.2013 which has been impugned in this Appeal.

6. The Respondent has then again filed an application under section 34 of the A & C Act for setting aside the award as patently illegal having conflict with the public policy of India in further attacking the same as arbitrary, anomalous and against the material available on record.

It is the stated that again on Claim No.3, the Tribunal has taken that eight months period despite seeing that a period of thirteen months the portion of title was occupied by another agency, which caused hurdles for the Respondent to execute the work. It is contended that without another valid and justifiable reason the Tribunal has arbitrarily reduced the award by 50% though it has taken cognizance of the fact that the Respondent sustained loss for keeping his man and machinery idle with the materials kept nearby. Rejection of the Claim No.5 has been challenged to be arbitrary and so also the non-award of interest under Claim No.6. When the Tribunal has erroneously accepted the stand of the Appellant that it has not received any interest from the Bank to the Fixed Deposit Receipt (FDR) of Rs.2,50,000/- and only received the interest for the fixed deposit of Rs.50,000/-

7. The Appellant objected to the said application filed by the Respondent under section 34 of the A &C Act in setting aside the there is absolutely no ground to challenge the award within the preview of the provisions contained under section 34 of the A & C Act.

8. Learned District Judge having gone for a detail discussion as to the acceptance/rejection of the claims advanced by the Respondents has finally concluded as under:-

> "So, as per the above discussion, it is found that the Award made by the learned Tribunal in respect of Claim Nos.3,4,5 & 6 of the impugned Award dated 01.02.2013 are patently illegal and no based on materials on record besides being against the public policy of India. Further, the findings in respect of Claim Nos.3 to 6 are found not be in consonance with the observation of this Court vide ARBP No.205/2008 in its order dated 20.04.2012. Hence the impugned Award dated 01.02.2013 passed by the learned Arbitrators being found to be unsustainable in law is required to be set aside on the foregoing reasons and since the major part of the Award are not in accordance with law and not sustainable, the entire Award dated 01.02.2013 is liable to be set aside and the matter is to be remitted back to fresh adjudication by the Tribunal within a reasonable period of time as the dispute relates to the year 2000 and in the meantime already nineteen years have elapsed. Hence it is ordered."

9. Heard Mr.P.K. Parhi, learned Deputy Solicitor General assisted by Mr. J. Nayak, learned Central Government Counsel at length and Mr. D. Acharya, learned counsel for the Respondent.

Perused the impugned order and have carefully gone through the award passed by the Arbitral Tribunal.

10. Keeping in view the submissions made and on going through the impugned order passed by the learned District Judge, at the outset, the question arises that once the award passed by the Arbitral Tribunal was set aside was it permissible for the learned District Judge to remit the matter to the Arbitral Tribunal for fresh adjudication mainly pointing out the observations made in the earlier round application under section 34 of the A &C Act have not been scrupulously followed while considering the Claim Nos.3 to 6.

11. It be stated that section 34 of the A & C Act deals with the application for setting aside arbitral award and that reads:-

> (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> An arbitral award may be set aside by the Court only if—
>
> (a) the party making the application furnishes proof that—
>
> (i) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
>
> (b) the Court finds that—
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
>
> (ii) the arbitral award is in conflict with the public policy of India.

12. The above provision contained in section 34(4) of the A & C Act makes it clear that on receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to

resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

13. It has been held in case of I-Pay Clearing Services Private Ltd. Vrs. ICICI Bank Ltd., 2022 (I) Live Law, (SC) 2 that:-

> It is true that Section 34(4) of the Act is couched in a language, similar to Article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration. In the case of AKN & Anr. v. ALC & Ors., by considering legislative history of the Model Law, it was held by Singapore Court of Appeals that remission is a 'curative alternative'. In the case of Kinnari Mullick and Anr. v. Ghanshyam Das Damani 1, relied on by learned senior counsel for the appellant, the question which fell for consideration was whether Section 34(4) of the Act empowers the Court to relegate the parties before the Arbitral Tribunal after setting aside the arbitral award, in absence of any application by the parties. In fact, in the said judgment, it is held that the quintessence for exercising power under Section 34(4) of the Act is to enable the Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award, by curing the defects in the award. In the judgment in the case of Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.2, it was a case where there was no inquiry under Section 34(4) of the Act and in the said case, this Court has held that the legislative intention behind Section 34(4) of the Act, is to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. It was not a case of patent illegality in the award, but deficiency in the award due to lack of reasoning for a finding which was already recorded in the award. In the very same case, it is also clearly held that when there is a complete perversity in the reasoning, then the same is a ground to challenge the award under Section 34(1) of the Act. The case of Som Datt Builders Limited v. State of Kerala3 is also a case where no reasons are given for the finding already recorded in the award, as such, this Court held that in view of Section 34(4) of the Act, the High Court ought to have given Arbitral Tribunal an opportunity to give reasons.

14. Section 34(4) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to Arbitral Tribunal to give an opportunity to resume the proceedings or not. The words "where it is appropriate" itself indicate that it is the discretion to be exercised by the Court, to remit the matter when requested by a party. When application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under Section 34(4) of the Act and the reply thereto. Merely because an application is filed under Section 34(4) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award. Under guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the Arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under guise of

either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot be relegated to the Arbitrator. In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award. A harmonious reading of Section 31, 34(1), 34(2A) and 34(4) of the Arbitration and Conciliation Act, 1996, make it clear that in appropriate cases, on the request made by a party, Court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award. But at the same time, when it prima facie appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings. Further, as rightly contended by the learned counsel appearing for the respondent, that on the plea of 'accord and satisfaction' on further consideration of evidence, which is ignored earlier, even if the arbitral tribunal wants to consciously hold that there was 'accord and satisfaction' between the parties, it cannot do so by altering the award itself, which he has already passed.

15. In the present case, with the obtained facts and circumstances, the learned District Judge having set aside the award is not right in remitting the matter to the same Arbitral Tribunal for fresh adjudication.

16. In the wake of aforesaid, the Appeal stands allowed and the impugned order is hereby set aside.

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2024 (I) ILR-CUT-478

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

JCRLA NO. 55 OF 2008

GOPABANDHU SAHOO ....Appellant

-V-

STATE OF ODISHA ....Respondent

CRIMINAL TRIAL – Conviction of appellant for offence U/s. 498A & 302 of IPC – In view of the evidence of doctor & one eye-witness, trial court convicted the appellant – The appellant took plea that the evidence of eye-witness is not trustworthy as he has not made any reaction to the incidence – Whether the evidence of the eye-witness is trustworthy and reliable? – Held, Yes – Post-event conduct of a witness varies from person to person – It cannot be a cast-iron reaction to be followed as a model by everyone witnessing such event. (Para 8)

Case Laws Relied on and Referred to :-

1. (2023) SCC OnLine SC 80 : Munna Lal -Vrs.- State of Uttar Pradesh

2. (1999) 8 Supreme Court Cases 649 : Rammi -Vrs.- State of M.P.

For Appellant : Ms. Anima Dei, Amicus Curiae

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

JUDGMENT Date of Hearing & Judgment : 13.12.2023

BY THE BENCH

1. The appellant Gopabandhu Sahoo faced trial in the Court of learned Additional Sessions Judge, Nayagarh in S.T. Case No.3 of 2007 for commission of offences under sections 498-A and 302 of the Indian Penal Code (hereinafter the 'I.P.C.') on the accusation that after his marriage with Sukanti Sahoo (hereinafter 'the deceased') and before 13.08.2006, he subjected the deceased to cruelty in order to coerce her parents to meet his unlawful demand of money and that during the evening hours on 13.08.2006 at village Duda, he committed murder of the deceased.

The learned trial Court vide judgment and order dated 25.04.2008 though acquitted the appellant of the charge under section 498-A of the I.P.C. but found him guilty under section 302 of the I.P.C. and sentenced him to undergo rigorous imprisonment for life and to pay fine of Rs.5000/- and in default of payment of fine, to undergo R.I. for a further period of six months.

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter 'F.I.R.') lodged by Laxmidhar Sahoo (P.W.2), the brother of the deceased, in short, is that on 13.08.2006 at about 09:00 p.m., D.W.1 Babula Sahu and the minor son of the appellant, who was aged about 10 years, came to his house and informed him that the deceased was very serious and they have been sent by the appellant to give such message. On being confronted by P.W.2, both D.W.1 and the minor son of the appellant told that since there was a quarrel, the deceased committed suicide by hanging herself. However, on repeated query by P.W.2, he was told that the appellant assaulted the deceased and subsequently, when the gentlemen of the village were called and in their presence D.W.1 was asked, he informed that the appellant had killed the deceased by assaulting her. After getting such information, P.W.2 proceeded to the house of the appellant but on the way, he met the appellant and on being confronted, the appellant told that there was a quarrel for which the deceased committed suicide by hanging herself but on repeated query by P.W.2, the appellant stated that he had given some blows to the deceased. P.W.2 after arriving at the house of the appellant found the deceased dead and she was in a naked condition and blood was oozing out from his mouth and nostrils. It is further stated in the F.I.R. that the marriage between the appellant and the deceased was solemnized three years prior to the date of lodging of the F.I.R. and the deceased was the third wife of the appellant and at the time of marriage, utensils, gold ornaments and cash of Rs. 6000/- was given to the appellant. It is

further stated that the appellant used to assault the deceased after taking liquor and on intervention by his in-laws family members, he used to assure that he would not repeat such activities and would lead a peaceful life. It is stated that on 13.08.2006, the appellant killed the deceased by assaulting her.

P.W.9, the Assistant Sub-Inspector of Police attached to Banigochha outpost received the written report of P.W.2 on 14.08.2006 in connection with the occurrence which was sent to Officer-in-Charge of Daspalla Police Station for registration of the case and accordingly, Daspalla P.S. Case No. 69 dated 14.08.2006 was registered under sections 498-A and 302 of the I.P.C. against the appellant. P.W.9 took up investigation of the case and he examined the informant (P.W.2), visited the spot which is the backyard of the house of the appellant in village Duda. He prepared the spot map vide Ext.6, arrested the appellant and sent requisition to the Tahasildar, Daspalla and after his arrival, he held inquest over the dead body in presence of the witnesses and prepared the inquest report vide Ext.2 and then he sent the dead body to the Medical Officer, Dasapalla for post mortem examination through Constables and examined other witnesses and as per the direction of the Officer-in-Charge. P.W.9 handed over the charge of investigation of the case to S.I. of Police Kartikeswar Nayak (P.W.11) who, after taking over the charge of investigation, arrested the appellant on 15.08.2006 and forwarded him to Court. P.W.11 received post mortem report (Ext.7), made prayer to the learned J.M.F.C., Dasapalla for recording the statement of witness Aintha Nayak (P.W.1) under section 164 of the Cr.P.C. and on completion of investigation, he submitted charge sheet against the appellant under sections 498-A and 302 of the I.P.C.

Upon submission of charge sheet, the case was committed to the Court of Session, after complying due formalities, the learned trial Court framed charges as aforesaid. Since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to establish his guilt.

<u>Prosecution Witnesses & Exhibits:</u>

3. In order to prove its case, the prosecution examined as many as eleven witnesses.

P.W.1 Aintha Nayak is a co-villager of the appellant who stated that on the fateful day, when he was going towards his land, he heard groaning sound of the deceased saying 'MARIGALI MARIGALI' and upon hearing such sound, he proceeded to the spot and saw that the deceased was lying on the ground and the appellant was pressing his one of his legs against the throat of the deceased and was dealing kicks by another leg.

P.W.2 Laxmidhar Sahoo was the brother of the deceased who is also the informant in this case. He stated that on the relevant day, D.W.1 and the son of the appellant came to his house and informed him that there was a quarrel between the appellant and the deceased and the appellant had assaulted the deceased

which resulted in her death. Upon receiving such information, he proceeded to the house of the appellant where he found the deceased lying dead in a naked condition and blood was oozing out of her mouth as well as nose. He further stated that when he confronted the appellant about the incident, the appellant informed him that there was a quarrel between him and the deceased for which she committed suicide. He is also a witness to the preparation of the inquest report vide Ext.2.

P.W.3 Dhirendra Nayak is a co-villager of the appellant who stated to have seen the deceased lying dead in the house of the appellant. He is a witness to the preparation of inquest report vide Ext.2.

P.W.4 Gobardhan Kanra is a co-villager of the appellant. He is a witness to the preparation of the inquest report vide Ext.2.

P.W.5 Baikuntha Kanra is a co-villager of the appellant who stated to have seen the dead body of the deceased in presence of the police. He is also a witness to the preparation of the inquest report vide Ext.2.

P.W.6 Rajendra Kumar Ratha stated that one saree and a paper were seized by the police after being produced by a police constable in his presence. He is a witness to the seizure of the above materials as per seizure list Ext.3.

P.W.7 Dinabandhu Sahoo is the cousin brother of the appellant who stated to have heard the groaning sound of the deceased at about 4 to 5 p.m. on the relevant day. He further stated to have seen Pramod Naik and Gandia carrying the deceased towards the courtyard of the appellant and subsequently, he learnt about the death of the deceased.

P.W.8 A.T. Dora was working as a constable at the Banigochha outpost. He stated that P.W.9 directed him and two other constables to guard the spot where the dead body of the deceased was lying and command certificate vide Ext.4 was issued in his favour. He further stated that after the post mortem examination, on his production, the command certificate and wearing apparels of the deceased were seized by P.W.11 vide Ext.3.

P.W.9 Gopal Krishna Nayak was posted as the Assistant Sub-Inspector of Police attached to Banigochha outpost. He received the written report from P.W.2 and sent the same to the O.I.C., Daspalla for registration of the case and took up preliminary investigation. As per the subsequent direction of the O.I.C., he handed over the charge of investigation to P.W.11.

P.W.10 Dr. Basant Kumar Panda was working as the Surgery Specialist at the Government Hospital, Daspalla. He conducted post mortem examination on the dead body of the deceased on police requisition and proved his report vide Ext.7.

P.W.11 Kartikeswar Nayak was working as the Sub-Inspector of Police at Daspalla Police Station. He took over the charge of investigation from P.W.9, as per the direction of the O.I.C., Daspalla and on completion of investigation, he submitted the charge sheet.

The prosecution exhibited eight documents. Ext.1 is written report, Ext.2 is the inquest report, Ext.3 is the seizure list, Ext.4 is the command certificate, Ext.5 is the dead body challan, Ext.6 is the spot map, Ext.7 is the post mortem report and Ext.8 is the statement of P.W.1 recorded under section 164 of the Cr.P.C.

Defence Plea:

4. The defence plea of the appellant is one of complete denial. In order to negate the prosecution case, the defence examined one witness.

D.W.1 Rabindra Kumar Sahoo is the brother of the second wife of the appellant who stated that on the fateful day, he got up from his afternoon nap at about 4 p.m upon hearing hulla. He further stated to have seen Pramod and Gandia carrying the deceased to the courtyard and others, who were present there, administered water to the deceased and at that time, the appellant rushed to the spot. He also stated that the deceased was groaning at that moment. He proceeded to call P.W.2 and by the time they returned, the deceased had already succumbed. He categorically stated that the deceased committed suicide by hanging herself.

Findings of the Trial Court:

5. The learned trial Court after analyzing the oral as well as documentary evidence on record came to hold that in view of the evidence of doctor (P.W.10) and eye-witness (P.W.1), it is clearly established beyond all reasonable doubt that due to pressing of the throat and the assault caused by the appellant, there was bleeding from the nose and the mouth of the deceased and death was caused. The learned trial Court was pleased to hold that as per the inquest report (Ext.2), the dead body was lying in the courtyard which found corroboration from the evidence of P.W.7 and P.W.9 and it is clearly established that on the fateful day, the appellant assaulted the deceased by pressing his leg on her throat as a result of which there was bleeding from her mouth, nose and trachea, laryngeal box and hyoid bone was broken for which there was respiratory failure and death was caused and the eye-witness has clearly substantiated the fact in the evidence that it is none else but the appellant himself who caused the death of the deceased. The learned trial Court also came to the finding that the deceased met with a homicidal death and upon analyzing the evidence on record, it was held that the prosecution has utterly failed to prove the charge under section 498-A of the I.P.C. and acquitted the appellant of such charge. However, it came to a definite conclusion that the prosecution has successfully brought home the charge under section 302 of the I.P.C. against the appellant beyond all reasonable doubt and accordingly, convicted thereunder and sentenced him as aforesaid.

Contention of the Parties:

6. Ms. Anima Dei, learned counsel appearing for the appellant submitted that it is very difficult to accept the evidence of P.W.1 as an eye-witness to the

occurrence and since the dead body was lying in the courtyard of the house and P.W.1 was standing behind the fence of the backyard of the house and there is no evidence that from his standing position, the courtyard would be visible, it is difficult to accept that he would be in a position to witness the assault, if any, by the appellant on the deceased. The learned counsel further submitted that though the place of assault in the 'bari' is stated to be a muddy place but the doctor has ruled out that there was any mud found on the body of the deceased. It was further argued that P.W.7 has categorically stated that the deceased was lifted by two persons namely Pramod Nayak and Gandia towards the courtyard of the house and when he asked those two persons, they told that the deceased was hanging from a 'saguan' tree and they were brining her from that place. The learned counsel submits that the defence plea that it is a case of suicidal hanging is getting corroboration from the evidence of not only P.W.7 but also D.W.1. The learned counsel further submits that no motive behind the commission of crime has been established by the prosecution and the conduct of the P.W.1 in not raising hulla even though he was stated to be standing for five minutes and watching the occurrence is an improbable feature 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, on the other hand, supported the impugned judgment and argued that the defence plea that it is a case of suicidal hanging is falsified by the medical evidence inasmuch as the doctor (P.W.10), who conducted post mortem examination over the dead body of the deceased, not only marked that the trachea, laryngeal box and hyoid bone were broken but he has specifically stated that the death was homicidal and the injuries noticed on the person of the deceased were ante mortem in nature and further he has stated that the injuries inflicted on the neck of the deceased could be caused if anyone puts his leg with pressure and it may lead to respiratory failure and since the evidence of P.W.1 is that he saw the appellant pressing the throat of the deceased by his leg while she was lying on the ground and was also dealing kicks by another leg, the homicidal death is clearly established and merely because P.W.1 did not raise any hulla to draw the attention of the others, it cannot be a ground to disbelieve his evidence particularly when the evidence has come on record that the appellant was involved in anti-social activities. The learned counsel further argued that the evidence of P.W.1 has not at all been shattered in the cross-examination and nothing has been brought on record by way of cross-examination of P.W.1 that from his standing position, the place of assault would not be visible and therefore, the learned trial court has rightly arrived at the conclusion that it is a case of homicidal death and that the appellant was responsible for committing the murder of the deceased and thus, the jail criminal appeal should be dismissed.

Whether the deceased met with a homicidal death?:

7. Adverting to the contentions raised by the learned counsel for the respective parties, let us first examine whether on the basis of evidence available

on record, the prosecution has successfully established that the deceased met with a homicidal death or not. P.W.10 conducted the post mortem examination on the dead body of the deceased on 15.08.2006 at Government Hospital, Daspalla and on dissection, he found that the trachea, laryngeal box as well as hyoid bone of the deceased were broken. He also found that both the lungs were congested and there were black spots in the abdomen and the spleen was congested and there was congestion of anterior neck muscles. On the basis of these findings, the doctor came to the conclusion that the death was homicidal in nature and the injuries on the deceased were opined to be ante mortem in nature and the cause of the death was due to respiratory failure. He specifically stated that the injuries inflicted on the neck of the deceased would be caused if anybody puts his leg with pressure on the neck and the same might result in respiratory failure causing the death. The post mortem report has been marked as Ext.7. In the cross-examination, it has been elicited that the doctor has noticed multiple abrasions on the right wrist joint and in the report, he has not mentioned to have noticed any foot mark on the neck of the deceased. The doctor has stated that if anybody assaults a person lying upwards, there must be resistance from her side and her body must be shaking and there must be mud mark on the body of the assailant if anybody assaults by foot after coming in contact of the mud. The doctor has further stated that there was no ligature mark and the injuries were ante mortem in nature and all the three injuries i.e. the fractures of trachea, laryngeal box and hyoid bone could not have been possible due to suicidal hanging. Nothing has been brought out further in the cross-examination to disbelieve the evidence of the doctor or to substantiate the defence plea that it is a case of suicidal hanging. In view of the inquest report (Ext.2), the evidence of the doctor (P.W.10), findings of the post mortem report (P.W.7), we are of the view that the learned trial Court has rightly come to the conclusion that it is a case of homicidal death and therefore, the defence plea that the deceased died on account of suicidal hanging is not acceptable.

Whether evidence of P.W.1 as an eye witness is trustworthy and reliable?:

8. Coming to the evidence of the eye-witness (P.W.1), he has stated that on the date of occurrence while he was going towards his land, he heard the sound of the deceased saying 'MARIGALI MARILGALI' and hearing such sound, he went to spot and found that the deceased was lying on the ground and the appellant had pressed her throat by one of his legs and dealing kicks by another leg and the deceased was groaning. He further stated that upon seeing him, the appellant went away and in the night, he could know that the deceased had died. In the cross-examination, P.W.1 has stated that there was a 'bari' in the backyard of the house of the appellant and it was surrounded by a fence and that the appellant had raised maize plants inside the 'bari' during the year of occurrence. He further stated in the cross-examination that the deceased was wearing a saree and the appellant was standing on her keeping his right leg on the throat and dealing kicks

to her by his left leg and the appellant at that time was in bare foot. He further stated in the cross-examination that the appellant was dealing kicks consistently and he watched the occurrence continuously for five minutes. He further saw that the deceased was in an unconscious state and was not moving her limbs and only making groaning sound and he has specifically stated that nobody had seen the assault except him. He further stated that the villagers did not like the appellant due to his involvement in anti-social activities. He has denied the suggestion given by the learned defence counsel that he had enmity with the appellant prior to the occurrence regarding Panchayat work.

From the evidence of P.W.1, it not only appears that the assault took place in the backyard of the house of the appellant but there is nothing brought out in the cross–examination that merely because P.W.1 was standing by the side of the fence, it would not have been possible on his part to witness the assault made by the appellant to the deceased. It is correct that it has been brought out that the backyard of the house was surrounded by fence and some maize plants were there but in absence of any further evidence that the fence was of such a nature that the happenings inside the 'bari' would not be visible, if someone stands on the other side of the fence, it is difficult to accept the contention raised by the learned counsel for the appellant.

The I.O. (P.W.9) visited the spot on the date of lodging of the F.I.R. itself and he has specifically stated that by the time he reached at the spot, the dead body was shifted from the 'bari' to courtyard and there were marks of violence at the spot and there was dragging mark and foot prints at the spot. The dead body was lifted from the spot to the courtyard. P.W.7, no doubt, has stated that there were different trees in the backyard of the house of the appellant and the place where the utensils were washed in the 'bari' was a muddy spot and that 'bari' was fenced and maize plants were in existence, which were of five feet height. But there is no evidence that the assault took place at the muddy spot. Therefore, the questions that have been put to the doctor that there must be mud mark on the body of the assailant if anybody assaults by foot after coming in contact of the mud becomes irrelevant. The evidence of P.W.1 has not at all been shattered in the cross-examination.

Law is well settled that it is the quality of evidence which matters and not the quantity and on the basis of the testimony of a solitary witness, which is clinching, trustworthy and above-board, the conviction can be recorded. The above proposition of law has been legislatively recognized through section 134 of the Evidence Act which emphatically says that no particular number of witnesses shall in any case be required for the proof of any fact. The above position of law has also found repeated reiteration from innumerable judgments of the Hon'ble Supreme Court and this Court. Recently, the Hon'ble Supreme Court in the case **Munna Lal -Vrs.- State of Uttar Pradesh reported in (2023) SCC OnLine SC 80**, while reaffirming that evidence has to be weighed and not counted, held as follows:

> "28…Section 134 of Indian Evidence Act, 1872, enshrines the well-recognized maxim that evidence has to be weighed and not counted. In other words, it is the quality of evidence that matters and not the quantity.As a sequitur, even in a case of murder, it is not necessary to insist upon a plurality of witnesses and the oral evidence of a single witness, if found to be reliable and trustworthy, could lead to a conviction."

When the evidence of P.W.1 relating to the assault on the deceased by the appellant is getting corroboration from the medical evidence adduced by P.W.10., there is hardly any difficulty in accepting the prosecution version. As far as the argument relating to non-protest by P.W.1 is concerned, it may be on account of several reasons; one of such reasons may be that the appellant was involved in anti-social activities. The reaction of witnesses on seeing a crime being committed in their presence varies from person to person and no concrete rule can be evolved that every witness must react to a specific occurrence in a particular way. Only because a witness reacted in a different way or weird manner and did not shout at the spot to draw the attention of others and/or come forward to save the person being assaulted, he cannot be declared as an unreliable witness nor can the Court discard his evidence altogether solely basing upon that ground. The Hon'ble Apex Court has time and again unequivocally held that post-occurrence behaviour of witnesses cannot be predicted and uniformity in their reactions cannot also be expected. In the case of **Rammi -Vrs.- State of M.P. reported in (1999) 8 Supreme Court Cases 649**, the Hon'ble Highest Court held as follows:

> "8. Such a remark on the conduct of a person who witnessed the murderous attack is least justified in the realm of appreciation of evidence. <u>This Court has said time and again that the post-event conduct of a witness varies from person to person. It cannot be a cast-iron reaction to be followed as a model by everyone witnessing such event. Different persons would react differently on seeing any violence and their behaviour and conduct would, therefore, be different</u>. We have not noticed anything which can be regarded as an abnormal conduct of PW 9 Ram Dulare."
>
> **[Emphasis supplied]**

Therefore, it cannot be said that merely because P.W.1, who was present at the spot, did not shout to draw the attention of others after seeing the assault,his presence at the spot would be disbelieved.

<u>Conclusion:</u>

9. Therefore, we are of the view that 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 beyond all reasonable doubt is quite justified and in view of the foregoing discussion, the order of conviction and sentence as passed by the learned trial Court hereby stands confirmed. The JCRLA being devoid of merit stands dismissed.

It is deducible from the case records that the appellant was granted bail by this Court on 11.01.2019. The learned trial Court is directed to take steps to take the appellant into custody to serve out the remaining part of his sentence.

The trial court records along with a copy of this judgment be sent down to the concerned Court for information and compliance.

Before parting with the judgment, we put on record our appreciation to Ms. Anima Dei, learned Amicus Curiae for rendering her assistance in arriving at the above decision. She shall be entitled to her professional fee which is fixed at Rs.7,500/-. We also appreciate Mr. Sonak Mishra, learned Additional Standing Counsel for ably and meticulously presenting the case on behalf of the State.

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2024 (I) ILR-CUT-487

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

JCRLA NO.64 OF 2008

HADU @ KUSALESWAR MANHIRA .... Appellant

-V-

STATE OF ODISHA .... Respondent

(A) CRIMINAL TRIAL – "Last Seen" theory – The appellant is convicted for commission of offence U/s. 302 of IPC – There is no direct eye-witness – The P.W.6 stated in her evidence that on the day of occurrence the appellant came and asked the deceased to accompany him to bring fire wood – The deceased on other hand told the appellant to go as she would come later – About half an hour later, the deceased went to collect the fire wood with a bamboo basket – Whether the evidence of P.W.6 can be utilized as a 'last seen' circumstance of the appellant with the deceased? – Held, No – It is a pre-condition for applying the last seen theory, the deceased must have been seen in the company of the accused for the last time before he/she was found dead. (Para 9)

(B) THE INDIAN EVIDENCE ACT, 1872 – Section 27 – Requisites pre-conditions for applicability of section 27, discussed with reference to case law. (Para 10)

(C) CRIMINAL TRIAL – Absence of motive – Effect of – Held, in a case based on circumstantial evidence absence of motive strengthen the benefit of doubt in favor of the appellant. (Para 12)

Case Laws Relied on and Referred to :-

1. (2016) 65 OCR 1097 : Mangala Oyale -Vrs.- State of Odisha.
2. (1984) 4 Supreme Court Cases 116 : Sharad Birdhichand Sarda -V- State of Maharashtra
3. AIR (34) 1947 : Pulukuri Kottaya and others -Vrs.- Emperor

4. AIR 1952 SC 343 : Hanumant Govind Nargundkar & another -V.-State of Madhya Pradesh
5. (1969) 35 CLT 351 : Satrughana alias Satura Majhi -Vrs.- State
6. (2022) Supreme Court Cases OnLine SC 1454 : Nandu Singh -Vrs.-State of Madhya Pradesh (Now Chhattisgarh)

For Appellant : Ms. Manaswini Rout, Amicus Curiae

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

JUDGMENT Date of Hearing & Judgment : 02.01.2024

BY THE BENCH.

1. The appellant Hadu @ Kusaleswar Manhira faced trial in the Court of learned Additional Sessions Judge, Sonepur in Sessions Trial No.34 of 2005 for commission of offence under section 302 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that on 15.12.2004 in between 3.00 p.m. to 6.00 p.m., at village Silatimunda under Tarava police station, he committed murder of his wife Sumitra Manhira (hereinafter 'the deceased').

The trial Court, vide impugned judgment and order dated 14.07.2006, found the appellant guilty of the offence charged and sentenced him to undergo imprisonment for life.

Prosecution Case:

2. As per the first information report (hereinafter 'F.I.R.') lodged by one Purna Chandra Bag (P.W.1) before the Officer in-charge of Tarava police station on 15.12.2004, the prosecution case is that the deceased was his sister. On that day, at about 6.00 p.m., while he was binding straw, he heard cries from the side of the house of the appellant and came to that place and found some female members were crying there. P.W.1 asked the reason for their crying and came to know that the appellant and the deceased had gone to jungle to bring fire wood but they did not return. Getting such message from the lady members, P.W.1 along with others went in search of the deceased and they found the dead body of the deceased lying in a field with bleeding injuries and somebody had used sharp cutting weapon to kill the deceased and a bundle of wood was lying near the dead body. P.W.1 suspected that the appellant might have committed murder of the deceased. It is further stated in the F.I.R. that the appellant and the deceased had been to collect fire wood in the afternoon and they did not return till 6 O' clock in the evening and there was some previous quarrel between the couple.

Basing upon the written report presented by P.W.1,the Officer in-charge (P.W.12) registered Tarava P.S. Case No.82 dated 15.12.2004 under section 302 of the I.P.C. against the appellant. P.W.12 himself took up investigation of the case. During the course of investigation, he examined the informant (P.W.1) and other witnesses. On 15.12.2004, at about 7.20 p.m., the appellant appeared at the police station, confessed his guilt. Accordingly, he was arrested by P.W.12 and the statement

of the appellant was recorded. Then the appellant led P.W.12 and other witnesses to his cultivable land and gave recovery of one axe from inside the bush which was seized as per seizure list Ext.4. P.W.12 also held inquest over the dead body and prepared the inquest report (Ext.2) so also the spot map (Ext.12). He also seized the bundle of fire wood and the blood stained earth and sample earth as per seizure list Ext.5, sent the dead body to the Headquarters Hospital, Sonepur for post mortem examination and seized the blood stained clothes of the appellant as per seizure list Ext.9. The wearing apparels of the deceased were also seized as per seizure list (Ext.6/1), which were produced by the constables, who escorted the dead body for post mortem examination. The I.O (P.W.12) sent requisition to R.I., Tarava for preparing sketch map of the spot. The weapon of offence i.e. axe (M.O.I), was sent to the doctor, who conducted post mortem examination, for obtaining his opinion regarding possibility of injuries sustained by the deceased with such weapon and the seized articles were sent to R.F.S.L., Sambalpur, for chemical examination. The chemical examination report (Ext.15) was received. On completion of investigation, charge sheet was submitted under section 302 of the I.P.C. against the appellant.

Framing of Charge:

3. After submission of charge sheet, the case was committed to the Court of Session where the trial Court framed the charge under section 302 I.P.C. against the appellant. The appellant pleaded not guilty and claimed to be tried for which, the sessions trial procedure was resorted to establish his guilt.

Prosecution Witnesses, Exhibits & Material Objects:

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

P.W.1 Purna Chandra Bag is the brother of the deceased and the informant in this case who stated that on the fateful day, he heard sound of crying from the house of the appellant. When he proceeded to appellant’s house, he found that some ladies were crying. Upon his query, he was informed that the appellant had killed the deceased. P.W.1 further stated to have seen the deceased lying on the paddy field in a pool of blood with a completely severed throat. He is also a witness to the preparation of the inquest report vide Ext.2.

P.W.2 Mahadev Mahala is a co-villager who stated that on the relevant day, he along with others heard shout from the house of the appellant. Upon hearing the sound, he along with P.W.1 and Santosh went there and saw the inmates of the house crying. He further stated that when P.W.1 enquired about the reason for such crying, he was informed that the appellant had killed the deceased. P.W.2 further stated to have seen the dead body of the deceased lying on the paddy field with the throat almost cut.

P.W.3 Sumanta Bag is the nephew of the deceased who stated that while returning from pond, he heard the sound of crying from the house of the appellant.

Accordingly, he proceeded to the house. Upon his query, he was informed that the appellant had killed the deceased. He further stated to have seen the dead body of the deceased lying on the spot with the head almost completely severed.

P.W.4 Niranjan Dehury is a co-villager who stated that on the date of occurrence, after being informed that the appellant had killed the deceased, he along with others proceeded to the spot and saw the dead body of the deceased lying with her neck almost completely severed. He further stated that the appellant confessed before the police to have killed the deceased. He also stated that the appellant led them to the place of concealment of weapon and gave recovery of the same. He is a witness to the seizure of the weapon of offence, i.e. axe (M.O.I), as per the seizure list (Ext.4).

P.W.5 Murali Bag is a co-villager who stated that the appellant took the deceased to the paddy field and killed her. He further stated that he went to the spot of occurrence and saw the deceased lying there with her neck almost completely severed. P.W.5 is also a witness to the preparation of inquest report vide Ext.2.

P.W.6 Chanchala Bag is the sister-in-law of the deceased who stated that, at about 3 p.m., on the date of occurrence, while the deceased was husking paddy, the appellant came and asked her (deceased) to accompany him to bring fire wood. However, the deceased asked the appellant to proceed first and she would go at a later stage. After half an hour, the deceased went to collect fire wood. Later, she was informed by P.W.3 that the appellant had killed the deceased.

P.W.7 Bhaskara Podha stated that upon hearing about the murder of the deceased, he went to the spot and saw the dead body of the deceased. He is a witness to the seizure of blood stained earth, sample earth, one pair of chapal, a bundle of fire wood and one ‘Dala’ (a bamboo basket) from the spot as per the seizure list (Ext.5).

P.W.8 Dr. Santosh Kumar Misra was posted as the Assistant Surgeon at the District Headquarters Hospital, Sonepur who, upon police requisition, conducted post mortem examination over the dead body of the deceased and proved his report vide Ext.7. He also opined that the injuries found from the post mortem examination were possible by the axe (M.O.I) and he proved such opinion vide Ext.8.

P.W.9 Laxman Dehury stated that in the evening hours of the fateful day, he saw the appellant coming from the opposite direction. Upon seeing him, he queried the appellant as to where was he going, to which the appellant answered that he was proceeding towards Tarva. Then they parted their ways and P.W.9 informed the elder brother of the appellant that the appellant was going towards Tarva. Subsequently, he along with the elder brother of the appellant went to Tarva and saw the appellant near Tarva Police Station and returned home. Next day, P.W.12 called him to the police station and in his presence, seized one banian, a dhoti and a gamucha on production by the appellant, as per the seizure list (Ext.9).

P.W.10 Jangeswara Manhira is the elder brother of the appellant who stated that during the evening hours of the relevant day, he was informed by P.W.9 that the appellant was proceeding towards Tarva. Subsequently, he along with P.W.9 went to search the appellant and found him in the police station. After returning to the village, he came to know that the appellant had killed the deceased.

P.W.11 Kishore Kumar Bhoi was working as the Revenue Inspector, Tarva, who visited the spot on police requisition and prepared his report vide Ext.10 and also prepared the sketch map vide Ext.11.

P.W.12 Prasanta Kumar Nanda was working as the O.I.C. of Tarva Police Station who, on the basis of the written report submitted by the informant (P.W.1), registered the F.I.R. (Ext.1) and took up investigation of the case. Upon completion of investigation, P.W.12 submitted the charge sheet against the appellant.

The prosecution exhibited fifteen documents. Ext.1 is the F.I.R., Ext.2 is the inquest report, Ext.3 is the confessional statement of the appellant, Ext.4 is the seizure list of tangia, Ext.5 is the seizure list of blood stained earth and sample earth, Ext.6/1 is the seizure list of wearing apparel of deceased, Ext.7 is the post mortem report, Ext.8 is the opinion of the doctor regarding examination of axe, Ext.9 is the seizure list of banian, dhoti and gamucha, Ext.10 is the R.I. report, Ext.11 is the sketch map, Ext.12 is the spot map, Ext.13 is the dead body challan, Ext.14 is the forwarding letter of M.Os and Ext.15 is the chemical examination report.

Four numbers of material objects were admitted in evidence. M.O.I is the axe (tangia), M.O.II is the dhoti, M.O.III is the banian and M.O.IV is the gamucha.

Defence Plea:

5. The defence plea of the appellant is one of denial.During the course of trial, the defence examined the appellant as D.W.1 who stated that the informant (P.W.1) has foisted a false case on him. He further stated that on the date of occurrence, he performed puja from 7 a.m. to 5 p.m. and after performing puja, he was sitting in the outer verandah of his house when P.W.1 informed him that the dead body of the deceased was lying in the paddy field. He also stated that upon getting such information, he went to Tarva police station to report the incident. He outrightly denied to have any dispute with the deceased. Rather D.W.1 stated that the informant had a strained relationship with the deceased due to some land dispute.

Findings of the Trial Court:

6. The learned trial Court, after assessing the oral as well as documentary evidence on record, came to hold that there is no direct evidence connecting the appellant with the commission of the crime and the case is based on circumstantial evidence. The trial Court further held that the weapon of offence i.e. axe (M.O.I), was recovered at the instance of the appellant from inside the bush and the place was not accessible to public. Therefore, there was no reasonable apprehension of the weapon of offence being planted to rope in the appellant with the crime. The trial

Court further held that the deceased had been to collect the fire wood with the appellant and the evidence of P.W.6 in that respect is quite trustworthy and reliable and the prosecution has successfully proved the circumstantial evidence relating to the appellant being 'last seen' with the deceased. The trial Court has rejected the contention raised by the learned Public Prosecutor regarding motive behind the commission of crime on the part of the appellant. However, taking into account the seizure of the wearing apparels of the appellant, which was stated to be stained with blood and the findings of the chemical examination report, it was held that the prosecution has proved the chain of circumstances which unerringly pointed towards the guilt of the appellant. Accordingly, the appellant was convicted under section 302 of the I.P.C.

Contentions of the Parties:

7. Ms. Manaswini Rout, learned counsel appearing for the appellant argued that admittedly, there are no eye witnesses to the occurrence and the case is based on circumstantial evidence and the motive behind the commission of crime is absent in the case. The circumstance relating to 'last seen' of the appellant in the company of the deceased, which is deposed to by P.W.6, is not at all acceptable inasmuch as P.W.6 himself has stated that the deceased went to collect fire wood half an hour after the appellant left the spot asking her to accompany him.The learned counsel further submitted that so far as the leading to discovery of the axe (M.O.I) is concerned, even though the I.O. stated that it was recovered on 15.12.2004, but there is no evidence where the weapon of offence was kept after its seizure and in what condition and why there was such an inordinate delay in sending the same for chemical examination, which was done only on 06.04.2005. The learned counsel further argued that though the I.O. (P.W.12) has stated that the axe was kept in police malkhana before it was sent for chemical examination, but the maklhana register has not been produced. Therefore, any possible tampering with the same cannot be ruled out. Learned counsel for the appellant, by placing reliance upon the case of **Mangala Oyale -Vrs.- State of Odisha reported in (2016) 65 OCR 1097**, contended that it is very difficult to convict the appellant only basing upon the evidence relating to leading to discovery of the axe. Learned counsel concluded her argument by submitting that in this case, the circumstances have not been firmly established and when they are taken together, it does not form a chain so complete in order to arrive at an irresistible conclusion that it is the appellant and appellant alone, who is the author of the crime. Therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Priyabrata Tripathy, learned Additional Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that both the deceased and the appellant were last seen together. Thereafter, the dead body was recovered from a field and the appellant was absent and the axe, which was recovered at the instance of the appellant, which has been

examined by the doctor (P.W.8), who opined that the injuries sustained by the deceased were possible by such weapon. Moreover, when the chemical examination report (Ext.15) indicates that human blood was found from the axe (M.O.I), it can be said that prosecution has successfully proved that the appellant is the author of the crime.

Whether the deceased met with a homicidal death?

8. P.W.8, the doctor conducted post-mortem examination over the dead body of the deceased on 16.12.2004 and he noticed the following injuries.

> "One cut-throat wound in neck of 5" in length cutting throughout the neck caused by a blow with sharp cutting edge of a heavy weapon. The neck is almost completely separated and attached to body by a falp of skin. The wound is at C-3, C-4 level cutting all the vital organs and blood vessels at this region. Multiple cut injury present one below left angle of mouth i.e. 2" x ½" x 1" and one behind right ear 3" x 1" x2". The cause of death is cut-throat of all the vital organs and big blood vessels resulting in bleeding and neck. All the above injuries are ante-mortem in nature."

The homicidal death aspect of the deceased is not disputed by the learned counsel for the appellant. The inquest report (Ext.2), post mortem report (Ext.7) and the evidence of P.W.8 clearly established that the death of the deceased was homicidal.

Whether the deceased was last seen alive with the appellant?:

9. The law is well settled that in order to convict an accused on the basis of the circumstantial evidence, each circumstance has to be firmly established. The circumstance cannot be explained under any other hypothesis. The circumstance taken together must form a complete chain so that there would not be any escape from the conclusion that it is the accused and accused alone was committed the crime. The leading decision on this point is by the Supreme Court in the case of **Sharad Birdhichand Sarda -Vrs.- State of Maharashtra, reported in (1984) 4 Supreme Court Cases 116**, in which five golden principles have been summed up which has been stated to be panchsheel in appreciating the case based on circumstantial evidence.

In this case, where there is no direct evidence on record, we delve to discuss about the evidence relating to 'last seen theory'. The only witness in this respect is none else but P.W.6, who is the sister-in-law of the deceased, who has stated that on the date of occurrence, the appellant came and asked the deceased to accompany him to bring fire wood. The deceased, on the other hand, told the appellant to go first telling him that she would come later. P.W.6 further stated that after about half an hour, the deceased went to collect the fire wood with a bamboo basket. Subsequently, she came to know from her son (P.W.3) that the appellant had killed the deceased. From this statement, it is very clear that P.W.6 has not seen the appellant and the deceased going together to collect fire wood. The evidence rather indicates that the appellant first left the place. After about half an hour, the deceased

went to collect the fire wood. From the statement of P.W.6, it does not appear that the appellant had asked the deceased to come to a particular place to collect the fire wood. Therefore, in our humble view, the evidence of P.W.6 cannot be utilized as a 'last seen' circumstance of the appellant with the deceased. It is a pre-condition for applying the 'last seen theory' that the deceased must have been seen alive in the company of the accused for the last time before he/she was found dead. Here in this case, it is apparent that P.W.6 has seen the deceased alive even after the appellant went ahead alone to collect fire wood. Therefore, it cannot be said that the deceased was last seen in the company of the appellant before her dead body was discovered. The onus of proving the circumstances, under which the deceased met with her death, cannot be shifted to the appellant. Thus, section 106 of the Evidence Act cannot come into play in the instant case to make the appellant liable to disprove his guilt as the prosecution has failed to discharge its initial burden of proving that the appellant was last seen with the deceased. The possibility of the deceased coming in contact with others after P.W.6 last saw her cannot be ruled out. Nobody has seen the appellant and the deceased together at the spot where the dead body of the deceased was lying. There is no evidence on record as to what was the distance between the house of the appellant where the appellant asked the deceased to accompany him and the place where the dead body was lying. There is no evidence on record that before leaving the house, the deceased informed P.W.6 that she is going to collect fire wood as asked by her husband. In view of the nature of evidence adduced by P.W.6, the circumstance relating to last seen fails.

Whether the statement leading to discovery of axe can be relied upon to convict the appellant?:

10. Coming to the only other circumstance i.e. the recovery of the weapon of offence at the instance of the appellant, no doubt P.W.12 has stated that on 15.12.2004, at about 7.20 p.m., the appellant came to the police station and confessed before him that he killed the deceased by inflicting axe blows on her neck. But this confessional statement is not admissible in view of the bar provided under section 25 of the Evidence Act. The accused, being examined as D.W.1, has disowned such a statement made to the police officer. The appellant came to the police station on 15.12.2004, at 7.20 p.m. But on that day, no statement of the appellant was recorded. Rather, P.W.12 has stated that on 16.12.2004, at about 5.45 a.m., he arrested the appellant and recorded his confessional statement, which has been marked as Ext.3, and the appellant led him and the witnesses to his cultivable land and gave recovery of an axe from inside the bush of palsa which was seized as per seizure list Ext.4. The I.O. (P.W.12) has stated that on 15.12.2004, at about 8.00 p.m., he reached the spot for investigation but he had not taken the appellant with him to the spot and he could not make detail verification of the spot as it was night though he had a torch light with him. It pre-supposes that perhaps on 15.12.2004 there was no information with the I.O. that any weapon of offence was concealed by

the appellant. The other witness to the leading to discovery is P.W.4, who has stated that while in police custody the appellant stated that he had killed his wife (deceased) with a tangia and the I.O. (P.W.12) recorded the confessional statement of the appellant in a separate paper and then the appellant led them to the place of concealment i.e. palsa tree, where he gave recovery of the axe which was seized by P.W.12 as per seizure list Ext.4. In the cross-examination, he has stated that the place of concealment is towards the south of the spot which is about 3 to 4 cubits away from the place where the dead body was lying and the recovery of the weapon of offence was given at 7.00 a.m.

It is the settled proposition of law that section 27 of the Evidence Act is an exception to sections 25 & 26 which prohibit the proof of confession made before the police officer or a confession made while the person is in police custody unless it is made in the immediate presence of a Magistrate. Section 27 allows that part of the statement made by the accused to the police, whether it amounts to confession or not, which relates distinctly to the fact thereby discovered to be proved. For applicability of section 27, two conditions are the key requisites namely (i) information must be such as has caused discovery of the fact, and (ii) information must relate distinctly to the fact discovered.

A Division Bench of this Court in **Mangala Oyale** (supra) discussed the provision under section 27 of the Evidence Act in the light of the decision of the Privy Council in case of **Pulukuri Kottaya and others -Vrs.- Emperor reported in AIR (34) 1947**, the decision of the Hon'ble Supreme Court in case of **Hanumant Govind Nargundkar and another -Vrs.- State of Madhya Pradesh reported in AIR 1952 SC 343** and the decision of this Court in the case of **Satrughana alias Satura Majhi -Vrs.- State reported in (1969) 35 CLT 351** and held as follows:

> "17. Learned counsel for the accused has argued that a piece of evidence collected under Section 27 of the Act in no circumstances can form the foundation of the conviction and as such the accused is entitled to an order of acquittal. The aforesaid is a favorite argument advanced at the Bar in most of the cases, where only the incriminating evidence is relevant under Section 27 of the Act. But the aforesaid contention is at times fallacious as seen from the law laid down in the case of Pulukuri Kottaya (supra) of the Privy Council. A Division Bench of this Court dealing with the aforesaid in the case of Satrughana alias Satura Majhi -vrs.- State, reported in XXXV (1969) CLT 351, have held at paragraph 8 as follows:
>
> "8. *Kottaya v. Emperor*, is the leading decision on this point. A clear exposition of the evidentiary value of such a statement is given in para 11 of the judgment. Their Lordships observed thus:-
>
> "Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law."
>
> The effect of this passage has unfortunately been overlooked in most of the subsequent decisions.

The implication of this concept may be explained by an illustration. If the statement made under Section 27 of the Evidence Act leads to discovery of opium, then a conviction can be founded solely on the basis of that statement, as possession of opium without license is by itself an offence under the Opium Act. Similarly discovery of arms without licence on the basis of a statement made under Section 27 of the Evidence Act can constitute the sole basis of conviction. But where the gist of the offence is not possession alone, then the statement leading to discovery in most cases cannot constitute the foundation of the prosecution case. As their Lordships put it, it is only one link in the chain of proof, and the other links must be established beyond reasonable doubt before the guilt is brought home to the accused."

xx xx xx xx xx

A similar view was taken in In re *Periyaswami Thevan*. There the distinction in the effect of discovery of an article belonging to the deceased and to the accused was forcefully brought out. Their Lordships held that if the prosecution had shown that the blood-stains on the chopper belonged to the same group as the blood of the deceased, the answer would have been clinching. They observed thus:

"Ordinarily in a case of circumstantial evidence where there has been a discovery as a result of confession made under Section 27, Evidence Act, one expects to find the discovery of something which can be associated with the deceased and not with the accused. The question of the weapon with which the offence was committed being discovered as a result of information given by the accused is also probable. But in such a case the mere fact that a weapon, which could have been used for the commission of a crime like this, was discovered with bloodstains on it on information given by the accused, would not, by itself be sufficient to show that he was the murderer".

On the dictum of the Privy Council authority, we are clearly of opinion that the confessional statement leading to discovery, in the facts and circumstances of this case, cannot establish the prosecution case that the accused was the murderer, though it raises grave suspicion."

Having regard for the aforesaid position of law, we are of the humble view that the statement made by the appellant before the police in leading to discovery of the axe (M.O.I) cannot per se lead to the construction of an imaginary prosecution mansion when the bedrock in the form of clinching evidence against the appellant is conspicuously absent.

Possibility of tampering with seized items:

11. In the case in hand even though the I.O. (P.W.12) and the recovery witness, i.e. P.W.4 have stated that the discovery of tangia was made at the instance of the appellant but most peculiarly, the evidence of the I.O. (P.W.12) is silent as to what he had done with the axe after its seizure except stating that it was sent to the doctor for examination. The I.O. has not stated that it was kept in a sealed condition. In the crossexamination, though he has stated that weapon of offence was in police malkhana before it was sent for chemical examination but no malkhana register has been proved in this case to corroborate the evidence of the I.O. If the weapon is not kept in safe custody before its dispatch for chemical examination, the tampering with the same can not be ruled out. Even though, the weapon was seized on

16.12.2004 but it was examined by the doctor (P.W.8) on 29.03.2005 and the forwarding letter of chemical examination indicates that the same was sent only on 06.04.2005. The chemical examination report indicates that though the axe was found to have contained human blood but so far as the grouping is concerned, no opinion was given and in the remarks column, it has been mentioned to be inconclusive. Similarly, so far as the wearing apparels of the appellant are concerned, though it is mentioned that from the dhoti, ganji and gamucha, human blood stains were found but no opinion was given about the grouping and the delay in dispatch of the exhibits for chemical examination has not been explained by the prosecution. When the seized blood stained dhoti, banian and gamucha were shown to P.W.12 during the cross examination, he admitted that no blood stain was visible on such apparels.

Absence of motive to commit murder:

12. In this case, there is absence of any motive behind the commission of the crime. In a case of circumstantial evidence, motive assumes pertinent significance and absence of motive would put a guard on the Court to scrutinize the available circumstances on record carefully and minutely to see whether the prosecution has successfully established its case beyond all reasonable doubt or not. In the case of **Nandu Singh -Vrs.- State of Madhya Pradesh (Now Chhattisgarh) reported in (2022) Supreme Court Cases OnLine SC 1454**, a three- Judge Bench of the Hon'ble Supreme Court has reiterated the aforesaid stance of law in the following words:

> "12. In a case based on substantial evidence,motive assumes great significance. It is not as if motive alone becomes the crucial link in the case to be established by the prosecution and in its absence the case of Prosecution must be discarded. But, at the same time, complete absence of motive assumes a different complexion and such absence definitely weighs in favour of the accused."

Needless to say that there is no evidence to show that the appellant had a strained relationship with the deceased and in absence thereof, there is hardly any circumstance which makes this Court believe that the appellant was keen to take away the life of the deceased. Hence, the absence of motive strengthens the benefit of doubt in favour of the appellant.

Conclusion:

13. After detailed examination of the evidence appearing on record, since the circumstance of 'last seen' has not been satisfactorily proved by the prosecution and since the evidence is lacking regarding the safe custody of the seized weapon before its production in Court for sending it to chemical examination, it cannot be said that the prosecution has proved the chain of circumstances to be a complete one and there is an irresistible conclusion that it is the appellant and appellant alone, who has committed the crime.

Therefore, we are of the view that the impugned judgment and order of conviction passed by the learned trial Court is not sustainable in the eye of law. Accordingly, the conviction of the appellant under section 302 of the I.P.C. is hereby set aside.

It appears that the appellant is in judicial custody. He be set at liberty forthwith if his detention is not required in any other case. The Jail Criminal Appeal is allowed.

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

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

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2024 (I) ILR-CUT-498

S.K. SAHOO, J.

I.A. NO.1993 OF 2022
(**ARISING OUT OF CRLA NO. 955 OF 2022**)

MANOJ KUMAR PRADHAN ....Appellant/Petitioner

-V-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 389(1) – Ambit & scope of Appellate Court relating to stay of judgment and order of conviction – Discussed.

Case Laws Relied on and Referred to :-

1. (2014) 8 SCC 909 : Shyam Narain Pandey Vs. State of U.P.
2. (2001) 6 SCC 584 : K.C. Sareen Vs. C.B.I., Chandigarh.
3. (2012) 53 OCR (SC) 1233 : State of Maharastra through C.B.I. Vs Balakrishna Dattatrya Kumbhar.
4. A.I.R. 2008 SC 35 : State of Punjab Vs. Deepak Mattu.
5. (2022) 85 OCR 667 : Pruthwiraj Lenka Vs. State of Odisha (Vigilance).
6. (2023) 91 OCR (SC) 84 : Om Prakash Sahani Vs. Jai Shankar Chaudhary & Anr.
7. A.I.R. 2011 SC 3845 : A.B. Bhaskara Rao Vs. Inspector of Police, CBI, Visakhapatnam.
8. (2012) 2 S.C.C. 648 : Alister Anthony Pareira Vs. State of Maharashtra.

For Petitioner : Mr. Sourya Sundar Das, Sr. Adv.

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

ORDER Date of Order : 19.12.2023

S.K. SAHOO, J.

The appellant/petitioner Manoj Kumar Pradhan who was working as Marketing Officer (M.I) and was designated as the Purchase Officer of DPC, Dharmagarh with additional charge of DPC, Koksara has filed this interim application under section 389 of Cr.P.C. for staying the order of conviction passed against him by the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Bhawanipatna in G.R. (Vigilance) Case No.46 of 2010/T.R. No.11 of 2015 vide impugned judgment and order dated 22.10.2022 under section 13(2) read with section 13(1)(c)(d) of the Prevention of Corruption Act, 1988 (hereafter 1988 Act?) and sections 409/468/477-A of the Indian Penal Code (hereafter I.P.C.?) and sentencing him to undergo rigorous imprisonment for three and half years and to pay a fine of Rs.5,00,000/- (rupees five lakhs), in default, to undergo further R.I.for one month for the offence under section 13(2) read with section 13(1)(c)(d) of the 1988 Act, R.I. for five years and to pay a fine of Rs.3,00,000/- (rupees three lakhs), in default, to undergo further R.I. for one year for the offence under section 409 of the I.P.C., R.I. for three and half years and to pay a fine of Rs.3,00,000/- (rupees three lakhs), in default, to undergo further R.I. for one year for the offence under section 468 of the I.P.C. and R.I. for three and half years and to pay a fine of Rs.3,00,000/- (rupees three lakhs), in default, to undergo further R.I. for one year for the offence under section 477-A of the I.P.C. and directing both the substantive sentences to run concurrently. The petitioner was acquitted of the charge under section 120-B of the Indian Penal Code. The learned Trial Court also acquitted the co-accused persons, namely, Surya Prakash Agrawal and Ghasiram Agrawal of all the charges.

2. The prosecution case, in short, is that P.W.19 Jagannath Naik, Deputy Superintendent of Police (Vigilance), Bhawanipatna Unit lodged a written report before the Superintendent of Police (Vigilance), Koraput Division, Jeypore on 30.09.2010 stating therein that on credible information about bungling custom milling rice in respect of Rice Receiving Centres at Kusumkhunti and Ladugaon under DPC, Koksara and three rice mills, namely, M/s.Bajrang Rice Mill, Ladugaon, M/s. Suroj Agro Industries, Bongomunda and M/s. Jai Hanuman Rice Mill, Siuni, he made an enquiry and found that the petitioner was the Purchase Officer of DPC, Daramgarh and was in additional charge of DPC, Koksara for the period from 08.06.2007 to 04.11.2008. It is further alleged that as per the guidelines issued by the Commissioner-cum-Secretary to Government, Food Supplies and Consumer Welfare Department vide L.No.19886/FSCW, Bhubaneswar dated 11th October, 2007, the duty and responsibility of the Purchase Officer was to (i) ensure timely

and complete delivery of resultant CMR by the Custom Millers once the paddy redelivered to them, (ii) in case of non-receipt of CMR within twenty days, the Purchase Officer shall report the same to the District Manager immediately, (iii) it shall be the duty of the Purchase Officer to submit daily/weekly procurement return and statement of accounts in prescribed proforma regularly to the District Manager and (iv) Purchase Officer shall keep the Enforcement Officer, ACSO concerned where the mill is situated and the D.M., OSCSC Ltd. informed of the quantities of paddy delivered and rice received from the custom millers and shall also continuously and frequently visit the mill to prevent diversion/unauthorized removal of paddy/rice by custom miller. It is further alleged that in order to ensure smooth procurement of paddy and delivery of CMR under decentralized mode by the OSCSC Ltd. during KMS 2007-08, arrangement was made to operate individual DPC in the district vide Order No.781/OSCSC dated 08.11.2007 and as per the order under Koksara DPC, rice mills, namely, (1) Shree Ganapati Rice Industries Pvt. Ltd., Kusumkhunti, (2) Jai Hanuman Rice Mill, Siuni, (3) Suraj Agro Industries, Bangomunda, (4) Shri Bajrang Rice Mill, Ladugaon and (5) Om Shri Harikishan Agro Tech., Ladugaon and Dhanalaxmi Rice Mill, Ladugaon were tagged and similarly, the petitioner, Marketing Inspector was designated as Purchase Officer and was tagged to Dharamgarh, Golamunda and Koksara Block. It is further alleged that though paddy was handed over to the custom millers up to 31.01.2008, no resultant rice was received from the custom millers for which a joint physical verification of the DPC and rice mill premises was conducted on 24.09.2008 by CSO, Kalahandi in the presence of Sub-Collector, Dharamgarh, ACSO Enforcement, ACSO, Dharamgarh and M.I., Koksara. It is further alleged that during verification, they found that the petitioner returned Q.14,807.72 of rice to the three custom millers for improvement of the quality and though the M.I. reported about return of Qtl.14,807.72 rice to the millers for improvement from 16.07.2006 to 20.07.2006, the M.I. has not checked the mill premises as required to ensure that the stock was available in the mill premises and the resultant improved rice is delivered at the DPC till the date of physical verification i.e. 24.09.2008. It is further alleged that on 23.10.2008, a surprise check was conducted by Vigilance in the three rice mills with assistance of Civil Supplies Officials and Commercial Tax Officials in presence of the petitioner and during verification, no stocks were found at DPC godown at Kusumkhunti and Ladugaon. It is further alleged that on physical verification of M/s. Bajrang Rice Mill, Ladugaon, it was ascertained that Sushil Kumar Agrawal, proprietor of the rice mill had received Qtls.39,000.00 of paddy and returned resultant rice of Qtls.26560.00 @ 68% of the paddy received to the DPC, Koksara in between 16.12.2007 to 31.05.2008 and the petitioner returned Qtls.3488.03 kgs. of rice to the miller in July 2008 as those were not under FAQ specification for improvement and return. Till the date of search i.e. 23.10.2008, the miller had returned Qtls.1700.00 of improved boiled rice to DPC, Koksara and balance quantity of Qtls. 1788.03 of boiled rice was due to return which he

later on delivered as evident from the letter no.145/Crop dated 02.02.2009 of District Manager, OSCSC Ltd., Kalahandi and there is no due against M/s. Bajrang Rice Mill.

It is further alleged that during joint surprise check of Jai Hanuman Rice Mill, it revealed that co-accused Ghasiram Agrawal, proprietor M/s. Jai Hanuman Rice Mill had received Qtl.29,800.00 paddy from the DPC against which he had returned the required resultant part-boiled rice of Qtl.20,264.00to the DPC, Koksara in between 11.12.2007 to 13.05.2008 but the petitioner had returned Qtl.5937.36 of rice to the Miller for improvement against which the Miller returned Qtl.1230.00 of rice and the miller is yet to return Qtl.4707.36 rice to the DPC and during verification by Vigilance, Qtl.14.00 of rice and paddy of Qtl.320.50 kg. were found available.

It is further alleged that on 23.10.2008, joint stock verification was made on M/s Suraj Agro Industry, Bangomunda by Vigilance with assistance of Civil Supplies Officials and during stock verification, rice of Qtl.222.00 was found and during physical verification, it was ascertained that co-accused Surya Prakash Agrawal, the proprietor of the firm had executed agreement on 22.11.2007 with D.M., OSCSC Ltd., Bhawanipatna had received Qtl.29,500.00 of paddy against which he delivered required resultant rice of Qtl.20,060 to the DPC but the petitioner returned Qtl.5382.33 rice to the Miller for improvement out of which the miller again delivered Qtl.678.94 rice after improvement to the DPC and remaining Qtl.4503.39 rice is yet to be returned.

It is further alleged that on 22.08.2008, the petitioner reported to the District Manager intimating that the Assistant Manager, Quality Control, FCI refused to verify the stock which was lying with him at RRC, Ladugaon delivered by three Rice Millers and as the stock was not consistent with FAQ specification, the M.I. returned the CMR Stock of Qtl.5467 of rice to custom miller M/s. Suroj Agro Industry, Bangomunda, Qtl.3401.46 of rice to M/s. Bajrang Rice Mill, Ladugaon and Qtl.5939.17 of rice to M/s. Jai Hanuman Rice Mill, Siuni but on scrutiny of documents and statement of Rama Krushna Jena (P.W.17) revealed that P.W.17 had visited M/s. Dhanalaxmi Rice Mill and M/s. R.K. Agro Produce on 12/13.07.2008 but the M.I. had neither requested him for testing of the quality of rice nor shown him the rice stock for such testing and therefore, when the stock of rice was not tested at all, there was no reason to return the said rice to the millers after keeping the same with him for more than forty five days from the date of last receipt of rice as per his stock register being dated 31.05.2008 till he returned the rice on 16.07.2008 to 20.07.2008 and as matter of Rule, the M.I. was supposed to test the quality of rice and accept on the day of receipt and under no circumstance, he can retain the rice without testing and the M.I. was also supposed to collect sample of the rice in triplicate, retain one sample with him, hand over one sample to the miller and send one such sample to the CSO which he had not observed.

It is further alleged that on verification of the rice stock register of DPC at Ladugaon, it revealed that the M.I. had shown return of Qtl.3210.00 and Qtl.3182.33 on 16.07.2008 and 17.07.2008 respectively to Suraj Agro Industries, Qtl.5138.14 and Qtl.4501.58 on 18.07.2008 and 19.07.2008 respectively to Jai Hanuman Rice Mill and Qtl.3488.03 on 20.07.2008 to Bajrang rice mill and therefore, total quantity of returned rice comes to Qtl.19,520.08 whereas the M.I. in his report dated 04.06.2008 had shown return of Qtl.14,807.22 rice only making the discrepancy of Qtl.4712.38 rice excess return contradicting his own reports. It is further alleged that the computerized statement of progressive delivery of paddy and C.M.R. submitted by the M.I. on 04.06.2008 for the period as on 01.06.2008 shows that there was no due of rice to return to the DPC by the custom millers and the computerized statements on progressive delivery of paddy and C.M.R. submitted by the M.I. dated 28.08.2008 by making a correction of the date i.e. 28.08.2008 in place of 01.06.2008 showing that there was no due of rice to be returned to the DPC by the custom millers but the M.I.had manipulated by making additions in his own handwriting showing that the stock of Qtl.14,807.72 rice was returned to the Millers for improvement and there was also mentioned of report of improved rice of Qtl.758.94 after 20.07.2008 and as per letter no.145/Corp. dated 02.02.2009 of District Manager, OSCSC Ltd., Kalahandi, two rice millers, namely, M/s. Jai Hanuman Rice Mill, Siuni and M/s.Suraj Agro Industries, Bongomunda had not yet returned Qtl.4732.36 and Qtl.4403.39 rice to the DPC after improvement and thereby misappropriated Rs.69,99,208/- and Rs. 65,12,658/- respectively.

It is further alleged that the petitioner showed undue official favour to the millers by falsely showing receipt of rice from them and violating the guidelines of the paddy purchase for which the miller got the opportunity to misappropriate the custom milling rice to the tune of 9135.75 quintals, worth Rs.1,35,11,866/- including the cost of paddy, milling charges, transportation and surcharge @ Rs.0.20 paise per quintal per day for failing to deliver the rice after lapse of twenty five days of receipt of paddy.

On receipt of such written report, P.W.8 Sushanta Kumar Biswal, the O.I.C., Koraput Vigilance police station, Jeypore registered Koraput P.S. Case No.46 dated 30.09.2010 under section 13(2) read with section 13(1)(d) of the 1988 Act and sections 468/477-A/420 of the I.P.C.

After the F.I.R. was lodged, investigation was taken up by P.W.19 as per the direction of the Superintendent of Police, Vigilance, Koraput Division, Jeypore, who in course of his investigation, examined the P.W.8 and P.W.17. On 19.11.2010,he seized the documents as per seizure list Ext.3, obtained the copy of guideline regarding procurement of paddy of Kharif Marketing Season (KMS) for 2007-08 and the original memorandums prepared during surprise check of M/s. Jaya Hanuman Rice Mill, M/s. Suraj Agro Industry, M/s. Bajrang Rice Mill and M/s. Sri Ram Rice Mill, Ladugaon. He also obtained original memorandum

of surprise check of premises and godown of Rice Receiving Centre I & II (RRC) taken on rent at Kusumkhunti. On 30.03.2011, he seized inspection report dated 02.08.2008 of Ram Krushna Jena (P.W.17), Manager, Quality Control, F.C.I. at Sriram godown, Ladugaon and eleven documents as per seizure list Ext.4 and on 31.03.2011, he prepared forwarding report for the examination of documents by expert and he sent the original documents to A.I.G. of Vigilance (Document Examination Cell), Cuttack for examination and opinion. On 16.04.2011, he seized the original files of M/s. Suraj Agro Industry, M/s. Jaya Hanuman Rice Mill, M/s Bajrang Rice Mill along with original correspondent of DPC, Part-I & II for Kharif Marketing Season for the year 2007-08 as per seizure list Ext.5 and on 28.05.2011, he handed over charge of investigation to his successor (P.W.20) on his transfer.

P.W.20 during his investigation, received reply from the Government Examiner of Questioned Document (GEQD) of Directorate of Vigilance, Cuttack and he placed requisition to the Manager, Quality Control, FCI, Titlagarh to obtain information as to whether the Marketing Inspector, Koksara has given any requisition in the year 2006-07 and 2007-08 to check the specification of rice received from three industries, namely, Jaya Hanuman Rice Mill at Siuni, M/s. Suraj Agro Industries at Bangomunda and M/s. Bajrang Rice Mill at Ladugaon. P.W.20 issued requisition to M/s. Jaya Hanuman Rice Mill at Siuni and M/s. Suraj Agro Industries at Bangomunda to submit some information and also issued notice to the petitioner to produce transit pass/gate pass as to in which vehicle the custom rice was carried. He received two letters vide Ext.47 and Ext.48 from Civil Supply Officer (CSO)-cum-District Manager, OSCSC, Kalahandi and he seized some documents on production by P.W.2 Niranjan Sahu vide seizure list Ext.2. He collected the specimen handwriting and admitted handwriting and forwarded the same to GEQD, Vigilance Directorate, Cuttack and received opinion. He was accorded sanction order through the Superintendent of Police, Vigilance, Koraput by Commissioner-cum-Secretary, Food and Civil Supplies Department, Government of Odisha and on completion of investigation, submitted charge sheet against the petitioner and two others under section 13(2) read with section 13(1)(c)(d) of the 1988 Act and sections 406/468/477-A/120-B of the I.P.C. to stand trial in the Court of law.

3. The learned trial Court in its impugned judgment has been pleased to hold that the allegation of the prosecution regarding forgery of record and falsification of accounts relating to the CMR received by him are well established. However, the prosecution has not placed any admissible evidence to the effect that the petitioner made the aforesaid forgery at the instance of or in connivance with the co-accused persons. The co-accused persons are not proved to have committed forgery or falsification of any account maintained by them with regard to the transaction of rice with the petitioner and the DPC and therefore, charge under sections 468/477-A read with section 120-B of the I.P.C.cannot be sustained against

the co-accused persons but the above proved conduct and positive act of forgery, falsification of accounts, subsequent interpolation of documents by the petitioner, makes him liable for the offence under sections 468/477-A of the I.P.C. Learned trial Court further held that it can safely be said that the petitioner is solely responsible for causing loss to the Government to the tune of Rs.1,44,34,621/-, i.e. the cost of 9085.75 quintals of CMR @ Rs.1,588.71 paise per quintal and he being the custodian of the CMR and having domain over that property, in the facts and circumstances, is proved to have committed criminal breach of trust and as such liable for punishment under section 409 of the I.P.C. and the charge under the said provision is established against the petitioner, but it could not be established against the co-accused persons. Learned trial Court further held that the petitioner did not follow the Government guideline in the manner as required by the law. The learned trial Court was of the further view that the petitioner did not take any positive action to prevent the loss of such huge amount and evidence was forthcoming that he was involved in manipulation of records and therefore, the petitioner was held guilty under section 13(2) read with section 13(1)(c)(d) of the 1988 Act.

4. Mr. Sourya Sundar Das, learned Senior Advocate appearing for the petitioner contended that the learned trial Court has illegally convicted the petitioner under section 13(2) read with section 13(1)(c)(d) of the 1988 Act and sections 409/468/477-A of the I.P.C. He argued that the conviction has been arrived at by the learned trial Court solely on the basis of Ext.38, Ext.18 and Ext.C-1. While dealing with the above three exhibits, the learned trial Court observed that the Vigilance Officer entertained doubt regarding correctness of certain entries in the stock register (Ext.18). The learned trial Court dealt with the opinion of Government Examiner (Ext.42), who had opined that the signature of the petitioner on the admitted documents tallied with the signatures on the statement of progress delivery (Ext.38) and stock register (Ext.18). The trial Court also held that the entries regarding return of specific quantity of CMR for improvement as mentioned in Ext.38 was not proved by the Examiner to be that in the handwriting of the petitioner and then the learned trial Court jumped into a conclusion on the basis of assumption that it is crystal clear that there has been manipulation, correction and insertion of words, expressions and figures. The learned trial Court further held that when Ext.18 was maintained by the petitioner, he is the best person to say how such type of manipulations and insertions were made in the relevant entries and the petitioner has not preferred to explain the circumstances. Mr. Das further argued that one document closely similar to Ext.38 was available on record and was marked as Ext.C-1. While comparing these documents with Ext.38, the learned trial Court found that the printed part of Ext.38 is same as in Ext.C-1 which appeared to have been copied from the original by Xerox process. It is argued that the petitioner has not been put any question with regard to Ext.18, Ext.38 and Ext.C-1 in the accused statement. Since no specific questions have been put on these three

documents in the accused statement, the learned trial Court should not have used this document against the petitioner as the petitioner did not get any opportunity to offer explanation as regards the incriminating material surfaced against him. The learned counsel further argued that in the sanction order Ext.50, the sanctioning authority accorded sanction for prosecution of the petitioner concerning alleged misappropriation of rice amounting to Rs.1,44,747/- from RRC, Kusumkhunti. It is argued that since there is no order of sanction from RRC, Ladugaon, the petitioner could not be convicted for any kind of allegation concerning the said RRC. The learned counsel further argued that there has been alteration of charge and the misappropriation amount has been changed from Rs.1,44,747/- to Rs.1,44,34,621/-. It is argued that the smaller amount was for RRC, Kusumkhunti for which sanction was accorded and the bigger amount being for RRC, Ladugaon, there has been no sanction. It was argued that since there is statutory infraction with regard to sanction and alteration of charge, the conviction cannot be sustained particularly when the two co-accused persons have been acquitted of all the charges. He further argued that had the learned trial Court considered the evidence on record in favour of the petitioner and not ignored the same, the impugned order of conviction would not have come into existence. The finding recorded by the learned trial Court is out and out perverse and without any application of its judicial mind and therefore, the impugned judgment is bad in the eye of law. He further submitted that the exceptional and special circumstances which exist in the facts of the case sufficiently indicate that the present litigation is luxury litigation on the part of the prosecution at the cost of the petitioner. He argued that there is no chance of early hearing of the appeal on merit and therefore, when the prosecution has not proved the guilt of the petitioner to the hilt and that the petitioner has fair chance of acquittal and he has made out an exceptional case, this Court may be pleased to pass an order of stay of conviction. He placed reliance in the case of **Shyam Narain Pandey -Vrs.- State of U.P. reported in (2014) 8 Supreme Court Cases 909** wherein it was held that unless there are exceptional circumstances, the appellate Court shall not stay the conviction, though the sentence may be suspended. There is no hard and fast rules or guidelines as to what are those exceptional circumstances.

Mr. Sanjaya Kumar Das, learned Standing Counsel for the Vigilance Department appearing for the opposite party vehemently opposed the prayer for stay of conviction and also filed his objection to such petition. It was contended that the learned trial Court after going though the evidence on record has rightly found the petitioner guilty and since stay of conviction should be exercised only in exceptional circumstances and in rare cases where failure to stay conviction would lead to injustice and irreversible consequences, nothing having been pointed out by the learned counsel for the petitioner in that respect, no favourable order should be passed in his favour. It is further contended that it has become a contagious disease in the society, which needed social reforms and judicial inference

to get rid of the same. He further submitted that so far as the contentions of suspension/stay of conviction and sentence of the petitioner are concerned, the interim application is liable tobe dismissed because of his conviction and sentence for committing the offence under the Prevention of Corruption Act. He further submitted that as the law is equal to all and to be judged impartially, the petitioner does not stand in a different footing to be considered in any special circumstances, when he has been found guilty for adopting corruption by thinking it to be his official act. He further contended that in the event, the petitioner succeeds in the criminal appeal preferred by him before this Court, he would be at liberty to claim all of his consequential benefits from the Government and in view of the above, the I.A. should be dismissed.

5. First, let me deal with the ambit and scope of section 389(1) of Cr.P.C. relating to stay of judgment and order of conviction by the appellate Court. In the case of **K.C. Sareen -Vrs.- C.B.I., Chandigarh reported in (2001) 6 Supreme Court Cases 584**, it is held as follows:-

> "11. The legal position, therefore, is this: though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction, the Court should not suspend the operation of the order of conviction. The Court has a duty to look at tall aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate Court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior Court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, dehors the sentence of imprisonment as a sequel thereto, is different matter.
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> 12. Corruption by public servants has now reached a monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functions of the public offices, through strong legislative, executive as well as judicial exercises, the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic policy. Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a Court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior Court. The mere fact that an appellate Court or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction, it is public interest which suffers and sometimes even irreparably.

When a public servant who is convicted of corruption is allowed to continue to hold public office, it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction, the fall out would be one of shaking the system itself. Hence, it is necessary that the Court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a Court order suspending the conviction."

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

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

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14. The aforesaid order is therefore, certainly not sustainable in law if examined in light of the aforementioned judgments of this Court. Corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights' violation in itself, as it leads to systematic economic crimes. Thus, in the aforesaid backdrop, the High Court should not have passed the said order of suspension of sentence in a case involving corruption. It was certainly not the case where damage if done, could not be undone as the employee/Respondent if ultimately succeeds,could claim all consequential benefits. The submission made on behalf of the Respondent, that this Court should not interfere with the impugned order at such a belated stage, has no merit for the reason that this Court, vide order dated 9.7.2009 has already stayed the operation of the said impugned order."

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

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

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

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

> "33.…The Appellate Court should not reappreciate the evidence at the stage of section 389 of the Cr.P.C. and try to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach.
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> 34. In the case on hand, what the High Court has done is something impermissible. High Court has gone into the issues like political rivalry, delay in lodging the F.I.R., some over-writings in the First Information Report etc. All these aspect, will have to be looked into at the time of the final hearing of the appeals filed by the convicts. Upon cursory scanning of the evidence on record, we are unable to agree with the contentions coming from the learned Senior Counsel for the convicts that, either there is absolutely no case against the convicts or that the evidence against them is so weak and feeble in nature, that, ultimately in all probabilities the proceedings would terminate in their favour….."

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

> "19. From the analysis of the above decisions and the concerned provisions with which we are concerned, the following principles emerge:
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> a) When the Court issues notice confining to particular aspect/sentence, arguments will be heard only to that extent unless some extraordinary circumstance/material is shown to the Court for arguing the matter on all aspects.
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> b) Long delay in disposal of appeal or any other factor may not be a ground for reduction of sentence, particularly, when the statute prescribes minimum sentence. In other cases where no such minimum sentence is prescribed, it is open to the Court to consider the delay and its effect and the ultimate decision.
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> c) In a case of corruption by public servant,quantum of amount is immaterial. Ultimately it depends upon the conduct of the delinquent and the proof regarding demand and acceptance established by the prosecution.
>
> d) Merely because the delinquent lost his job due to conviction under the Act may not be a mitigating circumstance for reduction of sentence, particularly, when the Statute prescribes minimum sentence."

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

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

6. The petitioner has been convicted under section 409 of the Indian Penal Code. The essential ingredients of the offence are that the accused must be a public servant and that he must have been entrusted, in such capacity, with property and that he must have committed breach of trust in respect of such property. Once entrustment is proved, it is for the accused to prove how the property entrusted was dealt with. Misappropriation of money or property can be temporary and it can bepermanent. The prosecution need not prove the actual mode of misappropriation.

The petitioner has also been convicted under section 468 of the Indian Penal Code which deals with forgery for the purpose of cheating. If it can be proved that the purpose of the offender in committing the forgery is to obtain property dishonestly or if his guilty purpose comes within the definition of cheating, he can be punished under this section. Therefore, the prosecution must prove that the document is a forged document and that the accused forged the document and that he did so with an intention that the forged document would be used for the purpose of cheating.

The petitioner has also been convicted under section 477-A of the Indian Penal Code which deals with falsification of accounts. The ingredients of the offence are as follows:-

> **(i)** The person coming within its purview must be a clerk, officer, or servant or acting in the capacity of a clerk, officer, or servant
>
> **(ii)** He must willfully and with intent to defraud-
>
> **(a)** destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to, or is in possession of, his employer; or has been received by him for or on behalf of his employer; or
>
> **(b)** make or abet the making of any false entry in, or omit or alter or abet the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security, or account.

'Willfully' means that the act is done deliberately and intentionally, not by accident or inadvertency, so that the mind of the person who does the act goes with it. The term 'with intent to defraud' means either an intention to deceive and by means of deceit to obtain an advantage or an intention that injury should befall some person or persons. Advantage which is intended must relate to some future occurrence or, in other words, must be of a prospective nature. Making false entries in the measurement book in order to conceal fraudulent or bogus acts, falls within the purview of section 477-A of I.P.C. It is necessary to show not merely false entries in the books of accounts, but that such false entries were made with intent to defraud. Even if the intention with which the false entries were made was to conceal a fraudulent or dishonest act previously committed, the intention will be to defraud. Making a alse document with a view to enable the persons who committed misappropriation to retain the wrongful gain which they had secured also amounts to the commission of a fraud and the act brings the case under this section.

So far as the offence under section 13(2) read with section 13(1)(c)(d) of the 1988 Act is concerned, the accusation against the petitioner is that he ommitted criminal misconduct by abusing his position as a public servant and caused loss to the Government by corrupt and illegal means and obtained pecuniary advantage of Rs.1,44,34,621/-.

The main contention raised by the learned counsel for the petitioner regarding the defect in the accused statement is that no questions were put on Ext.38, Ext.18 and Ext.C-1. Failure in drawing the attention of the accused to the incriminating evidence and inculpatory materials brought in by prosecution specifically, distinctly and separately may not by itself render the trial against the accused void and bad in law. Firstly, if having regard to all the questions put to him, he was accorded an opportunity to explain what he wanted to say in respect of prosecution case against him and secondly, such omission has not caused prejudice to him resulting in failure of justice, the trial cannot be held to be void and bad in law. The burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice. (**Ref.: Alister Anthony Pareira -Vrs.- State of Maharashtra : (2012) 2 S.C.C. 648**)

At this stage, it would not be proper to discuss in detail about the omissions of some documents in the accused statement and its effect and whether the accused has been prejudiced in any manner. As many as sixty two questions have been put in the accused statement and the petitioner has answered to each of such questions and further stated in answer to question no.61 that he had not violated any guidelines and that since he reported against the millers, the criminal case was initiated against them. At the final stage of hearing, it can be adjudicated about the effect of omission of relevant questions, if any, with respect to any particular document/documents.

Similarly, though argument has been advanced relating to the alteration of charge by the learned trial Court, it seems that initially so far as the amount is concerned, in the first, fourth and fifth charge which relates to offence under section 13(2) read with section 13(1)(c)(d) of the 1988 Act, section 477(A) of the Indian Penal Code and 120-B of the Indian Penal Code respectively, the misappropriation amount was mentioned to be Rs.1,44,747/- and vide order dated 13.07.2022, the same was corrected to Rs.1,44,34,621/-. The order dated 13.07.2022 of the learned trial Court indicates that one petition was filed by the learned Special Public Prosecutor prayed for rectification of the amount of misappropriation as mentioned in the charges and the learned counsel representing the parties did not object to the same rather fullyadmitted about the arithmetic mistake and accordingly, the learned trial Court after perusing the charge sheet, came to hold that it is an arithmetic mistake or which can be turned as typographical mistake and hence, on the consent of both the sides, the same needed to be rectified and accordingly, the amount of Rs.1,44,747/- was corrected as Rs.1,44,34,621/-. There is no dispute that under section 216 of Cr.P.C., the Court has power to alter the charge or add to any charge at any time before the judgment is pronounced. Sub-section (3) of section 216 states that if the alteration or addition to a charge is such that proceeding immediately with the trial is not likely in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

In the case in hand, when the learned counsel for the parties did not object and fully admitted about the arithmetic mistake and the learned trial Court held that there would be no prejudice caused to the parties if the amount is corrected, passed the order for correcting the amount in the charge portion as per order dated 13.07.2022, the contention of the learned counsel for the petitioner at this stage that the alteration of the charge has not happened in consonance with section 216 Cr.P.C. and there is infraction of the provision of law, is very difficult to be accepted, however it is kept open to be adjudicated at the final stage of hearing of the criminal appeal.

Similarly, though the learned counsel pointed out certain error in the sanction order, however section 19(3) of 1988 Act clearly states that no finding, sentence or order passed by a Special Judge shall be reversed or altered, inter alia, by a Court in appeal on the ground of any error, omission or irregularity in the sanction order unless in the opinion of the Court, a failure of justice had, in fact, been occasioned thereby.

7. After carefully and meticulously analyzing the finding of the learned trial Court, the submission made by the learned counsel for the respective parties and the evidence on record, I am of the humble view that at this stage, it cannot be said that it is a case of no evidence against the petitioner. Whether the evidence available

on record would be sufficient to uphold the impugned judgment and order of conviction of the petitioner and whether on the basis of defects pointed out by the learned counsel for the petitioner in the accused statement, in the framing of charge and in the sanction order etc. or on the basis of points raised by the learned counsel for the petitioner, benefit of doubt is to be extended to the petitioner is to be adjudicated at the final stage when the appeal would be heard on merit. Giving any finding on the merits of the case is likely to cause prejudice to either of the parties. This Court will certainly have a duty to make deeper scrutiny of the evidence and decide the acceptabilityor creditworthiness of the evidence of witnesses at the final stage of hearing of the appeal on merit. At this stage, reappreciation of evidence by conducting detailed analysis and trying to pick up lacunas or loopholes in the case of the prosecution is not permissible. No extraordinary circumstance/material is shown to this Court for granting the desired relief to the petitioner.

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

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

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

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2024 (I) ILR-CUT-512

K.R. MOHAPATRA, J.

CMP NO. 1256 OF 2023

FAKIR MOHAN LENKA …….Petitioner

-V-

B.D.O. & SUCCESSOR-IN-OFFICE, SALIPUR BLOCK & ORS. ……Opp.Parties

CODE OF CIVIL PROCEDURE, 1908 – Order XXVI, Rule 9 – Whether wrong appreciation of the material on record by Trial Court is a justified

ground to depute a survey knowing commissioner at the appellate stage? – Held, No – When ample materials are available on record to identify the land and to answer the queries, there is no necessity to further depute a survey knowing commissioner to answer the same.
(Para 6)

Case Laws Relied on and Referred to :-

1. 1994 (I) OLR 205 : Bishnu Charan Sahu Vs. Paramananda Sahu & Ors.
2. 2016 (I) OLR 624 : Nakula Sahu Vs. Suresh Chandra Beherdolai.

For Petitioner : Mr. Abinash Routray
For Opp.Parties : Mr. Swayambhu Mishra, ASC

JUDGMENT Heard & disposed of on : 03.01.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 11th July, 2023 (Annexure-6) passed by learned Additional District Judge, Salipur in RFA No.97 of 2011 is under challenge in this CMP, whereby an application filed by the Plaintiff No.1-Petitioner under Order XXVI Rule 9 C.P.C. has been rejected.

3. Mr. Routray, learned counsel for the Petitioner submits that the suit has been filed for permanent and prohibitory injunction. The Plaintiffs are the recorded tenants of Plot Nos.1389 and 1390. A pucca road was constructed adjacent to the land of the Petitioner over Plot No.1396 encroaching upon his land. Hence, the suit was filed for the aforesaid relief. The suit being dismissed, the Petitioner preferred the appeal, which is pending in the Court of learned Additional District Judge, Salipur in RFA No. 97 of 2011. During pendency of the suit, the Plaintiffs have adduced evidence in support of their case. They also examined a private Amin to show that there is an encroachment over the suit plot by the Government in constructing a road. The said report was disbelieved on the ground that it was not signed by the local people and boundary tenants. In order to ascertain that there is an encroachment over the suit property, an application under Order XXVI Rule 9 C.P.C. was filed before learned Appellate Court and the impugned order under Annexure-6 has been passed. It is his submission that an application under Order XXVI Rule 9 C.P.C. is maintainable at the appellate stage in view of the ratio decided in the case of **Bishnu Charan Sahu –v- Paramananda Sahu and others**, reported in 1994 (I) OLR 205, wherein at paragraph-6 it is held as under:

> *"6. A survey-knowing commissioner is deputed for local investigation for the purpose of elucidating the question as to whether the disputed land appertains to a particular survey plot or plots. His report is evidence in the case and forms part of the record. Such evidence is usually collected during trial of a suit In a given case if such evidence was essential but has not been led during trial of the suit, and it is sought to be led in appeal, it would be by way of additional evidence. As to when either party to an appeal is entitled*

to produce additional evidence, the relevant provision is Order 41, Rule 27 of the Code. Under Clause 1(b) of the said rule the appellate Court has power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for any other 'substantial cause'. An appellate Court may be able to pronounce judgment on the materials already on record but may still consider additional evidence necessary in the interest of justice to pronounce a satisfactory judgment. In such a case paramount consideration being ends of justice, admission of additional evidence is for meeting a 'substantial cause'. Further more if additional evidence sought to be introduced in appeal has a direct bearing on the main issue involved in the case, a party should normally be permitted to adduce additional evidence unless he is guilty of laches. If an appellate Court felt that the evidence of survey-knowing commissioner after local investigation, or opinion of a handwriting expert after comparison, is required in the interest of justice, there can be no legal impediment for appellate Court to permit admission of additional evidence and ultimately utilize the same for final disposal of the appeal. But in such a case the appellate Court has in compliance of Rule 28, to retain the appeal and either to take such evidence itself or direct the trial Court or even any other subordinate Court to take such evidence and send it to the appellate Court who can utilise the same while finally disposing of the appeal.

3.1 He also relied upon the decision of this Court in the case of **Nakula Sahu –v- Suresh Chandra Beherdolai**, reported in 2016 (I) OLR 624, which also reiterates the aforesaid ratio. Learned Appellate Court rejected the petition only on the ground that a Survey Knowing Commissioner should not be deputed to collect the evidence for a party and discretion of the Court can be exercised only when it finds difficulty in passing an effective decree on the available evidence. It is also erroneously held by learned Appellate Court that no such material was placed before the Court. Hence, prayer of the Petitioner to depute a Survey Knowing Commissioner was not entertained. It is his submission that a Survey Knowing Commissioner can only clarify the dispute between the parties, which is essentially a boundary dispute. This aspect was completely brush aside by learned Appellate Court while adjudicating the matter. Hence, he prays for setting aside the impugned order under Annexure-6 and to direct learned Appellate Court to depute a Survey Knowing Commissioner to answer the questionnaire as per the Schedule in the petition under Order XXVI Rule 9 C.P.C.

4. Mr. Mishra, learned Additional Standing Counsel vehemently objects to the same. It is his submission that the land was measured by the Tahasil Amin in presence of the Plaintiff No.1-Petitioner and the report has been exhibited as Ext.B-I. The Plaintiffs have also examined a private Amin on their behalf, but he did not support their case as observed by learned trial Court in the judgment passed in the suit. In order to patch of the lacunae in their case, such an application has been architectured by the Plaintiffs. Hence, learned Appellate Court has rightly observed that process of the Court cannot be used to procure evidence for a party.

4.1 Mr. Mishra, learned Additional Standing Counsel draws attention of this Court to the following observation made by learned trial Court in the judgment passed in the suit.

> *"D.W.2 is the sarpanch of the locality. During his cross examination he has stated that on 13.5.2002, the plaintiffs' plot No. 1389 and 1390 were measured in his presence. Subsequently, Tahasil Amin had measured on 21.12.2008 during pendency of the case and the report of the Tahasil Amin is marked as Ext.B-I. During both these measurement he was present. He has stated that the demarcation is made on 13.5.2002 and measurement made on 21.12.2008 gave the same result and as per the measurement by Tahasil Amin the concrete work has been done over the Govt. road plot and no encroachment has been made."*

He, therefore, submits that when the witness examined on behalf of the Plaintiffs did not support their case, deputation of a Survey Knowing Commissioner at this stage will be a travesty of law and will certainly prejudice the Defendants. Hence, he prays for dismissal of CMP.

5. Considering the rival contentions of the parties and on perusal of the record, it appears that the Petitioner filed petition under Order XXVI Rule 9 C.P.C. with the following questionnaire.

SCHEDULE

Points to be answered by the Civil Court Commissioner

1. Whether the Settlement/Consolidation Authorities prepared the Map of Hal Plot Nos. 1394, 1395, 1389 and 1390 correctly as per the entitlement of the owners of the said land?

2. Whether the length of Hal Plot No.1394 from East to West has been enhanced to 150 Kadi from 120 Kadi?

3. Whether there is existence of "Bhagabata Ghara" over Plot No. 1395 which is just adjacent to the village road?

4. Whether any portion of the land of the Plaintiffs in Plot No.1389 and 1390 have been included in Village road?

6. There is nothing on record to suggest that the Plaintiffs could not have adduced evidence before learned trial Court on those issues/subject matter. Mr. Routray, learned counsel for the Petitioner, however, submits that evidence has been adduced on the aforesaid subject matter before learned trial Court, but it was erroneously disbelieved/ignored by learned trial Court. If that be so, learned Appellate Court can re-appreciate the evidence available on record at the time of adjudication of the appeal. Further, the land was measured by the Tahasil Amin in presence of the parties. The report has also been exhibited as Ext.B-I. The Plaintiffs have also examined a private Amin and report along with map and field book etc. has been exhibited as Exts. 7, 8, 9 and 10. When ample materials are available on record to identify the land and to answer the questionnaire, as quoted above, there is no necessity to further depute a Survey Knowing Commissioner to answer the same. Wrong appreciation of the materials on record by learned trail Court cannot be a ground to depute a Survey Knowing Commissioner at the appellate stage.

7. In that view of the matter, this Court is of the considered opinion that learned Appellate Court has committed no error in rejecting the petition under Order XXVI Rule 9 C.P.C. Hence, the CMP being devoid of any merit stands dismissed.

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2024 (I) ILR-CUT-516

K.R.MOHAPATRA, J.

W.P.(C) NO.35289 OF 2023

AISHWARYA SAHOO ....Petitioner

-V-

GOVERNMENT OF INDIA & ANR. ...... Opp.Parties

PASSPORT ACT, 1967 – Section 6(2)(f) r/w office memorandum dated 10th October, 2019, para 5(VI) – An FIR was lodged against the petitioner – No charge sheet has been submitted pursuant to the said FIR – Whether it amounts to pendency of criminal case as per the provision U/s. 6(2)f of the Act? – Held, No. (Para 10)

Case Law Relied on and Referred to :-

1. AIR Online 2023 AP 112 : Venkateswara Rao Maladi Vs. The Regional Passport Officer.

For Petitioner : Ms. Sujata Jena

For Opp.Parties : Mr. Prasanna Kumar Parhi, DSGI & Mr. D.R.Bhokta, CGC

JUDGMENT Heard & Disposed of on : 08.01.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Petitioner in this writ petition seeks to set aside the letter dated 4th October, 2023 (Annexure-6) issued by the Regional Passport Officer, Bhubaneswar, Odisha-Opposite Party No.2 directing the Petitioner to obtain the order from the concerned criminal Court allowing him to go abroad and to submit the same along with the prescribed undertaking before the Passport Authority for renewal of her passport.

3. Ms. Jena, learned counsel for the Petitioner submits that the Petitioner was issued with a passport bearing Number W5519561. It was issued on 24th November, 2022 and was valid upto 23rd November, 2023. Accordingly, the Petitioner made an application for renewal of her passport. Considering her application, letter under Annexure-6 has been issued.

4. It is her submission that the Petitioner had obtained a loan from the Canara Bank. Alleging misutilization of the money for which it was obtained, an FIR was lodged on 17th August, 2021 (Annexure-1) against her. Till date, no charge sheet

has been submitted pursuant to the said FIR. In view of the above, it cannot be said that a criminal case is pending against the Petitioner. Thus, the provision under Section 6(2) (f) of the Passport Act, 1967 (for brevity 'the Act') has no application to the case of the Petitioner. Hence, she prays for a direction to the passport Authority to consider the application for renewal of passport without insisting upon the restriction under Section 6(2) (f) of the Act.

5. Mr. Parhi, learned DSGI along with Mr. Bhokta, learned CGC submits that admittedly an FIR has been lodged against the Petitioner and it is under investigation. Thus, she is required to submit an order from the concerned criminal Court allowing her to move abroad. In absence of such document, it would be difficult on the part of the Regional Passport Authority to take a decision on renewal of her passport.

6. Considering the rival contentions of the parties and on perusal of the record, this Court feels it proper to go through Section 6(2) of the Act, which reads as under:

> *"6. Refusal of passports, travel documents etc-*
> *(1) xxx xxx xxx xxx*
>
> *(2) Subject to the other provisions of this Act, the passport authority shall refuse to issue a passport or travel document for visiting any foreign country under clause (c) of sub-section (2) of section 5 on any one or more of the following grounds, and on no other ground, namely: -*
>
> *(a) that the applicant is not a citizen of India.,*
>
> *(b) that the applicant may, or is likely to, engage outside India in activities prejudicial to the sovereignty and integrity of India.,*
>
> *(c) that the departure of the applicant from India may, or is likely to, be detrimental to the security of India;*
>
> *(d) that the presence of the applicant outside India may, or is likely to, prejudice the friendly relations of India with any foreign country;*
>
> *(e) that the applicant has, at any time during the period of five years immediately preceding the date of his application, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years;*
>
> *(f) that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India;*
>
> *(g) that a warrant or summons for the appearance, or a warrant for the arrest, of the applicant has been issued by a court under any law for the time being in force or that an order prohibiting the departure from India of the applicant has been made by any such court;*
>
> *(h) that the applicant has been repatriated and has not reimbursed the expenditure incurred in connection with such repatriation;*
>
> *(i) that in the opinion of the Central Government the issue of a passport or travel document to the applicant will not be in the public interest."*

7. Section 6(2)(e) of the Act deals with issuance of passport or travel document when during last five years of making such application the applicant is convicted in an offence involving moral turpitude and is sentence to undergo imprisonment for more than two years. Section 6(2)(f) of the Act deals with a situation where the applicant is facing a criminal trial. In the case of **Vangala Kasturi Rangacharyulu –v- Central Bureau of Investigation**, Hon'ble Supreme Court held as under:

> *"the refusal of a passport can be only in the case where applicant is convicted during the period of 05 years immediately preceding the date of application for an offence involving moral turpitude and sentenced w imprisonment for not less than two years"*

8. In the aforesaid case law, Hon'ble Supreme Court has dealt with and explained the scope of Section 6(2)(e) and Section 6(2)(f) of the Act. The legal position has also been clarified by the High Court of Andhra Pradesh in the case of **Venkateswara Rao Maladi –v- The Regional Passport Officer**, reported in AIR Online 2023 AP 112, in which it is held as under:

> *"**23**. The Madhurai Bench of Madras High Court in J. Mathanagopal v. The Regional Passport Officer held as extracted hereinunder:*
>
> *"19. It is not in dispute that the case that is pending before the Judicial Magistrate, is yet to be taken cognizance by the Sessions Court and the case is still pending before the Judicial Magistrate in P.R.C. No. 32 of 2016 and as such, it cannot be termed to be a pendency of criminal case. In view of the same, the provisions of the Indian Passports Act, 1967 may not be attracted. While that being so, it would not be appropriate to direct the petitioner to approach the "concerned court" to obtain an order by way of a direction to enable him to get the relief before the passport authorities."*
>
> ***24**. Learned counsel for the petitioner placed on record the Office Memorandum No.VI/401/1/5/2019 dated 10.10.2019 issued by the PSP Division, Ministry of External Affairs, Government of India, before this Court. In the said Office Memorandum, Point No.6 is extracted hereinunder:*
>
> *"(vi) In case where the secondary Police Verification is also 'Adverse', it may be examined whether the details brought out in the police report match the undertaking submitted by the applicant. It may be noted that mere filing of FIRs and cases under investigation do not come under the purview of Section 6(2)(f) and that criminal proceedings would only be considered pending against an applicant if a case has been registered before any Court of Law and the court has taken cognizance of the same."*
>
> ***25**. xxxx xxxx xxxx xxxx*
>
> ***26. Considering the above settled law and the Office Memorandum No. VI/401/1/5/2019 dated 10.10.2019 issued by the Government of India, this Court has no hesitation to hold that Section 6(2)(f) of the Passport Act, 1967 would arise when there is pending proceedings before the Criminal Court after cognizance is taken."***

9. Para-5(vi) of the Office Memorandum dated 10th October, 2019 issued by the Ministry of External Affairs, Government of India, reads as under:

> *"(vi) In case where the secondary Police Verification is also 'adverse', it may be examined whether the details brought out in the police report match the undertaking submitted by the applicant. <u>It may be noted that mere filing of FIRs and cases under</u>*

> *investigation do not come under the purview of Section 6(2)(f) and that criminal proceedings would only be considered pending against an applicant if a case has been registered before any Court of law and the court has taken cognizance of the same.*"
> *(Emphasis supplied)*

10. Upon a close reading of the provision under Section 6(2) of the Act as well as the case laws cited and also Office Memorandum dated 10th October, 2019, there cannot be any iota of doubt that if in a case pending before any criminal Court, the judicial Magistrate has not taken cognizance of the offences, it cannot be said to be a 'case pending'. It has also been clarified in the office memorandum dated 10th October, 2019. In the instant case, no charge sheet has been submitted against the Petitioner in the aforesaid criminal case. As such, this Court does not find any legal impediment to consider the application of the Petitioner for renewal of his passport.

11. On perusal of the order passed in W.A. No.1663 of 2022, it appears that the Hon'ble Division Bench has not discussed the legal aspect of the order of the Collateral Bench. Thus, I am of the considered opinion that this writ petition can be considered independently bereft of the order passed in W.A. No.1663 of 2022.

12. Availability of a statutory remedy is not a bar for this Court to exercise its discretion under Article 226 of the Constitution of India, more particularly when a legal interpretation is involved.

13. In view of the discussion made above, this Court has no hesitation to set aside the letter under Annexure-6. Since the application for renewal of passport is still pending for consideration, it should be considered keeping in mind the discussion and observation made above.

14. Accordingly, the writ petition is disposed of with a direction that application of the Petitioner for renewal of passport bearing Registration No. W5519561 shall be considered without insisting upon getting an order/NOC/order from the competent criminal Court as required under Annexure-6.

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2024 (I) ILR-CUT-519

K.R. MOHAPATRA, J.

CMP NO. 1292 OF 2023

PRAVA DAS & ORS. ……..Petitioners

-V-

AKSHYA KUMAR SWAIN & ANR. …….Opp.Parties

(A) CODE OF CIVIL PROCEDURE, 1908 – Order VII Rule 11(d) r/w Section 19(1)(C) & Section 67 of Orissa Land Reforms Act, 1960 – The petitioner/plaintiff prays for a decree declaring the partition effected U/s. 19(1)(C) of OLR Act as, illegal and void – Whether the Civil Court

has Jurisdiction to adjudicate the same in view of the bar U/s. 67 of the OLR Act? – Held, Yes – When there is a procedural error committed by the statutory authority in deciding a matter under a special statute the civil court has Jurisdiction to adjudicate it, even if the suit is barred under the statute. (Paras 10-11)

(B) CONSTITUTION OF INDIA, 1950 – Article 227 – Whether civil miscellaneous petition under this Article is maintainable against an order passed U/o. VII Rule, 11 CPC passed by the revisional court? – Held, Yes – As it does not amount to decree U/s. 2(2) of CPC. (Para 10)

Case Laws Relied on and Referred to :-

1. (2022) 8 SCC 633 : Frost International Limited Vs. Milan Developers & Builders Pvt. Ltd. & Anr.
2. 1974 (I) CWR 475 : Sudarsan Patra Vs. Dayanidhi Mishra.
3. 2014 (I) CLR 548 : Smt. Parbati Mallick Vs. Laxman Mishra & Ors.
4. OLR Full Bench (1975) 333 : Magulu Jal & Ors. Vs. Bhagaban Rai & Ors.
5. (2020) 7 SCC 366 : Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) dead through Legal Representatives & Ors.

For Petitioners : Mr. Khetra Mohan Dhal
For Opp.Parties : Mr. Susanta Kumar Dash

JUDGMENT Heard & Disposed of on : 16.01.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Memo of appearance of Mr. Dash, learned counsel for Opposite Parties filed in Court is taken on record.

3. Order dated 25th July, 2023 (Annexure-9) passed by learned 3rd Additional District Judge, Cuttack in Civil Revision No.3 of 2023 is under challenge in this CMP, whereby order dated 18th January, 2023 (Annexure-7) passed by learned 5th Additional Senior Civil Judge, Cuttack in Civil Suit No. 112 of 2019-I, has been set aside.

4. Civil Suit No.112 of 2019-I has been filed for the following reliefs.

"27. That the Plaintiffs therefore pray :

A) That a decree declaring the partition effected in Case no.37 of 2016 U/s 19 (1)(C) of the Orissa Land Reforms Act to be without jurisdiction, illegal and void may be passed;

B) That a decree declaring the registered sale deed Nos.2202 and 2203 D.6.7.2018 and Sale deed no.2586 D.10.8.2018 of the Registering Officer, Jagatpur to be illegal, invalid and not binding against the Plaintiffs may be passed;

C) That a decree for perpetual injunction may be passed against D. nos.5 and 6 restraining them from coming upon the disputed property described in Schedule – 'A' below and making any construction thereon;

D) That a decree for costs of the sit may be passed against the defendants;

E) That the Plaintiffs may be granted such other relief or reliefs to which they may be found entitled under law and equity."

5. On receiving summons, Defendants appeared. Defendant Nos.5 and 6 filed an application under Order VII Rule 11(d) CPC to reject the plaint on the ground that civil Court has no jurisdiction to grant relief in respect of validity of an order passed under Section 19(1)(c) of the Odisha Land Reforms Act, 1960 (for short the 'OLR Act'). Plaintiffs filed objection to the same. Learned trial Court considering the case of the parties, rejected the petition, vide order under Annexure-7. Assailing the same, the Defendant Nos. 5 and 6 preferred Civil Revision No.3 of 2023 and the impugned order has been passed under Annexure-9 setting aside the order passed under Annexure-7 and granting liberty to the Plaintiffs-Petitioners to redress their grievances against the order passed by the Tahasildar, Tangi-Choudwar under Section 19(1)(c) of the OLR Act before competent appellate authority under the said Act.

6. The matter was listed on 1st December, 2023 for admission. On the said date, Defendant Nos.5 and 6 (Opposite Parties herein) entered appearance through Caveat. A preliminary objection was raised with regard to maintainability of a CMP (under Article 227 of the Constitution of India) against an order rejecting a plaint.

7. Mr. Dhal, learned counsel for the Petitioners, in response to this said objection, relied upon a decision in the case of **Frost International Limited Vs. Milan Developers and Builders Pvt. Ltd. and another**, reported in (2022) 8 SCC 633, wherein it is held as under:-

"27. Therefore, we hold that the High Court was not right in observing that the Revisional Court had exceeded its jurisdiction and it could not have allowed the application filed under Order 7 Rule 11 CPC and thereby reversed the order of the trial court and finally disposed of the suit. In fact, the High Court has failed to appreciate the second proviso to Section 115 CPC (Orissa Amendment) in its true perspective. The Revisional Court, being the High Court or the District Court, as the case may be, can reverse an order which would finally dispose of the suit or other proceeding. That is exactly what has been done by the Revisional Court being the District Court in the petition being CRP No. 5 of 2012.

xx xx xx

31. No doubt rejection of a plaint is a decree within the meaning of Section 2(2)CPC and an appeal lies from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeals from a decision of such court. However, it must be borne in mind that when a Revisional Court rejects a plaint, in substance, an application filed under Order 7 Rule 11 is being allowed. Under such circumstances, the remedy by way of a writ petition under Article 227 of the Constitution could be availed and Respondent 1/the plaintiff has resorted to the said remedy in the instant case; although if the plaint had been rejected by the trial court i.e. court of original jurisdiction, it would have resulted in a right of appeal under Section 96 CPC"

(Emphasis supplied)

In view of the above, this Court while holding the CMP to be maintainable, issued notice to the Opposite Parties and granted interim order.

8. Mr. Dhal, learned counsel for the Petitioners submits that learned revisional Court committed error of law in allowing the Revision Petition and thereby rejecting the plaint. Although the relief claimed in Para-27(A) of the plaint may be subject to the jurisdiction of revenue Court under Section 58 of the OLR Act, but rest of the reliefs cannot be entertained by a revenue Court. He also relied upon a decision in the case of **Sudarsan Patra Vs. Dayanidhi Mishra**, reported in 1974 (I) CWR 475, wherein this Court held as under:-

> *"7. The next point urged by Mr. Mishra is that the suit out of which this appeal arise is not maintainable in view of the provisions contained in section 193(b) of the Orissa Tenancy Act. This contention of Mr. Mishra is also without any force. Claim for arrear salary and for recovery of the amounts advanced by the plaintiff as loan to the defendant cannot be entertained in a rent court. By no stretch of imagination, it can be said that the plaintiff's suit for recovery of the aforesaid sums is cognizable by a rent court, Law is well settled that the civil court has jurisdiction to entertain all suits, except those whose cognizance by it is either expressly or by implication barred. Section 193(b) of the O.T. Act, in my opinion does not either expressly or by implication bar the cognizance of the suit instituted by the present plaintiff. That being so, it cannot be said that the civil court has no jurisdiction to entertain the present suit as contended by Mr. Mishra. <u>It is also well settled that when a part of the plaintiff's claim is cognizable by a civil court and the other part is cognizable by a revenue court, the civil court will have the jurisdiction to entertain the suit for the whole claim, even though a part of it is cognizable by a revenue court</u>. Thus, under no circumstances it can be said that the plaintiff's suit is not maintainable in the civil court. No other point has been raised before me."* *(Emphasis supplied)*

He, therefore, submits that even though prayer made at Para- 27(A) of the plaint may be subject to the jurisdiction of a revenue Court, but the rest part of the relief claimed in the suit can be adjudicated by the civil Court. Thus, it is only the civil Court which can take cognizance of the entire relief claimed in the suit. He further submits that there is an allegation of fraud and infraction of procedure by the revenue Court while entertaining the application under Section 19(1) (c) of the OLR Act. Hence, there is no bar under law for the civil Court to entertain a suit in view of the provision under Section 9 CPC. In the instant case, it is alleged that the Plaintiffs who are successors of one of the pre-deceased co-sharers, namely, Prabir Kumar Das, were neither signatories to the memorandum of partition nor to the order passed by the revenue Officer. As such, civil Court has the jurisdiction to entertain the suit. In support of his submission, he relied upon the case of **Smt. Parbati Mallick Vs. Laxman Mishra and others**, reported in 2014 (I) CLR 548, wherein it is held as under:-

> *"8. It is no more res integra that fraud vitiates all solemn actions and finding of fraud is a finding of mixed question of facts and law. It is also well settled that civil court's jurisdiction is not ousted if procedural irregularities in a case conducted by a tribunal or a statutory authority are well proved before it and the civil court has jurisdiction to*

> *decide the said question which is vested in it under section 9 of the C.P.C. It is also well settled that when fraud is revealed, a court has inherent power to recall its order as fraud and justice can never dwell together. A judgment of a court cannot be allowed to stand, if it has been obtained by playing fraud. The Supreme Court in the case of Indian Bank v. M/s. Satyam Fibres (India) Pvt. Ltd., AIR 1996 SC 2592 has laid down that the judiciary in India possesses inherent power to recall its judgment or order if it is obtained by fraud on Court and the above principles will also apply to statutory Tribunal."*

He, therefore, submits that jurisdiction of the civil Court is not ousted when there is procedural irregularity in adjudicating a matter by any Tribunal or statutory authority and fraud has been practised by a party to obtain the order before the Court of limited jurisdiction or Tribunal under a Special statute. It is his submission that Section 19(1)(c) of the OLR Act reads as under:-

> *"19.* ***Partition among co-sharer raiyats how to be effected****-*
> *(1) No partition of a holding among co-sharer raiyats shall be valid unless made by*
> *xx xx xx*
> *(c) an order of the Revenue Officer in the manner prescribed, on mutual agreement."*

Corresponding Rule 19A, the Orissa Land Reforms (General) Rules, 1965 (for brevity 'the Rules') provides the procedure to deal with an application under the Section 19(1)(c) of the OLR Act. Relevant portion of Rule 19A necessary for our discussion reads as under:-

> *"19A (3) Such an application shall be made, to the Revenue Officer by all the co-sharer raiyats either personally or through their authorised agents.*
> *xxx xxx xxx*
> *19A (6) Before passing orders, the Revenue Officer shall obtain the signature or the thumb impression of all co-sharer raiyats or their authorised agents on the body of the record signifying their consent to partition the holding on mutual agreement."*

Since the Plaintiffs-Petitioners are neither parties in the petition under Section 19(1)(c) of the OLR Act nor signatories to the so-called memorandum of partition and the order passed by the revenue Officer under Section 19(1)(c) of the Act, civil Court has jurisdiction to entertain a suit of present nature and examine the same. He also placed reliance on a decision of the Full Bench of this Court in the case of **Magulu Jal and others Vs. Bhagaban Rai and others**, reported in OLR Full Bench (1975) 333 in support his submission. In view of the above, he submits that it is only the civil Court, which can take cognizance and adjudicate the suit. Learned revisional Court exceeding its jurisdiction has passed the impugned order granting liberty to the Petitioners to approach the appellate authority under the OLR Act. He, therefore, prays for setting aside the impugned order and to hold that the suit is maintainable.

9. Mr. Dash, learned counsel for Opposite Parties refutes the submission made above. It is his submission that the ratio in **Frost International Limited (supra)** may not be applicable to the instant case, as the issue before the Hon'ble Supreme

Court was whether the revisional Court has jurisdiction to reject a plaint in exercise of power under Order VII Rule 11 CPC. In the instant case, no such issue is raised. He, however, submits that the ratio decided in the said case is binding and holds the field.

9.1 It is further submitted that the pleadings in the plaint have to be read as a whole while considering the application under Order VII Rule 11 CPC. If the averments made in the plaint are read as a whole, it unerringly leads to the conclusion that there was a partition recorded by the revenue Court under Section 19(1)(c) of the OLR Act. Statutory remedy of appeal under Section 58 of the OLR Act is efficacious to deal with the objection raised by the Plaintiffs in respect of the order passed under Section 19(1)(c) of the OLR Act. The civil Court has jurisdiction to decide the matter when the Plaintiff is remediless. But in the instant case, an efficacious statutory remedy is available to the Plaintiffs-Petitioners to get the order passed under Section 19(1)(c) of the OLR Act set aside. Rest of the reliefs claimed in the plaint are only consequential to the declaration, if any, that the order under Section 19(1)(c) of the OLR Act is illegal. Unless and until the order under Section 19(1)(c) of the OLR Act is set aside, no further relief can be granted in the suit. It is his submission that after partition was recorded under Section 19(1)(c) of the OLR Act, the co-sharers got the land mutated in their names. Accordingly, Defendant Nos.1 to 3 executed the sale deed in question in favour of Defendant Nos.5 and 6. No relief either to declare the sale deed in favour of the Opposite Parties to be void and illegal or permanent injunction against them can be granted unless the order recording partition is set aside. Thus, the relief claimed under Paras-27(B) and 27(C) of the plaint are dependent upon the outcome of the prayer made in para- 27 (A). In that view of the matter, the plaint has been rightly rejected. If the competent revenue Court sets aside the order passed under Section 19(1)(c) of the OLR Act, the Plaintiffs may file a suit for rest of the reliefs and not before that. He further submits that while adjudicating a petition under Order VII Rule 11 CPC, a duty is cast upon Court to determine whether the plaint discloses a cause of action by scrutinizing the averments made in the plaint read in conjunction with the documents relied upon, or whether the suit is barred by any law. In the instant case, the revisional Court scrutinizing the documents relied upon by the Plaintiffs has come to a conclusion that the relief claimed in the suit is barred under law in view of the bar under Section 67 of the OLR Act. Reliance is also placed in the case of **Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) dead through Legal Representatives and others**, reported in (2020) 7 SCC 366 in which it is held as under:-

> *"23.11. The test for exercising the power under Order 7 Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. This test was laid down in Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I [Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512] which reads as : (SCC p. 562, para 139)*
>
> *"139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the*

> *said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed."*

He, therefore, submits that learned revisional Court has committed no error much less any jurisdictional error in passing the impugned order. Hence, he prays for dismissal of the CMP.

10. Heard learned counsel for the parties; perused the case record as well as case laws cited by learned counsel for the parties. This Court, while issuing notice in the matter, recorded a finding that in view of the ratio in **Frost International Limited (supra)**, the CMP is maintainable against an order passed under Order VII Rule 11 CPC by the revisional Court. It does not amount to decree under Section 2(2) CPC. However, on perusal of the impugned order under Annexure-9, it appears that learned revisional Court has not recorded any finding rejecting the plaint. It has only observed as under:-

> *".... Hence taking the above facts and circumstances and intention of Legislature of the Act to avoid multiplicity of proceeding and the decision of the Hon'ble Court in the judgments cited supra, this Court is of the view that the bar u/s. 67 of the OLR Act is squarely applicable to the present case and as such in the interest of justice the plaint filed by the plaintiffs in CS No.112 of 2019 should be rejected as per Order 7, Rule 11(d) CPC. ....."*

But there is no finding allowing such application. While setting aside the impugned order under Annexure-9, the revisional Court only granted liberty to the Plaintiffs to raise their grievance against order passed by the Tahasildar, Tangi-Choudwar under Section 19(1)(c) of the OLR Act before the competent appellate authority for adjudication. No specific finding either rejecting the plaint or allowing application under Order VII Rule 11(d) CPC has been recorded by the revisional Court.

10.1. Section 67 of the OLR Act reads as under:-

> *"67. **Bar of jurisdiction of Civil Courts**.—*
> *Save as otherwise expressly provided in this Act, no Civil Court shall have jurisdiction to try and decide any suit or proceeding so far as it relates to any matter which any officer or other competent authority is empowered by or under this Act to decide."*

It clearly stipulates that the civil Court lacks jurisdiction to adjudicate a dispute between the parties, which the Officer or competent authority is empowered by or under the OLR Act to decide. In the instant case, Plaintiffs-Petitioners have a remedy under Section 58 of the OLR Act to file an appeal against the order under Section 19(1)(c) of the said Act. Thus, in view of the bar under Section 67 of the OLR Act, it prima facie appears that the civil Court lacks jurisdiction to adjudicate upon the relief claimed under para-27 (A) of the plaint. At the same breath it can be said, the Plaintiffs claimed that the order passed under Section 19(1)(c) of the OLR Act has been obtained by practicing fraud and without following due procedure of law. Mr. Dhal, learned counsel categorically submitted that mandatory procedure under Rule 19A (3) and (6) of the Rules were not followed while entertaining the

application under Section 19(1)(c) of the OLR Act. Neither the petition under Section 19(1)(c) was filed by all the co-sharers nor the Revenue Officer, namely, Tahasildar, Tangi-Choudwar, obtained signature of all the co-sharers, namely the Petitioners before passing the order of partition. The same can be ascertained from the documents appended to the plaint. When there is a procedural error committed by the statutory authority in deciding a matter under a special statute, the civil Court has jurisdiction to adjudicate it even if the suit is barred under the said statute. Further, in the case of **Mangulu Jal (supra)**, Full Bench of this Court categorically laid down the law as under:-

> *"20. The following principles may be laid down as well settled by the aforesaid authorities :*
>
> *(i) Exclusion of the jurisdiction of the Civil Court is not to be readily inferred. Such exclusion must either be explicitly expressed or clearly implied.*
>
> *(ii) Even if jurisdiction is so excluded, Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Civil Court would interfere if it finds the order of the special tribunal is unfair, capricious or arbitrary.*
>
> *(iii) Where a liability not existing at common law is created by statute which at the same time gives a special and particular remedy for enforcing it, a remedy provided by the statute must be followed and the Court's jurisdiction is ousted. The scheme of the particular Act is to be examined to see if remedies normally associated with actions in Civil suits are prescribed by the statute.*
>
> *(iv) The Legislature may entrust the special tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or to do something more. The Legislature shall have to consider whether there shall be an appeal from the decision of the tribunal as otherwise there will be none. In cases of this nature, the tribunal has jurisdiction to determine all facts including the existence of preliminary facts on which exercise of further jurisdiction depends. In the exercise of the jurisdiction the tribunal may decide facts wrongly or if no appeal is provided therefrom there is no appeal from the exercise of such jurisdiction.*
>
> *(v) Even in a case when the Civil Court would have jurisdiction on a finding that the special tribunal has acted beyond the scope of its authority as in point No. (ii), it cannot substitute its own decision for that of the tribunal but would give a direction to dispose of the case in accordance with law."* *(Emphasis supplied)*

11. Thus, when there is an allegation of procedural infraction is made, statutory bar to maintain a suit will not come on the way of the competent civil Court to entertain and adjudicate a suit. Learned revisional Court although noted the principles decided in **Mangulu Jal (supra)**, but has not discussed the applicability of Para- 20(ii) of the same to the instant case. Of course, an appeal under Section 58 of the OLR Act is provided against an order Section 19(1)(c) of the OLR Act, But, in view of the ratio in the case of **Sudarsan Patra (supra)** when a part of the claim of the Plaintiff is cognizable by a Civil Court and the other part is cognizable by a

revenue Court, the civil Court will have the jurisdiction to entertain the suit for the whole claim, even though a part of it is cognizable by a revenue Court. In the instant case, the petition under Order VII Rule 11 CPC is filed on the allegation that the relief against order passed under Section 19(1)(c) of the OLR Act is not cognizable by the civil Court. But, if the ratio in **Sudarsan Patra (supra)** is applied, the conclusion may be different. It is, however, submitted by Mr. Dash, learned counsel for Opposite Parties that relief claimed in para 27(B) and (C) of the plaint are consequential to the relief sought for in para- 27 (A). Thus, he submitted that unless the relief sought for in para 27 (A) is granted in favour of the Plaintiffs-Petitioners, there will be no cause of action to claim relief under para 27(B) and (C). As it appears, this aspect was neither raised nor discussed by the revisional Court. Sufficient material is not available before this Court to appreciate rival contention of both learned counsels. The real test to entertain an application under Order VII Rule 11 CPC would be to find out whether the Plaintiff will be entitled to the relief claimed in the plaint if averments in entirety made therein are accepted to be correct.

11.1. In addition to the above, learned revisional Court has not recorded any finding regarding fate of the petition under Order VII Rule 11 (d) CPC filed by Opposite Parties.

12. In view of the above, this Court feels that the matter requires fresh consideration by the revisional Court keeping in mind the discussions made above.

13. Accordingly, the impugned order under Annexure-9 is set aside and the matter is remitted to learned 3rd Additional District Judge, Cuttack to adjudicate Civil Revision No.3 of 2023 afresh giving opportunity of hearing to the parties concerned keeping in mind the discussions made hereinabove.

14. With the aforesaid observation and direction, the CMP is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

15. Interim order dated 1st December, 2023 passed in IA No.1228 of 2023 stands vacated.

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2024 (I) ILR-CUT-527

B.P. ROUTRAY, J.

FAO NO.776 OF 2014

PRASANNA KUMAR CHOUDHURY …. Appellant

-V-

THE CHAIRMAN, PARADIP PORT TRUST …. Respondent

EMPLOYEE COMPENSATION ACT, 1923 – Section 4(1) r/w Section 8 – Employer deposited ₹ 2,62,870/- towards compensation U/s. 4(1) of the

Act before adjudication of the case – The learned commissioner directed to deduct the amount which the claimant already received from the final award – Whether the direction needs interference? –Held, No – In terms of section 8 r/w 4(1) of the Act, the compensation amount deposited by the employer before adjudication is liable for deduction.
(Para 5)

Case Laws Relied on and Referred to :-

1. 1976 (1) SCC 289 : Pratap Narain Singh Deo v.Srinivas Sabata.
2. (1999) 8 SCC 254 : Kerla State Electricity Board v. Valsala K..

For Appellant : Mr. Raghunath Biswal
For Respondent : Mr. Aditya Mishra & Mr. P.S. Acharya

JUDGMENT Date of Judgment : 15.12.2023

B.P. ROUTRAY, J.

1. Present appeal by the injured-claimant is directed against order dated 27.6.2014 passed by the Commissioner for Employee's Compensation-cum-Deputy Labour Commissioner, Cuttack in W.C. Case No.218-D/2007, wherein deduction of Rs.2,62,870/- from the compensation amount has been directed towards receipt of previous amount.

2. The claimant-Appellant was serving under Paradip Port Trust and in course of his employment the accident took place on 28.04.2005 resulting sustenance of 70% loss of earning capacity.

3. The Appellant filed Workmen Compensation Case No.218-D/2007 before the learned Commissioner and upon receipt of notice,the employer-Respondent (Paradip Port Trust) deposited a sum of Rs. 2,62,870/- towards compensation in terms of Section 4(1) of the Employees Compensation Act, 1923 (hereinafter stated as "the Act").Thereafter the same was paid to the claimant on 9.5.2008. However, by objecting to the compensation amount so paid, the claimant contested the case and finally the learned Commissioner awarded Rs. 3,75,528/- in terms of Section 19 of the Act. Keeping in view the amount paid to the claimant, the learned Commissioner directed the Respondent to deposit balance amount along with interest @12% per annum.

4. The contention of the Appellant is that such deduction of the amount already paid to him is illegal and he should be paid with entire compensation amount as directed by the learned Commissioner.

5. Section 8 read with Section 4(1) of the Act makes it clear for deposit of the compensation amount by the employer before adjudication. Law is well settled that deposit of such amount towards compensation in terms of Section 8 of the Act is liable for deduction.It is also desirable under the law that compensation should be paid from the date of accident. In the case of ***Pratap Narain Singh Deo v. Srinivas***

Sabata, 1976 (1) SCC 289 and ***Kerla State Electricity Board v. Valsala K., (1999) 8 SCC 254***, it has been held by the Supreme Court that the payment of compensation would fall due from the date of accident.Therefore, it is desirable on the part of the employer to deposit the undisputed amount upon receipt of the notice.

6. In the instant case, it is not that the earlier amount was paid independently, but it is admitted that the same has been paid through the Commissioner.Therefore, by operation of the provisions contained under Section 8 of the Act, no further case is made out in favour of the claimant not to adjust such amount, already received from the Commissioner, towards compensation.

7. In the result, the appeal is dismissed.

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2024 (I) ILR-CUT-529

B.P. ROUTRAY, J.

FAO NO.312 OF 2020

PEMMI VENKATARAMANA & ANR. …….Appellants

-V-

UNION OF INDIA …….Respondent

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

Case Law Relied on and Referred to :-

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

For Appellants : Ms. D.Mahapatra

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

JUDGMENT Date of Judgment : 02.01.2024

B.P. ROUTRAY, J.

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

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

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

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

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

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

7. It is true that the journey ticket though shows travel from Visakhapatnam to Palasa, but the dead body was recovered lying at Ichhapuram Railway Station which is beyond Palasa Station and the Tribunal disbelieved the case of the claimants mainly on this ground that the deceased did not have a valid journey ticket to travel up-to Ichhapuram. The reason so assigned by the Tribunal to disbelieve bonafide journey of the deceased in the train is not found justified. It is for the reason that A.W.2 has stated in his evidence that the deceased boarded the train for travelling after purchasing the journey ticket and there may be some genuine reason for the deceased to travel beyond Palasa. For the only reason that the journey ticket only authorizes him to travel up-to Palasa would not be enough to say that he was not a bona fide passenger at Ichhapuram.

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

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

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2024 (I) ILR-CUT-531

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO. 40400 OF 2021

RENU KESHARI .….Petitioner(s)

-V-

D.M, M/s.UNITED INDIAN INSURANCE CO. LTD., CTC …..Opp.Party(s)

THE MOTOR VEHICLE ACT, 1988 – Section 14(2)(B)(ii) proviso & 15(1) – Validity of Driving License – Whether the DL valid and effective for a period of thirty days of its expiry as per the proviso to sub-section 2(B)(ii) of the Act? – Held, No – If the application for renewal is made within a period of thirty days of its expiry, it would be deemed to be valid for a period of thirty days, irrespective of its date of renewal – However, if such application is made beyond thirty days of such expiry, the license shall be treated as valid from the date of its renewal and during the period between the date of expiry and the date of renewal, the license shall consider to be non-effective and invalid.

(Para 12)

Case Law Relied on and Referred to :-

1. 2008(8) SCC 165 : Ram Babu Tiwari Vs. United India Insurance Co. Ltd.

For Petitioner : Mr. Mithun Das & Mr. P.S. Das.
For Opp.Party : Mr. R.C. Sahoo-1.

JUDGMENT Date of Hearing :19.10.2023 : Date of Judgment:10.11.2023

Dr. S.K. PANIGRAHI, J.

1. The Petitioner through this Writ Petition, challenges the letter dated 12.10.2021, issued by the Opp. Party, thereby rejecting the representation of the

Petitioner for settling the claim of damage and personal accident claim of her husband under Policy No. 2603003118P1155220799.

I. FACTUAL MATRIX OF THE CASE:

2. The petitioner's husband died in an ill-fated road accident on 21.04.2019, while he was proceeding towards Cantonment Road, Cuttack, along with his two daughters on his Suzuki Access Scooter bearing Regn. No.OD-33R-7797 duly insured before the Opp. Party/Company. It is also pertinent to mention here that the minor daughters of the Petitioner also sustained severe injuries in that accident.

3. In this regard, a Police Case has been registered in Cantonment Police Station vide Cantonment P.S. Case No.56, dated 21.04.2019 as against the Driver of the offending Vehicle for the offence punishable under sections 279/304(A)/337/338 of the I.P.C. After recovery from the pain, the Petitioner claimed for compensation before the Opp. Party for own damage along with personal accident of her deceased husband by following due procedure on 16.08.2019. The same has been registered as own damage claim No. 2603003119C050059001 and personal accident claim No.2603003:19C050089001.

4. The Claim of the Petitioner has been repudiated by the Opp Party due to the reason, "*The insured owner-cum-driver late Mrutunjaya Prasad Keshari was not having a valid and effective Driving license at the material time of accident* (Dt.21.01.2019)". The DL (OR0519900288438) of late Mrutunjaya Prasad Keshari was valid up to Dt.02.04.2019". The same is intimated to the Petitioner vide Letter No.704, dated 25.11.2019.

5. The Petitioner clarified the above ambiguity by her Letter, dated 24.12.2019 to the Opp. Party. However, when the Opp. Party did not consider the same, the Petitioner on 10.09.2020 shot a Legal Notice to the Opp. Party by clarifying the ambiguity by mentioning that husband of the Petitioner was possessing or valid DL, the same was valid up to 02.04.2019 and the accident/incident took place on 21.04.2019 after expiry of 19 days. It is intimated to the Opp. Party that if the DL Holder will be alive, he shall renew the same for the next term within the time stipulation, which is not barred at all as per law, i.e. Section 14(B)(II), Proviso, which is extracted herein below:

> *"Provided that every driving license shall not withstanding its expiry under this Sub-Section continue to be effective for a period of thirty days from such expiry."*

6. Therefore, under such particular facts and circumstances of the statutory provision of law, it is crystal clear that the deceased husband of the Petitioner has valid and effective driving license at the time of said accident.

7. When the Opp. Party did not pay heed towards the Legal Notice, as at Annexure-4, the Petitioner approached this Court by filing a Writ Petition bearing W.P.(C) No.27880 of 2021, for a direction to the Opp. Party to settle the claim of the petitioner and disburse the compensation amount in regard to personal accident claim

of her husband under Police as mentioned supra. On 16.09.2021, the above mentioned Writ Petition was listed before this Court and after perusing the Writ Petition, this Court was pleased to dispose of the same vide Order, dated 16.09.2021 as extracted herein below:

> *"4. Regard being had to the facts and submissions and the nature of relief sought for, the writ petition is disposed of directing the Opposite Party to dispose of the aforesaid representation of the petitioner vide Annexure-4 in accordance with the Policy of the company within a period of three months from the date of receipt of the certified copy of the certified copy of this order.*
>
> *5. Till disposal of the representation, no coercive action shall be taken against the petitioner.*
>
> *6. The petitioner is directed to supply the copy of the writ petition containing all the annexures along with certified copy of this order to Opposite Party for convenience and reference to Annexure-4."*

8. After receiving the certified copy of the Order, passed in the above mentioned Writ Petition, the Petitioner communicated the same to the Opp. Party on 22.09.2021 and after receipt of the same, the Opp. Party vide its Letter No. 737, dated 12.10.2021 communicated the Petitioner that her representation under Annexure-4 is rejected on the ground that validity of the Driving License of her husband, was expired on 02.04.2019 and the date of accident was on 21.04.2019. Thus, the Opp.Party is unable to accept the interpretation of proviso to Sub-Section (2)(B)(ii) of Section-14 of the M.V. Act.

9. Learned counsel for the petitioner submits that the Opp. Party did not comply with the order dated 16.09.2021 passed in W.P.(C) No.27880 of 2021 in letter and spirit. It is a fact that the Petitioner's husband died in a road traffic accident and the Petitioner initially claimed vide her Letter, dated 16.08.2019 and the Opp.Party vide letter dated 25.10.2019 repudiated the claim of the Petitioner on the ground of invalidity and ineffectiveness of her husband's Driving License. Thereafter, vide Annexure-4 again the Petitioner through her Legal Counsel, approached the Opp.Party by mentioning the provision U/s. 14(2)(B)(ii) of M.V. Act. But, again the Opp.Party rejected the same on a wrong interpretation of above proviso, where the grace period is 30 days after expiry of Driving License and the deceased may apply for renewal, before expiry of 30 days. But, due to ill-fate, the deceased met with a road accident on 21.04.2019, i.e. prior to 10 days to expire the grace period as mentioned in the aforesaid proviso. On the above premises, the Petitioner craves the indulgence of this Court for a direction in the manner as prayed for.

II. SUBMISSIONS OF OPPOSITE PARTY:

10. *Per contra*, learned counsel for the Opp. Party intently made the following submissions:

> (a) As alternative remedy is available to the Petitioner under common law and special statute, the writ petition in the context of present case is not maintainable and in order to

avoid the severity of law and judicial procedure, this writ petition has been filed by abusing the process of law. The Petitioner having approached this Court with unclean hands, she does not deserve to invoke the extraordinary jurisdiction of this Court.

(b) Though the Police registered Cantonment P.S. Case No.56/2019 under Sections 279/304(A)/337/338 of the I.P.C. but after investigation submitted charge-sheet under Sections 279/338/304/109 I.P.C. against Sampada Parida, the erring Driver and Niranjan Lenka, the owner of the offending vehicle for abetting the offence and arrested them and forwarded to the Court. Since the death caused due to culpable homicide is not covered under the Policy, the Petitioner is not entitled to any compensation as prayed for.

(c) It is false to allege that the Opp. Party did not consider the letter dated 24.12.2019 of the Petitioner. As a matter of fact, on receiving the said letter dated 24.12.2019, the Opp. Party under letter dated 14.01.2020 reiterated their stand taken in the letter of repudiation dated 25.11.2019, vide Annexure-3 and turned down the request of the Petitioner to review her claims, with due intimation to the Petitioner. But by suppressing this fact, the Petitioner had filed W.P.(C) No.27880 of 2021 and has repeated the same mistake in the present Writ Petition, also.

(d) Be that as it may, as the proviso to Section 14 (2) (B) (ii) of the Motor- Vehicles Act, 1988 (hereinafter referred to as "the Act") was misinterpreted in the legal notice dated 10.09.2020, the Opp. Party did not consider it prudent to reply the same, since repeated representations are forbidden under law and does not improve the case of the Petitioner. However, in response to the order dated 16.09.2021 of this Hon'ble Court in W.P. (C) No.27880 of 2021, the Opp. Party disposed of the representation of the Petitioner made under Annexure-4 of the said Writ Petition in terms of Annexure-5 of the present Writ Petition.

(e) The Opp. Party was directed to dispose of the representation of the Petitioner in accordance with the Policy of the Company. Under the Policy, a person holding an effective driving license at the time of accident is entitled to drive the vehicle insured. But in the present case, the deceased was not holding an effective driving license at the time of accident inasmuch as the same was expired on 02.04.2019, whereas the accident was taken place on 21.04.2019, i.e. 19 days after the date of expiry of his driving license. The Annexure-5 will speak for itself that the representation of the Petitioner has been disposed of in true letter and spirit of the order dated 16.09.2021 of this Hon'ble Court.

(f) While disagreeing with the interpretation of proviso to sub-Section (2) sub-clause (ii) of Section 14 of the Act as made by the Petitioner under her representation dated 10.09.2020, the Opp. Party has categorically stated that in order to take advantage of such deeming provision, the license holder has to apply for renewal of his driving license before happening of any incident giving rise to a claim under the Policy, otherwise the Company is at liberty to disown its liability for want of validity and effectiveness of the driving license.

(g) The contention of the Petitioner that the deceased- insured would have applied for renewal of his driving license after the date of accident, had he been alive, is of no consequence inasmuch as it is a contingent proposition and if such proposition is accepted, then the present claim would not have arisen and the Opp. Party would not have drag on to the litigation. Moreover, such proposition is against the true spirit of contract of insurance drawn up between the insured and the insurer and the relevant provision governing the law of renewal of a driving license.

(h) The Opp. Party being a public sector Company and being the custodian of public money have taken a bonafide decision on the claim made by the Petitioner and having found that the deceased-insured had no effective driving license at the time of accident, the Opp. Party was constrained to repudiate the claim of the Petitioner with due intimation to her. So, the Petitioner is not entitled to the any relief as claimed for.

III. COURT'S REASONING AND ANALYSIS:

11. It has been further asserted that as the law concerning renewal of driving license does not mandate that if, the application for renewal is made beyond the grace period of thirty days, the driving license would be renewed from the last date of such grace period, it is totally misconceived to allege that the driving license of the deceased was valid for a period of thirty days of its expiry. Therefore, the Opp. Party has not only disposed of the representation of the Petitioner in terms of order dated 16.09.2021 of the Hon'ble Court but also in consonance with the provisions of law governing the renewal of driving license as envisages under Section 15 of the Act.

12. In fact, Section 15(1) of the Act deals with the renewal of the driving license. According to the said provision, when an application for renewal of driving license is made, the Licensing Authority may renew the same with effect from the date of its expiry. The 1st proviso to such provision further provides that, if the application for renewal is made beyond thirty days after the date of its expiry, the license shall be renewed with effect from the date of its renewal. In other words, if the application for renewal is made within a period of thirty days of its expiry, it would be deemed to be valid for a period of thirty days, irrespective of its date of renewal. However, such application is made beyond thirty days of such expiry, the license shall be treated as valid from the date of its renewal and during the period between the date of expiry and the date of renewal, the license shall be considered to be non-effective and invalid.

13. Therefore, in order to take advantage of proviso to sub-Section (2) sub-clause (ii) of Section 14 the holder of the license has to apply for renewal of his license within a period of thirty days of its expiry. Since the provision governing the renewal of driving license does not provide that if, the application for renewal is made after expiry of grace period of thirty days, the driving license shall be renewed from the last day of such grace period of thirty days. The theory advanced by the Petitioner that her husband's driving license was valid and effective for a period of thirty days of its expiry is totally misconceived as the same is against the true spirit of first proviso to Section 15 (1) of the Act.

14. Had the deceased applied for renewal of his driving license after the date of its expiry but prior to the date of accident in question, his driving license would have been deemed to be valid at the time of accident in terms of sub-section (2) sub-clause (ii) of Section 14 of the Act, even if the same was not renewed by the time of accident. As no application for renewal was made prior to date of accident, advantage of said provision is not available to the Petitioner.

15. In **Ram Babu Tiwari v. United India Insurance Co. Ltd.**[1], the Supreme Court held:

> *"18. It is beyond any doubt or dispute that only in the event an application for renewal of licence is filed within a period of 30 days from the date of expiry thereof, the same would be renewed automatically which means that even if an accident had taken place within the aforementioned period, the driver may be held to be possessing a valid licence. The proviso appended to sub-section (1) of Section 15, however, clearly states that the driving licence shall be renewed with effect from the date of its renewal in the event the application for renewal of a licence is made more than 30 days after the date of its expiry. It is, therefore, evident that as, on renewal of the licence on such terms, the driver of the vehicle cannot be said to be holding a valid licence, the insurer would not be liable to indemnify the insured."*

16. In the present case the driving license of the deceased, who is none other than the insured himself was expired on 02.04.2019, whereas the accident took place on 21.04.2019 and by that time no application for renewal of his license was made. So, in utter disregard of the terms and conditions of the Policy the deceased-insured was driving the vehicle insured at his own risk and as the insurer of his life. Since the deceased-insured has violated the terms and conditions of the Policy, the Petitioner is precluded from deriving any benefit that flows from the Policy and cannot take advantage of the wrong committed by her deceased husband, particularly when the claim does not relate to a third party but relate to the insured himself.

17. With respect to the aforesaid discussion, this Court is not inclined to entertain the prayer of the Petitioner. This Writ Petition is, accordingly, dismissed. No order as to costs.

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2024 (I) ILR-CUT-536

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO. 20392 OF 2023

AMARNATH PRADHAN ......Petitioner(s)

-V-

PRABIR KUMAR DEY & ORS. ......Opp.Party(s)

CONSUMER PROTECTION ACT, 2019 – Sections 2(47), 39 – The deceased son of petitioner issued cheques to Opp. Party which were dishonored – The Opp. Party filed a complaint case against the petitioner as he is the only surviving class-1 legal heir – Whether the Consumer Commission has the Jurisdiction to decide the question of vicarious liability to the present petitioner ? – Held, No – The State

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1. **2008(8) SCC 165**

Consumer Commission is completely denote with Jurisdiction over the subject matter – The Opp. Party holds the liberty to file a civil suit or approach the mediation center to resolve the dispute.

For Petitioner(s) : Mr. Prafulla Kumar Rath, Sr. Adv. & Mr. S. Rath.
For Opp.Party(s) : Mr. Karunakar Jena

JUDGMENT Date of Hearing : 01.09.2023 : Date of Judgment : 20.11.2023

Dr. S.K. PANIGRAHI, J.

1. The Petitioner through this Writ Petition has challenged the order dated 22.06.2023 passed by the President, State Consumer Disputes Redressal Commission, Odisha, Cuttack in C.C No.24 of 2021, the same being completely without jurisdiction, illegal and unsustainable in the eye of law.

I. **FACTUAL MATRIX OF THE CASE:**

2. The petitioner's deceased son being a proprietor entered into a contract to supply building materials like chips, sand & boulders and provide machineries on rent to the O.P. The O.P had made certain excess payment to a sum of Rs. 1,03,08,600/-. Hence the proprietor issued 3 nos. of postdated cheques of different amounts and different dates for repayment of the same.

3. Unfortunately, the petitioner's son/proprietor expired due to a tragic car accident. The O.P on presenting such postdated cheques before the bank, the same returned dishonored on the ground of "insufficient funds" and "other customer deceased."

4. The O.P issued notice to the present petitioner U/s 138 (b) of Negotiable Instrument Act, 1881 although the present petitioner is not the author of the cheque nor anywhere a signatory to the agreement or has a buyer seller relationship with the O.P. The O.P thereafter filed Complaint Case No.24/2021 before the State Consumer Disputes Redressal Commission, Odisha claiming a sum of total Rs. 1,05,08,600/-

5. The said complaint petition being not maintainable before the aforesaid forum, was allowed vide order dated 22.06.2022. Hence challenging the same, this writ has been filed.

II. **PETITIONER’S SUBMISSIONS:**

6. Learned counsel for the Petitioner(s) earnestly made the following submissions in support of his contentions:

7. The Proforma Opposite Party No.3 since already dead, the impugned order is against a dead person. Hence, the impugned order is a nullity in the eye of law. The learned Commission completely failed to appreciate that the complaint case in absence of proper description of the Proforma Opposite Party No.3 was not at all maintainable & hence the impugned order is liable to be set aside.

8. The Commission miserably failed to consider the issue of maintainability as to whether the Complainant is coming within the definition of consumer and dispute presented before it qua the present petitioner was at all maintainable. The petitioner nowhere being a party to any of the alleged contract nor a signatory to the Cheque nor even any semblance with the business of the Proforma Opposite Party No.3, no liability could have been saddled with the Opposite Party No.1.

9. The Opposite Party No.1 as a complainant filed C.C Case No.24 of 2021 before the State Consumer Disputes Redressal Commission, Odisha, Cuttack with a prayer for payment of outstanding dues of Rs. 1,03,08,600/- and other dues. The allegation of the Complainant was that he was having some dealings with Debabrata Amarnath who is the Proprietor of Proforma Opp. Party No.3 towards purchase of Chips and Metals, for which there was transaction. It is further complained that there was over payment of Rs. 1,03,08,600/-. The Proforma Opposite Party No.3 by virtue of three Cheques had refunded the aforesaid amount. But to the misfortune the said Proforma Opposite Party No.3 died on 17.10.2020, out of unfortunate Car accident. After death of the Proforma Opposite Party No.3, the Cheques which were presented in the Bank were bounced. Subsequent thereto, the present Consumer Complaint No. 24 of 2021 was filed with the prayer as aforesaid.

10. The Commission though has specifically found that the Complainant has not filed any documents to prove the basic transaction on the issue of buyer and seller, but has held that the Complainant is entitled to claim, damages from the present petitioner, who is father of late Debebrata Amarnath. The Complainant has not filed a single piece of paper or has proved anything showing involvement of the petitioner in the alleged transaction or business.

11. The Proforma Opposite Party No.3 was not in proper description. It was merely described as Proprietor and the said Proprietor was already dead as on the date of filing of the Consumer Complaint Petition. Therefore, the pivotal issue that fall for consideration is that the Complaint Petition involving a dead person was not maintainable from its inception. The Commission, however, has failed to consider this aspect has held the C.C Case is maintainable and passed the impugned order directing the Opposite Party No.1 to pay the Complainant's claim amount of Rs. 96,00,000/- with 9% interest and a sum of Rs.2,00,000/- for mental agony.

III. **SUBMISSIONS OF OPPOSITE PARTY NO.1:**

12. *Per contra*, learned Senior Standing Counsel for the Opp. Parties intently made the following submissions:

13. The Petitioner has failed to show any infirmity in the decision making process involved in the present case. It is well settled in law that Judicial Review in exercise of constitutional writ jurisdiction is permissible not in respect of the correctness of the decision, but only in respect of the correctness of the decision making process. Thus, the present Writ Petition is misconceived and liable to be dismissed.

14. The Consumer Complaint No.24 of 2021 is maintainable before the State Consumer Disputes Redressal Commission, Odisha, Cuttack & the said State Commission has jurisdiction to entertain & dispose of the same, in view of the facts of the present case & the legal position that the petitioner since only the surviving class-I legal heir of his deceased son late Debabrat Amarnath, the petitioner is legally bound to clear up make payment of the just dues / discharge the debt / liability of his only son by making payment of the amount due towards the discharge of the debt/liability of his only son, since the petitioner being the only surviving class-l legal heir of his only son late Debabrat Amarnath.

15. It is the solemn duty/piety of the petitioner to clear up/legally bound to pay the just dues & discharge the debt/liability of his only son, since the petitioner being the only surviving class-I legal heir of his only unmarried son late Debabrat Amarnath.

16. The petitioner in not making payment of the admitted dues of the complainant relating to the cheque bearing No.063515 dated 05.03.2021 for Rs.25,00,000 drawn on the Bank of Maharashtra, Nayapali, Bhubaneswar Branch issued by late Debabrat Amarnath during his lifetime & cheque bearing No.362669 dt.03.05.2021 for Rs.36,00,000 drawn on HDFC Bank, Sankar Cinema Road, Angul Branch towards part payment of the aforesaid dues of late Debabrat Amarnath & cheque bearing No.188417 dt.11.05.2021 for Rs.35,00,000 drawn on the State Bank of India, Angul Branch which were issued by Debabrat Amarnath, son of the petitioner in favor of the Opp. Party No.1 towards part payment of his dues / discharge of debt/ liability relating to the above mentioned dishonored cheques amounts to negligence & deficiency in service & "Unfair Trade Practice" within the meaning of section-2(47) of the Consumer Protection Act, 2019 on the part of the petitioner for which the complainant is entitled to recover the amount along with the compensation & other reliefs indicated U/S-39 of the Consumer Protection Act, 2019 for any loss or injury suffered by this Opp. Party due to the aforesaid negligence & deficiency in service of the petitioner.

17. In the present case, in view of the legal position that the petitioner being the surviving class-I legal heir of his only deceased son late Debabrat Amarnath, the petitioner is legally bound to pay/ clear up the dues by making payment of the amount due towards discharge of debt / liability of his only son, namely, Debabrat Amarnath.

18. The arrangement between the Complainant & the only son of the Opp. Party No.1 / writ petitioner was brought to the notice of the Opp. Party No.1, namely, Amarnath Pradhan, who also approved & gave a green signal to go ahead in the matter for providing materials by the son of the Opp. Party No.1 to the Complainant on payment of consideration thereof & for providing machineries on rent by Debabrat Amarnath for smooth running of the business of the Complainant, who was a bosom friend of the only son of the Writ Petitioner.

19. In view of the facts & circumstances stated above, the son of the writ petitioner Opp.Party No. 1, namely, Debabrat Amarnath, who provided the Complainant/Opp.Party No.1 some materials amounting to Rs.10.00 lakhs on payment of a sum of Rs.10.00 lakhs by the Complainant towards consideration money to meet the cost of the materials subsequently. The Complainant/Opp.Party No.1 has also paid a substantial amount through his wife's account on various occasions.

20. Debabrat Amarnath the only son of the writ petitioner was regularly supplying huge quantity of different materials to the Complainant on payment of cost thereof & was regularly making adjustment of the amount of the Complainant.

21. Subsequently, the payment towards the cost of materials was piled up and over payment was made by the Complainant to Debabrat Amarnath, the son of the writ petitioner, who failed to keep up the promise and could not make payment of the overdue amount to the Complainant on different dates in connection with multiple transactions which was within the knowledge of the writ petitioner.

22. The Complainant/Opp.Party No.1 on different occasions had received from "Auro Infrastructures" a sum of Rs. 26,69,900.00 (Rupees Twenty six lakhs sixty nine thousand nine hundred) only towards over payment of cost of materials supplied to the Complainant/Opp.Party No.1 by Debabrat Amarnath. The Complainant/Opp. Party No.1 has to receive from Debabrat Amarnath total amount of Rs.1,03,08,600.00 only which is due from him.

23. When Debabrat Amamath failed to make payment of all the amount to the Complainant, he voluntarily provided handed over three postdated cheques amounting to Rs.25,00,000/- (Rupees Twenty five lakhs), Rs. 36,00,000/- (Rupees Thirty six lakhs) and Rs.35,00,000/- (Rupees Thirty five lakhs) only total amounting to Rs.96,00,000/- (Rupees Ninety six lakhs) only to ensure payment of the aforesaid amount to be paid to the Complainant/Opp.Party No.1 & on 14.10.2020 he promised to repay the balance amount of Rs.24,49,000/- (Rupees Twenty four lakhs forty nine thousand) only on 21.10.2020, out of the amount of payment that he would get from "the National Building Construction Corporation Limited" to be paid in the name of "Auro Infrastructures" and also he would get his C.C. TopUp loan from Maharashtra Bank, latest by 24th October, 2020.

24. The postdated cheque bearing No. 063515 dt.05.03.2021 for Rs.25,00,000/- (Rupees Twenty five lakhs) only drawn on the Bank of Maharastra, Nayapali, Bhubaneswar Branch issued by late Debabrat Amarnath during his lifetime in favour of the Complainant towards payment of the admitted dues/discharge of debt/liability was presented by the Complainant on 05.03.2021 in the Kotak Mahindra Bank Ltd., Sahid Nagar Branch, Bhubaneswar for collection & the said cheque bearing No.063515 dt.05.03.2021 was dishonored/returned by the said Bank unpaid on the ground of "Funds Insufficient" as mentioned by the Bank & intimated to the Complainant/Opp.Party No.1.

25. Similarly, the postdated cheque issued by Debabrat Amarnath in favor of the Complainant bearing cheque No.362669 dated 03.05.2021 for Rs.36,00,000/- (Rupees Thirty six lakhs) only drawn on the HDFC Bank, Shankar Cinema Road, Angul Branch towards part payment of the aforesaid dues of Debabrat Amarnath / discharge of his debt / liability was presented by the Complainant on 03.05.2021 in the Kotak Mahindra Bank Ltd., Sahid Nagar Branch, Bhubaneswar for collection & the said cheque No.362669 dt.03.05.2021 was dishonored/returned by the said Bank un paid on the ground of "Others-customers deceased" as mentioned by the Bank & intimated to the Complainant. Similarly, the postdated cheque bearing No.188417 dt.11.05.2021 for Rs.35,00,000/- (Rupees Thirty five lakhs) only, drawn on the State Bank of India, Angul Branch which was issued by Debabrat Amarnath, son of the Writ Petitioner in favor of the Complainant towards part payment of his dues / discharge of debt / liability was presented by the Complainant on 12.05.2021 in the Kotak Mahindra Bank Ltd., Sahid Nagar Branch, Bhubaneswar for collection & the said cheque bearing No.188417 dated 11.05.2021 was dishonored/returned by the said Bank unpaid on the ground of "Funds Insufficient" as mentioned by the Bank & intimated to the Complainant.

26. Three Notices U/s 138 (b) of the Negotiable Instruments Act, 1881 were issued on behalf of the Complainant to Sri Amarnath Pradhan (Writ Petitioner), who is not only father of Debabrat Amarnath, but also his class-I legal heir demanding payment of Rs.25,00,000/- (Rupees Twenty five lakhs), Rs. 36,00,000/- (Rupees Thirty six lakhs) and Rs.35,00,000/- (Rupees Thirty five lakhs) only relating to dishonour of post dated cheques issued by Debabrat Amarnath, the only son of the Opp.Party No.1/Writ Petitioner bearing No. 063515 dt. 05.03.2021 for Rs. 25,00,000/- (Rupees Twenty five lakhs), post dated cheque bearing No.362669 dated 03.05.2021 for Rs.36,00,000/- (Rupees Thirty six lakhs) and postdated cheque bearing No.188417 dated 11.05.2021 for Rs.35,00,000/- (Rupees Thirty five lakhs) only, since Amamath Pradhan (Opp. Party No.1/Writ Petitioner) was the only surviving Class-I legal heir of late Debabrat Amarnath after his death.

27. The Complainant/Opp.Party No.1 met the Opp. Party No.1/Writ Petitioner several times and requested him to make payment of the dues of his son as he being the surviving Class-I legal heir of his only son. The Opp.Party No.1/Writ Petitioner requested the Complainant/Opp.Party No.1 to give him a statement of the entire amount paid by the Complainant/Opp. Party No.1 to his deceased son, so that he will arrange money and clear up the entire dues of the Complainant. Accordingly, on dated 15.05.2021 the Complainant handed over to the Opp. Party No.1/Writ Petitioner details of the statement of the entire amount to be received by the Complainant/Opp.Party No.1 from late Debabrat Amarnath.

28. Though the Opp. Party No.1/Writ Petitioner has promised to repay the entire amount due, to be paid by his son to the Complainant, but subsequently on 04.05.2021 he refused to make payment of the same. Due to the aforesaid negligence

of the Writ Petitioner for non-payment of the aforesaid outstanding dues & for deficiency in service of the Writ Petitioner, the Opp. Party No.1 has suffered mental tension & injury/agony which the Complainant/Opp.Party No.1 has assessed & claimed a sum of Rs.2,00,000/- and is entitled to receive from the Opp. Parties as Compensation, along with outstanding admitted dues of Rs.1,03,08,600/-. The Complainant/Opp.Party No.1 claimed total amount of Rs. 1,05,08,600/- to be received from the Writ Petitioner who was Opp. Party No.1 in C.C. Case No.24 of 2021.

29. However, the State Commission vide order dt.22.06.2023 passed in C.C Case No.24 of 2021 directed the Writ Petitioner/Opp. Parties to pay a sum of Rs.96,00,000 as compensation to the Complainant / Opp. Party No.1 within 45 days, failing which it will be payable with 9% interest per annum. The State Commission has further directed the Opp. Parties jointly & severally liable to pay compensation of Rs.2,00,000/- (Rupees Two Lakh) only to the Complainant for mental agony within the above period of 45 days. It has been further directed that all the payments if not paid within the above period of 45 days, they will carry interest @ 12% from the date of filing the complaint till the date of payment is made.

30. The present Writ Petitioner is liable to pay the dues of the Complainant / Opp. Party No.1 for deficiency in service for non-payment of dues of the Complainant, the Writ Petitioner being the only surviving class-I legal heir of late Debabrat Amarnath, the only son of Sri Amarnath Pradhan. The Opp. Party No.1 & the deceased Debabrat Amarnath being the members of the joint family are Service Providers in the Consumer Complaint in question for the Complainant. This fact is clear from the Written Statement/Written Version, where the Writ Petitioner has deemed to have admitted that he has been managing the Opp. Party No.3 after the death of Debabrat, as the said fact has not been specifically denied in the Written Statement / Written Version, which is based on the principle of non-traverse.

31. The Writ Petitioner has tried to misguide the Court by bringing the case of buyer & seller without explaining at which paragraph of the impugned order the learned Commission has said so. On the other hand, the learned State Commission has observed in paragraph-14 of the impugned order that the Complainant was to get over-payment refunded from Debabrat who is the son of the Writ Petitioner.

32. It is pertinent to mention here that in view of the provisions of Section-100 of the Consumer Protection Act, 2019, the provisions of this Act shall be in addition to & not in derogation of the provisions of any other law for the time being in force. It is submitted that the question raised in paragraph-11 of the Writ Petition is not concerned with the Jurisdiction, but they are based on question of facts. Which are to be disposed of by the Fact Finding Forum, but not by Writ Jurisdiction as stated in the preceding paragraphs.

IV. **COURT’S REASONING AND ANALYSIS:**

33. It is not disputed that the proprietor issued 3 nos. of postdated cheques of different amounts and different dates for repayment of the same. Unfortunately, the petitioner's son/proprietor expired due to a tragic car accident. The O.P on presenting such postdated cheques before the bank, the same returned dishonored on the ground of "insufficient funds" and "other customer deceased." The O.P issued notice to the present petitioner U/s.138 (b) of Negotiable Instrument Act, 1881. The O.P thereafter filed Complaint Case No.24/2021 before the State Consumer Disputes Redressal Commission, Odisha claiming a sum of total Rs. 1,05,08,600/-

34. The Commission though has specifically found that the Complainant has not filed any documents to prove the basic transaction on the issue of buyer and seller, but has held that the Complainant is entitled to claim, damages from the present petitioner, who is father of late Debebrata Amarnath. The Complainant has not filed a single piece of paper or has proved anything showing involvement of the petitioner in the alleged transaction or business. The Proforma Opposite Party No.3 was not in proper description. It was merely described as Proprietor and the said Proprietor was already dead as on the date of filing of the Consumer Complaint Petition.

35. There is a serious issue as to jurisdictional issue involved in this case. The Complainant having failed to prove that there is any business transaction between the Complainant and the Opposite Party No.1, the Consumer Commission may not be a forum to decide the question of vicarious liability to the present petitioner. The State Consumer Commission is completely denuded with jurisdiction over the subject matter entertained the application on the contractual judgment having passed ignoring and without answering the aforesaid basic issue that has been raised both in the Written Statement and in the Writ Petition as well. Therefore, availability of an alternate remedy will not be a bar for this Court to pass an order.

36. With respect to the aforesaid discussion, this Court is inclined to quash the order dated 22.06.2023 passed by the President, State Consumer Disputes Redressal Commission, Odisha, Cuttack in C.C.No.24 of 2021. The Writ Petition is, therefore, allowed. The Opposite Party No.1 holds the liberty to file a civil suit or approach the Mediation Centre to resolve the dispute.

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2024 (I) ILR-CUT-543

MISS SAVITRI RATHO, J.

BLAPL NO. 10808 OF 2023

ASHOK KUMAR BEHERA ……Petitioner

-V-

STATE OF ODISHA ……Opp.Party

CODE OF CRIMINAL PROCEDURE,1973 – Section 439 – Petitioner is in custody since 08.07.2023 due to pendency of G.R case U/ss. 376, 506,

379 of IPC– In the meantime, investigation has been completed and charge sheet has been filed on 05.09.2023 – Whether the petitioner is entitle to bail? – Held, Yes – As there is no chance of the petitioner tampering with any evidence if he is released on bail as the investigation has been completed, the bail application is allowed.

For Petitioner : Mr. B.P. Mohanty.

For Opp.Party : Mr. S.S. Pradhan, AGA

JUDGMENT Date of Judgment : 16.01.2024

SAVITRI RATHO, J.

This is an application under Section 439 of Cr.P.C. for grant of bail to the petitioner in connection with Brahmagiri P.S. Case No. 110 of 2023 corresponding to G.R. Case No. 125 of 2023 pending in the Court of the learned Nyayadhikari, Gram Nyayalaya, Brahmagiri under Sections 376, 506, 379 of IPC.

2. The prayer for bail of the petitioner has been rejected vide order 12.09.2023 passed by the learned 1st Additional Sessions Judge, Puri in B.A. No. 82/806 of 2023.

3. The prosecution allegation in brief is that the victim informant is a house wife and she has a nine year old son. She knows the petitioner who belongs to a nearby village. In the year 2022, in the month of December he had sent her a friend request on facebook and treating her as a sister he was talking with her and was also visiting her in her house. On 20.05.2023, at about 8.00 a.m., when her husband and son were not at home, he entered inside the house and had sexual intercourse with her forcibly. When she protested, he clicked her nude photographs and threatened that if she complained to her husband, he would make her nude photographs viral in facebook and would kill her and her husband and son while leaving, he took away her Samsung Galaxy mobile.

4. I have heard Mr. B.P. Mohanty, learned counsel for the petitioner and Mr. S.S. Pradhan, learned Additional Government Advocate for the State and gone through the statements of the witnesses recorded in the case diary.

5. Mr. B.P. Mohanty, learned counsel for the petitioner submits that false allegations have been made against the petitioner. He further submits that the petitioner is about 10 years younger than the victim and the informant has developed friendship with the petitioner through a social media site and they were in a relationship. She had taken money from him on different occasions with him. She had taken some pictures of their intimate moments and she was blackmailing the petitioner to make the photographs viral when he asked for his money and demanded further money from him. So the petitioner took away her mobile phone. When the petitioner refused to pay further money or return her phone, she lodged the FIR against him. He further submits that the petitioner is in custody since 08.07.2023 and

in the meantime, investigation has been completed and charge sheet has been filed on 05.09.2023, for which there is no chance of the petitioner tampering with any evidence if he is released on bail. He also submits that the investigation reveals that the petitioner has not circulated any photographs of the informant on social media for which offences under the IT Act are not included in the charge sheet.

6. Mr. S.S. Pradhan, learned Additional Government Advocate opposes the prayer for bail stating that the petitioner has taken advantage of the victim-informant who is a married lady and has threatened to circulate their intimate photographs over social media for which, he does not deserve to be granted bail.

7. Dinabandhu Jena, Tapan Kumar Jena, Pita Pradhan and Santosh Behera who have been examined during investigation have stated before the police that petitioner and informant know each other since long and they used to come together to the petitioner's village and travel to different places together and were on good terms . The petitioner used to help the informant and the informant had borrowed money from the petitioner. As she suddenly stopped talking to him, the petitioner had gone to her house on 20.05.2023 to ask for return of the money and reason for not talking to him, but since she did not give any reply, he got annoyed and had physical relations with her against her wishes. As her husband arrived, he left hurriedly taking the informant's mobile phone with him.

8. Considering the submission of the counsel, the nature of allegations against the petitioner, the statements of the villagers, the age of the victim and as investigation has been completed, I am inclined to allow the prayer for bail of the petitioner .

9. The petitioner-Ashok Kumar Behera shall be released on bail on such terms and conditions as may be fixed by the learned Court below in seisin over the matter.

10. The BLAPL is accordingly allowed.

11. Observations in this order have been made for the purpose of consideration of the prayer for bail and should not influence the learned trial court which is to decide the case, on the basis of evidence which is yet to be recorded.

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2024 (I) ILR-CUT-545

M.S. SAHOO, J.

CRLREV NO. 291 OF 2011

STATE OF ORISSA (G.A. VIGILANCE DEPT) ……Petitioner

-V-

SRI HARIHAR PRASAD RANASINGH & ANR. ……Opp.Parties

CODE OF CRIMINAL PROCEDURE,1973 – Section 401 r/w Section 397 – Petitioner filed present revision challenging the rejection of application

filed U/s. 311 of Cr.PC – Whether revision is maintainable against an interlocutory order? – Held, No. (Para 5)

Case Law Relied on and Referred to :-

1. (2009) 5 SCC 153 : Sethuraman v. Rajamanickam.

For Petitioner : Mr. Sangram Das, SC (Vigilance).

For Opp.Parties : Mr. Amar Kumar Mohanty

JUDGMENT Date of Hearing & Judgment : 21.12.2023

M.S. SAHOO, J.

1. The petition has been filed seeking, revision of the order dated 23.02.2011 passed by the learned Special Judge (Vigilance), Bhubaneswar in TR Case No. 98 of 1999 (State v. Harihar Prasad Ranasingh and another) filed by the State-petitioner under section 401 read with section 397 of Cr.P.C.

By the order impugned, the learned trial court had rejected the application of the prosecution filed under section 311 of Cr.P.C.,by observing that the P.W.1, who is sought to be recalled by the prosecution, by filing the petition dated 15.2.2011 by the prosecution had stated in his examination-in-chief that he is witness only to seizure of some documents of the society by the vigilance police. The further ground of rejection of the prayer for recalling P.W.1 was that in his cross-examination P.W.1 had stated that he has no personal knowledge regarding maintenance of the register seized by the police.

In view of the depositions of the P.W.1 in his examination-in-chief as well as cross-examination learned trial court held that the prayer to recall P.W.1 to prove the seized documents cannot be allowed.

3. Learned Standing Counsel though strenuously argued for admitting the revision petition and allowing the same, referring to the averments made in the petition, however, very fairly referred to the decision of the Hon'ble Supreme Court rendered in ***Sethuraman v. Rajamanickam (2009) 5 SCC 153***.

4. In the said decision it has been held at paragraph-5, p.154 of SCC as quoted herein :

> *"5. Secondly, what was not realized was that the order passed by the Trial Court refusing to call the documents and rejecting the application under Section 311 Cr.P.C., were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397(2) Cr.P.C. The Trial Court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondent/accused and the only defence that was raised, was that his signed cheques were lost and that the appellant/complainant had falsely used one such cheque. The Trial Court also recorded a finding that the documents were not necessary. This order did not, in any manner, decide anything finally. Therefore, both the orders, i.e., one on the application under Section 91 Cr.P.C. for production of documents and other on the application under Section 311 Cr.P.C. for recalling the witness, were*

> *the orders of interlocutory nature, in which case, under Section 397(2), revision was clearly not maintainable. Under such circumstances, the learned Judge could not have interfered in his revisional jurisdiction. The impugned judgment is clearly incorrect in law and would have to be set aside. It is accordingly set aside. The appeals are allowed."*

5. Applying the principles laid down by the Hon'ble Supreme Court in ***Sethuraman (supra)*** and considering the facts and circumstances of the present case it has to be held that order against which the present revision has been sought for, is interlocutory in nature as the learned trial court rejected the prayer made in the petition filed by the prosecution under section 311 of Cr.P.C. Therefore, Revision against the said order would not be maintainable.

6. Further in view of the categorical statement made by the P.W.1 in his examination-in-chief and cross-examination as referred above, the learned trial court is correcting in holding that P.W.1 is not to be recalled to prove the exhibits/seized documents as he had already stated on oath in his earlier deposition that he is only witness to the seizure of the documents and he has no personal knowledge regarding maintenance of the register seized by the police.

7. In view of the above discussion, the CRLREV is dismissed.

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2024 (I) ILR-CUT-547

R.K. PATTANAIK, J.

RSA NO.358 OF 2005

SMT. BANASHREE MAHAKUD ....Appellant

-V-

EXECUTIVE ENGINEER (R&B), BHADRAK & ORS. ....Respondents

ORISSA ESTATE ABOLITION ACT, 1951 – Section 8(1) – The plaintiff instituted the suit for declaration of her occupancy right over the suit schedule land and permanent injunction against the respondent on the basis of order passed in R.F case instituted U/s. 8(1) of the Act – The Trial Court decreed the suit – The 1st Appellate Court interfered in the decree – Whether the 1st Appellate Court was justified in not taking cognizance of recognition of the occupancy status of the plaintiff as per Section 8(1) of OEA Act, so declared by the authority concerned? – Held, Yes –Section 8(1) of the Act makes no provision for any such application to be entertained and for the said purpose no enquiry is contemplated. (Para 11)

Case Laws Relied on and Referred to :-

1. AIR 1984 Ori 77 : Radhamani Dibya and Others Vrs. Braja Mohan Biswal & Others.
2. 1992 (I) OLR 41 : Basanti Kumari Sahu Vrs. State of Orissa & Others .

For Appellant : Mr. R.K. Mohanty

For Respondents : Mr. YSP Babu, AGA

JUDGMENT Date of Judgment : 04.12.2023

R.K. PATTANAIK, J.

1. The appellant has filed the instant appeal under Section 100 of the Civil Procedure Code, 1908 questioning the correctness of the impugned judgment in Title Appeal No.38 of 1999, whereby, the judgment and decree in Title Suit No.90 of 1996 stands set aside on the grounds inter alia that the same is against the weight of evidence and not in accordance with law.

2. The plaintiff as appellant instituted the suit for declaration of her occupancy right over the suit schedule land and permanent injunction against the respondents. The State contested the suit with a joint WS filed by the respondents. The case of the plaintiff is that C.S. Khata No.69 stood recorded in the name of the then District Board, Balasore with status 'Jamadharjya Jogya' and later, it was leased out in favour of her grandfather, who possessed the same by constructing a thatched house over it. It also pleaded that in the year 1984, the plaintiff applied for rent fixation in respect of the suit land registered as R.F. Case No. 3105 of 1984, wherein, respondent No. 3 settled the suit land by order dated 30th October, 1985 and issued rent schedule declaring her as a raiyat.With the above pleading, the occupancy right was claimed by the plaintiff, considering which, the court of 1st instance decreed the suit. In other words, objection of the defendants was rejected declaring the plaintiff's occupancy right over the suit land.

3. The respondents challenged the findings of the court in appeal. The learned Lower Appellate Court overruled the decision in Title Suit No.90 of 1996 and allowed the appeal with the conclusion that such a direction to record the suit land in favour of the plaintiff in Misc. Case No.2899 of 1988 is impermissible under law and against the provisions of the Orissa Estates Abolition Act, 1951 (hereinafter referred to as 'the Act'). It has been further concluded that the plaintiff could manage to settle the suit land in her favour in connivance with the local revenue authority, who did not have the power to do so and also while dealing with a suo motu resumption proceeding. Being aggrieved of, the plaintiff filed the instant appeal on the ground that the learned Lower Appellate Court could not have ignored recognition of her occupancy status and when acceptance of rent stands proved and never challenged at any point of time.

4. Heard Mr. Mohanty, learned counsel for the appellant and Mr. Babu, learned AGA for the State appearing for the respondents.

5. Mr. Mohanty, learned counsel for the appellant submits that during 1928 settlement, Sabik RoR in respect of suit land under Khata No.69 was published in the name of District Board, Balasore liable to fixation of fair and equitable rent which was leased out in favour of the appellant's grandfather. It is contended that all the

District Boards were abolished by virtue of Odisha Act 7 of 1960 with effect from 26th January, 1961 and accordingly, the land with District Board at Balasore stood vested with the Government in Revenue Department free from all encumbrances except the tenancy right in view of Section 8(1) of the OEA Act, inasmuch as, all the tenants under the intermediary continued to hold the lands under the State Government. According to Mr. Mohanty, R.F. Case No. 3105 of 1984 was initiated by respondent No.3 under the OEA Act for fixation of rent in respect of the suit land measuring an area Ac.0.27 decimal, wherein, the original lease deed and rent receipts prior to 1960 were filed and by order dated 30th October, 1985 rent was fixed and rent schedule (Ext.2) was prepared leading to the collection of arrear rent and salami vide Ext.3 with the tenancy ledger (Ext.4) prepared. In so far as the suit land is concerned, it relates to Plot No.1547 in respect of which arrear rent was realized from the plaintiff and it is contended that during 1989-90 major settlement, RoR in respect of C.S. Plot Nos.1547 and 1566 stood recorded in the name of the State Government.After such recording, it is further pleaded that suo motu resumption proceeding was initiated with an order passed therein vide Annexure-6 with a direction for correction of the revenue record, however, in 1990, encroachment proceeding in L.E. Case No.268 of 1990 was initiated for eviction of the appellant in respect M.S. Plot Nos.1918 and 1891 under M.S. Khata No.1014 and finally, eviction order under Ext.7 was passed. It is lastly submitted that despite an order in Misc. Case No.2899 of 1988 i.e. Ext.6, no rent was accepted nor any correction was made to the RoR, as a result of which, the appellant filed the suit for a declaration that she has acquired right of occupancy vis-à-vis the schedule land and also to restrain the respondents from entering into the land and disturbing her peaceful possession. With the above facts on record not being disputed, Mr. Mohanty contends that the suit was rightly decreed in favour of the appellant but without any justifiable reason, it was set aside by the court in appeal.

6. Mr. Babu, learned AGA for the State appearing for the respondents would submit that the decision of the learned Lower Appellate Court is perfectly justified and in accordance with law since the suit land could not have been settled with the appellant in R.F. Case No.3105 of 1984 and Misc. Case No.2899 of 1988. The reason assigned by the court below, as according to Mr. Babu, learned AGA for the State, is in confirmity with Section 8(1) of the OEA Act. In other words, it is contended that such settlement in favour of the appellant could not have been permitted as the OEA, Collector-cum-Tahasildar, Bhadrak is not competent and legally authorized. The learned Lower Appellate Court in view of the fraud noticed, as finally submitted, rightly interfered with the decree and hence, impugned decision calls for no interference.

7. Considering the pleadings on record, the following substantial questions of law are formulated:

> (i) Whether the learned lower appellate court was correct in ignoring the rent schedule i.e. Annexure-2 issued under the provisions of the OEA Act while dismissing the suit?

(ii) Whether the learned court below was justified in not taking cognizance of recognition of the occupancy status of the plaintiff under Section 8(1) of the OEA Act so declared by the authority concerned?

(iii) Whether it was correct to interfere with the decree of the suit when resumption proceeding and order passed therein have not been challenged and when such challenge is barred under Section 39 of the OEA Act?

8. The suit land corresponds to Plot Nos.1547 and 1566 under CS Khata No.69 appertains to Plot Nos.1892, 1892/2362 and 1918 of M.S. Khata No.1014. The C.S. plots stood recorded with the District Board, Balasore and subsequently settled in the name of PWD Department as made to reveal from Exts.9 and 1 respectively. The learned civil court declared occupancy right in favour of the plaintiff in respect of both the C.S. plots. Considering the order in R.F. Case No.3105 of 1984 and order dated 15th May, 1989 in Misc. Case No.2899 of 1988, whereby, correction to the MS RoR was directed confirming the possession of the plots, the occupancy right was declared in favour of the appellant. The learned Lower Appellate Court, however, overruled it with a view and conclusion that fraud was perpetuated to ensure the plots settled with the appellant and in so far as the above proceedings are concerned, the same are nonest in the eye of law since defendant No.3 did not have the authority to do so.

9. As regards the lease, the contention of the plaintiff is that it was in favour her grandfather in respect of C.S. Khata No.69. Not a scrap of document was produced before the courts below in support of the alleged lease. The plaintiff did not bother to cause production of any such record regarding the lease on the strength of which the occupancy right was demanded. The plaintiff heavily relied on Ext.6 and the order in R.F. Case No.3105 of 1984 and other documents, such as, Exts.2, 4, 5 and 5/a, which are the Rent Schedule, Tenant Ledger and rent receipts respectively. It is claimed that the lease document was produced before defendant No.3 which led to the settlement of the plot in R.F. Case No.3105 of 1984 followed by the order in Misc. Case No.2899 of 1988. The details of the lease could not be elicited by the plaintiff nor did she make any attempt to call for record while demanding the occupancy right in respect of Plot Nos.1547 and 1566. In fact, Plot No.1566 stood included with a direction to correct the M.S. RoR after order in Mis. Case No.2899 of 1988 was passed. In absence of any evidence regard the lease and particular details brought on record, in the considered view of the Court, it was therefore rightly not given any weightage and importance. In other words, the learned Lower Appellate Court did not commit any illegality in not accepting the plea of tenancy of the plaintiff.

10. As to the orders in R.F. Case No.3105 of 1984 and Misc. Case No.2899 of 1988, the learned Lower Appellate Court further held that defendant No.3 had no authority to settle the plots in favour of the appellant which is not permissible. The occupancy right has been declared in exercise of jurisdiction under Section 8(1) of the OEA Act which is challenged by the State. If the above provision is read and

understood, it relates to confirmation of tenancy by a deeming effect when the tenant is treated so under the State Government after vesting provided he had been inducted as such by the ex-intermediary and the OEA authority is only to undertake an administrative exercise. In other words, no adjudicatory process is contemplated with any application received from any one claiming himself as a tenant under the expropriator except an enquiry necessary to ascertain existence of such tenancy, which is by virtue of Section 8(1) of the OEA Act.

11. Regarding the effect of Section 8(1) of the OEA Act, this Court in **Radhamani Dibya and Others Vrs. Braja Mohan Biswal and Others AIR 1984 Ori 77** held and observed that Section 8(1) of the OEA Act makes no provision for any such application to be entertained and for the said purpose, no enquiry is contemplated, the same being merely declaratory of the continuity of the tenure of tenancy as it was immediately before the date of vesting. The said view stands reiterated in **Basanti Kumari Sahu Vrs. State of Orissa and Others 1992 (I) OLR 41**, wherein, it is concluded that the State being the owner is entitled to receive rent from its tenants including persons deemed to be tenants under Section 8(1) of the OEA Act as such rights are akin to a landlord. It has been further held and observed therein that the statutory authority has been vested with power to collect rent on behalf of the State from its tenants and where the revenue records indicate a person as a tenant and the Government has been receiving rent from such person, there is no difficulty for the OEA authority to accept the same but where there is no record that a person is a tenant but nevertheless comes forward and offers rent for acceptance, the authority is under obligation to satisfy himself that the claim in that regard is justified and for such limited purpose, an enquiry is necessary and that perforce has to be administrative in nature and its mode and nature would have to be determined by the facts and circumstances of a particular case. So, therefore, in the decision (supra), it was held that though an enquiry is contemplated and the decision may partake the trapping of an adjudication, it is not one in exercise of powers under Section 8(1) of the OEA Act which does not authorize a proceeding and adjudication but the enquiry is akin to an enquiry necessitate to be an undertaken by any agent of a landlord and where in exercise of such authority, land is settled in course of a proceeding conferring the tenancy right, it would be without jurisdiction. Having regard to the facts of the present case, in absence of any evidence on lease and manner of enquiry held on earlier tenancy vis-à-vis the plaintiff's grandfather, the adjudicatory exercise which was undertaken by defendant No.3 in R.F. Case No.3105 of 1984 in respect of one of the plots and thereafter, by order under Ext.6 in Misc. Case No.2899 of 1988 shall have to be held as beyond jurisdiction not conceived of and contemplated under the OEA Act as Section 8(1) thereof is declaratory in nature, the fact and position of law which was lost sight of by the court of 1st instance but was duly corrected by the learned Lower Appellate Court.

12. Regarding the fraud alleged by the State, it is to be held that due to want of evidence in support of the alleged lease, the Court does not find any reason to

interfere with the finding of the Lower Appellate Court which is to the effect that the appellant stage managed the orders in R.F. Case No.3105 of 1984 and Misc. Case No.2899 of 1988. It is reiterated that absence of credible evidence on the alleged lease and other details regarding the possession ever since such lease, the Court is having no other option except to conclude that the tenancy could not have been declared in favour of the plaintiff, furthermore when, there is no clarity on record that defendant No.3 had exercised the jurisdiction with an administrative enquiry. Consequently, the substantial questions of law stand answered against the appellant.

13. Hence, it is ordered.

14. In the result, the appeal is hereby dismissed, however, in the circumstances, there is no order as to cost.

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2024 (I) ILR-CUT-552

R.K.PATTANAIK, J.

R.S.A NO. 577 OF 2003

JAGANNATH GOUDA & ORS. …. Appellants

-V-

SURENDRA GOUDA & ORS. …. Respondents

PARTITION – Whether oral family partition, subsequently reduced to writing, required any registration as per the Registration Act ? – Held, No – In case of a memorandum of family settlement, no registration is necessary unless new interest is created in favour of a party to it.

(Para 12)

Case Laws Relied on and Referred to :-

1. 2018 1 OLR 457 : Ganesh ChandraJew Vrs. Kalia Singh.
2. MANU/OR/0038/2017 : Bhramarbar PradhanVrs. Kamala Bewa and others .
3. MANU/OR/0159/1060 : Krushna Ch.Meher and others Vrs. Hrushikesh Meher & Ors.
4. 1994 OLR (I)121 : Indramani Nayak Vrs. Ainthu Nayak & another .
5. Civil Appeal No.7764/2014 (31.07.2020) : Ravindra Kaur Grewal & Ors.Vrs. Manjit Kaurand & Ors.
6. MANU/OR/0146/1993 : Bishnu Charan Sahu Vrs. Premananda Sahu and others.
7. MANU/SC/0126/1954 : Srinivas krishnarao Kango Vrs. Narayan Devji Kango & Ors.

For Appellants : Mr. M. Mishra, Senior Adv.
For Respondents : Mr. R.K. Mohanty, Senior Adv.

JUDGMENT Date of Judgment : 20.12.2023

R.K. PATTANAIK, J.

1. Instant appeal under Section 100 of the Code of Civil Procedure, 1908 is filed by the appellants challenging the impugned judgment dated 16th July, 2003 promulgated in Title Appeal No.27/84 of 1998-99 by the learned Additional District

Judge, Sonepur, whereby, the appeal was dismissed confirming the decree of learned Civil Judge (Senior Division), Sonepur in Title Suit No.35 of 1994 on the grounds inter alia that the findings and decision are not tenable in law.

2. The plaintiffs instituted the suit in T.S. No.35 of 1994 against the respondents for declaration of right, title and interest in respect of schedule 'A'; schedule 'B' vis-à-vis plaintiff Nos.2 to 5 and proforma defendant No.8 or in the alternative, to partition the entire schedule A, B, 'C' properties into three equal shares with one share each allotted to plaintiff No.1; plaintiff Nos.2 to 5 and proforma defendant No.8; and defendant Nos. 1 and 7. The said suit was contested by defendant No.1 and was finally dismissed by a decree dated 15th April, 1998. The aforesaid decision of the learned Trial court was challenged by the plaintiffs before the learned Lower Appellate Court in Title Appeal No.27/84 of 1998-99 and as stated earlier, the appeal was also dismissed. Being aggrieved of, the plaintiffs and their successors-ininterest filed the second appeal on the ground that both the learned courts below committed error and illegality in not declaring the title in respect of the suit properties in their favour or to partition it.

3. This Court by order dated 10th December, 2003, formulated the substantial questions of law which are as follows:

> (i) Whether oral family partition subsequently reduced to writing required any registration as per the Registration Act?
>
> (ii) Whether a document relating to family settlement not stamped properly can be admissible as per Evidence Act?
>
> (iii) Whether an R.O.R without any cogent evidence is enough to confer the defendants a valid title?

4. Heard Mr. Mishra, learned Senior Advocate appearing for the appellants and Mr. Mohanty, learned Senior Advocate for the respondents.

5. The learned Trial court held that there is no direct evidence in respect of income of the joint nucleus to acquire the suit property. Furthermore, the partition so pleaded by the plaintiffs was not admissible. The learned Lower Appellate Court on the point of partition held that such evidence was unacceptable and also confirmed that the joint family had no sufficient nucleus to pay the consideration money when the suit property was acquired. The contention of the plaintiffs is that the suit land was purchased in the year 1943 in the name of Bhakta Gouda by Keshab Gouda and it was out of the joint nucleus and hence, could not have been recorded exclusively in the name of Bhakta Gouda. The findings of the learned courts below have been challenged on the ground that the same to be erroneous not consistent with the materials on record.

6. Mr. Mishra, learned Senior Advocate appearing for the appellants would submit that the parties had raiyati land of Ac.3.315 decimal and there was a mutual partition in respect of Bhogra lands in three equal shares, as a result of which, schedule 'A', 'B' and 'C' properties were allotted but such partition was disbelieved

for no reason on the ground that the evidence is inadmissible. It is further submitted by Mr. Mishra, learned Senior Advocate that the purchase of the suit land in 1943 could not be by Bhakta Gouda alone. With regard to the joint nucleus, it is further submitted that the purchase was made in 1943, whereas, the evidence was received long after, hence, it was difficult to adduce direct evidence. It is contended that where the nucleus to be sufficient to acquire any property even in the name of one of the members of the family, presumption would arise that the acquisition is joint family interest and when admittedly, Ac. 3.315 decimals of landed properties had been with the family, there was sufficient nucleus to acquire the same. With respect to partition, it is contended that the evidence ought to have been accepted and it was supported by a family arrangement. It is also contended that when the suit land was Bhogra in character and converted to raiyati land, each and every member of the family would have an interest. Referring to a decision in the case of ***Ganesh ChandraJew Vrs. Kalia Singh 2018 1 OLR 457*** and ***Bhramarbar Pradhan Vrs. Kamala Bewa and others MANU/OR/0038/2017***, it is contended that once the Gounti tenancy was abolished, the Bhogra land becomes joint family interest which remained dormant so long as the tenure subsisted and would spring into life as soon as the system is abolished. With the above submission, it is claimed that both the learned courts below failed to examine the aforesaid aspects, while dismissing the suit. It is also contended that when the Bhogra lands were converted to raiyati lands, the same lost its character and every member of the family would be entitled to claim share therein by partition and in support of such contention, the following decision in the case of ***Krushna Ch. Meher and others Vrs. Hrushikesh Meher and others MANU/OR/0159/1060*** has been referred to by Mr.Mishra, learned Senior Advocate appearing for the appellants.

7. On the contrary, Mr. Mohanty, learned Senior Advocate appearing for the respondents justified the impugned judgment of learned Lower Appellate Court confirming the dismissal of the suit. As according to Mr. Mohanty, learned Senior Advocate, rightly the title was not declared in respect of the suit land jointly and at the same time, partition was denied. Both the learned courts below, as further submitted, considered the income of the joint family and correctly reached at a conclusion that it was no sufficient to acquire the property in question. It is also contended that earlier partition suit claimed by the plaintiffs was also disbelieved since the evidence was not satisfactory, so therefore, the impugned judgment and decree in Title Appeal No.27/84 of 1998-99 deserves to be confirmed.

8. The learned Trial court framed issues to ascertain whether the lands under Khata No.253/43 of 4th settlement to be the coparcenery of the joint family interest or separate property of Bhakta Gouda and if there was any partition in respect of Schedule 'A' and 'B' properties with shares being allotted to the plaintiffs. It is settled law that there is no presumption that a joint family possesses property jointly. Article 233(2) of Hindu Law by Mulla lays down the principles that there is no presumption in favour of a family that the property to be joint because it is in jointness

and when in a suit for partition, a particular item of property claimed to be of the joint family, the burden of proving the same rests on the party asserting it. As further observed therein that whether it is established or admitted that the family possessed some joint properties which from its nature and relative value may have formed the nucleus from which the property in question is likely to have been acquired, in that case, the presumption arises that it was joint property and the burden shifts to the parties alleging acquisition to establish affirmatively that the property was acquired without the aid of the joint family. It is also stipulated therein that whether the evidence adduced by a party is sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus, out of which, the acquisition could have been made is one of the fact that depends on the nature and extent of the nucleus. The decision in ***Indramani Nayak Vrs. Ainthu Nayak and another 1994 OLR (I) 121*** deals with presumption regarding an acquisition claimed to be a joint family interest in juxtaposition to the interest of a co-sharer alleged to be exclusive.

9. In so far as the extent of the property in possession of the joint family is concerned, it is to be considered whether the same was sufficient to generate surplus for purchase of the suit land. The learned courts below guessed the income of joint nucleus as against the purchase made in 1943 and concluded that the evidence adduced from the side of the plaintiffs to be not satisfactory. In other words, the burden of proof which lies with the plaintiffs could not be discharged to show that there was sufficient joint family nucleus to acquire the suit land and other properties in the year 1943. The defendants claimed that there was partition among Bhakta and others prior to 1940 but the plaintiffs stand is that the partition was held after 4th settlement in 1962. By the time, the partition of 1943 took place, considering the evidence on record, it is found that both Banka and Binu were minors, whereas, Bhakta was major and in such circumstances, it cannot be believed that the partition among the brothers really happened. Admittedly, the suit land was acquired by the time the family living jointly. The manner of acquisition of the suit land did not receive any clear evidence disclosing the income of the joint nucleus. An assessment has been made by both the courts below to determine the income of the joint family.

10. According to the learned Trial court, the income was insufficient to purchase the suit land and other properties, hence, the plea of the plaintiffs was rejected. Applying the law that family since joint carries no presumption that property acquired by any member of the family is the joint interest, both the learned courts below concluded that it had to be held as separate and exclusive interest of Bhakta. The acquisition even if alleged to be by Keshab Gouda but it stands in the name of Bhakta. In view of the purchase so made and acquired exclusively in the name of Bhakta, in absence of sufficient joint nucleus proved and established, a conclusion was drawn that the same to be a separate interest of Bhakta and not a subject of joint family.

11. The documentary evidence revealed that the suit land was settled with Bhakta during Bhogra conversion proceeding. It is a fact that after the Bhogra conversion proceeding, the suit land was settled in the name of Bhakta with occupancy right to the

exclusion of his brothers. Apparently, the two brothers of Bhakta being dissatisfied, even though filed no appeal or revision but knocked the doors of the learned Trial court with the suit instituted.

12. The witnesses examined from the side of the plaintiffs hardly could able to divulge the income and expenditure of the joint family property by the year 1942. But it is not expected that evidence of income of a joint family would be able to be brought on record after lapse of considerable time as in the present case. However, the suit land and extent of properties possessed by the joint family of the plaintiffs held not to be sufficient to acquire the suit land, a conclusion arrived at by learned courts below on a general assessment. As it is made to appear from the materials on record, Bhakta was in his mid 20's by the time the purchase was made in respect of the suit land Bhogra in nature. It is also revealed that evidence is conspicuously absent on partition during the 4th settlement with no separate possession reflected in the remarks column against each plot. Likewise evidence as to partition prior to 1940 is also not clearly established which was most unlikely at a time when Bhakta was young with two of his brothers to be minor. The plea of partition after the 4th settlement was disbelieved by learned courts below which rather appears to be probable which is supported by the testimony of P.W.2, an independent witness an Amin, who measured the suit land with the land schedule and trace map, such as, Ext.3/a and 3/b Ext.3/c and 3/d respectively prepared containing signatures of the allottees thereon marked as Ext. 3/e to 3/g and fortified by Ext.1and rent receipts (Ext. 4/a to 4/d) in respect of respective shares by the plaintiffs. The finding that the partition sheet needed registration is, in the considered view of the Court, erroneous as in case of a memorandum of family settlement, no registration is necessary unless new interest is created in favour a party to it. The Apex Court in ***Ravindra Kaur Grewal and others Vrs. Manjit Kaur and others in Civil Appeal No.7764 of 201***4 decided on 31st July, 2020 held that for a family settlement, registration is not required. Hence, in view of the supporting partition led from the side of the plaintiffs is found to be readily acceptable. Furthermore, additional evidence is sought to be introduced to show possession of respective shares by the parties after amicable settlements and to justify it a decision in the case of ***Bishnu Charan Sahu Vrs. Premananda Sahu and others MANU/OR/0146/199***3 is placed reliance on by stating that the same is necessary to decide the lis properly and for substantial cause.

13. As to the joint nucleus fund, it is admitted that the family had landed properties by the time of alleged purchase with no evidence to even remotely suggest any independent income of Bhakta. The guess work by the learned courts below on the probable income of the family is something an exercise difficult to comprehend. In a reading of the decision in ***Srinivas krishnarao Kango Vrs. Narayan Devji Kango and others*** reported in ***MANU/SC/0126/1954***, it is made to understand that where existence of nucleus is shown and no other source of income is disclosed, the presumption would be in favour of the nucleus was sufficient whereafter the onus shifts to the other side to prove it be a separate acquisition.

Since, in the case at hand, evidence comes forth that there was landed properties of the family while in jointness, without adverting to any guess work on income, aMpresumption should be drawn in favour of sufficient nucleus, which the learned courts below failed to do. As no evidence on separate income of Bhakta is available on record, the inevitable conclusion would be that the suit land to be the joint acquisition of the family. Once it is held that the acquisition to be joint family property, the lands are held to partible with all the members having shares therein. In ***Krushna Ch. Meher*** (supra), it is held that when the Bhogra land was subsequently converted to raiyati land, it looses the character of being impartible and the ordinary rule of Hindu law on partition would necessarily revive.It is also held in ***Ganesh Chandra Jew*** (supra) and connected citations that after abolition of Gaunti tenure system, the Bhogra lands become joint family interest which remains dormant so long as it is in existence. So notwithstanding any such order in Bhogra proceeding, when the suit land is held to be a joint acquisition, its impartibility character is extinguished thereby entitling all the members of the family to claim shares therein. Hence, the inescapable conclusion of the Court is that the partition of the suit land is only to be recognized as per schedule 'A', 'B' and 'C'.

14. Hence, it is ordered.

15. In the result, the appeal stands allowed. As a logical sequitur, the impugned judgment dated 16th July, 2003 promulgated in Title Appeal No.27/84 of 1998-99 by the learned Additional District Judge, Sonepur is hereby set aside for the reasons discussed herein above. However, in the circumstances, there is no order as to costs leaving the parties to bear it throughout.

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2024 (I) ILR-CUT-557

SASHIKANTA MISHRA, J.

W.P.(C) NO. 21183 OF 2023

JEETENDRA SAHU ……. Petitioner

-V-

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

SERVICE LAW – Leave – Petitioner had undergone treatment for functional endoscopy sinus surgery with septoplasty as outdoor patient in ENT department of DHH Bolangir from 26.05.2022 to 07.06.2022 –The authority without treating the aforesaid period as 'leave' treated it as "No Pay"– The ground of rejection was that, the petitioner had not undergone any surgical procedure and treated only as outdoor patient – Whether the order of rejection is sustainable? – Held, No – It is not a rule of law that in order to be eligible for sick leave, the concerned employee must undergo a surgical procedure.

(Para 7)

For Petitioner : Ms. Babita Kumari Pattanaik
For Opp.Parties : Mr. T. Pattnaik,ASC

JUDGMENT Date of Judgment : 18.10.2023

SASHIKANTA MISHRA, J.

1. The petitioner has filed this writ application with the following prayer:

> *"It is therefore humbly prayed that this Hon'ble Court may graciously be pleased to admit the case, call for the records and after hearing both the parties pass the following reliefs;*
>
> *i) To quash the order dtd 24.06.2022 under Annexure-2.*
>
> *ii) To quash the order dtd order dtd.4.4.2023 under Annexure-4.*
>
> *iii) To direct the opposite parties to treat the period from 26.5.2022 to 7.6.2022 as commuted leave or EL.*
>
> *iv) To direct the opposite parties to grant all financial and consequential benefits.*
>
> *v) And pass such other order/orders as may be deemed fit and proper for the interest of justice.*
>
> *And for this act of kindness, the petitioner as in duty bound shall ever pray."*

2. The facts of the case are that the petitioner was initially appointed as a Constable on 16.11.2011 and posted at Bolangir. He was promoted to the post of Havildar on 20.07.2022. In the meantime, in the year 2016, he underwent treatment for Functional Endoscopy Sinus Surgery (FESS) with Septoplasty and was advised by his treating doctor to avoid excess exposure to cold, hot, rain and humidity condition as also to avoid forceful sneezing. He therefore, submitted a representation for being entrusted with general duties, which was allowed. The ailment resurfaced after five years, for which the petitioner had a medical check-up at Sum Ultimate Medicare, Bhubaneswar on 17.12.2021. The Consultant Physician advised him to undergo CT Para Nasal Sinus examination and also for Sinus surgery. Because of Panchayat and Urban Local Body elections in the month of February and March, 2022, the petitioner was not allowed to apply Earned Leave (E.L.) during that period. He was granted 20 days E.L. by order dated 28.03.2022 but because of non-availability of funds, the petitioner did not avail the said leave and underwent homeopathic treatment. While continuing as such, he suffered from Sinusitis on 25.05.2022 and therefore, applied for leave to the IIC, Bangomunda Police Station for his medical treatment. He was sent to P.H.C., Bangomunda along with Constable Girija Kanta Patel for medical examination and treatment as per Command Certificate dated 26.05.2022. The doctor at PHC referred him to consult an ENT Specialist at DHH, Bolangir. On being informed, the IIC instructed Constable Patel to take the petitioner to DHH, Bolangir. The petitioner thus, reported before the ENT Specialist on 26.05.2022, who prescribed certain medicines and advised home rest till completion of the course of medicine. Therefore, Constable Patel left the petitioner with the care of his wife at DHH, Bolangir. The petitioner underwent medical treatment as an

outdoor patient in ENT Department of DHH, Bolangir from 26.05.2022 to 07.06.2022. He was declared fit by the doctor and joined in his duties on 08.06.2022. He also submitted his medical reports but by order dated 24.06.2022 of the S.P., Bolangir, the period from 26.05.2022 to 08.06.2022 was treated as "No Pay". Feeling aggrieved, the petitioner submitted a representation before the I.G. of Police (Northern Range), Sambalpur. However, by order dated 04.04.2023, the representation was rejected mainly on the ground that the petitioner had not undergone any surgical procedure and was treated only as an outdoor patient. Being thus aggrieved, the petitioner has approached this Court in the present writ application.

3. A counter affidavit has been filed on behalf of opposite parties. It is stated that while the petitioner was posted at Bangomunda Police Station, he was mobilised for law and order duty in connection with by-election of six Brajarajnagar Assembly Constituencies of Jharsuguda District to be held on 31.05.2022. He was commanded by the IIC, Bangomunda P.S. to report before S.P., Jharsuguda vide Command Certificate dated 25.05.2022 but the petitioner refused to perform election duty on the plea that he had performed such duty at Bolangir during three-tier Panchayatiraj Election, 2022. Further, he refused to receive Command Certificate and created a hue and cry and declared himself sick. All these facts were recorded in the Bangomunda P.S. General Diary on 25.05.2022 and 26.05.2022. It is further submitted that the petitioner intentionally avoided to perform election duty as directed and took the false plea of being sick even though no surgical treatment had been undergone by him. The period in question was therefore, rightly treated as "No Pay" by the competent authority.

4. Heard Ms. B.K. Pattanaik, learned counsel for the petitioner and Mr. T.K. Pattanaik, learned Addl. Standing Counsel for the State.

5. Ms. B.K.Pattanaik, learned counsel for the petitioner would submit that there can be no dispute that the petitioner was sick and was treated at DHH, Bolangir as evident from the medical documents submitted by him before the authority. It is also a fact that he was advised rest by the treating doctor. So, only because there was no surgical procedure, cannot imply that he was not ill. Secondly, the allegation that he had refused to receive the Command Certificate as he wanted to avoid performing election duty is completely baseless. Therefore, treating the sick period as "No Pay" is completely illegal. Ms. Pattanaik would further submit that the I.G. did not appreciate the matter in the correct perspective but was swayed away by the allegation made by the IIC that the petitioner had intentionally avoided to perform election duty.

6. Mr. T.K. Pattanaik on the other hand would argue that police force works on discipline and demands absolute obedience by the personnel to the orders of the higher authority. The petitioner grossly violated such discipline by refusing to receive the Command Certificate issued in his favour, which is

highly unbecoming on his part as a member of the police force. On facts, Mr. Pattanaik would argue that as rightly held by the I.G., the petitioner was not suffering from such a serious ailment as to prevent him from performing his duties and therefore, his representation was rightly rejected.

7. It appears that the Command Certificate was issued by the IIC on 25.05.2022 directing the petitioner (C/415, J. Sahoo) to report before the S.P., Jharsuguda Camp at RO, Jharsuguda for by-election duty and to return to P.S. after the duty is over. At the bottom of Command Certificate it is endorsed by the IIC that "denied for receive CC". It has been alleged that the petitioner refused to receive the Command Certificate on the ground of his sickness and also raised hue and cry. Such fact has been entered in the General Diary No.21. Surprisingly however, on the next day, i.e. on 26.05.2022 at 9 a.m., the very same IIC issued Command Certificate to Constable, C/80 G.K. Patel to take the petitioner to the hospital for his treatment and to return to the Police Station thereafter. Again, on the same day at 10.30 a.m. Constable G.K. Patel was directed to take the petitioner to DHH, Bolangir and to hand him over to his family after his check up. Firstly, if the petitioner had refused to receive the Command Certificate for the election duty on 25.05.2022, it is not comprehended as to why such fact was simply entered in the General Diary and no action was taken against him. On the contrary, a Command Certificate was issued to another Constable to take the petitioner for medical check-up to DHH, Bolangir. This obviously implies that the IIC was well aware of the sickness of the petitioner as otherwise there was no reason to depute another constable to take the petitioner to DHH for treatment. Issuance of both the Command Certificates therefore, strikes as mutually contradictory. Be that as it may, the OPD Card issued by DHH, Bhim Bhoi Medical College and Hospital, Bolangir refers to the medical condition of the petitioner, the medicines prescribed and specific advice of the doctor for home rest, avoiding travelling and allergent conduct. The petitioner was also directed to follow up after seven days. The petitioner appeared before the Asst. Professor, ENT on 07.06.2022, who certified that the patient was under the treatment for Sinusitis and that he is fit to resume his duties. These facts are corroborated by copies of the documents on record which have not been specifically denied or disputed by the opposite parties in their counter. In fact, nothing has been stated at all about issuance of the Command Certificate on 25.05.2022 to Constable G.K. Patel. Thus, the averments of the writ application relating to the petitioner"s treatment at DHH, Bolangir having not been specifically denied, the doctrine of non-traverse would apply in full measure and hence, would be deemed to have been admitted. Even otherwise, this Court finds that the order of the S.P. in treating the period in question (14 days) as "No Pay" was passed without citing any reason whatsoever. Since the order was passed to the detriment of the petitioner, rules of natural justice require the S.P. to have granted the petitioner at least an opportunity of hearing before passing the same. Perusal of the order passed by the I.G. reveals that he has

analysed the previous and current medical documents and held that on 26.05.2022, the petitioner was treated at DHH, Bolangir and was prescribed routine medicines of chronic Sinusitis. Though the OPD card has been referred to yet the specific advice of the doctor for home rest etc. appear to have been overlooked by the I.G. in his order. On the other hand, the so-called circumstantial evidence surrounding the report of IIC Bangomunda P.S. was accepted in toto by the I.G. This Court has already noted the apparent incongruity in factual aspects in that if the petitioner refused to receive the Command Certificate on 25.05.2022, why no action was taken against him and instead a fresh Command Certificate was issued on the next date to another constable to take the petitioner to the hospital for his treatment. As already indicated, this appears entirely contradictory. That apart, a doctor is always the best and most competent person to opine as regards the condition of a patient. So, if he advised home rest, such advice cannot be overlooked or ignored. The further finding of the I.G. that he was prescribed routine medicines and no special surgical procedure was undergone by the petitioner, is untenable. It is obviously not in hands of the petitioner to undergo the surgical procedure on his own. The same obviously depends on prognosis of the treating doctor. On the face of clear advice by the doctor for home rest the above reasoning of the I.G. is rendered untenable. Moreover, it is not a rule of law that in order to be eligible for sick leave, the concerned employee must undergo a surgical procedure.

8. For the foregoing reasons therefore, this Court is of the considered view that the impugned orders cannot be sustained in the eye of law and therefore, warrants interference by this Court.

9. Resultantly, the writ petition is allowed. The impugned orders dated 24.05.2022 (Annexure-2) and 04.04.2023 (Annexure-4) are hereby quashed. The opposite party authorities are directed to pass necessary orders to consider the period from 26.05.2022 to 08.06.2022 as Commuted Leave or Earned Leave as the case may be. Such order shall be passed within three weeks from the date of production of certified copy of this order.

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2024 (I) ILR-CUT-561

SASHIKANTA MISHRA, J.

BLAPL NO. 10659 OF 2023

DHIRAJ KUMAR ...… Petitioner

-V-

STATE OF ODISHA ...…. Opp.Party

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT,1985 – Section 37 – The petitioner is in custody for commission of offence U/s. 20(b)(ii)(c) /29 of the Act – Total 840 kgs. of ganja seized from the

vehicle – Application U/s. 439 Cr.P.C has been filed with a ground that petitioner is in custody for nearly two years and trial has not been commenced yet – Effect of – Held, it cannot always be a ground to release the accused on bail, particularly when the offence is grave.

(Para 6)

Case Laws Relied on and Referred to :-

1. SLP(Crl) No.4169 of 2023 : Rabi Prakash v.State of Odisha.
2. 2022 SCC Online SC 891 : Narcotics Control Bureau v. Mohit Aggarwal.

For Petitioner : M/s. A.K. Acharya, A.Acharya & S. Mishra
For Opp.Party : Mr. Sitikanta Mishra, Addl. Standing Counsel

ORDER Date of Order : 18.10.2023

SASHIKANTA MISHRA, J.

Heard learned counsel for the petitioner and learned counsel for the State.

2. The petitioner is in custody since 25.11.2020 in connection with Similiguda P.S. Case No. 103 of 2020 corresponding to T.R. Case No. 77 of 2020 pending in the court of learned Additional Sessions Judge-cum-Special Judge, Koraput for the alleged commission of offence under Section 20(b)(ii)(C)/29 of the NDPS Act.

3. The prosecution case is that, on 24.11.2020 at about 11.59 A.M., the IIC of Silimilguda Police Station, in the district of Koraput, received information from a reliable source regarding transportation of huge quantity of ganja i.e. the fruiting and flowering tops of cannabis plants, in a 10 wheeler Full Body Truck loaded with crystal salt. It was also learnt that the truck would be passing through Rajput Chhak on Semiliguda-Nandapur Road. The police party therefore, went to the spot and waited for the arrival of the truck. After sometime, a 10 wheeler full body truck, bearing Registration No.CG-04- FB-2582, was seen coming from Nandapur side. The truck was stopped and its contents were searched. Large number of yellow color jerry bags containing crystal salt, were found and several bundles, covered with cello tapes were kept in the middle portion of the truck in between the salt packets in a concealed manner. On further search, the bundles were found to contain ganja. On weighment the total quantity of ganja came to 840 kgs. There were two persons in the vehicle including the present petitioner-Dhiraj Kumar. Thereafter, the required formalities of search and seizure were made and the petitioner and the other persons were arrested and since then, they are in custody. Subsequently, charge sheet was submitted including the name of one Dolphin Pangi as coaccused.

4. It is submitted by Mr. A.K.Acharya, learned counsel for the petitioner, that the co-accused-Arvind Kumar, being a Juvenile, his case was transferred to the Juvenile Justice Board after the case record was split up and was granted bail. In so far as the petitioner is concerned, despite being in custody for nearly two years, trial has not even commenced as yet. Mr. Acharya further submits that the trial court has been simply issuing summons to the witnesses but none has appeared so far. Under

such circumstances, the bar under Section 37 of the NDPS Act could not apply as held by the Hon'ble Supreme Court recently in the case of ***Rabi Prakash v. State of Odisha***; SLP (Crl.) No. 4169 of 2023).

5. Per contra, Mr. Sitikanta Mishra, learned Additional Standing Counsel submits that the contraband seized from the exclusive and conscious possession of the petitioner is 841 kgs and the manner in which, it was concealed in the truck along with crystal salt clearly shows the culpability of the petitioner.

As regards delay in conclusion of trial, Mr. Mishra argues that it cannot always be a ground to release the accused person on bail, particularly when the offence is grave. He also refers to a decision of the Supreme Court in the case of Narcotics Control Bureau v. Mohit Aggarwal, reported in 2022 SCC Online SC 891.

6. I have heard learned counsel for the parties at length and have also gone through the materials on record in detail. As submitted by the State Counsel, the manner in which huge quantity of contraband (841 kgs of ganja) was being transported in a concealed manner by itself, shows a strong prima facie case against the petitioner. It is not the case of the petitioner that he was falsely implicated in the case or that the contraband was planted deliberately. The only ground putforth for being released on bail appears to be long detention of the petitioner. Mr.Acharya has referred to the judgment of the apex court in the case of ***Rabi Prakash*** (supra), wherein reference has been made to Section 37 to hold that the second condition, regarding formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage and the petitioner has already spent more than three and half years in custody. It was under such circumstances that the Supreme Court held that prolonged incarceration generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such situation, the constitutional liberty must override the statutory embargo created under Section 37 of the NDPS Act. Be it noted that in the instant case the petitioner has been in custody for 23 months only. Moreover, in the case of ***Rabi Prakash*** (supra), it was not laid down as an inviolable proposition of law that in all cases of long incarceration, the accused person must be released on bail but the observations were made looking into the peculiar facts and circumstances before the Supreme Court. It is also trite law that the length of the period of detention or charge sheet filed and trial having commenced or not commenced by themselves are not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act. In this regard, reference may be had to the judgment of the Supreme Court in the case of ***Narcotics Control Bureau v. Mohit Aggarwal***, reported in 2022 SCC Online SC 891.

7. Thus, from a conspectus of the discussion made hereinbefore, this Court finds that there exists a strong prima facie case to show that the petitioner has committed the alleged offence and secondly, there is no compelling necessity to release him on bail, that too, on the ground that trial has not commenced.

8. The BLAPL is accordingly rejected.

2024 (I) ILR-CUT-564

SASHIKANTA MISHRA, J.

RVWPET NOS. 210, 215, 171, 176, 181,182, 184, 216 OF 2023

PRADEEP KUMAR DHAL ……..Petitioner

-V-

GOVERNING BODY OF CHRIST COLLEGE & ORS. …….Opp.Parties

RVWPET NO. 215 OF 2023
PRADEEP KUMAR DHAL -V- STATE OF ODISHA & ORS.

RVWPET NO. 171 OF 2023
Dr. SMITA NAYAK -V- STATE OF ODISHA & ORS.

RVWPET NO. 176 OF 2023
RABINDRANATH LENKA -V- CHRIST COLLEGE, CUTTACK & ORS.

RVWPET NO. 181 OF 2023
RABINDRANATH LENKA -V- STATE OF ODISHA & ORS.

RVWPET NO. 182 OF 2023
ITISHREE SWAIN -V- STATE OF ODISHA & ORS.

RVWPET NO. 184 OF 2023
ITISHREE SWAIN -V- STATE OF ODISHA & ORS.

RVWPET NO. 216 OF 2023
PRANGYA PARAMITA JETHY -V- STATE OF ODISHA & ORS.

CODE OF CIVIL PROCEDURE,1908 – Section 114 r/w Order 47 Rule 1 – Review – Principles relating to review of a Judgment – Discussed with reference to case laws. (Paras 4-8)

Case Laws Relied on and Referred to :-

1. (1964) 5 SCR 174 : AIR 1964 SC 1372 : Thungabhadra Industries Ltd. Vs. Govt. of A.P.
2. (1995) 1 SCC 170 : Meera Bhanja Vs. Nirmala Kumari Choudhury.
3. (2023) SCC Online SC 1406 : Sanjay Agarwal Vs. State Tax Officer.
4. (2006) 4 SCC 78 : Haridas Das Vs. Usha Rani Banik.
5. (2008) SCC OnLine Ori 2 : AIR 2008 Ori 143 : Governing Body of Stewart Science College, Cuttack Vs. State of Orissa & Governing Body of Christ College, Cuttack Vs. State of Orissa.
6. (2022) SCC OnLine SC 1091:St. Mary’s Education Society and Anr. Vs. Rajendra Prasad Bharagava & Ors.

For Petitioner(s) : M/s. Bimbisar Dash & A. Nayak.
M/s. B.S. Tripathy, A. Tripathy, A.Sahoo.
M/s. Sameer Kumar Das, P.K. Behera & N. Jena.
M/s.K.P. Mishra, L.P. Dwibedi, S. Rath, A. Mishra & K. Hussain.

For Opp.Parties : Mr. S.N. Das, ASC.
M/s. Susanta Kumar Dash, S. Das,P. Das, P. Haricchandan.
Ms. Pami Rath, Sr. Adv. with M/s. S. Gumansingh,
P. Mohanty & J. Mohanty.

JUDGMENT Date of Judgment : 14.12.2023

SASHIKANTA MISHRA, J.

The petitioners in these applications seek review of the judgment passed by this Court on 26.04.2023 in a batch of writ applications being W.P.(C) No. 21522 of 2019, W.P.(C) No.3150 of 2020, W.P.(C) No. 12970 of 2018, W.P.(C) No. 4075 of 2014, W.P.(C) No.22665 of 2015, W.P.(C) No. 10414 of 2021, W.P.(C) No. 6557 of 2021, W.P.(C) No. 3150 of 2020 and W.P.(C) No. 6969 of 2021. As per the said judgment, this Court held that Christ College, Cuttack is a minority institution within the meaning of Section 2 of the Odisha Education Act, 1969 and further, the prayer made by the review petitioners in their respective writ applications are relatable to contract of personal service and no public law element is involved for being adjudicated upon by this Court exercising writ jurisdiction under Article 226 and 227 of the Constitution of India.

2. The review applications have been filed raising two grounds- firstly, the finding of the Court regarding the status of Christ College as a minority institution being based on the Division Bench decision of this Court in ***Dr. Shyamal Ku. Saha and others vs. State of Orissa and others*** [W.P.(C) No. 2207/2012, 29737/2011, 7579/2008 and 9406/2008 disposed of on 26th June, 2012] is erroneous on the face of record and secondly, whether the grievances of the petitioners are amenable to be adjudicated by this Court exercising writ jurisdiction or not have not been deliberated.

3. Heard Mr. Sameer Kumar Das, learned counsel for the petitioners in RVWPET Nos. 171, 176, 181, 182 & 184 of 2023; Mr. Bimbisar Dash, learned counsel for the petitioner in RVWPET No.210 of 2023; Mr. B.S. Tripathy, learned counsel for the petitioner in RVWPET No. 215 of 2023; Mr. Susanta Kumar Dash, learned counsel appearing for the Christ College; Ms. Pami Rath, learned Senior Counsel appearing along with Mr. P. Mohanty, learned counsel for the private opposite party in RVWPET Nos. 182 & 184 of 2023; and Mr. S.N. Das, learned Addl. Standing Counsel appearing for the State.

4. Before adverting to the specific contentions raised before this Court by the parties, it would be proper to keep in perspective the principles relating to review of a judgment. Order-47, Rule 1 of CPC relates to remedy of review by a person dissatisfied with a judgment. It reads as under;

> *"**1. Application for review of judgment.—**(1) Any person considering himself aggrieved—*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
>
> *(b) by a decree or order from which no appeal is allowed, or*
>
> *(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due*

diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applied for the review.

Explanation.—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

5. It is evident that the power of review can be exercised only under the circumstances indicated in the provision and not otherwise. No doubt, provisions of CPC cannot regulate the proceeding under Article 226 of the Constitution but it is well settled that same principles apply to review arising out of Article 226 proceedings. Principles with regard to exercise of review jurisdiction have been laid down by the Supreme Court in several decisions, all of which need not be referred to save and except certain oft- quoted and relevant ones. In the case of ***Thungabhadra Industries Ltd. v. Govt. of A.P.***, reported in **(1964) 5 SCR 174 : AIR 1964 SC 1372**, the Supreme Court held as follows;

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions, entertained about it, a clear case of error apparent on the face of the record would be made out."

6. In the case of ***Meera Bhanja vs. Nirmala Kumari Choudhury,*** reported in (1995) 1 SCC 170, the Supreme Court held as follows:

"8. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, CPC. In connection with the limitation of the powers of the court under Order 47, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleshwar Sharma v. Aribam Pishak Sharma [(1979) 4 SCC 389 : AIR 1979 SC 1047] , speaking through Chinnappa Reddy, J., has made the following pertinent observations: (SCC p. 390, para 3)

"It is true as observed by this Court in Shivdeo Singh v. State of Punjab [AIR 1963 SC 1909] , there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. <u>But, there are definitive limits to the exercise of the power of review. The power of</u>

review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court."

7. In a recent judgment rendered in the case of **Sanjay Agarwal vs. State Tax Officer,** reported in (2023) SCC Online SC 1406, the Supreme Court noted several earlier judgments and culled out the principles decided and summarized the same in the following words:

*"**16.** The gist of the afore-stated decisions is that:—*

(i) A judgment is open to review inter alia if there is a mistake or an error apparent on the face of the record.

(ii) A judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so.

(iii) An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record justifying the court to exercise its power of review.

(iv) In exercise of the jurisdiction under Order 47 Rule 1 CPC, it is not permissible for an erroneous decision to be "reheard and corrected."

(v) A Review Petition has a limited purpose and cannot be allowed to be "an appeal in disguise."

(vi) Under the guise of review, the petitioner cannot be permitted to reagitate and reargue the questions which have already been addressed and decided.

(vii) An error on the face of record must be such an error which, mere looking at the record should strike and it should not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

(viii) Even the change in law or subsequent decision/judgment of a co-ordinate or larger Bench by itself cannot be regarded as a ground for review."

8. In view of the contentions raised before this Court during hearing of these applications, which would be referred to a little later, this Court feels it apposite to also refer to the judgment of the Supreme Court in the case of ***Haridas Das vs. Usha Rani Banik***, reported in (2006) 4 SCC 78, wherein it was held as under;

"13. In order to appreciate the scope of a review, Section 114 CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the court since it merely states that it "may make such order thereon as it thinks fit". The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them

postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict. This is amply evident from the Explanation to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the court should exercise the power to review its order with the greatest circumspection. This Court in Thungabhadra Industries Ltd. v. Govt. of A.P. [(1964) 5 SCR 174 : AIR 1964 SC 1372] held as follows : (SCR p. 186)

"There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error….where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

9. Keeping the above principles in background, the contentions of the parties shall now be dealt with.

Mr. Sameer Kumar Das, learned counsel has argued that the finding in **Dr. Shyamal Ku. Saha** was misinterpreted by this Court to hold that the same was also relatable to Christ College, Cuttack. Mr. Das has referred in particular to that part of the judgment passed by the Division Bench where it was held that the earlier judgment rendered by the Single Judge in ***Governing Body of Stewart Science College, Cuttack v. State of Orissa and Governing Body of Christ College, Cuttack vs. State of Orissa,*** reported in 2008 SCC OnLine Ori 2 :: AIR 2008 Ori 143 cannot be held to have finally determined the status of Stewart Science College as a minority educational institution and that instead of entertaining the writ applications, learned Single Judge ought to have directed to get the dispute adjudicated by the competent fact finding authority.

Mr.Bimbisar Dash has also made similar argument as has Mr.B.S. Tripathy. According to learned counsel, the finding of this Court that no specific finding was rendered as regards the status of Christ College is erroneous on the face of it and therefore, should be revisited.

Mr. Susanta Kumar Dash as well as learned State counsel have both argued that firstly, the contention raised on behalf of the petitioners is factually incorrect and in any case the same cannot be ever a ground for review. Even if two views are theoretically possible to be taken on a particular issue, same cannot be a subject of review.

10. After hearing counsel for the parties at length on the first point this Court is of the view that while adjudicating the writ applications, particularly the question of

status of the institution, reference was made by it to the Single Bench judgment in ***Governing Body of Stewart Science College, Cuttack*** (supra) and Division Bench of this Court in **Dr. Shyamal Ku. Saha** (supra). After analyzing the said judgments, this Court rendered a specific finding as delineated under paragraph-10 of the judgment. According to the petitioners, the interpretation of the earlier judgments by this Court is erroneous, which is apparent on the face of it. In view of the discussion made by this Court in paragraph-10 of the judgment, this Court is not inclined to accept that interpretation of the earlier judgments is erroneous constituting an error on the face of the record. Even otherwise, as held in **Sanjay Agarwal** (supra) "*an error on the face of record must be such an error which, mere looking at the record should strike and it should not require any long-drawn process of reasoning on the point where there may conceivably be two opinions*".

For the above reasons, therefore, the first ground urged by the review petitioners is not tenable.

11. As regards the second ground it has been argued at length by the learned counsel for the Review Petitioners that the finding of this Court that the grievance of the petitioners in the writ applications relates to contract of personal service and therefore, not amenable to the writ jurisdiction was never deliberated as the petitioners were not given opportunity to argue on this point. Particular reference has been made to order dated 22.03.2023, wherein the matter was heard again on the point of status of the institution but not on maintainability of the writ application. In this regard, it has been argued by Ms. Pami Rath, learned Senior Counsel that after closure of hearing of the writ applications when the matters were kept reserved for judgment, on mention being made by her they were listed again as she had not participated in the hearing due to non-mentioning of her name in the cause-list at the relevant time. Therefore, the matters were listed again and she was heard at length. In course of hearing on the said day she cited the judgment of the Supreme Court in the case of ***St. Mary's Education Society and Another vs. Rajendra Prasad Bharagava and others,*** reported in 2022 SCC OnLine SC 1091, which, inter alia, deals with the point of maintainability of a writ application involving service dispute in the private realm against a private education institution. According to Ms. Rath, it is therefore, not factually correct to contend that there was no hearing on that point.

12. A reference to the judgment under review would reveal that the following was mentioned in paragraph-22 and 23.

> *"22. This takes the Court to the next question - whether the writ applications would be maintainable despite the aforementioned finding.*
>
> *23. It has been argued on behalf of the petitioners that even if it is held that the Christ College is a minority educational institution, it is still amenable to the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution since by providing education it is performing a public duty. On the other hand, it has been argued on behalf of the Christ College that even if it is held that the institution is performing a publicduty,*

> *the lis before this Court involves individual and private grievances of the petitioners against the Management, which cannot be gone into in the writ applications."*

13. In view of such categorical observation of this Court and reliance placed on the case of **St. Mary's** (supra) relied upon by Ms. Rath, it is factually incorrect to contend that there was no hearing on the point of maintainability of the writ application. It is significant to note that even during hearing of these review applications on 07.11.2023 and 08.11.2023, learned counsel for the petitioners made attempts to convince the Court that the finding of the Court that the grievances of the petitioners in the writ application related to contract of personal service and no public law element is involved, is erroneous on the face of it. Surprisingly however, on the next date i.e. on 09.11.2023 three memorandums were filed by the learned counsel for the petitioners reserving their rights to argue their cases on merits only if the review applications were allowed. In view of the abrupt stoppage of arguments on merits by the petitioners, this Court closed the arguments and the matters were kept reserved for judgment. From what was argued on behalf of the petitioners it is evident that they essentially contend that they should have been heard further on the point and the cases should not have been decided referring only to the relief claimed in the writ applications. In the judgment passed by this Court, after referring to the settled position of law as laid down in **St. Mary's** (supra) this Court referred to the individual prayers made in the writ applications in paragraphs-25 to 31 of the judgment and held that such grievances are relatable to contract of personal service and no public law element is involved.

14. While not conceding to the arguments that the petitioners were not heard on the point, this Court finds that even otherwise it is the settled law that a review of a judgment would not be justified merely because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict. The above was held in **Haridas Das** (supra). Thus, the second ground raised for review of the judgment is also found to be untenable.

15. Having regard to the foregoing discussion therefore, this Court is unable to persuade itself to review the judgment in question.

16. Resultantly, the review applications being devoid of merit, are dismissed.

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2024 (I) ILR-CUT-570

A.K. MOHAPATRA, J.

CRLREV NO.37 OF 2021

KISHORE CHANDRA DAS …...Petitioner

-V-

STATE OF ODISHA …... Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 397, 401 – Revision – Commission of offence U/s. 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988 – A disciplinary proceeding was lawfully initiated against the present petitioner which was almost identical to the charges in the vigilance case – The disciplinary authority after detailed enquiry and consideration of the facts as well as contentions of both sides, finally exonerated the petitioner – Whether exoneration in the disciplinary proceeding on the self-same charges would have a bearing effect on vigilance case? – Held, Yes – It would be an abuse of process of law, if the criminal trial in shape of vigilance case is allowed to continue against the petitioner.

Case Laws Relied on and Referred to :-

1. (2008) 10 SCC 394 : Yogesh v. State of Maharashtra.
2. (2020) 9 SCC 636 : Ashoo Surendranath Tewari v.CBI.
3. CRLMC No.3407 of 2010 : Dr.Minaketan Pani v. State of Orissa.
4. 1994 Supp (3) SCC 735 : Santosh De v. Archna Guha.
5. (2010) 2 SCC 398 : P.Vijayan v. State of Kerala.
6. (1995) 4 SCC 181 : State of J & K -v.- Sudershan Chakkar.
7. (2005) 1 SCC 568 : State of Orissa v. Debendra Nath Padhi.
8. (2020) 10 SCC 120 : Mukesh Singh v. State (Delhi).
9. (2007) 1 SCC 1 (Para-48) : Prakash Singh Badal -v.- State of Punjab.
10. (2018) 16 SCC 299 : Asian Resurfacig Road Agency (P) Ltd. & Another v. CBI.

For Petitioner : M/s. Pitambar Acharya, Sr. Advocate.

For Opp.Party : Mr. Sangram Das, ASC (Vigilance Department).

JUDGMENT Date of Hearing : 29.08.2023 : Date of Judgment : 02.11.2023

A.K. MOHAPATRA, J.

1. The above named Petitioner has filed the present criminal revision Petition under section 397 read with 401 of the Code of criminal Procedure with a prayer to set aside the order dated 17.11.2020 passed by the learned Special Judge, Vigilance, Sundargarh on the discharge petition filed by the Petitioner under section 239 of the Code of Criminal Procedure in CTR No.26 of 2014 corresponding to SBP Vig P.S.Case No.44 dated 30.06.2012 for alleged commission of offence under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

2. For the sake of brevity, the factual matrix of the case has been narrated in gist. The Petitioner was serving as a Joint Secretary in the Commerce and Transport Department, Government of Odisha. It has also been mentioned that the Petitioner who had worked in different departments, in different capacities, diligently and sincerely. The service career of the Petitioner has remained unblemished till registration of the Vigilance case. On 30.06.2012 an F.I.R. was lodged against the Petitioner. It appears that the trial has not progressed substantially and such inordinate delay in conclusion of the trial has been impacting the service career of

the Petitioner adversely. The F.I.R. registered against the Petitioner by the Vigilance department reveals that the Petitioner during his incumbency for the period from 09.03.2011 to 27.06.2011 as B.D.O., Bargaon Block in connivance with the co-accused namely Kundan Kumar Agarwal, Proprietor of M/S Baba Dharsu Traders, Ujalpur, Sundargarh has committed criminal misconduct by showing undue official favour in purchasing 10,000 bags of Konark cement from the abovenamed co-accused thereby the Petitioner has caused a pecuniary loss of Rs.2,05,300/- and on the equal amount of loss to the Government. It has been alleged that the said amount of loss could have been saved, had the Petitioner been diligent in his conduct. With regard to the procedure adopted in purchasing the cement bag, it has been alleged in the F.I.R. that the Petitioner without following the proper tender procedure and without further negotiating with the co-accused had issued the supply order on different dates at a higher price, than the price which the co-accused offers to the public. It has also been alleged that the Petitioner has not taken any permission for the purchase. The Petitioner had not invited quotation from the leading cement manufacturers as well as other authorized dealers selling Konark Cement to the general public at a lesser rate.

3. Per contra, the case of the Petitioner as narrated in his Petition, is that the Petitioner was functioning as B.D.O., Bargaon for the aforesaid period. For the purpose of development work, the DRDA, Sundargarh vide letter dated 16.06.2010 had intimated all B.D.Os with regard to supply of cement and as per the terms of the agreement of the year 2010-11, the price was fixed at Rs.4980/- per M.T. i.e. Rs.249/- per bag i.e. price upto Block point including transportation charges, all taxes and duties, loading and unloading charges, irrespective of any fluctuation in price for the agreed period from three suppliers/manufacturers, namely, OCL India Ltd, ACC Ltd. and Ultratech Limited. It has been further stated that pursuant to the aforesaid instructions vide letter dated 16.06.2010 under Annexure-2 to the Revision Petition, the Petitioner had placed the indent for procurement of materials for development work for the year 2010-11. Since there was a delay in supply of cement from the cement manufacturing companies, the Petitioner, on submission of willingness for supply of cement by M/s. Baba Dharsu Traders at Rs.248/- per bag including all taxes, transportation charges, loading and unloading and stacking charges placed the order with above named Supplier by following the official procedure. Such placement of indent is stated to be well within the authority of the Petitioner and in consonance with the guidelines under Annexure-2.

Considering the urgency of the developmental work, the Petitioner procured 10,000 bags of cement of OCL brand from the authorized dealer at a rate of Rs.248/- per bag including all costs. It is needless to mention here that the approved rate for supply of cement to all blocks/DRDA of Sundargarh for the period from 31.05.2010 to 30.05.2011 was at Rs.249/- per bag including all costs and taxes. However, it has been further stated that on a mala fide motive on 30.06.2012 an F.I.R. bearing No.44 of 2012 was lodged by the State Vigilance authority implicating the Petitioner

as an accused for alleged commission of offence under the Prevention of Corruption Act. The Petition further reveals that the Government without application of mind on 13.11.2023 accorded sanction under Section 19 of the P.C.Act, 1988 for prosecution against the Petitioner. On 14.12.2013 the Vigilance Police has mechanically filed a Charge Sheet for alleged commission of offence under Section 13(2) read with 13(1)(d) of P.C.Act read with Section 120-B of the Indian Penal Code. It is alleged that before filing Charge Sheet no preliminary enquiry as mandated by law was ever conducted.

4. Being aggrieved by the aforesaid illegal conduct of initiating a prosecution against the Petitioner without there being any legal basis, the Petitioner moved a discharge petition under section 239 Cr.P.C. before the learned Special Judge, Vigilance, Sundargarh. Learned Special Judge, Vigilance without application of mind and in a mechanical and arbitrary manner rejected the said petition vide his order dated 17.11.2020 which has been filed along with the present Petition and marked as Annexure-3.

5. Heard Mr.Pitambar Acharya, learned senior counsel appearing on behalf of the Petitioner and Mr.Sangram Das, learned Standing Counsel for the Vigilance department. Perused the case record as well as other materials either filed along with the revision petition or placed on record by the learned counsels appearing from either side. Mr.Acharya, learned senior counsel appearing on behalf of the Petitioner, at the outset, submitted that the learned court below has miserably failed to take into consideration the letter No.CFSD:AA/1/30 dated 10.11.2011 issued by the OCL India Ltd. He further submitted that the said letter is in reply to Letter No.1227/Vig. (RKL) dated 03.11.2011 of the Inspector of Vigilance, Rourkela. The OCL India Ltd has clarified that M/s. Baba Dharsu Traders is authorized to sale Konark Ordinary Portland/Slag/PS Cement (OCL brand) at any price, primarily in Sundargarh district. In such view of the matter, it was contended before this Court that the aforesaid reply of OCL India Ltd. was well within the knowledge of the vigilance authority and the same has been accepted by the prosecution and therefore, there was no dispute with regard to the position that M/S. Baba Dharsu Traders is authorized to sale Konark Ordinary Portland/Slag/PS Cement (OCL brand) at any rate within Sundargarh district.

6. Mr. Acharya, learned senior counsel further contended that the learned trial court has also failed to take note of the fact that in letter dated 05.12.2011 under Annexure-5, the Project Director, District Rural Development Agency, Sundargarh has specifically stated that due to delay in supply of cement by manufacturing company, if BDOs buy approved brand of cement from dealers at the approved rate of DRDA, no specific instruction is required for the said purpose by the B.D.O. Therefore, the purchase made by the Petitioner in the present case from the authorised dealer at the rate of Rs.248/- per bag of 50 kg. i.e., at a price lower than the sanctioned price of Rs.249/-per bag of 50 kg, the Petitioner has not violated the

terms and conditions of the District Tender Committee and that such conduct of the B.D.O. was within his authority and in consonance with the decision of the DRDA.

7. Mr.Acharya, learned senior counsel further argued that the learned trial court has mechanically ignored letter No.6387/DRDA dated 15.11.2012 issued by the Project Director, DRDA, Sundargarh. In the said letter, it has been clarified to the Inspector, Vigilance in reply to the letter dated 04.10.2012 that the District Level Purchase Committee in compliance with the Rule 68(2) (a) of the Panchayat Samiti Accounting Procedure Rules, 2002 finalised the rate and brand of cement and communicated the same to all BDOs for easy and timely execution of development works going on in the respective blocks. Moreover, DRDA has also clarified that the Block administration including execution of development work comes within the purview of the Panchayat Samiti Accounting Procedure Rules, 2002. In such view of the matter, it was emphatically contended before this Court that the Petitioner has not violated the provision or Rules relevant for the purpose of the present case.

8. In course of his argument, learned senior counsel appearing for the Petitioner placed strong reliance on the judgment in the case of ***Yogesh v. State of Maharashtra***, reported in ***(2008) 10 SCC 394*** wherein the Hon'ble Supreme Court has observed as follows:

> "16. It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. *The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record if unrebutted, make a conviction reasonably possible.*"

9. Most importantly, learned senior counsel appearing on behalf of the Petitioner brought it to the notice of this Court that a Disciplinary Proceeding which was initiated against the Petitioner has ended in exoneration of the Petitioner. He further elaborated that a Disciplinary Proceeding was initiated by the GA & PG department vide Memorandum No.27765/Gen dated 24.09.2018 against the Petitioner. After conducting a detailed enquiry, and after recording evidence the Disciplinary Authority has come to a conclusion to drop the proceeding and to exonerate the Petitioner from all charges vide order dated 18.06.2021.

10. It is stated by Mr.Acharya, learned senior counsel that the charges in the Disciplinary Proceeding are identical to the charges in the vigilance case. He further contended that the standard of proof in a Disciplinary Proceeding is preponderance

of probability. In contrast the standard of proof followed in all criminal cases is " beyond all reasonable doubt" In the said context, it is submitted by the learned senior counsel appearing for the Petitioner that when the departmental authorities failed to establish the charges against the Petitioner in the Disciplinary Proceeding wherein the standard of proof is preponderance of probability, which is much lesser standard, there is no chance whatsoever that the selfsame allegation against the Petitioner as involved in the vigilance case would be sustained or proved beyond all reasonable doubt, which undoubtedly is of a higher degree.

11. In the context of exoneration of the Petitioner from all charges in the Disciplinary Proceeding and the impact thereon on the criminal prosecution, learned senior counsel appearing for the Petitioner submitted that after exoneration in the Disciplinary Proceeding on self same allegation, this Court should not allow criminal prosecution to continue. He further contended that law in this regard is no more res integra. Referring to the landmark judgment of the Hon'ble Supreme Court in ***Ashoo Surendranath Tewari v.CBI, (2020) 9 SCC 636*** , learned senior counsel for the Petitioner submitted that the ratio laid down by the Hon'ble Supreme Court in the aforesaid judgment squarely applied to the fact of the present case. This Court at this juncture, would like to refer to some of the paragraph of the judgment in ***Ashoo Sundranath Tewari's*** case which would be relevant for adjudication of the dispute involved in the present case. The relevant paragraphs are quoted herein below:

> *"**12**. After referring to various judgments, this Court then culled out the ratio of those decisions in para 38 as follows: (Radheyshyam Kejriwal case (Radheshyam Kejriwal v. State of W.B.(2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721), SCC P. 598)*
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> *"38.The ratio which can be culled out from these decisions can broadly be stated as follows:*
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> *(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;*
>
> *(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;*
>
> *(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;*
>
> *(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;*
>
> *(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or section 300 of the Code of Criminal Procedure;*
>
> *(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and*
>
> *(vii)* ***In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases****."*

> ***13**. It finally concluded : (Radheshyam Kejriwal case (Radheshyam Kejriwal v. State of W.B.(2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721) SCC p. 598, para-39)*
>
> *"39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."*

12. Similarly, referring to the judgment in the case of ***Dr.Minaketan Pani v.State of Orissa (CRLMC No.3407 of 2010)*** deciding by this Court vide judgment dated 20.05.2022, learned senior counsel for the Petitioner submitted that the judgment in ***Dr.Minaketan Pani*** (supra) has been decided by taking into consideration the judgment of the Hon'ble Apex Court in ***Radheyshyam Kejriwal v.State of West Bengal and Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI (supra). In Dr.Minaketan Pani's case*** by referring to the aforesaid two Supreme Court judgments this Court has held that the exoneration in the Disciplinary Proceeding would result in quashing of the criminal case initiated on the self same charges since it requires a higher standard of proof.

It would be profitable to quote relevant paragraphs-22 and 26 of the judgment in ***Dr.Minaketan Pani's case*** (supra):

> *"22.Then we have the other three-Judge Bench judgment, which is more recent in **Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI** (supra) which follows **Radheyshyam Kejriwal v. State of west Bengal** (supra) but does not notice **State (NCT of Delhi) v. Ajay Kumar Tyagi** (supra). It however takes note of P.S. Rajya (supra). The conclusion reached in Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI (supra) is that the exoneration in departmental proceedings would result in the quashing of the criminal case on the same charges since it entitled a higher standard of proof. In other words, if on the lower standard of proof itself the charges were not made out, they obviously would not be made out on a higher standard of proof in a criminal case. The case was held to be covered by Clause (vii) in para 38 of **Radheyshyam Kejriwal v. State of West Bengal** (supra).*
>
> *26. For all of the aforementioned reasons, in the facts and circumstances of the present case where on the same charges on which the Petitioner is facing criminal trial he has been honourably exonerated in the departmental proceedings, the Court adopts the reasoning of the decisions in **Radheyshyam Kejriwal v. State of West Bengal (supra) and Ashoo Surendranath Tewari v. Deputy Superintendent of police, EOW, CBI** (supra) and sets aside the impugned order dated 15th January, 2009, passed by the Sub-Divisional Judicial Magistrate (S), Cuttack in G.R.Case No.1057 of 2007."*

13. Finally, learned senior counsel appearing on behalf of the Petitioner argued that there exist an inordinate delay in launching the prosecution as well as in concluding the trial. He further contended that such inordinate delay in launching the prosecution has remained unexplained. He further argued that although the F.I.R. is of the year 2012 however, till date the Prosecution has not been able to produce any material document in support of the prosecution case. In the aforesaid background,

learned senior counsel for the Petitioner submitted before this Court that the learned trial court has miserably failed to consider the aforesaid aspect of delay and further, he has failed in his duty by not discharging the Petitioner from the criminal case. In the said context, learned counsel for the Petitioner also refers to the judgment in the case of ***Santosh De v. Archna Guha, 1994 Supp (3) SCC 735***. Paragraph-13 of the said judgment, which is relevant for the purpose is quoted herein below:

> *" We are not satisfied that there are any valid grounds for interference with the order of the High Court. The most glaring circumstance in the case is the delay in commencing the trial. The case was committed to sessions court on 15.07.1974 and the charges came to be framed by the sessions court only on 13.04.1983 i.e. after a lapse of about eight years. The appellant is not in a position to explain the reasons for this delay. In the order under appeal, the High Court has stated that this delay is entirely on account of the default of the prosecution. This is not a case of what is called "systemic delays"- as explained in Abdul Rehman Antulay ((1992) 1 SCC 225 : 1992 SCC (Cri) 93). In our opinion, this unexplained delay of eight years in commencing the trial, by itself, infringes the right of the accused to speedy trial. In the absence of any material to the contrary, we accept the finding of the High Court that this delay of eight years is entirely and exclusively on account of the default of the prosecution. Once that is so there is no occasion for interference in this appeal. It is accordingly dismissed."*

14. Lastly, learned senior counsel for the Petitioner urged before this Court that due to pendency of the aforesaid criminal case, although the Disciplinary Proceeding has ended in exoneration of the Petitioner, the Petitioner, who is likely to retire very shortly is debarred from getting any promotion as well as the other service and financial benefit attached to his post. Therefore, it was argued that long pendency of the criminal case which is not likely to be concluded in near future, in the event the same is allowed to be continued by this Court, such continuance of the criminal proceeding would cause grave injustice to the Petitioner and the same would only amount to abuse of process of law by the State authority.

15. Mr.Sangram Das, learned Additional Standing Counsel, Vigilance department on the other hand contended that the learned trial Court has not committed any illegality at all in rejecting the discharge petition of the Petitioner filed under Section 239 Cr.P.C. Therefore, at the outset he contended that the revision petition is devoid of merit and the same should be thrown out.

16. In course of his argument, Mr.Das, learned Additional Standing Counsel submitted that five points fall for determination in the present process of adjudication. Those are;

> i) Whether an accused is entitled to acquittal when investigation by an Officer who himself is informant/complaint in the case ?
>
> ii) Whether the question of vitiation of Sanction order can be agitated at threshold of trial or has to be raised during trial ?
>
> iii) Whether the defence/plea of the accused can be looked into at the stage of discharge?
>
> iv) Whether the challenge to an order for framing of charge can be entertained u/s. 397 Cr.P.C. to re-appreciate the matter ?

v) Whether the material produced by the prosecution before trial court reasonably connect the accused with the offence and disclose grave suspicion against the accused ?

17. Before adverting to deal with the points raised by the learned Additional Standing Counsel, this Court would like to clarify that so far the factual aspect of the matter is concerned, the same is not disputed by the leaned Additional Standing Counsel which is evident from the note of submission submitted by the learned Additional Standing Counsel. Learned Additional Standing Counsel basically addressed this Court on the legal questions involved in the present proceeding. In course of his argument, learned Additional Standing Counsel initially addressed with regard to the legal principle applicable to an application seeking discharge. Broadly, he has referred to 10 principles that is to be kept in mind by the Court while considering the application of discharge. He has also referred to the judgment in ***P.Vijayan v. State of Kerala (2010) 2 SCC 398***, which lays down that there must exist some materials for entertaining strong suspicion which can form the basis for drawing of a charge and refusing to discharge the accused.

18. Learned Additional Standing Counsel, Vigilance also refers to the case in ***State of J&K -v.- Sudershan Chakkar reported in (1995) 4 SCC 181*** – and submits that the defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under section 227 Cr.P.C. Finally, learned Additional Standing Counsel also referred to the judgment in the case of ***State of Orissa v. Debendra Nath Padhi*** reported in ***(2005) 1 SCC 568***. Referring to the landmark judgment in ***Debendranath Padhi*** (supra) learned Additional Standing Counsel submitted that it has been observed by the Hon'ble Supreme Court that the expression "record of the case" used in Section 227 Cr.P.C. is to be understood as the documents and articles, if any produced by the Prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of charge. At the stage of framing of charge, the submission of the accused is to be confined to the materials produced by the Police.

19. In course of his argument, learned Additional Standing Counsel submitted that there is no bar in law that the informant cannot be the investigator and solely on such ground, the accused is not entitled to acquittal. In the said context he refers to the judgment of ***Mukesh Singh v.-State (Delhi)*** reported in ***(2020) 10 SCC 120***. With regard to the 2nd issue, it was contended that the sanction order can be agitated at the threshold of the trial. But the question with regard to initiation of sanction order has to be raised only during trial and in the said context, he refers to the case of ***Prakash Singh Badal-v.-State of Punjab*** reported in ***(2007) 1 SCC 1 (Para-48)***

20. In reply to the 3rd issue, it was stated by the learned Additional Standing Counsel that the defence/plea of the accused is not to be looked into at the stage of discharge as has been held by the Hon'ble Supreme Court in ***State of J & K -v.- Sudershan Chakkar*** (supra.) In reply to the 4th issue, he contended that the Hon'ble Supreme Court in ***Asian Resurfacig Road Agency (P) Ltd. and Another v. CBI***

reported in ***(2018) 16 SCC 299*** Hon'ble Apex Court has observed that the challenge to an order of framing charge should be entertained only in rarest of rare cases only to correct a patent error of jurisdiction and not to re-appreciate the order.

21. Finally, in reply to the 5th issue, learned Additional Standing Counsel submitted that the materials on record which was filed by the Prosecution, discloses creation of suspicion against the Petitioner and reasonably connect the accused with the offence. In the said context, he has also referred to Rule 268(2)(a) of the Panchayat Samiti Accounting Procedure Rule, 2002 and submits before this Court that the Executive Officer of Zilla Parishad is the competent authority to invite tender annually for purchase of material and that the Tender Purchase Committee is the competent authority to take a decision with regard to the price of the commodities likely to be acquired and that the B.D.O. should act on the decision of such Purchase Committee while purchasing materials.

22. He further emphatically contended that the BDO has no power to take decision with regard to purchase of materials without approval of the purchase committee/Executive Officer of the Zilla Parishad. It was also contended that any purchase exceeding Rs.2,00,000/- by the B.D.O. requires prior approval of the Collector, as per Rule 268 (2)(c) of the said Accounting Procedure. Referring to the facts of the present case, he further contended that the accused-Petitioner purchased 10,000 bags of Konark cement from M/S Baba Dharsu Traders without approval of the Purchase Committee/Executive Officer, Zilla Parishad and the Collector, Sundargarh. As such it was submitted before this Court that he has acted illegally in the matter while purchasing 10000 bags of Konark cement from the above named traders. He also alleged that while procuring/purchasing cement from the traders the Petitioner has failed to strictly adhere to the procedure. On the factual side of the matter, learned Additional Standing Counsel while reiterating the prosecution case has narrated the F.I.R. story.

23. Broadly summarized, learned Additional Standing Counsel argued before this Court that this Court is bound by the ratio laid down by the Hon'ble Supreme Court while considering the application for discharge. Furthermore, he has alleged that the accused-Petitioner has not followed official procedure while procuring 10,000 bags of cement from the Traders as has been alleged in the F.I.R. Therefore, the entire effort of the learned Additional Standing Counsel was to convince this Court that even if the Petitioner has been exonerated in the Disciplinary Proceeding, such exoneration would have no direct bearing on the present criminal case initiated against the Petitioner alleging misconduct.

24. It was also argued by the learned Additional Standing Counsel that the nature of evidence, documents produced by the Prosecution before the learned trial court, prima facie discloses a grave suspicion against the accused-Petitioner and as such the learned trial Court was justified in rejecting the application for discharge.

He also contended that the probative value of the material cannot be gone into at this stage and a roving inquiry into pros and cons of the matter is not permissible at the stage of trial. Accordingly, learned Additional Standing Counsel justified the conduct of the learned trial court in rejecting the discharge petition filed by the Petitioner before the trial Court.

25. Having heard learned senior counsel for the Petitioner and the learned Additional Standing Counsel for the Vigilance department and on a careful examination of the record as well as the materials placed before this Court, this Court prima facie observes that in the event the Petitioner succeeds in convincing this Court that the charges in the Disciplinary Proceeding as well as in the vigilance case are identical and self same, following the law laid down by the Hon'ble Supreme Court in ***Radheyshyam Kejriwal***'s case (supra) as well as Ashoo ***Surendranath Tewari*** (supra), the Petitioner would succeed in the present revision application. Thereafter, this Court is not required to examine the other grounds raised by the Petitioner or the reply to the same by the learned Additional Standing Counsel. With regard to the scope and ambit of this Court in interfering with an order passed by the trial court on a discharge application under section 239 Cr.P.C., this Court observes that the law is fairly settled by a catena of judgment of the Hon'ble Supreme Court as well as this Court. Therefore, such settled principles need not be reiterated here for the sake of brevity.

26. To adjudicate the aforesaid issue, this Court is required to look into the memorandum of charges dated 24.09.2018 and the Article of charges attached thereto. Such documents placed on record by the learned senior counsel for the Petitioner after serving a copy thereof on the learned Additional Standing Counsel for Vigilance department, the article of charges communicated to the Petitioner vide Annexure-1 is as follows :

> ARTICLE OF CHARGE
>
> Shri Kishore Chandra Das, OAS(S),Ex-BDO, Bargaon Block, District: Sundargarh has committed following irregularities.
>
> Shri Kishore Chandra Das, OAS(S), Registrar, Khallikote Cluster University, Berhampur, during is incumbency from 09.03.2009 to 27.06.2011 as BDO, Bargaon Block, District: Sundergarh committed misconduct by showing undue official favour to Shri Kundan Kumar Agrawala, Proprietor of Baba Dharsu Traders, Ujalpur District Sundergarh relating to purchase of 10,000 bags of Konark Cement at a higher rate than the available market price and put the Government in a financial loss of Rs.2,05,300/-
>
> That, Shri Das purchased the above quantity of Konark brand cement at the cost of Rs.248/- per 50 kg. bag from one Kundan Kumar Agrawal, Prop. Baba Dharsu Traders, although there was availability of 14128, 19475 and 20061 bags of cement at the Block respectively violating the agreement made between PD, DRDA, Sundargarh and Cement companies.
>
> Thus the following articles of charge are framed against him for violation of Orissa Government Servant's Conduct Rules, 1959:-

1. Failed to maintain absolute integrity
2. Gross Misconduct
3. Devotion to duty.

27. Further, a perusal of order dated 18.06.2021 passed by the Additional Chief Secretary, GA & PG department Government of Odisha reveals that the Petitioner has been exonerated from all the charges leveled against him vide GA & PG Memo No.24.09.2018. The relevant para-5 is quoted herein below:

> "5. NOW THEREFORE, after careful consideration of the charges framed against Shri Das, his statement of defence, the findings of the Inquiring Officer, the directions of the Hon'ble Orissa High Court, Cuttack and other materials available on record, Government have been pleased to exonerate Shri Das off the charges leveled against him vide GA & PG Department Memorandum No.27765/Gen., dt.24.09.2018."

In view of the aforesaid order, it is clear that the charges brought against the petitioner which are almost identical to the charges in the vigilance case was duly enquired into by the Disciplinary Authority. After such detailed enquiry and consideration of the facts as well as contentions of both sides, the Disciplinary Authority has finally exonerated the Petitioner.

28. The arguments advanced by the learned Additional Standing Counsel is entirely based on the procedural irregularities in procuring 10,000 cement bags by the Petitioner while he was posted as B.D.O. Such procedural irregularities were also a part of the Disciplinary Proceeding and the same has been duly considered by the Disciplinary Authority. After considering all the aspects of the matter and taking into consideration the materials available on record, the Disciplinary Authority has exonerated the Petitioner from the charges made against the Petitioner as shown in Article of charges herein above. There is no doubt that the charges in the Article of charges are almost identical with the allegations made in the vigilance F.I.R. as well as the charge sheet.

29. Moreover, the standard of proof for the department in a Disciplinary Proceeding is of a lesser magnitude than the standard of proof for the prosecution in a vigilance case which is of a higher magnitude i.e., beyond all reasonable doubt. When the department has failed to establish the charges in the Disciplinary Proceeding with a lesser magnitude of standard of proof, it would be difficult for the prosecution to establish the charges in the criminal case beyond all reasonable doubt. Furthermore, in the Disciplinary Proceeding the Inquiring Officer must have examined the entire procedural aspect relating to the allegations made in the article of charges. Since they did not find any irregularities in the procedural aspects, the Petitioner has been exonerated of all the charges. Such development in the Disciplinary Proceeding would definitely have a direct bearing on the criminal case in the shape of vigilance case.

30. In ***Ashoo Surendraath Tewari'***s case (supra) the Hon'ble supreme Court by referring to ***Radheyshyam Kejriwal'***s case, reaffirmed the ratio laid down by the Hon'ble

Supreme Court in Pragraph-38 of ***Radheyshyam Kejriwal's*** case. Clause-7 of paragraph-38 of ***Radheyshyam Kejriwal's*** case (supra) clearly stipulates that *"in case of exoneration, however on merits where the allegation is found to be not sustainable at all and the persons held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle is the higher standard of proof in criminal cases"*. Finally, in paragraph-39 of the judgment in ***Radheyshyam Kejriwal's*** case (supra), the Hon'ble Supreme Court has prescribed the yardstick as to whether the allegation in the adjudication proceeding as well as the proceeding for prosecution is identical and that the exoneration of the person concerned in the adjudication proceeding is on merit ? Furthermore, in the event it is found on merit, there is no contravention of the provisions of the Act in the adjudication proceeding, the trial of the person concerned shall be an abuse of the process of the court.

31. By applying the aforesaid well established principle of law, this Court observes that there is no dispute with regard to the fact that a disciplinary Proceeding was lawfully initiated against the present Petitioner. Thereafter, such proceeding was allowed to continue as per the relevant service Rules. The Inquiring Officer after conducting an enquiry had submitted his report. Further, it appears that the Disciplinary Authority taking into consideration all aspects of the matter has been pleased to exonerate the Petitioner from the charges leveled against the Petitioner in the Disciplinary Proceeding which are identical to the charges in the vigilance case. It appears that the department has accepted the final verdict of the Disciplinary Authority and the same has attained finality.

32. On a careful analysis of the factual background of the present case, as well as keeping in view the law laid down by the Hon'ble Supreme Court in ***Radheyshyam Kejriwal's*** case as well as in ***Ashoo Surendranath Tewari's*** case (supra) this Court is of the considered view that the charges in both the Disciplinary Proceeding as well as in the Vigilance case are identical and based on self same facts. Moreover, the Petitioner having been exonerated from the Disciplinary proceeding which was conducted pursuant to the relevant Service Rules and the outcome of such Disciplinary Proceeding having attained finality, it would be an abuse of process of law if the criminal trial in shape of vigilance case is allowed to continue against the Petitioner. This Court further observes that the present case falls within one such rarest of rare case as has been held by the Hon'ble Supreme Court of India in Paragrph-38 of the judgment in ***Radheyshyam Kejriwal***'s case. Accordingly, this Court is also of the considered view that the learned trial court has committed a gross illegality by not allowing the discharge petition of the Petitioner. Accordingly, the impugned order dated 17.11.2020 is hereby set aside. Further, this Court has no hesitation in allowing the application under section 239 Cr.P.C. filed by the Petitioner to discharge him from the CTR No.26 of 2014 arising out of Sambalpur Vigilance P.S.Case No.44 dated 30.06.2012.

33. Accordingly, the revision application is allowed, however, there shall be no order as to cost.

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2024 (I) ILR-CUT-583

A.K. MOHAPATRA, J.

W.P.(C) NO.23326 OF 2022

KAILASH CHANDRA DAS ….Petitioner

-V-

STATE OF ODISHA & ORS. ….Opp.Parties

ODISHA CIVIL SERVICE (PENSION) RULE, 1992 – Rule 7(2)(C) and explanation(b) & Rule, 66 – The petitioner was a member of the selection committee during his incumbency as District Welfare Officer – A vigilance case was registered against the members of the committee including the petitioner – Whether withholding of the retiral as well as pensionary benefit on the basis of vigilance case is justified? – Held, No – The departmental proceeding was initiated after retirement – On the date of retirement, such proceeding was not in existence – The writ petition disposed of with certain direction.

(Para 15)

Case Law Relied on and Referred to :-

1. W.P.(C) No.14718 of 2015 (06.05.2022) : State of Odisha and others v. Sushanta Chandra Sahoo & Ors.

For Petitioner : M/s. Anil Kumar Das, K. Mohanty & N. Patra.

For Opp.Parties : Mr. N.K. Praharaj, AGA
Mr. S.K. Patra, Standing Counsel.

JUDGMENT Date of Hearing & Judgment : 04.01.2024

A.K. MOHAPATRA,J.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).

2. Heard Mr. Anil Kumar Das, learned counsel appearing for the Petitioner as well as Mr. N.K. Praharaj, learned Additional Government Advocate appearing for the State-Opposite Parties. Perused the pleadings of the parties as well as the documents annexed thereto.

3. The present writ petition has been filed by the Petitioner with a prayer for a direction to the Opposite Parties to sanction and release the final pensionary benefits, gratuity, unutilized leave salary, commuted value of pension and G.P.F. which has been withheld by the Opposite Parties even after his retirement from service w.e.f. 30.06.2018.

4. The factual background leading to filing of the present writ petition, in gist, is that the Petitioner was initially appointed as a Welfare Extension Officer on 25.09.1979. Pursuant to such appointment, the Petitioner joined in the office of the

B.D.O., Chikiti in the district of Ganjam. While working as such, the Petitioner was promoted to the post of Assistant District Welfare Officer on 31.10.2010 and thereafter he was promoted to the post of District Welfare Officer on 21.2.2011.

5. While the Petitioner was working as District Welfare Officer in Boudh Collectorate, on attaining the age of superannuation on 30.6.2018, the Petitioner has retired from service. During his incumbency as District Welfare Officer, Boudh, in the year 2013, a recruitment process to the post of R.I. was conducted in respect of the Boudh district under the Chairmanship of Collector, Boudh. The Petitioner was also a Member of the Selection Committee and he was entrusted with the work of scrutinizing the caste certificates of the candidates. During the process of such selection to the post of R.I., an allegation was made against the Petitioner relating to certain irregularities in the aforesaid recruitment process and, accordingly, a vigilance case was registered against the Members of the Selection Committee including the present Petitioner. The said case was registered as Berhampur Vigilance Case File No.89 of 2016. The list of accused persons appended to the Berhampur Vigilance File reflects the name of the Petitioner at Serial No.10. Since the Petitioner got entangled in the aforesaid vigilance case, the Petitioner has not been paid his retiral dues including pensionary benefits, gratuity etc. despite the fact that the Petitioner has retired from service on attaining the age of superannuation w.e.f. 30.6.2018. Being aggrieved by such illegal conduct of the Opposite Parties, the Petitioner has approached this Court by filing the present writ petition.

6. Learned counsel for the Petitioner in course of his argument submitted before this Court that in the aforesaid vigilance case, the investigation has not been concluded as of now and no charge sheet has been filed against the Petitioner. He further contended that the aforesaid Vigilance File was initiated on the basis of the allegation of certain irregularities in the recruitment process. He further contended that there is no allegation against the Petitioner of accepting any illegal gratification or the Petitioner having demanded or having been paid any money as bribe. Thus, it was contended by the learned counsel for the Petitioner that the allegations made in the Vigilance File, referred to hereinabove, are all baseless and the same has not been established by leading evidence.

7. He further submitted that withholding of the retiral as well as pensionary benefits only on the basis of the aforesaid Vigilance File which has been created against Selection Committee members including the Petitioner, the Opposite Parties have not acted within their authority to withhold the retiral dues as well as pensionary benefits as is due and admissible to the Petitioner as per law. Moreover, it was also emphatically contended that the allegations made against the Petitioner are baseless and fake, as the same have not been established as of now. He further contended that in a criminal proceeding unless a charge sheet is filed, it cannot be presumed that the Petitioner is prima facie involved in the alleged offence. Therefore, the bar under the rule with regard to withholding of the service as well as

pensionary benefits is to be made applicable only in the event it is found that the Petitioner is prima facie involved in a criminal case. Since no charge sheet has been filed indicating therein the name of the Petitioner, in such eventuality the Opposite Parties have no jurisdiction and authority to withhold the retiral as well as pensionary benefits of the Petitioner.

8. In the aforesaid context, learned counsel for the Petitioner referring to the judgment of this Court in ***State of Odisha and others v. Sushanta Chandra Sahoo and others*** (W.P.(C) No.14718 of 2015 decided on 06.05.2022), submitted that a Division Bench of this Court has succinctly discussed the law on the point and after a threadbare discussion of the provisions applicable to the facts of an identical case has come to a conclusion that it is only in the event of filing of the charge sheet as provided under Rule-7(2)(c) and Explanation-(b) appended thereto of the O.C.S. (Pension) Rules, 1992, it shall be presumed that a judicial proceeding is deemed to have been instituted from the date when the Magistrate takes cognizance in such criminal cases. For better appreciation, relevant portion of the aforesaid judgment in para-9 is quoted herein below:-

> *"9. On perusal of aforementioned provisions, it is made clear by Rule-7(2)(c), Explanation–(b) that judicial proceedings shall be deemed to be instituted from the date when in a criminal proceedings, on the complaint or report of a police officer the Magistrate takes cognizance. As per Rule-49(5)(a), where the sanction of payment of gratuity is delayed for more than a year from the date it is due under Sub-rules (1) or (2), as the case may be, and such delay is attributable to administrative lapses, interest at the rate of 7 per cent per annum for the period beyond one year shall be payable on the amount of gratuity. Similarly, Sub-rule (1) of Rule-66 provides that where departmental or judicial proceedings are pending in respect of government servant on the date of his retirement, he shall be paid a provisional pension, whereas in Sub-rule (2), which is supplement to Sub-rule (1) of Rule-66, provides that no gratuity shall be paid to the government servant until the conclusion of the departmental or judicial proceedings and issue of final order thereon. On cumulative reading of both the sub-rules, referred to above, it appears that the same will apply only when on the date of retirement of government employee, departmental or judicial proceedings are pending against him. But these rules will not apply where there are no departmental or judicial proceedings against government servant. But in the instant case, the petitioners have categorically stated that Vigilance P.S. Case No.7 dated 08.03.2007, by way of FIR, though was pending on the date of retirement of the opposite party no.1, i.e., 31.10.2012, but the judicial proceeding was started, pursuant to such Vigilance P.S. Case No.7 dated 08.03.2007, after the charge sheet was submitted on 22.07.2013, i.e., much after his retirement and, as such, no cognizance was taken by the time the opposite party no.1 had retired from service. Therefore, mere lodging of an FIR cannot be construed that a judicial proceeding is pending against opposite party no.1. As it appears, though for an incident of the year 2000, Bhubaneswar P.S. Case No.7 dated 08.03.2007, was lodged against the opposite party no.1, but charge-sheet in the said case was submitted on 22.07.2013. Thereby, by the date the opposite party no.1 retired from service, i.e., on 31.10.2012, it can safely be construed that neither departmental proceeding nor any judicial proceeding was pending before the authority for debarring opposite party no.1 from getting pensionary benefits as due and admissible to him."*

9. The Hon'ble Division Bench after taking note of several judgments in the above mentioned case has categorically come to a conclusion that grant of pension and gratuity are no longer matters of any bounty to be distributed by Government as per their own sweet will, but their valuable rights accrued in favour of the employees who have put in their service for a number of years while working under the Government. In the aforesaid reported judgment, the Hon'ble Division Bench while dismissing the State appeal against the order dated 05.05.2014 passed by the Tribunal in O.A. No.3318 of 2013 has dismissed the writ application preferred by the State-Opposite Parties. Further a direction was also given to the Opposite Parties to comply with the order of the Tribunal dated 05.05.2014 within a period of three months.

10. Learned Additional Government Advocate appearing for the State-Opposite Parties, on the other hand, referring to the counter affidavit filed by the State-Opposite Parties, submitted before this Court that the State-Opposite Parties have lawfully withheld the final pension, gratuity, unutilized leave salary, commuted value of pension and G.P.F. of the Petitioner, as the Petitioner was found to be involved in a vigilance case. Learned Additional Government Advocate further contended that the G.A. (Vigilance) Department vide their letter dated 03.10.2018 intimated that a vigilance case has been initiated against the Petitioner vide Berhampur File No.89/16 for showing undue official favour in appointment of Junior Stenographers, R.I., ARI & Amin in Boudh District violating the Government order, notifications.

11. He further contended that the inquiry in the aforesaid case is still pending as has been intimated by the G.A. (Vigilance) Department vide their letter dated 7.2.2022 and letter dated 26.08.2022. In the aforesaid context and referring to Rule-7 & 66(1) of O.C.S. (Pension) Rules, 1992, the learned Additional Government Advocate submitted that where a departmental or a judicial proceeding is pending against a Government servant on the date of his retirement, he shall be paid a provisional pension not exceeding the minimum pension which would have been admissible on the basis of his qualifying service. It was also contended by learned Additional Government Advocate that Rule-7 of the O.C.S. (Pension) Rules, 1992 authorizes the Government to withhold the pensionary benefits. Further, referring to the para-8 of the counter affidavit, it was submitted by the learned Additional Government Advocate that the G.A. (Vigilance) Department, vide their letter dated 03.11.2022, has forwarded the letter dated 28.10.2022 along with the a report from the DSP, Vigilance, Phulbani.

12. In the aforesaid background, learned Additional Government Advocate contended that since serious allegations have been made against the Petitioner for committing irregularities in the recruitment of R.I. in the Boudh District and the role of the Petitioner in scrutinizing the caste certificates for such recruitment is being investigated and on the basis of such allegation, a vigilance inquiry is still pending,

the Opposite Parties have rightly withheld the financial as well as pensionary benefits of the Petitioner under Rule-7 of the O.C.S. (Pension) Rules, 1992. In such view of the matter, learned Additional Government Advocate further contended that the writ petition at this stage is devoid of merit and, accordingly, the same deserves to be dismissed.

13. Having heard the learned counsels appearing for the respective parties and on a careful consideration of their submissions as well as upon a careful scrutiny of the pleadings of the respective parties and the materials on record, this Court observes that the only dispute that is required to be adjudicated in the present writ petition is with regard to the conduct of the Opposite Parties in withholding the financial as well as pensionary benefits, as is due and admissible to the Petitioner, in the event of his retirement from service. Furthermore, this Court is also of the prima facie view that such benefits can be withheld by authority of law and not otherwise.

14. The Petitioner has approached this Court by filing the present writ petition for a direction to the Opposite Parties to pay the financial as well as the pensionary benefits which he is entitled to, as per the law, in the event of his retirement. The same is being contested by the Opposite Parties on the ground that the Petitioner is involved in a pending vigilance inquiry. Therefore, in view of the Rule-66 of O.C.S. (Pension) Rules 1992, the Petitioner is only entitled to provisional pension till the conclusion of the aforesaid criminal proceeding. Therefore, this Court is required to adjudicate whether the conduct of the Opposite Parties in withholding the pensionary as well as financial benefits as is due and admissible to the Petitioner is legal and valid.

15. To answer the aforesaid question, this Court is required to examine the Rule-7 as well as Rule-66 of the O.C.S. (Pension) Rules, 1992. The aforesaid rules have been elaborately discussed and analyzed by the Division Bench of this Court in its judgment in ***Sushanta Chandra Sahoo's*** case (supra). The relevant portion of the judgment in ***Sushanta Chandra Sahoo's*** case (supra) has already been extracted hereinabove. Therefore, this Court is bound by the ratio laid down by the Division Bench in ***Sushanta Chandra Sahoo's*** case (supra) and in such view of the matter, no further analysis of the aforesaid provision and the factual background is required. In the aforesaid factual as well as legal scenario, this Court is of the considered view that the case of the Petitioner hinges upon the facts that whether a charge sheet has been filed in the meantime and as to whether cognizance has been taken in the criminal case or not. In such view of the matter and considering the submissions made by the learned counsel for the Petitioner, who has emphatically submitted that no charge sheet has been filed, this Court is of the view that the case of the Petitioner is covered by the judgment of the Division Bench of this Court in ***Sushanta Chandra Sahoo's*** case (supra). Moreover, the departmental proceeding was admittedly initiated after retirement of the Petitioner, i.e., on the date of Petitioner's retirement such proceeding was not in existence. However, on the other

hand, the learned Additional Government Advocate appearing for the State-Opposite Parties submitted that, from the counter affidavit, it appears that the name of the Petitioner appears in the Vigilance Case and on such ground the service as well as pensionary benefits of the Petitioner has been withheld by the authorities.

16. In view of the aforesaid factual background, this Court deems it proper to dispose of the writ petition by directing the Opposite Party No.1 to ascertain as to whether a charge sheet was filed and whether cognizance was taken by the court on the date the Petitioner has retired from service on attaining the age of superannuation, i.e., 30.06.2018. In the event it is confirmed that no charge sheet was filed and no cognizance was taken on 30.06.2018 and there was no disciplinary proceeding pending against the Petitioner as on the date, then Opposite Party No.1 shall do well to consider the case of the Petitioner in light of the law laid down by the Division Bench of this Court in ***Sushanta Chandra Sahoo's*** case (supra) and, accordingly, the Petitioner be extended all financial as well as pensionary benefits within a period of three months from the date of communication of a certified copy of this order by the Petitioner.

17. With the aforesaid observation and direction, the writ petition stands disposed of.

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2024 (I) ILR-CUT-588

V. NARASINGH, J.

CRLMC NO.1483 OF 2023

SUSANTA KUMAR SAMANTARAY & ANR. ....Petitioners

-V-

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

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 438 – Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court? – Held, it can continue till the end of trial, but if there are any special or peculiar feature necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – The Trial Court remanded the petitioner to custody in spite of an order of anticipatory bail by this Hon'ble Court – The petitioner is entitled to which of remedy available whether U/s. 482 or 439 of Cr.P.C? – Held, when the accused have been remanded even in the face of an order of anticipatory bail granted by this court, on a fallacious interpretation of the order and oblivious of the law governing the field this court is of the

considered view that self-imposed embargo ought not to deter this court from exercising its inherent jurisdiction to sub-serve Justice.

(C) WORDS & PHRASES – "Custody" – Connotation of the word "custody" discussed.

(D) INTERPRETATION OF STATUTE – Importance of hierarchical system of dispensation of Justice – Enumerated.

Case Laws Relied on and Referred to :-

1. 2022 (10) SCC 51: Satender Kumar Antil Vs. Central Bureau of Investigation & Anr.
2. AIR 2020 SC 831 : Sushila Aggarwal & Ors. Vs. State (NCT Delhi) & Anr.
3. (2003) 6 SCC 697 : Islamic Academy of Education & Anr Vs. State of Karnataka & Ors.
4. (2001) 2 SCC 721: Executive Engineer, Dhenkanal Minor Irrigation Division Vs. N.C. Budharaj.
5. (2002) 3 SCC 496 : Haryana Financial Corporation Vs. Jagdamba Oil Mills.
6. (2014) 16 SCC 623 : Sundeep Kumar Bafna vs. State of Maharashtra & Anr.
7. (1994) 3 SCC 440 : Directorate of Enforcement v. Deepak Mahajan.
8. (1980) 2 SCC 559 : Niranjan Singh Vs. Prabhakar Rajaram Kharote.
9. (1963) 3 SCR 338 = (AIR 1962 SC 1893) : East India Commercial Co. Ltd Calcutta Vs. The Collector of Customs, Calcutta.
10. AIR 1972 SC 2466 : Shri Baradakanta Mishra Vs. Shri Bhimsen Dixit.

For Petitioners : Mr. H.K. Mund, Sr. Adv.

For Opp.Party : Mr. N. Maharana, Standing Counsel (Vig.)

JUDGMENT Date of Hearing: 23.08.2023 : Date of Judgment : 18.12.2023

V. NARASINGH, J.

By filing this Petition under Section 482 of the Cr.P.C., the accused-Petitioners are assailing the order dated 20.03.2023 passed by the learned Special Judge, Vigilance, Bhawanipatna in G.R. Case No.21 of 2021 (V) and also seeking a direction from this Court to give effect to the order passed by this Court dated 24.01.2022 in ABLAPL Nos.16694 and 16666 of 2021.

1. Heard learned Senior Counsel for the Petitioners and learned counsel for the Opposite Party.

2. The brief facts germane for just adjudication is stated hereunder;

> *"……….that on 15.12.2021, F.I.R. vide, Annexure-1 was registered against the petitioners and three others alleging commission of offences U/S 13(2) r/w 13(1)(c) of the P.C. Act., 1988 and Sections 409/468/471/477-A/120-B of the I.P.C. vide Koraput Vigilance P.S. Case No.27 of 2021 which was registered as G.R. Case No.21 of 2021(v) in the Court of the Special Judge Vigilance, Bhawanipatna. The allegation against the present petitioners is that they being public servants committed criminal conspiracy with some subordinate officials of their department in misappropriating a sum of Rs.23,63,940/- causing wrongful loss to the Government and were also responsible for forging some official documents. The specific allegation was that funds were allotted for*

plantation of seedlings and on verification by the Vigilance it was allegedly found that the plantation was not properly done as required number of plants were not there at the spot.
xxx xxx xxx"

3. Apprehending arrest in connection with the aforementioned vigilance case, the Petitioners filed ABLAPL No.16694 and 16666 of 2021 respectively and were allowed by this Court by order dated 24.01.2022. The operative part of the order reads as under;

"…………accordingly, this Court directs that in the event of arrest of the petitioner in connection with the aforesaid case, he shall be released on bail on furnishing bail bond of Rs.10,000/- (rupees ten thousand) with two sureties each for the like amount to the satisfaction of the arresting officer with further conditions that he shall appear before the Investigating Office on receipt of the written notice and he shall cooperate with the investigation and shall further appear before the Investigating Officer as and when required and he shall not try to tamper with the evidence in any manner. If the petitioner fails to appear on receipt of written notice or does not cooperate with the investigation, the prosecuting agency is at liberty to seek appropriate remedy for cancellation of the anticipatory bail order of the petitioner.
xxx xxx xxx"

4. It is apposite to note that in the case at hand charge sheet was submitted against the Petitioners and other accused persons for offences U/s-13(2) r/w 13(1)(C) of the P.C. Act, 1988 and U/s-409/468/471/477(A)/120B of the IPC and Petitioners were shown as "not arrested" in the said charge sheet.

5. After submission of such charge sheet at Annexure-2, learned Court took cognizance of the offence and issued summons pursuant to which the present Petitioners appeared on 20.03.2023 and filed applications for bail.

6. The learned Special Judge rejected the Petitioners prayer for bail and by the impugned order dated 20.03.2023 at Annexure-5 remanded the accused Petitioners to custody.

7. Learned Senior counsel for the Petitioner, Mr. Mund submits that the impugned order is ex-facie illegal. And, in doing so the learned Special Judge lost sight of sub-section 3 of Section 438 of Cr.P.C. whereby, the learned Court was required to issue a bailable warrant in the face of the order passed by this Court under Section 438(1) of the Cr.P.C.

8. It is his further submission that the finding of the learned Court that the Petitioners did not cooperate in de-hors the record. It is also stated by the learned senior counsel that since the Petitioners were remanded to custody and this Court has granted them interim bail, there is no necessity of the Petitioners again surrendering before the learned Court in seisin.

9. Per contra, learned counsel for the Vigilance Department, Mr. Maharana submits that in the face of alternative remedy available, the CRLMC under Section 482 Cr.P.C. is liable to be rejected.

10. While rejecting application for bail, the learned Court in seisin referred to the judgment of the Apex Court in the case of **Satender Kumar Antil vrs. Central Bureau of Investigation & another, reported in 2022 (10) SCC 51** and arrived at the finding that "in cases of category D offence (Economic Offences), the Court shall decide the bail application on merit on the appearance of the accused in Court pursuant to the process issued".

11. The learned Trial Court also further observed as under;

> *"…………In the present case, it appears that even though the Hon'ble High Court granted anticipatory bail in favour of the accused persons with specific direction that in the event of arrest, they shall be released on bail with some conditions, they did not appear before the I.O. nor cooperated in the investigation in any manner. ………"*

12. By order dated 05.04.2023, this Court directed the Petitioners to be released on interim bail in I.A. No.1054 of 2023.

13. The impugned order of the learned Trial Court remanding the accused-Petitioners in custody in the face of anticipatory bail granted by this Court is ex-facie illegal in the light of the judgment passed by the constitution Bench of the Apex Court in the case of **Sushila Aggarwal & others Vrs. State (NCT Delhi) & another, AIR 2020 SC 831** wherein, the Apex Court has held that Anticipatory bail once granted shall normally continue till end of trial.

14. In the said case, question No.2 referred to constitution Bench was "Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court." at page-899 (para-77) and while answering such reference, the Apex Court held as under;

> *"(2) As regards the second question referred to this court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so."*

15. The observation of the learned Court in the impugned order relating to alleged non-cooperation is extracted hereinabove. The basis of such observation is not spelt out.

16. In his written note of submission, learned counsel for the Vigilance Department, Mr. Moharana has stated that "when an accused is extended the benefit of Anticipatory bail and the Investigating agency has neither arrested and nor released him on bail, and submitted Charge Sheet against him showing him as (not arrest), it is presumptive that the Investigating agency does not require his arrest or remand in the case. In that situation, if the accused appears in pursuant to summon issued by the Trial Court and moves the bail application, there is no reason for the Ld. Trial Court to send to remand him in custody, rather he should be released on bail by executing Bail bond with conditions the Ld. Trial Court fixed as deem just and proper."

17. From the aforesaid stand of the Vigilance Authority, it is abundantly clear that the finding of the learned Court that the Petitioner did not cooperate is ex-facie untenable.

18. In referring to the order of the Apex Court in the Case of **Satender Kumar Antil** (supra), the learned Court committed the cardinal sin of referring to a judgment bereft of its context. Oblivious of the law laid down by the Apex Court relating to the interpretation of judgments in the case of **Islamic Academy of Education and another vs. State of Karnataka and others** reported in **(2003) 6 SCC 697** more particularly paragraphs 139 (page-771) thereof wherein, the principle for interpretation of judgment has been set out in detail and the Apex Court referred to its earlier judgments in the case of **Executive Engineer, Dhenkanal Minor Irrigation Division vs. N.C. Budharaj** reported in **(2001) 2 SCC 721** and also in the case of **Haryana Financial Corporation vs. Jagdamba Oil Mills** reported in **(2002) 3 SCC 496.**

19. For convenience of ready reference paragraphs 139 and 140 of the judgment of **Islamic Academy of Education (supra)** is extracted hereunder;

> *"**139**. 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 its disposal.*
>
> ***140**. In Padma Sundara Rao v. State of T.N. it is stated: (SCC p.540, paragraph 9)*
>
> *"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 Herrington 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."*

20. The preliminary objection raised by the learned counsel for the Vigilance that rightly or wrongly since the Petitioners have been remanded to custody, the only remedy available to them is under Section 439 of Cr.P.C and the present Application under Section 482 of Cr.P.C. is not maintainable.

21. Section 482 of Cr.P.C. for convenience of ready reference is extracted hereunder ;

> *"**482. Saving of inherent powers 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."*

22. It is trite that in the face of express remedy, the power under Section 482 Cr.P.C is not to be exercised. But in the factual matrix of the case at hand when the accused have been remanded even in the face of an order of anticipatory bail being granted by this Court, on a fallacious interpretation of the order and oblivious of the law governing the field, this Court is of the considered view that self-imposed

embargo ought not to deter this Court from exercising its inherent jurisdiction to sub-serve justice.

23. As such the objection of the learned counsel for the vigilance regarding maintainability is negated.

24. In the case at hand, the Petitioners were released on interim bail, as already stated.

25. Hence, the other issue which arises for consideration is as to whether the Petitioners have to surrender before the learned Court below, to be released on bail. In the humble view of this Court, law in this regard is no longer res intergra inasmuch as, in the case of **Sundeep Kumar Bafna vs. State of Maharashtra and another** reported in **(2014) 16 SCC 623**, there has been a detailed analysis of the connotation of the word "custody".

26. The word custody has not been defined in Cr.P.C.. Yet there is no cavil that the accused who has been released on interim bail is deemed to be in the constructive custody of the Court in seisin. In this context, it is apposite to refer in the judgment of the Apex Court in the case of **Sundeep Kumar Bafna (Supra)**. Wherein, the Apex Court quoted with approval its earlier judgment in the case of **Directorate of Enforcement v. Deepak Mahajan reported in (1994) 3 SCC 440** and that of **Niranjan Singh v. Prabhakar Rajaram Kharote** reported in **(1980) 2 SCC 559**;

> *"xxx xxx xxx*
>
> *48. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused persons into custody and deal with him according to law. Needles to emphasise that the arrest of a person is a condition precedent for taking him into judicial custody thereof. <u>To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender</u>. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and "arrest" are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequence, vide Roshan Beevi.*
>
> *49. While interpreting the expression 'in custody' within the meaning of Section 439 CrPC, Krishna Iyer, J. speaking for the Bench in Niranjan Singh v. Prabhakar Rajaram Kharote observed that: (SCC p.563, para 9)*
>
> *'9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. <u>He can be stated to be in judicial custody when he surrenders before the court and submits to its directions</u>.' "*
>
> *(Emphasis supplied)*
>
> *If the third sentence of para 48 is discordant to Niranjan Singh, the view of the coordinate Bench of earlier vintage must prevail, and this discipline demands and*

constrains us also to adhere to Niranjan Singh , ergo, we reiterate that a person is in custody no sooner he surrenders before the police or before the appropriate court.
xxx xxx xxx"

(Emphasis added by this Court)

27. Hence, on the touchstone of the authoritative pronouncement of the Apex Court in the case of **Sundeep Kumar Bafna (Supra),** it is held that by virtue of the interim bail granted, Petitioners are deemed to be in the constructive custody of the Court in seisin and since for reasons already stated, the impugned order is set-aside, the interim order is made absolute till the conclusion of trial on the terms fixed, while releasing the Petitioners.

28. Before parting with this case, this Court is impelled to address the manner in which the impugned order has been passed disregarding the order of anticipatory bail granted to the Petitioners.

29. The justice delivery module of this country follows hierarchical system. In such a system, the Court sub-ordinate in the hierarchy has the bounden duty to follow the direction issued by the higher Court, otherwise, judicial discipline will go haywire.

29.A. In this context, it is apt to note here judgment of the Apex Court in the case of **East India Commercial Co. Ltd Calcutta v. The Collector of Customs, Calcutta** reported in **(1963) 3 SCR 338 = (AIR 1962 SC 1893).** Justice Subba Rao, as his Lordship then was, observed thus;

"……It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise there would be confusion in the administration of law and respect for law would irretrivably suffer………"

29.B. The same was quoted with the approval in the case of **Shri Baradakanta Mishra v. Shri Bhimsen Dixit** reported in **AIR 1972 SC 2466**. While analyzing the importance of hierarchical system of dispensation of justice, the Apex Court held thus;

"………Just as the disobedience to a specific order of the Court undermines the authority and dignity of the court in a particular case, similarly any deliberate and mala fide conduct of not following the law laid down in the previous decision undermines the constitutional authority and respect of the High Court. Indeed, while the former conduct has repercussions on an individual case and on a limited number of persons, the latter conduct has a much wider and more disastrous impact. It is calculated not only to undermine the constitutional authority and respect of the High Court generally, but is also likely to subvert the Rule of law and engender harassing uncertainty and confusion in the administration of law. …………."

30. It is disconcerting to note that while passing the impugned order, the learned Trial Court went on to re-examine the allegations on merit and thereby virtually sat in appeal over the order passed by this Court and in the process rendered the order of this Court passed in ABLAPL nugatory. Such approach amounts to by passing the hierarchal discipline in judiciary which is the corner stone of people's faith in the administration of justice. Such judicial adventurism and overreach is to be shunned, otherwise the edifice will crumble.

31. The CRLMC is accordingly disposed of.

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2024 (I) ILR-CUT-595

V. NARASINGH, J.

W.P.(C) NO.15096 OF 2014

RANJAN KUMAR ROUT ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

SERVICE LAW – Regularization – The authority rejected the representation for regularization of service primarily on the ground that, the petitioner is irregularly engaged without going through the rigorous of regular recruitment process – Whether the ground for rejection is sustainable? – Held, No – "Irregular appointment" cannot be a ground for rejection of petition for regularization – Case law discussed.

Case Laws Relied on and Referred to :-

1. 2006 (4) SCC 1 : AIR 2006 SC 1806 : Secretary, State of Karnataka & Ors. Vs. Uma Devi & Ors.
2. AIR 1978 SC 851 : Mahender Singh Gill Vs. Chief Election Commissioner.
3. AIR 2010 SC 2587: (2010) 9 SCC 247: State of Karnataka Vs. M.L. Kesari & Ors.
4. (2013) 14 SCC 65 : Nihal Singh & Ors. Vs. State of Punjab & Ors.
5. (2018) 13 SCC 432 : Sheo Narain Nagar & Ors. Vs. State of Uttar Pradesh & Ors.
6. 2022 (Supp) OLR-194 : Rudrakanta Panda & Ors. Vs. State of Odisha & Ors.

For Petitioner : Mr. S. Mohanty

For Opp.Parties : Mr. S.N. Pattnaik, AGA, Mr. A.K. Mishra

JUDGMENT Date of Hearing : 22.06.2023 : Date of Judgment : 20.12.2023

V. NARASINGH, J.

1. The Petitioner who was working as a Data Entry Operator being aggrieved by the order passed dated 9.7.2014 by the Project Director, DRDA Jagatsinghpur, Opposite Party No. 3 at Annexure-9 rejecting his representation for regularization in

terms of the earlier order passed by this Court dated 28.5.2014 in W.P.(C) No. 10053 of 2014 at Annexure-9 has invoked the writ jurisdiction of this Court.

2. Heard Mr. Mohanty, learned Counsel for the Petitioner and Mr. Pattnaik, learned AGA and Mr. A.K. Mishra, learned counsel for the Opposite Parties.

3. The Petitioner being eligible in all respects applied in terms of an advertisement issued by Project Director, DRDA Jagatsinghpur for the post of Data Entry Operator. Thereafter engagement letter was issued on 10.11.2000. Petitioner was making contribution to Provident fund regularly as per the order of the authority.

4. It is contended by the Petitioner that though he has completed almost 15 years of continuous service in the mean time without intervention of any court of law and his performance has been found to be satisfactory, yet no steps were taken by the Project Director, DRDA (Opposite Party No.3) Jagatsinghpur to regularize his service.

5. He also relied on the correspondences made by the Opposite Party No.3 while forwarding the name of the staff of DRDA, Jagatsinghpur including the name of the present Petitioner as per discussions made on the issue of regularizing the staffs of DRDA, Jagatsinghpur including the post of Data Entry Operators.

6. Accordingly, being aggrieved with the inaction of the authorities in regularizing his service, the Petitioner had earlier approached this court in W.P.(C) No.10053 of 2014 which was disposed of on 28.5.2014 directing the authorities to consider the representation submitted by the Petitioner for regularization of his service, keeping in view the judgment of Apex Court. It is contended that without due application of mind and in violation of the decision of Apex Court passed in **Secretary, State of Karnataka and others versus Uma Devi and others** reported in **2006 (4) SCC 1**, the representation of the Petitioner has been rejected vide Annexure-9 which, is assailed in the present Writ Petition.

7. The Opposite Parties have jointly filed a counter justifying their action rejecting the representation submitted by the Petitioner claiming regularization in service inter alia on the ground that the Petitioner has never been engaged continuously. Rather, DRDA has issued engagement letter to the Petitioner on daily wages basis at the rate of ₹40 per day for the work of data entry of BPL/IAY and other works as and when required by the order of Project Director, DRDA Jagatsinghpur.

8. The competency of the Additional PD to give any engagement order is also questioned. The Opposite Parties further denied that the Petitioner has been discharging his duties continuously against the regular post or vacancy without any interruption and has completed 15 years of service by stating that neither the post of Data Entry Operator is a sanctioned post available in DRDA nor he has been appointed

as contingent paid Data Entry Operator against particular designated post. Petitioner's claim of Continuous service, is disputed by the Opposite Parties on the ground that the Petitioner being a daily wage employee was paid wages for the period(s) he discharges his duties in a particular month which varies from month to month and accordingly the same sets at naught the claim of the Petitioner relating to continuity.

9. Disputing the mode of engagement, it is further contented by the Opposite Parties that the initial entry on daily wages basis of the Petitioner was through patronage and unfair method without following the regular procedure statutory rules and regulation governing such entry. Once the Petitioner has accepted the condition of service under which he has been engaged with eyes open fully knowing the nature of it and the consequences flowing from it, it is not open for the Petitioner to claim regularization citing his temporary engagement on daily basis as the foundation seeking regularization of service.

10. After hearing both sides and on perusal of the impugned order at Annexure 9 dated 9.7.2014, it is found the grievance of the Petitioner for regularization has been rejected inter alia on the ground that the Petitioner has been irregularly engaged without going through regular recruitment process rather on pick and choose method and there was no existing vacancy.

11. It is well-settled law that the grounds which do not form part of the order of rejection, cannot be raised by the authorities to support their claims while filing the counter affidavit. (Ref:- **Mahender Singh Gill vs. Chief Election Commissioner** reported in **AIR 1978 SC 851**)

12. As such, this Court is of the considered opinion that the authorities have rejected the representation for regularization of service primarily on the ground that the Petitioner is irregularly engaged without going through the rigours of regular recruitment process and there was no vacant post.

13. Therefore, it is to be tested whether these grounds can justify the action of the Opposite party in rejecting the representation of the Petitioner at Annexure-9.

14. Learned counsel for the Petitioner referring to the judgment of the Hon'ble Supreme Court reported in the case of **Secretary, State of Karnataka and others Vrs. Umadevi and others** : reported in **AIR 2006 SC 1806** and in the case of State of **Karnataka Vrs. M.L. Kesari & Ors.:** reported in **AIR 2010 SC 2587** submits that since the Petitioner has been working for more than 10 years as a temporary employee against various regular posts, lying vacant under the Opposite Party No.3's institution, Opposite Party No.3-authority should have considered his case for regularization/absorption in service.

15. After going through the pleadings and the submissions made by the respective parties, this Court is of the firm view that it is no more open to the Opp.

Party to take the plea of irregular recruitment/non selection through a valid recruitment process, since such a stand at the instance of the Opposite Parties would amount to allowing Opposite Parties to take advantage of their own wrong, having utilized the service of the Petitioner for more than a decade. The law laid down by the Hon'ble Apex Court in **Umadevi (supra)** is a clear guideline to be followed in matters of this nature.

16. The judgment of the Hon'ble Supreme Court of India in the case of **Secretary, State of Karnatak Vrs. Uma Devi (supra)** does not preclude the claims of employees who seek regularization after the exercise has been undertaken with respect to some employees, provided that the said employees have completed the years of service as mandated by **Uma Devi**. The ruling casts an obligation on the State and its instrumentalities to grant a fair opportunity of regularization to all such employees and ensure that the benefit is not confined to a limited few or a selected few as per the whims of the employees. The subsequent regularization of employees who have completed the requisite period of service is to be considered as a continuation of the one-time exercise. The relevant paragraph of the judgment in **Uma Devi (supra)** has been extracted here in below.

> *"53....In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."*

17. The directions issued in **Uma Devi** have been considered by subsequent Benches of the Hon'ble Supreme Court of India in **State of Karnataka Vrs. M.L. Kesari**: reported in **(2010) 9 SCC 247**.

18. The Hon'ble Supreme Court of India in matter of **Nihal Singh and Ors. Vrs. State of Punjab and Ors.**: reported in **(2013) 14 SCC 65** has taken note of the fact as to how the State and its instrumentalities are subjecting the daily wagers/casual workers to exploitation. It has been specifically observed that the judgment in **Uma Devi's (Supra)** case doesn't give the State and its instrumentality a licence to indulge in exploitation. The relevant extract of the judgment is quoted here in below;

> *"36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of*

new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits at par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks.

37. We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligation to function in accordance with the Constitution. Umadevi's judgment cannot become a licence for exploitation by the State and its instrumentalities.

38. For all the above mentioned reasons, we are of the opinion that the appellants are entitled to be absorbed in the services of the State. The appeals are accordingly allowed. The judgments under appeal are set aside."

20. In **Sheo Narain Nagar and Ors. Vrs. State of Uttar Pradesh and Ors.** : reported in **(2018) 13 SCC 432**, the Hon'ble Supreme Court has held in paras 8 and 9 as under;

"8. Coming to the facts of the instant case, there was a direction issued way back in the year 1999, to consider the regularization of the appellants. However, regularization was not done. The respondents chose to give minimum of the pay scale, which was available to the regular employees, way back in the year 2000 and by passing an order, the appellants were also conferred temporary status in the year 2006, with retrospective effect on 2.10.2002. As the respondents have themselves chosen to confer a temporary status to the employees, as such there was requirement at work and posts were also available at the particular point of time when order was passed. Thus, the submission raised by learned Counsel for the respondent that posts were not available, is belied by their own action. Obviously, the order was passed considering the long period of services rendered by the appellants, which were taken on exploitative terms.

9. The High Court dismissed the writ application relying on the decision in Uma Devi (supra). But, the appellants were employed basically in the year 1993; they had rendered service for three years, when they were offered the service on contract basis; it was not the case of back door entry; and there were no Rules in place for offering such kind of appointment. Thus, the appointment could not be said to be illegal and in contravention of Rules, as there were no such Rules available at the relevant point of time, when their temporary status was conferred w.e.f. 2.10.2002. The appellants were required to be appointed on regular basis as a one-time measure, as laid down in paragraph 53 of Uma Devi (supra). Since the appellants had completed 10 years of service and temporary status had been given by the respondents with retrospective effect in the 2.10.2002, we direct that the services of the appellants be regularized from the said date i.e. 2.10.2002, consequential benefits and the arrears of pay also to be paid to the appellants within a period of three months from today." *(Emphasized)*

21. In the backdrop of the factual matrix as borne out from records placed before this Court and from the analysis of law laid down by the Hon'ble Supreme Court of India in **Uma Devi's Case (Supra)**, which has been consistently followed

by subsequent Supreme Court judgments as well as by this Court (**Ref:- Rudrakanta Panda & Ors. Vs. State of Odisha & others** reported in **2022 (Supp.) OLR-194**), it is manifestly evident that the long uninterrupted services of the Petitioner should have been considered by the Opp. Party No.3 for regularization immediately after the Uma Devi's judgment. **The Petitioner's initial appointment was only irregular and not illegal as revealed from the records of the case**. The Opp. Parties have failed to carry out the direction issued by the Hon'ble Supreme Court of India in Uma Devi's case as no such exercise, as mandated, have been carried out till date vis-à-vis the Petitioner. Even after the said judgment, the exploitation of the Petitioner was unabated at the hands of the Opp. Parties.

22. In such view of the matter, "irregular appointment" cannot be a ground for rejecting claim of the Petitioner for regularization. Therefore, the impugned order at Annexure- 9 is not sustainable and accordingly it is quashed.

23. The Opp. Parties are hereby directed to carry out the exercise as mandated in Uma Devi's case forth with and shall do well to reconsider the case of the Petitioner to regularize his service with consequential benefits within a period of three months from the date of communication of this judgment.

24. Accordingly, the Writ Petition stands allowed. However, there shall be no order as to cost.

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2024 (I) ILR-CUT-600

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO. 2499 OF 2022

RAJKISHORE PATRA ….Petitioner

-V-

STATE OF ODISHA & ORS. ….Opp.Parties

REGULATION OF THE BOARD OF SECONDARY EDUCATION – Regulation 39 – Change of date of birth – The petitioner, after opening of service book in the year 2019, came to know about the wrong entry of date of birth – The authority rejected the same relying on the provisions contained under regulation 39 – Whether the rejection is sustainable? – Held, No – Petitioner, when came to know that his date of birth has been wrongly recorded in the service book, he approached the authority immediately, for which this court direct the authority to issue a fresh certificate. (Para 5 - 5.2)

Case Laws Relied on and Referred to :-

1. AIR 2021 SC 4775 : Jigya Yadav Vs. C.B.S.E.

2. (2013) 1 SCC 353 : Tukaram Kana Joshi & Ors. Vs. Maharashtra Industrial Development Corporation & Ors.
2. W.P.(C) No.1362 of 2015 : Subin Mohammed S. Vs. Union of India & Ors.
3. (1997) 4 SCC 647 : Union of India Vs. C.Rama Swamy
4. (2004) 3 SCC 394 : State of Punjab Vs. S.C.Chadha

For Petitioner : Mr. N. Lenka

For Opp.Parties : Mr. M.K. Balabantaray, AGA
Mr. S.S. Rao, Sr. Adv, Mr. A.A. Mishra & Mr. A. Mohanty

JUDGMENT Date of Hearing: 03.10.2023 : Date of Judgment: 29.11.2023

BIRAJA PRASANNA SATAPATHY, J.

1. The present writ petition has been filed inter alia with the following prayer:-

> *"Therefore, it is prayed that this Hon'ble Court be graciously pleased to admit the writ application, issue rule NISI in the nature of writ of mandamus or any other writ/writs as deem fit and proper calling upon the opposite parties to show-cause as to why the orders vide Annexure-5 and 6 shall not be quashed and why necessary correction of the date of birth of the petitioner as 26.05.1975 instead of 26.05.1972, in the High School Certificate of the petitioner vide Annexure-2 shall not be carried out.*
>
> *In the event of the opposite parties fail to show-cause or show insufficient cause said rule be made absolute.*
>
> *And further be pleased to pass any order/orders direction/directions as deem fit and proper.*
>
> *And for this act of kindness the petitioner shall as in duty bound ever pray."*

2. It is contended that the original date of birth of the Petitioner being 26.05.1975, the said date of birth of the Petitioner was recorded while the Petitioner took admission in Sradhapur U.P. School in the year 1980. After completion of Class V in the year 1985, Petitioner took admission in Sradhapur M.E. School, where his date of birth was also recorded as 26.05.1975. Subsequently, Petitioner took admission in Class VIII in Sankhari High School, Sankhari under Bhograi Block in Balasore District.

2.1. It is contended that Petitioner though produced the school leaving certificate issued by the Headmaster, Sradhapur M.E. School on 15.07.1987 under Annexure-1 and in the said certificate date of birth of the Petitioner was mentioned as 26.05.1975, but somehow or other in the school admission register of Sankhari High School, Sankhari the date of birth of the Petitioner was wrongly mentioned as 26.05.1972 in place of 26.05.1975. Because of such wrong recording of the date of birth of the Petitioner as 26.05.1972 in the school admission register of Sankhari High School, Sankhari, the said date of birth was also reflected in the High School Pass certificate issued by the Board of Secondary Education, Odisha on 15.12.1990 under Annexure-2.

2.2. Learned counsel for the Petitioner contended that since the Petitioner was a minor by the time he passed his HSC examination held in the year 1990 with such

wrong recording of his date of birth as 26.05.1972 in place of 26.05.1975, Petitioner could not know about the same and accordingly could not take any step to correct such wrong recording of his date of birth. It is also contended that Petitioner after completing his education joined as a Junior Engineer on contractual basis vide order dtd.27.06.2018 of the Engineer-In-Chief, Water Resources, Odisha, Bhubaneswar. Only when Petitioner was regularized in his service with opening of his service book on 03.09.2019, he came to know that his date of birth has been wrongly recorded as 26.05.1972 in place of 26.05.1975 in his HSC Pass Certificate so issued under Annexure-2.

2.3. Petitioner on coming across such wrong recording of his date of birth immediately moved the D.E.O., Balasore for correction of the same in the school admission register of Sankhari High School, Sankhari. On receipt of such application, D.E.O., Balasore directed the Block Education Officer, Bhograi to cause an enquiry and submit a report. Accordingly, B.E.O., Bhograi caused an enquiry and after verifying the admission register of Sradhapur U.P. & M.E. School so also the admission register of Sankhari High School, submitted a report by indicating therein that the date of birth of the Petitioner though is recorded as 26.05.1975 in the school admission register of both Sradhapur U.P. & M.E. School, but in the school admission register of Sankhari High School, Sankhari, his date of birth has been wrongly recorded as 26.05.1972 in place of 26.05.1975.

2.4. Basing on such report of the B.E.O., Bhograi, Petitioner filed an application before the Headmaster, Sankhari High School, Sankhari-Opp.Party No. 5 to correct his date of birth as 26.05.1975 in place of 26.05.1972. When no action was taken on such claim of the Petitioner as made on 16.11.2020 under Annexure-3, Petitioner approached this Court in W.P.(C) No. 14314 of 2021. This Court vide order dtd.10.06.2021 under Annexure-4 directed the present Opp. Party No. 3 to take a decision on the claim raised by the Petitioner in his application under Annexure-3.

2.5. It is contended that Opp. Party No. 3 without proper appreciation of the Petitioner's claim and the report submitted by the B.E.O., Bhograi as well as the recording of the date of birth of the Petitioner in the school admission register of Sradhapur U.P. & M.E. School, refused to correct the date of birth of the Petitioner as 26.05.1975 in place of 26.05.1972 vide the impugned communication dtd.24.11.2021 under Annexure-6 and consequential communication issued by the Opp. Party No. 5 on 14.12.2021 under Annexure-5. It is contended that such claim of the Petitioner was rejected by the Opp. Party No. 3 relying on Rule 39 of the Board's Regulation.

2.6. Learned counsel for the Petitioner contended that since in both the school admission register of Sradhapur U.P. & M.E. School, Petitioner's date of birth was recorded as 26.05.1975 and in school leaving certificate issued by Sradhapur M.E. School under Annexure-1, his date of birth was recorded as 26.05.1975, Petitioner should not be made to suffer because of wrong committed by the school authorities

of Sankhari High School, Sankhari in recording his date of birth as 26.05.1972.

2.7. Learned counsel for the Petitioner also contended that since Petitioner prior to opening of his service book on 03.09.2019 had no occasion to know about the wrong recording of his date of birth as 26.05.1972, he had no occasion to make any application before Opp. Party No. 3 for correction of his date of birth. It is accordingly contended that the ground on which the claim of the Petitioner was rejected by the Opp. Party No. 3 is not sustainable in the eye of law. In support of his aforesaid submissions, learned counsel for the Petitioner relied on the decision of the Hon'ble Apex Court in the case of ***Jigya Yadav Vs. C.B.S.E.*** (AIR 2021 SC 4775). Hon'ble Apex Curt in Para 70, 79, 96, 137, 146, 150, 162 & 172 of the said Judgment has held as follows:-

"70. It is further submitted that the respondent's claim was barred by the principle of estoppel as he was mandatorily required to submit his birth certificate in school at the time of admission as per Byelaw 6 of the Examination Byelaws, 1995 so that the school record could be in consonance with the birth certificate. Since the respondent failed to produce the same at the time of admission, it is urged, the school record carried the information voluntarily supplied in the admission form and no change can be permitted at this stage.

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79. As regards cases wherein the request for change of name is bona fide and there is no scope for prejudice, the decision of learned Single Judge directing such changes was held to be correct. The Court observed thus:

"3. On the other hand, we find that if correction has been genuinely and bona fide sought and no prejudice is caused, then in that event the conclusion arrived at by the learned Single Judge cannot be said to suffer from any infirmity."

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96. Respondent No. 6 (Satish Kumar @Shrey) has filed "Note on submissions" wherein various grounds have been advanced to question the prohibitory Byelaws of the Board and support the case for permitting genuine changes in certificates. It has been submitted that the Byelaws are not statutory in nature and thus, they cannot be made as "law" within the meaning of Article 19(2) of the Constitution and cannot be the basis to deprive the students of their fundamental right to express their identity under Article 19(1)(a). Reliance has been placed upon Kabir Jaiswal v. Union of India and Ors. (2020 SCC OnLine All 1488 : (AIR 2021 ALL 96) to support this position.

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137. No doubt, it is true that CBSE certificates are not strictly meant to be considered as identity documents, however, the same are being relied upon for corroborative purposes in all academic and career related transactions as foundational document. In fact, the CBSE itself has conceded to this fact that their certificates are relied for all official purposes, as noted above. The date of birth in matriculation certificate, in particular, is relied upon as primary evidence of date of birth of a citizen. Therefore, as regards the information contained in a CBSE certificate, the Board must afford opportunity to the students to modify it subject to complying with requisite formalities which are reasonable in nature. If all other State agencies could allow it for the preservance of consistency and accuracy, alongside being enablers in free exercise of rights by the

citizens, there is no reason for the CBSE to not uphold that right of the students. More so, it would be in the interest of CBSE's own credibility that their records are regarded as accurate and latest records of a student worthy of being relied upon for official purposes. Therefore, this approach would serve twin purposes – enabling free exercise of rights and preservance of accuracy.

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146. Similar provision is available for "correction" in date of birth, either on the basis of school records or on the basis of order of court. The word "change" is not used for date of birth as, unlike name, there can only be one date of birth and there can only be a correction to make it consistent with school record or order of Court. It cannot be changed to replace the former with a fresh date of one's choice. Be it noted, provisions relating to correction in date of birth and name are just and reasonable and do not impose any unreasonable restriction on permissibility of corrections. The restriction regarding limitation period shall be examined later, along with other provisions.

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150. Indisputably, the candidate would pursue further education and explore future career opportunities on the basis of school records including the CBSE Board. The CBSE maintains its official records in respect of candidate on the basis of foundational documents being the school records. Therefore, the CBSE is obliged to carry out all necessary corrections to ensure that CBSE certificate is consistent with the relevant information furnished in the school records as it existed at the relevant time and future changes thereto including after the publication of results by the CBSE. However, when it comes to recording any information in the original certificate issued by the CBSE which is not consistent with the school records, it is essential that the CBSE must insist for supporting public document which has presumptive value and in the given case declaration by a Court of law to incorporate such a change. In that regard, the CBSE can insist for additional conditions to reassure itself and safeguard its interest against any claim by a third party/body because of changes incorporated by it pursuant to application made by the candidate. In the concluding paragraph, we intend to issue directions to the CBSE Board in light of the discussion in this judgment. For the nature of uniform directions that we propose to issue so as to obviate any inconsistent approach in the cases under consideration including future cases to be dealt with by the CBSE Board, it is not necessary for us to dilate on the question of validity of the respective amendments in the relevant Byelaws effected from time to time.

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162. The next issue for consideration is whether it is proper for the High Courts to issue mandamus to the CBSE for correction of certificates in complete contravention of the Byelaws, without examining the validity of the Byelaws. For issuing such directions, reliance has been placed upon Subin Mohammed (2016 (1) KLT 340 : (AIR 2016 (NOC) 311 (KER), wherein the Court noted that the case does not involve correction of a typographical nature, as permissible in the Byelaws, but went on to uphold the right of the student to apply for changes on the basis of statutory certificate. It observed thus:

"35. Therefore, we have to proceed on the basis that the bye law of CBSE cannot be applied to the fact situation. But to reconcile the date of birth entry in the mark sheet with that of the entry in the statutory certificate, the candidates should not be left without any remedy. Their right to approach the Court for redressing their grievance cannot be ruled out."

The court then delineated the principles for issuance of writ of mandamus and noted that in the strict sense, a mandamus would not lie but considering the damage that the student could face as regards his career prospects, the permission was granted. In paragraph 39, it noted thus:

"39. It is contended that the future prospects of the petitioners to study or get employment abroad, will be substantially affected if the entry of date of birth in the mark sheet does not tally with that in the birth certificate. Though a writ of mandamus cannot be issued in the strict sense, we are of the view that, failure to exercise jurisdiction may put the petitioners to serious hardship. Hence, to render justice, it is always open for the Court to pass appropriate orders, taking into account the facts and circumstances of each case. However, if disputed questions of fact arises, it will not be appropriate for this Court to entertain the matter." (Emphasis supplied)

The law regarding the writ of mandamus is settled. The foremost requirement for issuance of mandamus is the existence of a legal right against a body which is either a public body or a non¬public body performing a public function. In Binny Ltd. ((2005) 6 scc 657 : (AIR 2005 sc 3202)), this Court summed up the principle thus:

"29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre¬eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England, 3rd Edn., Vol. 30, p.682,

"1317. A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform and which perform those duties and carries out its transactions for the benefit of the public and not for Private profit."

There cannot be any general definition of public authority or public action. The facts of each case decide the point."

In the present case, the question is not whether CBSE was amenable to writ of mandamus or not. For, we have already held the Board being a public body is performing a public function. The question is whether there was an enforceable legal right in favour of students to seek such a direction and whether Byelaws have the force of law and directions can be issued by the court only in conformity thereof.

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172. In light of the above, in exercise of our plenary jurisdiction, we direct the CBSE to process the applications for correction or change, as the case may be, in the certificate

issued by it in the respective cases under consideration. Even other pending applications and future applications for such request be processed on the same lines and in particular the conclusion and directions recorded hitherto in paragraphs 170 and 171, as may be applicable, until amendment of relevant Byelaws. Additionally, the CBSE shall take immediate steps to amend its relevant Byelaws so as to incorporate the stated mechanism for recording correction or change, as the case may be, in the certificates already issued or to be issued by it."

2.8. Learned counsel for the Petitioner also relied on another decision of the Hon'ble Apex Court in the case of ***Tukaram Kana Joshi & Ors. Vs. Maharashtra Industrial Development Corporation & Ors.*** ((2013) 1 SCC 353). Hon'ble Apex Court in Para 14 of the said Judgment has held as follows:-

"14. No hard-and-fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non-deliberate delay. The court should not harm innocent parties if their rights have in fact emerged by delay on the part of the petitioners."

2.9. Learned counsel for the Petitioner also relied on a decision of the Kerala High Court in the case of ***Subin Mohammed S. Vs. Union of India & Ors.*** (W.P.(C) No. 1362 of 2015). Hon'ble Kerala High Court in Para 40 & 41 of the said Judgment has held as follows:-

"40. In all these cases, there is delay on the part of the petitioners in approaching CBSE, which cannot be lightly condoned. Taking cue from Sarifuz Zaman (supra), they have virtually slept over their rights. But failure to exercise jurisdiction will result in injustice to the petitioners. Such writ petitions can therefore be entertained only on imposing cost on the petitioners, which we fix at 5,000/-.

41. Hence, to meet the ends of justice, it will be appropriate for this Court to dispose the writ petitions with the following directions:

W.P(C) Nos.1362/15 & conn.cases

i) That CBSE shall correct the entries in the mark sheet of the petitioners with reference to their corresponding birth certificates issued by the statutory authority, if the request is found to be genuine.

(ii) Genuineness of the birth certificate can be ascertained from the respective local/statutory authority/Head of the Institution or such other method, CBSE may deem it fit.

(iii) CBSE can demand in advance a consolidated fee, including all expenses for processing such applications.

(iv) Each of the petitioners shall pay 5,000/-(Rupees Five thousand only) as cost to CBSE within a period of one month."

3. Mr. S.S. Rao, learned Sr. Counsel appearing for the Board along with Mr. A.A. Mishra on the other hand made his submission basing on the stand taken in the counter affidavit so filed by Opp. Party Nos. 2 to 4. Learned Sr. Counsel contended that since the Petitioner passed his HSC examination conducted by the Board in the year 1990, in terms of the provisions contained under Regulation 39 of the Regulation of Board of Secondary Education, such nature of correction of date of birth is not permissible. Rule 39 of the said Regulation prescribes as follows:-

> *"39. **Date of Birth**: The date of birth once entered in the Board's records cannot be charged unless it is of the nature of clerical error or printing mistake. Application for the correction of the date of birth should be made within three years of passing the examination. No change in date of birth recorded shall be made unless the application for correction is received through the head of the institution concerned within three years of passing the examination."*

3.1. It is further contended that since the Petitioner is making such a belated claim for change of his date of birth, it is not entertainable in view of the decision of the Hon'ble Apex Court in the case of ***Union of India Vs. C. Rama Swamy*** reported in (1997) 4 SCC 647. Hon'ble Apex Court in Para 25 of the said Judgment has held as follows:-

> *"25. In matters relating to appointment to service various factors are taken into consideration before making a selection or an appointment. One of the relevant circumstances is the age of the person who is sought to be appointed. It may not be possible to conclusively prove that an advantage had been gained by representing a date of birth which is different than that which is later sought to be incorporated. But it will not be reasonable to presume that when a candidate, at the first instance, communicates a particular date of birth there is obviously his intention that his age calculated on the basis of that date of birth should be taken into consideration by the appointing authority for adjudging his suitability for a responsible office. In fact, where maturity is a relevant factor to assess suitability, an older person is ordinarily considered to be more mature and, therefore, more suitable. In such a case, it cannot be said that advantage is not obtained by a person because of an earlier date of birth, if he subsequently claims to be younger in age, after taking that advantage. In such a situation, it would be against public policy to permit such a change to enable longer benefit to the person concerned. This being so, we find it difficult to accept the broad proposition that the principle of estoppel would not apply in such a case where the age of a person who is sought to be appointed may be a relevant consideration to assess his suitability."*

3.2. Learned Sr. Counsel appearing for the Board also relied on another decision of the Hon'ble Apex Court in the case of ***State of Punjab Vs. S.C. Chadha*** reported in (2004) 3 SCC 394. Hon'ble Apex Court in Para 14 of the said Judgment has held as follows:-

> *"14. In the instant case the higher secondary examination certificate was issued on 3.6.1962 which contained information that the date of birth of the respondent was only 19.6.1944. If the said certificate disclosed a wrong date, it is not explained by the respondent as to why he did not make any move to get it corrected at that point or on any one of the occasions when he sought and obtained employment in 7/8 public institutions. Merely because in 1994 an opportunity was granted to the government*

> *employees to get their date of birth correct, that does not take away the effect of inaction and continued silence for more than three decades, which dehors laches on his part would seriously reflect on the bona fide nature of the claim itself. Even in the application made for employment in the year 1992-93, the date of birth was indicated, as noted above to be 19.6.1944. No contemporaneous document was produced to show that recording of the date of birth to be 19.6.1944 was wrong. Accepting the plea of the respondent would result in two public records, educational on one side and service on the other reflecting two different and conflicting dates of birth. Such anomalous situations are to be averted and not to be countenanced."*

3.3. It is also contended that the decision in the case of ***Jigya Yadav*** as relied on by the learned counsel for the Petitioner is not applicable to the facts of the present case in view of the finding of the Hon'ble Apex Court in Para 163 & 193 of the Judgment. It is accordingly contended that since the Petitioner is raising a claim for change of his date of birth more than 32 years of his passing the HSC examination, such a claim is not entertainable and it has been rightly rejected by the Board vide Annexure-6.

4. This Court taking into account the stand taken by the Petitioner that his date of birth recorded as 26.05.1975 in the school admission register of Sradhapur U.P. & M.E. School, passed an order on 13.07.2023 by directing learned counsel appearing for the Opp. Party Nos. 5 & 6 to produce the original school admission register as well as the school leaving certificate issued in favour of the Petitioner. Pursuant to the said order learned counsel appearing for the Opp. Party Nos. 5 & 6 produced the transfer certificate issued by Sradhapur M.E. School on 15.07.1987 vide Annexure-1 and the school admission register of Sankhari High School, Sankhari.

4.1. This Court after going through the transfer certificate issued by the Sradhapur M.E. School on 15.07.1987 finds that the date of birth of the Petitioner is recorded as 26.05.1975. In the school admission register of Sankhari High School so produced by the learned counsel appearing for the Opp. Party Nos. 5 & 6, this Court finds that the date of birth of the Petitioner was recorded as 26.05.1972 and it was corrected as 26.05.1975 in presence of the D.E.O., Balasore on 07.04.2017. This Court after going through the School admission register of Opp. Party No. 5 also finds that the date of birth of the Petitioner has been corrected as 26.05.1975 in the school admission register by the B.E.O.,Bhograi after due verification of the date of birth so recorded in the transfer certificate issued by Sradhapur M.E. School under Annexure-1.

5. Having heard learned counsel appearing for the parties and after going through the materials available on record, it is found that in the school admission register of Sradhapur M.E. School as well as the transfer certificated issued in favor of the Petitioner on 15.07.1987 under Annexure-1, the date of birth of the Petitioner is recorded as 26.05.1975.. Even though in the school admission register of Sankhari High School, Sankhari, the date of birth of the Petitioner was wrongly recorded as 26.05.1972,but the same was corrected by the B.E.O., Bhograi after due enquiry in terms of the direction issued by the District Education Officer, Balasore. It is also

found that even though Petitioner passed the HSC examination in the year 1990, but the service book of the Petitioner was only opened on 03.09.2019, wherein his date of birth was indicated as 26.05.1972. Petitioner after opening of his service book with wrong recording of his date of birth immediately moved the school authority of Opp. Party No. 5 to make correction of his date of birth as 26.05.1975 in place of 26.05.1972.

5.1. Since the said prayer was not considered, Petitioner approached this Court in W.P.(C) No. 14314 of 2021. This Court vide order dtd.10.06.2021 when directed Opp. Party No. 3 to consider the Petitioner's grievance as raised on 16.11.2020 under Annexure-3, the said prayer was rejected by the Opp. Party No. 3 relying on the provisions contained under Rule 39 of the Board's Regulation. Though as per Rule 39 of the Board's Regulation, no change of date of birth is permissible unless the application for correction is received through the head of institution within 3 years of passing the examination, but in the present case Petitioner when came to know that his date of birth has been wrongly recorded in the service book, which was only opened on 03.09.2019 as 26.05.1972, he immediately took step for make necessary correction of his date of birth by approaching the school authority of Opp. Party No. 5 on 06.11.2020 under Annexure-3.

5.2. Therefore, in view of such position and the fact that in the school admission register of both Sradhapur U.P. & M.E. School the date of birth of the Petitioner is recorded as 26.05.1975 and the said fact was also enquired and admitted by the B.E.O.,Bhograi with necessary correction of the date of birth in the school admission register of Opp. Party No. 5. This Court placing reliance on the decision Jigya Yadav as cited supra is of the view that the date of birth is required to be corrected by the authorities of Board of Secondary Education, Odisha. While holding so, this Court is inclined to quash the rejection of the Petitioner's claim so issued vide letter dtd.24.11.2021 under Annexure-6. While quashing the same, this Court directs Opp. Party No. 3 to issue a fresh HSC pass certificate in favour of the Petitioner by recording his date of birth as 26.05.1975. Such an exercise shall be undertaken and completed by Opp.Party No. 3 within a period of six (6) weeks from the date of receipt of this order.

6. The writ petition is disposed of accordingly.

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2024 (I) ILR-CUT-609

BIRAJA PRASANNA SATAPATHY, J.

WPC (OAC) NOS.4832 OF 2016, WP(C) NOS.21917 & 21919 OF 2019 AND W.P(C) NO.4862 OF 2020

PRABIRA KUMAR PATTANAIK & ORS. ….Petitioners

-V-

STATE OF ORISSA & ORS. …. Opp.Parties

SERVICE LAW– Regularization – Petitioners were engaged as attendant on daily wage basis in between 2006 to 2008 with the approval of competent authority – The authority without considering the case of petitioners for regularization issued advertisement to fill up 62 posts of Attendant on contractual basis – Whether the petitioners are eligible to absorb as against the 62 sanctioned posts? – Held, Yes – Reason indicated with reference to the case laws.

Case Laws Relied on and Referred to :-

1. (2006) 4 SCC-1 : Secretary, State of Karnataka vs. Uma Devi (3)
2. (2010) 9 SCC 247 : State of Karnatak vs. M.L.Keshari
3. 2013 (14) SCC 65 : Nihal Singh & Others vs. State of Punjab & Others
4. 2015 (8) SCC 265 : Amarkant Rai vs. State of Bihar & Others

For Petitioners : M/s. G.R. Sethi & J.K. Digal

For Opp.Parties: Mr. H. K. Panigrahi, Addl. Standing Counsel

JUDGMENT Date of Hearing : 08.11.2023: Date of Judgment : 13.12.2023

BIRAJA PRASANNA SATAPATHY, J.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical) Mode.

2. Since the issue involved in the present batch of Writ Petitions is identical, all the matters were heard analogously and disposed of by the present common order.

3. Heard learned counsel for the parties.

4. All these writ petitions have been filed inter alia with a prayer to direct the Opp. Parties to regularize the services of the Petitioners with quashing of the advertisement issued by the C.D.M.O, Puri on 15.12.2016.

5. Learned counsels appearing for the Petitioners in the present batch of writ petitions contended that Petitioners were all engaged as Attendant on daily wage basis and for a period of 44 days, in between the year 2006 to 2008, with due approval of their engagement by the Collector-cum-Chariman, Zilla Swasthya Samiti,Puri.

5.1. It is contended that on being so engaged on daily wage basis for a period of 44 days, petitioners were allowed to continue as such without any break in engagement. In spite of such long continuance on daily wage basis and without taking steps to absorb them in the regular establishment, when an advertisement was issued by the CDMO,Puri on 15.12.2006 to fill up 62 posts of Attendant on contractual basis in his office,W.P.C (OAC) No.4832 of 2016 was initially filed by some of the attendants. The Tribunal while issuing notice of the matter vide order dtd.29.12.2016, passed an interim order by directing that no coercive action shall be taken against the Petitioners therein and required number of posts of attendants

pursuant to the advertisement may not be filled up till filing of the counter and its adjudication.

5.2. It is contended that on the face of the order passed by the Tribunal, when this Court disposed of WP(C) No.4301 of 2020 vide order dtd.10.02.2020 with a direction to fill up the post of contractual attendant and the same shall be subject to final outcome of W.P.C(OAC)) No.4832 of 2016, the matter was challenged before this Court in W.A. No.205 of 2020. This Court while disposing Writ Appeal No.205 of 2020 issued the following direction. Relevant portion of the order reflected in paragraph 6 & 7 are quoted hereunder.

> *"6. In view of the above, this Court while setting aside the impugned order remits the matter back to the Single Bench for fresh disposal along with pending Writ Petitions.*
>
> *7. So far as the appellants are concerned, it is submitted that they are continuing in their service. Since the similarly situated persons are continuing in service, the present appellants shall continue in their service as such which shall be subject to result of W.P.(C) No.4301 of 2020. This Court further directs the opposite parties to go ahead with the selection process, if there is no other impediment for engagement of Attendants as per the advertisement but out of 61 posts, 20 posts shall be kept vacant keeping in mind the number of petitioners involved in the earlier described Writ Petitions as well as the present appeal."*

5.3. Learned counsel for the Petitioners contended that even though this Court while disposing the Writ Appeal N0.205 of 2020 directed to keep 20 posts of Attendant reserve for the Petitioners who are continuing on daily wage basis since the year 2006 -2008, but in fact because of the interim order initially passed in WP(C) NO.4832 of 2016, the selection process in terms of advertisement dtd.15.12.2016 was not proceeded with by filling up the posts on contractual basis.

5.4. Learned counsel for the Petitioners also contended that since the Petitioners from the year 2006-2008 are all continuing as Attendant in the establishment of CDMO, Puri on daily wage basis in view of the decision of the Hon'ble Apex Court so reported in the case of ***Secretary, State of Karnataka vs. Uma Devi (3)***, (2006) 4 SCC-1, ***State of Karnatak vs. M.L.Keshari***, (2010) 9 SCC 247, ***Nihal Singh & Others vs. State of Punjab & Others***, 2013 (14) SCC 65 and ***Amarkant Rai vs. State of Bihar & Others***, 2015 (8) SCC 265 ,they have accrued a right of regularization in their favour.

5.5. Hon'ble Apex Court in the case of Uma Devi in Para-44 has held as follows:-

> *"44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (supra), R.N. Nanjundappa (supra) and B.N. Nagarajan (Supra), and referred to in paragraph-15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context,*

the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one- time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wages are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not subjudice, need not be reopened based on this judgement, but there should be no further by passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

5.6. Similarly Hon'ble Apex Court in the case of **M.L. Keshari** in Para- 8 and 13 has held as follows:-

"8. Umadevi (3) casts a duty upon the Government or instrumentality concerned, to take steps to regularise the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure. Umadevi (3) directed that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10-4-2006).

13. The Division Bench of the High Court has directed that the cases of the respondents should be considered in accordance with law. The only further direction that needs to be given, in view of Umadevi (3), is that the Zila Panchayat, Gadag should not undertake an exercise within six months, as a general one-time regularisation exercise, to find out whether there are daily-wage/casual/adhoc employees serving the Zila Panchayat and if so whether such employees (including the respondents) fulfil the requirements mentioned in para-53 of Umadevi (3). If they fulfill them, their services have to be regularised. If such an exercise has already been undertaken by ignoring or omitting the cases of Respondents 1 to 3 because of the pendency of these cases, then their cases shall have to be considered in continuation of the said one-time exercise within three months. It is needless to say that if the respondents do not fulfill the requirements of para 53 of Umadevi (3), their services need not be regularised. If the employees who have completed ten years' service do not possess the educational qualifications prescribed for the post, at the time of their appointment, they may be considered for regularisation in suitable lower posts."

5.7. In the case of **Nihal Singh** in Para-35 to 38, Apex Court has held as follows:-

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining tin the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

21. In the first instances, the petitioner and the other Election Commissioners were appointed when the work of the Commission did not warrant their appointment. The reason given by Respondent 1 (Union of India), that on account of the Constitution (61" Amendment) Act reducing the voting age and the Constitution (64th Amendment) and (65 Amendment) Bills relating to election to the Panchayats and Nagar Paliks, the work

of the Commission was expected to increase and, therefore, there was need for more Election Commissioners, cuts notice. As has been pointed out by Respondent 2, the work relating to revision of electoral roll on account of the reduction of voting age was completed in all the States except Assam by the end of July 1989 itself, and at the Conference of the Chief Electoral Officers at Tirupati. Respondent 2 had declared that the entire preparatory work relating to the conduct of the then ensuing general elections to the Lok Sahba would be completed by August in the whole of the country except Assam. Further the Constitution (64th and 65th Amendment) Bills had already fallen in Parliament before the appointments. In fact, what was needed was more secretarial staff for which the Commission was pressing, and not more Election Commissioners. What instead was done was to appoint the petitioner and the other Election Commissioner on 16.01.1989. Admittedly, further the view of the Chief Election Commissioner were not ascertained before making the said appointments. In fact, he was presented with them for the first time in the afternoon of the same day i.e, 16-10-1989.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finance is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks.

37. We are of the opinion that neither the Governmnet of Punjab nor these public sector banks can continue such a practice consistent with their obligations to function in accordance with the Constitution. Umadevi (3) judgement cannot became a licence for exploitation by the State and its instrumentalities.

38. For all the abovementioned reasons, we are of the opinion that the appellants are entitled to be absorbed in the services of the State. The appeal are accordingly allowed. The judgements under appeal are set aside."

5.8. In the case of **Amarkanti Rai**, Hon'ble Apex Court in Para-8, 9, 11 to 14 has held as follows:-

"8. Insofar as contention of the respondent that the appointment of the appellant was made by the Principal who is not a competent authority to make such appointment and is in violation of the Bihar State Universities Act and hence the appointment is illegal appointment, it is pertinent to note that the appointment of the appellant as night guard was done out of necessity and concern for the College. As noticed earlier, the Principal of the College vide letters dated 11-3-1988, 7-1-1993, 8-1-2002 and 12-7-2004 recommended the case of the appellant for regularisation on the post of night guard and the University was thus well acquainted with the appointment of the appellant by the then Principal even though the Principal was not a competent authority to make such appointments and thus the appointment of the appellant and other employees was brought

to the notice of the University in 1988. In spite of that, the process for termination was initiated only in the year 2001 and the appellant was reinstated w.ef. 3-1-2002 and was removed from services finally in the year 2007. As rightly contended by the learned counsel for the appellant, for a considerable time, the University never raised the issue that the appointment of the appellant by the Principal is ultra vires the rules of the BSU Act. Having regard to the various communications between the Principal and the University and also the educational authorities and the facts of the case, in our view, the appointment of the appellant cannot be termed to be illegal, but it can only be termed as irregular.

9. The Human Resources Development, Department of Bihar Government, vide its Letter dated 11-7-1989 intimated to the Registrar of all the Colleges that as per the settlement dated 26-4-1989 held between Bihar State University and College Employees' Federation and the Government it was agreed that the services of the employees working in the educational institutions on the basis of prescribed staffing pattern are to be regularised. As per sanctioned staffing partien, in Ramashray Baleshwar College, there were two vacant posts of Class IV employees and the appellant was appointed against the same. Further, Resolution No. 989 dated 10-5-1991 issued by the Human Resources Development Department provides that employee working up to 10-5-1986 shall be adjusted against the vacancies arising in future. Although, the appellant was appointed in 1983 temporarily on the post that was not sanctioned by the State Government, as per the above communication of the Human Resources Development Department, it is evident that the State Government issued orders to regularise the services of the employees who worked up to 10-5-1986. In our considered view, the High Court ought to have examined the case of the appellant in the light of the various communications issued by the State Government and in the light of the circular, the appellant is eligible for consideration for regularisation.

XXX XXX XXX

11. Elaboration upon the principles laid down in Umadevi (3) Case and explaining the difference between irregular and illegal appointments in State of Karnataka Vs. M.L Kesari, this Court held as under (ML Kesari case SSC p 250, para 7) 7. It is evident from the above that there is an exception to the general principles against 'regularisation enunciated in Umadevi (3). if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possesses the prescribed minimum qualifications, the appointments will be considered to be illegal., But where the persons employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

12. Applying the ratio of Umadevi (3) case, this Court in Nihal Singh v. State of Punjab directed the absorption of the Special Police Officers in the services of the State of holding as under: (Nihal Singh Case, SCC pp. 79-80, paras- 35-36)

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure extracting work from persons such as the appellants herein for decades together itself would he arbitrary action (inaction) on the part of the State. 36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the Various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in the banks to meet such additional burden Apparently no such demand has ever been made by the State. The result is the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks

13. In our view, the exception carved out in para 53 of Umadevi (3)3 is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bore any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularisation viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularised w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 3-1-2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits to be paid from 1.-1-2010.

14. Considering the facts and circumstances of the case that the appellant has served the University for more than 29. years of the post of night guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularise the services of the appellant retrospectively w.ef. 3-1-2002 (the date on which he rejoined the post as per the direction of the Registrar)."

5.9. Learned counsel for the petitioners also relied on another decisions of this Court so passed on 02.05.2023 in WPC (OAC) NOs.1568 of 2018 and 4573 of 2016. It is contended that the judgment of this Court so passed on 02.05.2023 in the aforesaid two Writ Petitions has been confirmed by the Writ Appellate Court vide order dtd.07.11.2023 in Writ Appeal No.2427 of 2023. This Court in Paragraph-8.7 of the judgment has held as follows:-

"8.7. In view of the materials available on record and in view of such long continuance for more than 20 years, it is to be held that the Petitioners are continuing as against substantive vacancies and the Opposite Parties are required to absorb the Petitioners in the regular establishment and/or in the work charged establishment. Therefore, this Court placing reliance on the decisions as cited (supra) directs the Opposite Parties to absorb the Petitioners in the regular establishment and/or in the work charged establishment within a period of three (3) months from the date of receipt of this order."

6. It is also contended that initially this Court vide order dt.03.08.2021 when disposed of WPC (OAC) NO.4832 of 2016 with a direction on the Opp. Parties to consider the case of the Petitioners for their regularization keeping in view the decision of the Hon'ble Apex Court in the case of Uma Devi and M.L. Keshari vide order dtd.03.08.2021, the same was challenged by the State machineries in Writ Appeal No.748 of 2022. Vide Order dtd.04.04.2023, WPC (OAC) No.4832 of 2016 was remanded for fresh disposal by the Writ Appellate Court while setting aside the order dtd.03.08.2021. It is accordingly contended that since the petitioners in the present batch of Writ Petitions are continuing on daily wage basis since w.e.f the year 2006-2008 as Attendant in the establishment of CDMO, Puri without any break in engagement, in view of the decisions of the Hon'ble Apex Court as cited (supra) and the decisions rendered by this Court in its judgment dated 02.05.2023, so confirmed in Writ Appeal No.2427 of 2023, Petitioners are eligible and entitled to get the benefit of regularization of their services. It is however contended that Petitioners in the present batch of Writ Petitions though are continuing and discharging their duties as attendants, but they are not getting their wages.

6.1. Learned Addl. Standing Counsel on the other hand made his submission basing on the stand taken by Opp. Party No.3 in his counter.

Even though in the counter, a stand has been taken that the Petitioners are working in different wings of District Headquarter Hospital, Puri since last 17 years sincerely and honesty and with utmost satisfaction of the authority and several communications have been made to the higher authorities on behalf of Opp. Party NO.3 to consider the claim of the Petitioners for their regularization, but no decision has yet been received. It is further contended that, in absence of appropriate order from the higher authority, Opp. Party NO.3 is not in a position to consider the grievance of the Petitioners for their regularization in service. This stand as has been taken in Paragraph-4 of the counter so filed by Opp. Party NO.3 is reproduced hereunder:

> *4. That in reply to the averments made in Para 6.6 of the Original application, it is humbly submitted that the Petitioner have been working in different wings of DHH,Puri since 17 years and above. They are doing their duty very sincerely and honestly with utmost satisfaction of the competent authorities. Several letters had also been communicated to Higher Authorities on behalf of the Opp. party No.3 to consider their case for regularization of their service, but, no reply in this regard has received by the O.P. NO.3 till date. As per Health & FW Department Letter NO.25987 dt.08.12.2016, advertisement was made vide NO.10683 dt.15.12.2016 to fill up 62 (sixty two) NOs. of Attendant Posts, for which it does not come under jurisdiction of the O.P. NO.3 i.e. Chief District Medical & Public Health Officer, Puri to take any steps for absorption/regularization of existing daily wages/NHM/ZSS or any project against the regular post until any communication received from the Govt.*

7. Considering the rival submissions made by the learned counsel appearing for the parties, this Court when directed the State counsel to obtain instruction with regard to the status of the recruitment process so initiated in terms of the advertisement

dtd.15.12.2016, instruction provided by the CDMO, Purl vide his letter dtd.31.10.2023 was produced before this Court. This Court after going through the instruction found that the selection process initiated to fill up 62 posts of contractual attendants in terms of advertisement dtd.15.12.2016 was stopped because of the interim order passed by the Tribunal in WPC (OAC) NO.4832 of 2016 and in some other similar matters. It has also been indicated that all the Petitioners are continuing as Attendant on daily wage basis since their initial date of engagement from the year 2006-2008.

8. Having heard learned counsel for the parties and after going through the materials available on record, this Court finds that all the Petitioners were engaged as Attendant on daily wage basis with due approval of the Collector-cum-Chairman, Zilla Swasthya Samiti, Puri vide orders issued starting from 15.11.2006 onwards. As admitted by Opp. Party No.3, all the petitioners are continuing as Attendant on daily wage basis since their initial date of engagement with effect from the year 2006-2008. It is also found from the instruction provided by the CDMO that the selection process initiated to fill up 62 number of posts of attendant on contractual basis in terms of advertisement issued on 15.12.2016 has not been undertaken and all the petitioners are continuing as such till date.

8.1. In view of such position and placing reliance on the decisions of the Hon'ble Apex Court as cited (supra) and so also the decisions of this Court passed on 02.05.2023 in WPC (OAC) NO.1568 of 2018 and another, this Court while disposing the Writ Petition directs Opp. Party No.1 to 3 to take effective steps for regularization of the services of the Petitioners as against those 62 posts so sanctioned by the Government to fill up on contractual basis. Such a decision be taken by Opp. Party Nos.1 to 3 within a period of three (3) months from the date of receipt of this order. Till such a decision is taken, the Petitioners in the present batch of Writ Petitions be allowed to continue. It is also observed that Petitioners be paid with their wages as due and admissible if it has not been paid, as contended by the learned counsel appearing for the Petitioners.

All the Writ Petitions are accordingly disposed of.

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2024 (I) ILR-CUT-617

BIRAJA PRASANNA SATAPATHY, J.

WPC(OAC) NO.1184 OF 2019

Dr. SMITA PATRA ….Petitioner

-V-

STATE OF ODISHA & ORS. ….Opp.Parties

ODISHA MEDICAL EDUCATION SERVICE IN STATE'S SCALE OF PAY (METHOD OF RECRUITMENT CONDITIONS OF SERVICE) RULE, 2009 –

Rule 4(1) – Requisite qualification – On the last date for receipt of application for the post of Asst. Professor, speciality in Anatomy, the Opp. Party did not possess requisite qualification with three years of experience – The last date for making application was 28.11.2018 but the Opp. Party obtain required experience certificate on 08.03.2019 – Whether Opp.Party is eligible for the post? – Held, No – If any condition stipulated in the advertisement, it should be strictly followed by the authority, in no case it will be deviated.

Case Laws Relied on and Referred to :-

1. (2009) 2 SCC (L & S) : Uttar Pradesh Public Service Commission Vs Satya Narayan Sheohare & Ors.
2. JT (1998) (9) SC 190 : State of Haryana & Others Vs.Anurag Srivastav and Others
3. AIR 2003 SC 4411 : State of U.P Vrs. Vijay Kumar Misra.
4. 2015 (II) OLR 752 : Sasmita Manjari Das. Vs. State of Orissa & Ors.
5. (1996) 6 SCC 282 : Secretary, Deptt. of Health & Family Welfare Vs. Dr. Anita Puri & Ors.
6. W.P.(C) NO.31327 of 2022 (27.09.2023) : Kartik Senapati Vs. State of Orissa & Ors.
7. Civil Appeal No.6157-6158 of 2015 (10.08.2015) : Subash Ranjan Behera & Others Vs. State of Odisha & Others.
8. 2022 Live Law (S.C.) 502 : Anurag Sharma & Ors. Vs. State of Himachal Pradesh & Ors.

For Petitioner : M/s. Dr. J.K.Lenka

For Opp.Parties: M/s.M.K.Balabantaray, AGA.
Dr. D.K.Panda & Mr.S.B.Jena.

JUDGMENT Date of Hearing : 26.09.2023 : Date of Judgment : 21.12.2023

BIRAJA PRASANNA SATAPATHY, J.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical) Mode.

2. The present Writ Petition has been filed inter alia with the following prayer.

"In view of the facts mentioned in para-6 above, the applicant prays for the following relief(s):-

(i) Set aside the OPSC recommendation dt.07.06.2019 at Annexure-9 recommending the name of Respondent NO.3 bearing Roll. NO.167 for the only post meant for UR for recruitment to the post of Asst. Professor, Anatomy in Specialty in Group-A of OMES Rules, 2013 pursuant to advertisement NO.12 of 2018-2019.

(ii) Direct the OPSC (Respondent NO.2) to recommend the name of the application for the post of Asst. Professor in Anatomy in Group-A OMES pursuant to advertisement NO.12 of 2018-19 meant for UR category and direct the Respondent NO.1 to appoint the applicant for the said post of Asst. Professor in Anatomy with all consequential benefits.

(iii) Issue any other order(s) which deem fit and proper for adjudication.

3. It is the case of the Petitioner that Petitioner passed her MBBS examination from Berhampur University in the year 2001. Petitioner on her passing the MBBS examination was recruited and appointed as an Asst. Surgeon pursuant to the recruitment conducted by the Orissa Public Service Commission. Petitioner joined

as an Asst. Surgeon on 19.04.2004. Petitioner while so continuing, she was admitted to prosecute the Post Graduate in the discipline Anatomy as an inservice candidate leading to her acquiring M.D in Anatomy from MKCG Medical College and Hospital, Berhampur. Petitioner acquired such qualification of M.D. in Anatomy in the year 2013. After completing her M.D in Anatomy, Petitioner joined as a Tutor in S.C.B Medical College and Hospital, Cuttack, where she joined on 01.01.2014.

3.1. It is contended that while the matter stood thus, Orissa Public Service Commission in short ("The Commission") issued an advertisement vide Advertisement No. 12/2018-2019 for recruitment to the post of Asst. Professor in Super Speciality and Speciality in different discipline in SCB Medical College and Hospital, Cutack and MKCG Medical College and Hospital, Berhampur. It is contended that in the advertisement issued under Annexure-3, as against the post of Asst. Professor, Speciality, five(5) posts were advertised as against the discipline Anatomy and out of the said 5 vacancies, two(2) were reserved for S.T, two (2) for S.C and one(1) for unreserved candidate.

3.2. It is contended that under Para 4-(ii) of the advertisement, the qualification for the post of Asst. Professor in Speciality with regard to the discipline Anatomy, is prescribed as follows:

"Sl.No.	Name of the discipline	Academic qualification & teaching experience
1.	Anatomy	M.D (Anatomy)/M.Sc.(Anatomy) with 3 Years teaching experience in the subject from a recognized Medical College as Tutor or Sr. Resident."

3.3. It is contended that as provided under Paragraph-7(ii) of the advertisement, applications submitted if found to be incomplete in any respect are liable for rejection without entertaining any correspondence with the applicants on that score. It is also contended that as provided under Paragraph-8, various documents are required to be enclosed along with the applications, which includes certificate from competent authority regarding the prescribed experience of three (3) years as Tutor or Sr. Resident /Trainee as the case may be.

3.4. It is the case of the Petitioner that Petitioner as well as Opp. Party No.3 made their applications as against the post of Asst. Professor, Speciality in the discipline Anatomy.

3.5. It is also contended that the selection as against the post of Asst. Professor, Speciality in the discipline Anatomy is required to be conducted in accordance with the provisions contained under Orissa Medical Education Service (Methods of Recruitment and Conditions of Service) Rules, 2009 (In short "The Rules"). Rule 4 of the 2009 Rules prescribes the eligibility criteria for the post of Asst. Professor. Rule 4 of the Rules prescribes as follows:-

"4. Eligibility criteria for the Post of Assistant Professor (1) Selection shall be made through the Orissa Public Service Commission, from amongst the Tutors and Senior Residents having P.G., Degree in the same discipline with three years experience as such.

Provided that, the recruitment may also be made from amongst the Assistant Professors in any other Speciality or Higher Speciality subject to the condition that seniority in the Speciallity or Higher Speciality, as the case may be, shall be determined from the date of appointment in the new discipline in accordance with the placement given by the Commission, and accepted by the Government.

Provided further that, in the Departments of Anatomy, Physiology, Pharmacology and Microbiology, non-medical teachers may be appointed to the extent of 30% of the total number of posts and in the department of Bio-Chemistry, non-medical teachers may be appointed to the extent of 50% of the total number of posts.

(2) No person shall be eligible to be considered for appointment as an Assistant Professor unless he has acquired a post graduate degree in the concerned Speciality or any other equivalent degree or qualification prescribed by the Council.

(3) Selection of candidates shall be made with due regard to the candidates' academic attainment, teaching experience, aptitude, ability to teach, performance Appraisal Report and such other modalities as may be decided by the Commission."

3.6. It is contended by the learned counsel appearing for the Petitioner that by the time she made the application, she had the required teaching experience of three(3) years as a Tutor and the Petitioner being a M.D in Anatomy, she has to get preference with regard to selection as against Opp. Party No.3.

3.7. It is contended that by the time Opp. Party No.3 made her application in terms of the advertisement, she was not having the required teaching experience certificate with her and the said certificate was only obtained on 08.03.2019. Since as provided under Paragraph-7(ii,) applications submitted if found to be incomplete in any respect are liable for rejection, without entertaining any correspondence with the applicant on that score, the application of Opp. Party No.3 having not been enclosed with the required experience certificate which was only obtained on 08.03.2019, on the face of the last date for making the application being 28.11.2018, the application of Opp. Party No.3 could not have been entertained and it should have been rejected in limini. In support of his aforesaid submission, learned counsel for the Petitioner relied on the decision of the Hon'ble Apex Court of the following case laws: -

1. (2009) 2 SCC(L & S) : Uttar Pradesh Public Service Commission Vs Satya Narayan Sheohare & Others
2. JT (1998) (9) SC 190 : State of Haryana & Others Vs.Anurag Srivastav and Others
3. AIR 2003 SC 4411 : (State of U.P Vrs. Vijay Kumar Misra)This Court in the
4. 2015(II OLR-752 : (Sasmita Manjari Das. Vs. State of Orissa and Others)

In the case of State of ***Uttar Pradesh Public Service Commission Vs. Satya Narayan Sheohare and Others***, Hon'ble Apex Court in Paragraphs-9 & 10 has held as follows:

9. Section 2(b) of the Act defines `other backward classes of citizens' as those backward classes of citizens specified in Schedule I to the Act. Where a particular caste was not included in the list of `other backward classes' in Schedule I to the Act, when the Act was enacted, and when such caste is subsequently added to the list of other backward classes in Schedule I of the Act by way of an amendment, for all purposes, the Act commences in respect of the newly added caste, from the date when the Amendment Act came into effect.

10. Thus, the principle contained in Section 15 would apply whenever a new caste, which was not an OBC earlier, is added to Schedule I of the Act by an amendment to the Act. Therefore whenever the Act is amended by including new castes/classes in the list of other backward classes in Schedule I, the date of amendment to the Act would be the date of commencement of the Act in regard to such caste/class inserted by the amendment.

In the case of ***State of Haryana & Others Vs. Anurag Srivastav and Others***, Hon'ble Apex Court in Paragraphs-2 & 3 has held as follows:

"2.On the last date for receipt of applications, namely, 7-1-1981, Respondent 2 did not possess a Master's degree in Modern Indian History. She did possess a Master's degree in History, but in Group 'A', i.e., Medieval India. The marks-sheet which was annexed by her showed that the four papers which she had appeared in were in the group "Medieval India". The 2nd respondent herself has stated in her letter dated 3-7-1981, addressed to the Director, Haryana State Archives, Chandigarh, that she had passed MA Examination in History (1200 AD-1787 AD) from Kurukshetra University in 1978. One paper was for the period 1627 AD-1761 AD Apart from this, she had already appeared in MA Examination in Modern Indian History (1707 AD-1947 AD) for obtaining additional qualifications and the result was awaited.

3. She subsequently obtained an MA in History in Group 'B' "Modern Indian History" on 16-7-1981. The High Court has rightly held that on 7-1-1981, the last date for submitting the application, the 2nd respondent did not possess a Master's degree with Modern Indian History as her subject. She obtained this qualification on 16-7-1981 subsequent to her interview and selection."

In the case of ***State of Uttar Pradesh Vs. Vijay Kumar Misra***, Hon'ble Apex Court in Paragraph-8 has held as follows:

"8. The position is fairly well settled that when a set of eligibility qualifications are prescribed under the rules and an applicant who does not possess the prescribed qualification for the post at the time of submission of application or by the cut off date, if any, described under the rules or stated in the advertisement, is not eligible to be considered for such post. It is relevant to note here that in the rules or in the advertisement no power was vested in any authority to make any relaxation relating to the prescribed qualifications for the post. Therefore, the case of a candidate who did not come within the zone of consideration for the post could not be compared with a candidate who possess the prescribed qualifications and was considered and appointed to the post. Therefore, the so-called confession made by the officer in the Court that persons haying lower merit than the respondent have been appointed as SDI (Basic), having been based on misconception is wholly irrelevant. The learned single Judge clearly erred in relying on such a statement for issuing the direction for appointment of the respondent. The Division Bench was equally in error in confirming the judgment of the learned single Judge. Thus the judgment of the learned single Judge as confirmed by the Division Bench is unsustainable and has to be set aside."

In the case of ***Sasmita Manjari Das Vs. State of Orissa and Others***, this Court has held as follows:

> *"Law is well settled that if any condition stipulated in the advertisement, it is strictly to be followed by the authority and in no case it will be deviated which has been decided in the case of* ***Ramana Dayaram Shetty v. International Airport Authority of India****, reported in (1979) 3 SCC 489 wherein at paragraph-10it has been held:*
>
> *"it is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them."*
>
> *The Supreme Court also in the case of* ***B. Ramakichenin Alias Balagandhi-v-Union of India and Others****, reported in (2008) 1 SCC 362 has reiterated the same view after taking into consideration the ratio laid down by the Hon'ble Supreme Court in the case of* ***Ramana Dayaram Shetty-v-International Airport Authority of India****."*

3.8. However by accepting the application of Opp. Party No.3 and by allowing her to participate in the selection process as against the post of Asst. Professor, Speciality in the discipline Anatomy, when she was recommended by the Commission as against the discipline Anatomy as an UR candidate vide notification dtd.07.06.2019, so issued under Annexure-9, the Petitioner being aggrieved by such recommendation of Opp. Party No.3 is before this Court in the present Writ Petition.

3.9. Learned counsel for the Petitioner contended that as provided under Rule 4(i) of the 2009 Rules, which was amended in the year 2013, it has been clearly provided that in case of non-availability of M.S or M.D candidate, M.Sc. qualified candidates as prescribed by the Medical Council of India will be appointed in the Department of Anatomy and that too to the extent of 30% of the total number of posts. It is contended that Petitioner since was having M.D. in Anatomy and private Opp. Party No.3 was having M.Sc in Anatomy, in view of the 2nd proviso to Rule-4(i) of the Rules, Opp. Party No.3 should not have been considered ignoring the claim of the Petitioner. 2nd Proviso to the amended Rule 4(1) of the 2013 Rules provides as follows :

> *"Provided further that in case of non-availability of MS or MD candidates M.Sc. qualified candidates as prescribed by the MCI will be appointed in the Department of Anatomy, Physiology, Pharmacology and Microbiology to the extent of 30% and in the Department Bio-Chemistry to the extenyt of 50% of the total number of posts."*

3.10. It is also contended that since Opp. Party NO.3 along with her application never submitted the teaching experience certificate which she only obtained on 08.03.2019, the application of the Opp. Party No.3 could not have been entertained by the Commission with recommendation of her name as against the vacancy meant for UR category in the discipline Anatomy, in view of the stipulation contained under Para-7(ii) read with Para-8(v) of the advertisement and Note-2 appended to Para-8. Para 7(ii), Para 8(v) and Note-2 appended to Para-8 are quoted hereunder:-

> *"7.(ii) Applications submitted to OPSC if found to be incomplete in any respect are liable for rejection without entertaining any correspondence with the applicants on that scores.*
>
> *8.(v) Certificate from competent authority regarding the prescribed experience of three years as Tutor or Senior Resident/Training as the case may be.*
>
> *Note-2: Degree certificate, caste certificate, experience certificates service certificates and discharge certificate of Ex-Serviceman must have been issued by the competent authority within the last date fixed for submission of online application form."*

3.11. Learned counsel for the Petitioner also contended that even though under the relevant Recruitment Rule, the selection of candidates was required to be made taking into account the academic career and performance of the candidate in the viva-voce test, but the Commission only taking into account the qualification of Class-XII and MBBS, towards career assessment, made the selection and no mark was awarded towards Post Graduate qualification. It is also contended that since as against the discipline Anatomy, one Post was meant for UR candidate, taking into account the eligibility of candidate with M.Sc. in Anatomy at 30%, the single post reserved for UR candidate could not have been recommended in favour of Opp. Party No.3 and by doing so, principle of reservation was also violated.

3.12. Making all such submissions, learned counsel appearing for the Petitioner contended that the recommendation of Opp. Party No.3 as against the Post of Asst. Professor, Specialty in the discipline of Anatomy is not sustainable in the eye of law and requires interference of this Court.

4. Mr. D.K. Panda, learned counsel appearing for Opp. Party No.3 on the other hand contended that since in terms of the advertisement, candidates with M.D in Anatomy as well as candidate with M.Sc in Anatomy are eligible to get the benefit of appointment and Opp. Party No.3 having secured 78.280 mark as against the Petitioner securing 73.440 mark, she was rightly recommended by the Commission and it requires no interference of this Court.

4.1. It is also contended that even though at the time of making the application, Petitioner had not enclosed the experience certificate as required under Para-8(v), but after obtaining the same on 08.03.2019, Petitioner produced the same at the time of for verification of documents, the date of verification being so fixed to 11.03.2019. It is contended that since by the time verification of documents were made, Petitioner was having the required teaching experience certificate which she obtained on 08.03.2019, there is no illegality or irregularity with regard to acceptance of her application and consequential recommendation by the Commission on 07.06.2019 under Annexure-9. It is also contended that since the selection has been made by an expert body like the OPSC, the Courts should be slow to interfere with the opinion by experts unless allegations of mala fide is made and established.

In support of his submission, learned counsel appearing for Opp. Party No.3 relied on a decision of the Hon'ble Apex Court in the case of ***Secretary (Deptt. Of Health & Family Welfare Vs. Dr. Anita Puri & Others) (1996) 6 SCC 282*** and decision of this Court in ***W.P.(C) NO.31327 of 2022, disposed of on 27.09.2023 (Kartik Senapati Vs. State of Orissa & Others)***.

In the case of Dr. Anita Puri, Hon'ble Apex Court in Paragraph- 9 has held as follows:

> "9.The question for consideration is whether such sub-division of marks by the Commission on different facets and awarding only 2 1/2 Marks for higher qualification can be said to be arbitrary? Admittedly, there is no statutory rule or any guideline issued by the Government for the Commis- sion for the purpose of evaluation of merit of the respective candidates. When the Public Service Commission is required to select some candidates out of number of applicants for certain posts, the sole authority and discretion is vested with the Commission. The Commission is required to envoive the relative fitness and merit of the candidate and then select candidates in accordance With such evaluation. If, for that purpose the Commission prescribes marks for different facets and then evaluates the mcrit,the process to evaluation cannot be considered to be arbitrary unless marks allotted for a particular facet is on the face of it excessive. Weightage to be .given to different facets of a candidates as well .as to the -viva voce test vary from service to service depending upon the. requirement of the service itself: In course of the arguments before as the learned counsel for the Respondent No. 1 had submitted that the awarding of 20 marks for viva voce and 20 marks for General Knowledge out of 100 marks must be held to be on the face of it arbitrary giving a handle to the. Public Service Commission to manipulate the selection and, therefore, the High Court had rightly come to the conclusion that it was arbitrary. We are unable to accept this contention. This Court in the case of Ajay Hasia Etc. v. Khalid Majib Sehravardi and Others Etc., [1981] 1 S.C.C. 722, while considering the Case of selection, wherein 33% marks was the minimum requirement by a candidate in viva voce for being selected, held that it does not incur any consitutional infirmity. As has been stated earlier the expert body has to evolve some procedure for assessing the merit and suitability of the appellants arid the same necessarily has to be made only by allotting marks on different facets and them awarding marks in respect of each facet of a candidate and finaiiy evaluating his merit, it is too well settled that when a Selection is made by an expert body like public Service Commission which is also advised by experts having technical experience and high academic qualification in the field for which the selection is to be made, ihe courts should be slow to interfere with the opinion expressed by experts unless allegations of maln fide are made established. It would be prudent and safe for the courts to leave the decisions on such matters to the experts who are more familiar with the problems they face than the courts. If the expert body considers suitability of a candidate for a specified post after giving due consideration to all the relevant factors, then the court should not ordinarily interfere with such selection and evaluation. Thus, considered we are not in a position to agree with the conclusion of the High Court that the marks awarded by the Commission was arbitrary or that the selection made by the Commission was in any way vitiated."

Similarly, in the case of Kartik Senapati, this Court in Paragraphs- 31 and 32 has held as follows:

31. The next question that was raised before this Court is with regard to the authority of the Commission to reject the application of the Petitioner. In the said context, it is pertinent to refer to // 27 // Clause-11 of the advertisement. The said Clause-11 provides the ground for rejection of applications by the Commission. Sub-clause(d) provides a ground for rejection of application on the ground of non-furnishing of copies of Certificate/documents as provided under para-10 of the Advertisement. Similarly, the Clause11(j), which is relevant for the purpose of the present case, provides that if a candidate fails to furnish any of the original certificates and documents for verification on the date fixed by the Commission, his/her candidature is liable to be rejected on that ground.

32. On a careful examination of the grounds laid down in Clause11 of the advertisement, this Court observed that there is no specific ground under which the candidature of the Petitioner could have been rejected as has been done in the case of the Petitioner under Annexure-9 to the writ application. In such view of the matter, this Court has no hesitation to hold that the OPSC had no authority to reject the candidature of the Petitioner."

5. Learned counsel appearing for the Orissa Public Service Commission on the other hand contended that pursuant to the advertisement issued Annexure-3, Petitioner and Opp. Party No.3 participated in the selection process as against the post of Asst. Professor, Speciality in the discipline of Anatomy. Since the vacancy in U.R category was a vacancy arising prior to the amended 2013 Rules, the pre-amended 2009 Rules was followed with regard to selection to the post of Asst. Professor, Speciality in Anatomy. It is contended that Rule 4(1) of the 2009 Rules was followed in terms of the order of the Hon'ble Apex Court in the case of ***Subash Ranjan Behera & Others Vs. State of Odisha & Others (Civil Appeal No.6157-6158 of 2015***, decided on ***10.08.2015***. Hon'ble Apex Court in the case of Subash Ranjan Behera while disposing the appeal issued the following direction:

"Keeping in view the aforesaid position in mind, we set aside the final directions contained in the impugned judgment and substitute the same with the following directions: (1) The Commission shall fill up the posts which had arisen or fallen vacant prior to 18.12.2013 in accordance with Rules, 2009.
(2) The posts which arose from 18.12.2013 onward will be filled up in accordance with Rules, 2013.
(3) Advertisement shall be issued accordingly.
(4) We make it clear that in both the kinds of advertisements, the Assistant Professor already working on ad hoc / contractual basis as well as others shall have right to apply and be considered for the post."

5.1. Learned counsel for the Commission placing reliance on the direction issued in the case of Subash Ranjan Behera contended that since the vacancy in UR category is a vacancy arisen prior to 18.12.2013, the selection was made in terms of the provision contained under Rule 4(1) of the 2009 Rules. Preference as contained under the 2nd proviso to the amended Rule 4 of 2013 Rules is not applicable, in view of the decision in the case of Subash Ch. Behera. The Commission by making the selection in accordance with the provisions contained under the 2009 Rules rightly recommended Opposite Party No. 3 as she was found more meritorious.

However, it is fairly contained that Opp. Party No.3 obtained the teaching experience certificate on 08.03.2019 and such a certificate was not enclosed to her application while submitting the same on 28.11.2008 i.e. the last date of making the application.

6. This Court after going through the materials placed by the respective parties in support of their stand when found that the selection has not been made in terms of the stipulation contained in the advertisement, passed an order on 31.08.2023 directing the learned counsel appearing for the commission to produce the selection file in respect of selection process undertaken pursuant to the advertisement issued under Annexure-3. From the said selection file, so produced on 02.09.2023 before this Court when it was found that the Petitioner and private Opp. Party No.3 and other candidates who had made their applications for the post in question have only been allowed career mark with regard to their qualification of Class-XII and MBBS with no mark awarded in favour of the candidates having M.D. qualification, this Court on 05.09.2023 directed the learned counsel appearing for the Commission to produce the decision so taken by the Commission with regard to award of mark in favour of the candidates towards career assessment. Order dt.05.09.2023 is reproduced hereunder.

> "**Order: 05.09.2023**
>
> 1.This matter is taken up through Hybrid Arrangement (Virtual/Physical) Mode.
>
> 2. Pursuant to the order passed by this Court on 02.09.2023, the recruitment file to the post of Assistant Professor, Anatomy was produced before this Court. The recruitment file be kept in a sealed cover as before.
>
> 3. From the said file, it is found by the Petitioner and private Opposite Party No.3 and other candidates have been allowed marks with regard to their qualification in +2 and MBBS examination.
>
> 4. Mr. J.K. Lenka, learned counsel for the Petitioner contended that since the Petitioner has got qualification of M.D. she should have been awarded mark for that also. But Mr. A. Behera, learned counsel appearing for the Commission contended that basing on the decision taken by the Commission no mark has been awarded with regard to qualification of M.D.
>
> 5. In view of such submission made by Mr. Behera, this Court directs to Mr. Behera to produce the decision taken by the Commission with regard to award of mark in respect of the candidates appearing for the Post of Assistant Professor, Anatomy on the next date.
>
> 6. As requested by Mr. Behera, list this matter on 15th of September, 2023.
>
> 7. A free copy of this order be handed over to Mr. A. Behera, learned counsel appearing for the Commission for compliance.

6.1. Pursuant to the said order, learned counsel appearing for the Commission produced the instruction so provided by the Commission vide letter dt. 12.09.2023 with the enclosed Note sheet available at Page No.13,38 & 39. From the said instruction, it is found that, initially though the Commission on 03.10.2018 took a

decision to award marks towards career assessment by allowing 20% for Class-XII, 40% for MBBS and 40% towards P.G qualification, but the Commission subsequently took a decision on 25.04.2019 to award 20% towards Class-XII and 80% towards MBBS. This Court after going through the Note sheet enclosed to letter dt.12.09.2023 found the decision taken by the Commission on 03.10.2018, was modified in the subsequent decision taken on 25.04.2019 with regard to award of mark towards Career Assessment. From the note sheet, it was found that the decision taken on 03.10.2018 was taken by the Commission to award 20% for Class-XII, 40% for MBBS and 40% for P.G towards career assessment. But the decision dtd.25.04.2019 was only taken by a single member of the Commission, deciding therein to award 20% towards Class-XII and 80% towards MBBS.

6.2. Considering the stand taken by the Commission and after going through the instruction so provided vide letter dt.12.09.2023, this Court passed a further order on 22.09.2023 to the following effect.

> **22.09.2023** **O R D E R**
>
> **1**. This matter is taken up through Hybrid Arrangement (Virtual/Physical) Mode.
> **2**. Instruction provided by Mr. A. Behera, learned counsel appearing for the OPSC in Court today be kept in record.
> **3**. From the said instruction it is found that the Commission on 25.04.2019 was requested to take a fresh decision with regard to awarding of mark for having P.G. qualification in respect of candidates, who had made their application pursuant to the advertisement in question. It is further found from the instruction that the decision has been taken on the very same date itself i.e. on 25.04.2019 and nothing has been indicated that it is a decision of the Commission consisting of 5 members.
> **4**. Mr. Behera, learned counsel for the Commission is directed to produce before this Court the decision of the Commission so taken on the request made by the Selection Committee on 25.04.2019 on the next date.
> **5**. As requested, list this matter on 26.09.2023.

6.3. Pursuant to the order passed on 22.09.2023, learned counsel appearing for the Commission produced letter issued by the Commission on 26.09.2023 containing the reason for taking the decision not to award career mark for Post Graduate Qualification. Contents of letter dt.26.09.2023 is reproduced hereunder.

> "In inviting reference to the subject cited above I am to inform you that during scrutiny of documents in the recruitment for Assistant Professor (Anatomy) pursuant to the advertisement No.12 of 2018-19, it was come to the notice of the Commission that since many candidates have not been awarded marks in the PG but only issued with pass certificate, therefore, the then Chairman, OPSC had decided to shortlist candidates on the basis of the marks obtained in 12th Class (20%) and graduation (MBBS) (80%) to maintain uniformity in the recruitment process. The note sheet order of the then Chairman (pat P-39/N) has already been communicated to you in the previous letter (copy enclosed). The same may be placed before the Hon'ble Court for their kind appraisal."

7. Basing on the stand taken by the Commission in the counter affidavit and the instruction provided vide letter dt. 12.09.2023 and 26.09.2023 as well as the

reason to follow the 2009 Rules relying on the decision in the case of Subash Ranjan Behera, learned counsel for the Petitioner contended that as per Rule-4(3) of the 2009 Rules, selection of the candidates' is required to be made with regard to the candidates' academic attainment, teaching experience, aptitude, ability to teaching performance appraisal report and such other modalities as may be decided by the Commission. But on the face of Rule 4(3) of the 2009 Rules the decision taken by the Commission not to award any mark for P.G qualification is not sustainable in the eye of law. It is also contended that the decision rendered in the case of Subash Ranjan Behera is not applicable to the facts of the present selection process as the advertisement was published in the year 2018 which is much after the decision of the Apex Court in the case of Subash Ranjan Behera. It is also contended that in view of the subsequent decision of the Hon'ble Apex Court in the case of ***Anurag Sharma & Others Vs. State of Himachal Pradesh and Others 2022, Live Law (S.C.) 502***, the provision contained under the 2nd Proviso to Rule 4(1) of the 2013 amended Rule is required to be followed. As per the amended Rules, only on the case of non-availability of candidates with M.D in Anatomy, cases of candidates with M.Sc. can be considered. Hon'ble Apex Court in Para-11 of the judgment held as follows:

> 11. In view of the above principles, flowing from the constitutional status of a person in employment with the State, we have no hesitation in holding that the observations in Rangaiah that posts which fell vacant prior to the amendment of Rules would be governed by old Rules and not by new Rules do not reflect the correct position of law. We have already explained that the status of a Government employee involves relationship governed exclusively by rules and that there are no rights outside these rules that govern the services. Further, the Court in Rangaiah's case has not justified its observation by locating such a right on any principle or on the basis of the new Rules. As there are a large number of judgments which followed Rangaiah under the assumption that an overarching principle has been laid down in Rangaiah, we have to necessarily examine the cases that followed Rangaiah. We will now examine how subsequent decisions understood, applied or distinguished Rangaiah."

8. Having heard learned counsel for the parties and after going through their materials available on record, this Court finds that pursuant to the advertisement issued under Annexure-3, Petitioner and Opp. Party No.3 made their applications as against the post of Asst. Professor, Specialty in the discipline Anatomy. As found from the record, by the time Petitioner made her application, she was having the qualification of M.D, Anatomy and she had got the teaching experience in her favour so issued on 01.08.2017 under Annexure-2. As per the advertisement, candidates have to make their application in all respect by the last date so fixed to 28.11.2018 and any incomplete application as provided under Para-7(ii) is liable for rejection.

8.1. As provided in Paragraph-8 (v) of the advertisement, a candidate along with his/her application has to enclose various certificates which includes certificate from competent authority regarding the prescribed experience of three (3) years as Tutor

or Senior Resident/Training as the case may be. As found from the record which is not disputed either by the learned counsel appearing for Opp. Party No.3 or by Opp. Party No.2, Opp. Party No.3 by the time she made her application on 28.11.2018, she was not having with her the required teaching experience certificate which she obtained only on 08.03.2019. Since in terms of Note-2 appended to Para-8 of the advertisement all such certificates must have been issued by the competent authority within the last date fixed for submission of online applications and the Opp. Party No.3 having obtained such certificate on 08.03.2019 which is much after the last date of making the application which was fixed to 28.11.2018, as per the considered view of this Court, the application of Opp. party No.3 should not have been entertained in view of the decisions of this Court in the case of Sasmita Manjari Das.

8.2. Not only that though as per the Rules 4(1) of the 2009 Rules, the selection has to be made by awarding marks towards Career Assessment, but the Commission though initially took a decision on 03.10.2018 to award marks towards Career Assessment at 20% for Class-XII, 40% for MBBS and 40% for P.G, but the Commission, suo moto took a decision on 25.04.2019 by allowing 20% for Class-XII and 80% for MBBS. As per the considered view of this Court such a decision taken by the Commission on 25.04.2019 is not a decision so taken by the Commission. The decision dt.25.04.2019 has been taken by a single member though as per the practice as contended by the learned counsel for the Commission, such a decision has to be taken by a Committee of 5-members, to be constituted by the Chairman.

8.3. In view of such anomaly in the selection process and the fact that Opp. Party No.3 was not having her teaching experience certificate as on the last date of making the application which was a mandatory requirement, her application could not have been entertained by the Commission.

8.4. In view of such position, this Court is inclined to set aside the recommendation of Opp. Party No.3 by the Commission as against the post of Asst. Professor Speciality in the discipline Anatomy so made on 07.06.2019 under Annexure-9. While setting aside the recommendation of Opp. Party No.3, this Court directs the Commission to consider the case of the Petitioner and other eligible candidates in UR category as against the post of Asst. Professor, Speciality in Anatomy by awarding mark for post Graduate qualification within a period of one(1) month from the date of receipt of this order. On such consideration of the matter, if Petitioner is found otherwise eligible, Commission may recommend her name for being appointed as against the post of Asst. Professor Speciality in the discipline Anatomy. It is observed that if the Commission finds the Petitioner eligible and recommend her name for her appointment, consequential follow up action shall be taken by Opp. Party No.1 in providing appointment to the Petitioner. Such a decision be taken by Opp. Party No.1 within a period of one (1) month from the date of receipt of such recommendation.

With the aforesaid observation and direction, the Writ Petition is accordingly disposed of.

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2024 (I) ILR-CUT-630

MURAHARI SRI RAMAN, J.

W.P.(C) NO.7687 OF 2008

SMT. SUJATA MAHANTA … Petitioner

-V-

COLLECTOR-*CUM*-CHIEF EXECUTIVE ZILLA PARISHAD, MAYURBHANJ & ORS. … Opp.Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Delay in filing writ application – Effect of – Held, one who is not vigilant and diligent and does not seek intervention of the Court within reasonable time from the date of accrual of cause of action or alleged violation of constitutional, legal or other right is not entitiled to relief under Article 226 of the Constituion.

(B) SERVICE LAW – Suppression of vital document – Effect of – Held, suppression of vital document amounts to fraud – A person whose case is based on falsehood has no right to approach the Court.

(Paras 10.3 – 10.8)

Case Laws Relied on and Referred to :-

1. (2012) 6 SCR 75 : Smt. Badami (deceased) by her LR Vrs. Bhali
2. AIR 1967 SC 973 : K.V. Raja Lakshmiah Vrs. State of Mysore
3. 2002 Supp (3) SCR 534 : Northern Indian Glass Industries Vrs. Jaswant Singh
4. (1975) 1 SCC 152 : P.S. Sadasivaswamy Vrs. State of Tamil Nadu
5. (2007) 9 SCC 278 : New Delhi Municipal Council Vrs. Pan Singh & Ors.
6. (2011) 5 SCC 607 : Shankara Co-op. Housing Society Ltd. Vrs. M.Prabhakar & Ors.
7. (2010) 2 SCC 59 : Union of India Vrs. M.K. Sarkar
8. (2008) 10 SCC 115 : C. Jacob Vrs. Director of Geology and Another
9. (2019) 4 SCC 479 : Senior Divisional Manager, Life Insurance Corporation of India Ltd. Vrs. Shree Lal Meena
10. (2013) 12 SCC 179 : State of Uttaranchal Vrs. Sri Shiv Charan Singh Bhandari
11. (1995) 4 SCC 683 : State of Maharashtra Vrs. Digambar
12. (2014) 4 SCC 108 : Chennai Metropolitan Water Supply and Sewerage Board Vrs. T.T. Murali Babu
13. 2018 SCC OnLine Mad 11463 : S.Vaidhyanathan Vrs. Government of Tamil Nadu
14. (2023) 10 SCR 1049 = 2023 INSC 619 : State of Odisha Vrs. Laxmi Narayan Das
15. (2022) 2 SCC 25 : Union of India Vrs. N.Murugesan
16. (2019) 1 SCR 920 : Sarvepalli Radhakrishnan University Vrs. Union of India
17. (2015) 15 SCC 602 : State of Jammu & Kashmir Vrs. R.K. Zalpuri

For Petitioner : M/s. Banshidhar Satapathy,S.K. Sahoo, M. Pagal & A. Alli

For Opp.Parties : M/s. Ajodhya Ranjan Dash & Biplab Mohanty, AGA

JUDGMENT Date of Hearing : 20.02.2024 : Date of Judgment : 26.02.2024

MURAHARI SRI RAMAN, J.

***THE PRAYER IN THE WRIT PETITION*:**

Writ petition has been filed in the matter of Articles 226 and 227 of the Constitution of India, beseeching following relief(s):

> *"In the facts and circumstances of the case the humble petitioner fervently prays this Hon'ble Court to be graciously pleased to issue notice to the opposite parties, call for relevant records and after hearing the counsel of parties issue a writ in the nature of certiorari or any other appropriate writ incorporating the name of the petitioner in the List notified vide Letter dated 28.04.2008 as a disengaged Education Volunteer against Dhipasahi Education Guarantee Scheme Centre, Uparbeda deleting the name of opposite party No.4 and commanding opposite parties particularly to the Collector-cum-Chief Executive, Zilla Parisad and the District Project Co-ordinator, the opposite party Nos. 1 and 2 to engage the petitioner as Gana Sikshyak under Government Resolution No. 3358, dated 16.02.2008 within a stipulated period and/or pass such other order or direction as will do complete relief to the petitioner;*
>
> *And for this act of kindness, the humble petitioner shall as in duty bound ever pray."*

THE GRIEVANCE OF THE PETITIONER AS ADUMBRATED IN THE WRIT PETITION:

2. The petitioner, B.A., LL.B., claimed to have requisite qualification, being selected, was appointed to work as Education Volunteer in Dhipasahi Education Guarantee Scheme Centre at Uparbeda ("EGS Centre", for short) under the Education Guarantee Scheme vide Order No. 7643, dated 19.12.2005 of the District Project Officer, Sarba Sikshya Abhijan in Kusumi Block of the district of Mayurbhanj. Pursuant thereto, she had joined on duty on 30.12.2005 and thereafter having undergone "induction training" for 10 days from 02.01.2006 to 11.01.2006 at District Institute for Education & Training, Mayurbhanj, Baripada under the District Primary Education Programme, she continued in the said Centre.

2.1. Her grievance in the present writ petition is that the opposite parties prepared a list of disengaged Education Volunteers of Kusumi Block of Mayurbhanj District for their engagement in terms of the Government Resolution No.3358, dated 16.02.2008. As name of the petitioner did not find place in the said list, but in her place the name of one Sri Bhagaban Giri was mentioned against the EGS Centre for engagement as GANA SIKSHYAK, the petitioner seeks to replace his name with that of her name.

2.2. The petitioner submitted objection/representation before the Collector-cum-Chief Executive (opposite party No.1) and the District Project Officer, Sarba Sikshya Abhijan (opposite party No. 2) for incorporating her name in the list of disengaged Education Volunteers in respect of EGS Centre for giving engagement as GANA SIKSHYAK, but to no avail. Thus, this writ petition.

THE PLEADINGS AS NARRATED IN THE WRIT PETITION:

3. That the petitioner being appointed as Education Volunteer at EGS Centre, Dhipasahi, Uparbeda, Kusumi Block in Mayurbhanj district under the Education Guarantee Scheme vide Order No.7643, dated 09.12.2005 issued by the District Project Officer, Sarba Sikshya Abhijan, Mayurbhanj and accordingly the Block Resource Centre Co-ordinator of Kusumi, vide Letter No.144, dated 31.01.2005 directed the President, Village Education Committee, Dhipasahi EGS Centre, Uparbeda to execute agreement with Smt. Sujata Mahanta, the petitioner. Accordingly agreement was executed on 30.12.2005 and she having joined the EGS Centre as Education Volunteer on 30.12.2005, had undergone induction training from 01.01.2006 to 11.01.2006. It is stated that back from training, she continued to function as such since 12.01.2006.

3.1. The petitioner made application to avail maternity leave from 03.03.2006 to 31.05.2006 and it is claimed that she sought to join in duties on 01.06.2005 and continued there.

3.2. The Government of Odisha in School and Mass Education Department vide Resolution No. 3358/SME, dated 16.02.2008 took decision for disengagement of Education Volunteers and to rehabilitate them as GANA SIKSHYAK. It is submitted by the petitioner that even though she was appointed as Education Volunteer in Dhipasahi EGS Centre, Uparbeda under Kusumi Block her name did not appear in the list of disengaged Education Volunteers of Kusumi Block in respect of EGS Centre, but the name of Sri Bhagaban Giri, the opposite party No.4 did find place against the said EGS Centre for engagement as GANA SIKSHYAK vide Notification No.2296,dated 28.04.2008 issued by the District Project Co-ordinator, Sarba Sikshya Abhijan.

3.3. Highlighting grievance the petitioner has stated to have raised objection by tendering representation on 02.05.2006, which she alleges to be pending.

REPLIES OF THE OPPOSITE PARTIES TO THE CONTENTS OF THE WRIT PETITION:

4. Counter affidavit has come to be filed on 23.08.2011 by the opposite party Nos. 1 and 2 disputing the fact of availing maternity leave with effect from 03.03.2006 till 31.05.2006. It is contended that there was no circular/provisions for availing maternity leave by the Education Volunteers. Therefore, such leave as sought for by the petitioner is to be construed as abandonment of service. However, Sri Bhagaban Giri was engaged as Education Volunteer by the Village Education Committee of Dhipasahi EGS Centre located at Uparbeda for the reason that the petitioner abandoned the service.

4.1. The Resolution dated 16.02.2008 is the guidelines issued pursuant to the policy decision of the Government of Odisha in School and Mass Education

Department for engagement of disengaged Education Volunteers on abolition of EGS Scheme as GANA SIKSHYAKS.

4.2. It is further submitted by the answering opposite parties that the petitioner had served as Education Volunteer from 30.12.2005 to 02.03.2006, i.e., for a period of two months and five days and abandoned the Centre since 03.03.2006. Consequently, the Village Education Committee of Dhipasahi (Upardiha) EGS Centre engaged Sri Bhagaban Giri in pursuance of Letter No.1438 dated 19.04.2006 of District Project Co-ordinator, Mayurbhanj. Sri Bhagaban Giri being asked to join as Education Volunteer on or before 01.12.2006, he joined and worked as Education Volunteer till 31.03.2008, i.e., date of abolition of EGS.

4.3. As the petitioner abandoned the service and her maternity leave was not allowed, she could not be considered for being rehabilitated as GANA SIKSHYAK in terms of Resolution dated 16.02.2008.

HEARING OF THE WRIT PETITION:

5. This matter was on board on 20.02.2024 under the heading "Admission". It is submitted by Sri Banshidhar Satapathy, learned counsel for the petitioner that pleadings are completed and he does not wish to file any rejoinder affidavit to the counter affidavit filed on behalf of the opposite party No.1 to 2.

5.1. Sri Ajodhya Ranjan Dash, learned Additional Government Advocate has taken this Court to the Order dated 16.01.2023, wherein this Court directed for production of "entire file maintained by the Village Education Committee of Uparbeda, Dhipasahi EGS Centre containing all relevant details of the appointment of the petitioner, opposite party No.4, attendance of the volunteers in the classes, remuneration, etc.". Accordingly, Sri Biplab Mohanty, learned Additional Government Advocate produced the relevant records for perusal of this Court.

5.2. While issuing notice in the instant case, vide Order dated 05.06.2008, an interim protection to the following effect was granted to the petitioner:

> *"Issue notice as above.*
> *Accept one set of process fee.*
> *Any appointment made to the post of Gana Sikshyak, pursuant to the Order dated 28.04.2008 passed in respect of Dhipasahi EGS Centre, Uparbeda, Annexure-9, shall be subject to result of the writ petition."*

5.3. This Court with respect to appearance of the opposite party No.4 passed the following Order on 16.01.2023:

> *"Mr. Adhiraj Behera, learned counsel submits on behalf of Mr. Prafulla Kumar Rath, who had appeared for the opposite party No.4 that they have no instruction in this regard from their client."*

5.4. In such view of the matter, since none appeared for the opposite party No.4, the counter affidavit filed by said opposite party is ignored.

5.5. Therefore, this Court heard Sri Banshidhar Satapathy, learned Advocate for the petitioner and Sri Ajodhya Ranjan Dash assisted by Sri Biplab Mohanty, learned Additional Government Advocates for the opposite party Nos.1 to 3.

SUBMISSIONS AND ARGUMENTS OF RESPECTIVE PARTIES:

6. Sri Banshidhar Satapathy, learned Advocate for the petitioner reiterating the contents of the petition, urged that the petitioner had never abandoned her service, rather the record would reveal that she had submitted application clearing stating therein that she requires maternity leave from 03.03.2006 till 31.05.2006. He has seriously disputed and argued that the answering opposite parties have gone beyond the record to affirm incorrect fact to the effect that "At the time she applied for maternity leave from 03.03.2006 without mentioning specific date on end of leave as per Annexure-6".

6.1. Refuting the stand of the opposite party Nos.1 and 2 at paragraph 8 of the counter affidavit that "no maternity leave was allowed to petitioner as there was no provisions in this regard in the EGS Scheme", Sri Banshidhar Satapathy, learned Advocate submitted that said stance is not only contrary to what is spelt out in Letter bearing No. 39847 (225)-Bt.-V-42/2007/F, dated 01.10.2007 issued by the Government of Odisha in Finance Department, but also runs counter to the terms of the contract executed by the petitioner and the authority.

6.2. It is further vehemently argued by Sri Banshidhar Satapathy, learned counsel for the petitioner that having not disputed that the petitioner after remaining in maternity leave from 03.03.2006 to 31.05.2006, she approached the authority concerned on 01.06.2006 by submitting the joining report.

6.3. It is stated by the petitioner that despite the fact that the petitioner has tendered her joining report on 01.06.2006, the authorities have proceeded to allow Sri Bhagaban Giri, the opposite party No.4, to work as Education Volunteer with effect from 01.12.2006 superseding her. Sri Bashidhar Satapathy, learned Advocate laid stress on paragraph 10 of the counter affidavit of the opposite party Nos.1 and 2, which reads as follows:

> *"That in reply to the averment made in paragraph 7 of the writ petition it is submitted that the VEC of Dhipasahi (Upardiha) EGS Centre had engaged Bhagaban Giri vide Letter No.1438, dated 19.04.2006 of District Project Co-ordinator, Mayurbhanj to join as Education Volunteer as on 01.12.2006 after being abandoned by the petitioner and continued up to 31.03.2008 till abolition of EGS Scheme."*

6.4. It is alleged by the learned counsel that it is ascertained by the petitioner that while she was under maternity leave the Village Education Committee, engaged Sri Bhagaban Giri-opposite party No.4 to manage the Centre for a temporary period without approval of the District Project Co-ordinator-opposite

party No.2 and taking the advantage of his temporary engagement, he managed to enter his name against the Dhipasahi EGS Centre, Uperbeda ignoring the name of the a petitioner. In view of the above the petitioner being disengaged Education Volunteer of Dhipasahi EGS Centre, Uparbeda, she deserves to be engaged as GANA SIKSHYAK in terms of Resolution dated 16.02.2008.

6.5. It is, therefore, submitted by the counsel for the petitioner that this Court, considering the plight of the petitioner, disengaged Education Volunteer, who is now entitled to be engaged as GANA SIKSHYAK in conformity with Government of Odisha in School and Mass Education Resolution No. 3358/SME, dated 16.02.2008, may show indulgence by issue of writ of mandamus in exercise of powers under Article 226/227 of the Constitution of India.

7. Per contra, Sri Ajodhya Ranjan Dash, learned Additional Government Advocate submitted that the allegation of the petitioner is unfounded inasmuch as mere throwing application for maternity leave would not suffice that the same is allowed/granted; rather in absence of prior intimation and approval of the competent authority, the leave cannot be said to be authorized. The procedure for availing maternity leave being not adhered to by the petitioner, she cannot be allowed such benefit claimed for.

7.1. Advancing argument further he submitted that in order to carry on the normal function of EGS Centre and looking to the interest of the pupils, the Village Education Committee of Dhipasahi EGS Centre engaged Sri Bagaban Giri, who continued till 31.03.2008, with effect from which the EGS Centre was closed on account of cessation of the Scheme.

7.2. Sri Biplab Mohanty, learned Additional Government Advocate by producing the concerned records, referred to the following Letter vide Memo No.28, dated 19.02.2008:

"Office of the Block Resource Centre Co-Ordinator, Kusumi, Badampahar
No. (100) Dated 19.02.2008
To
The Education Volunteer/
President Dhipasahi EGS Centre

Sub.: Closure of EGS Centre and handing over changes thereof.

Ref. : Letter No. 884(30)EGS/08, dated 19.01.2008 of the Director, OPEPA, Bhubaneswar and Memo No. 485(14), dated 08.02.2008 of the D.I. of Schools, Rairangpur

Sir/Madam

With reference to the letter cited above I am to inform you that all the EGS Centres will be closed on 31.03.2008. Hence you are instructed to handover all the records, assets to the Headmaster Uparbeda Upper Primary School by 31.03.2008 positively extending copies of change reports to the undersigned and also to the S.I. of Schools. And also you are instructed to ensure the admission of all the students of your Centre to the nearest formal school immediately after completion of annual

common examination, 2008 and intimate the concerned CRCC regarding the admission of the students.

Yours faithfully,
Block Resource Centre Co-ordinator,
Kusumi : Badampahar

Memo No. 28 dated 19.02.2008

Copy to the Headmaster, Uparbeda Nodal Upper Primary School for information.

Sd/- 19.02.2008
Block Resource Centre Co-ordinator
Kusumi: Badampahar"

7.3. Accordingly, all possible steps were taken to close the EGS Centre and the President of Dhipasahi EGS Centre, Uparbeda, Kusumi Block has directed that Sri Bhagaban Giri, who was engaged to work as Education Volunteer since 01.12.2006, has been disengaged with effect from 31.03.2008. Sri Biplab Mohanty, learned Additional Government Advocate has drawn attention of this Court to the contents of Resolution passed in the Meeting of EGS Centre held on 01.04.2004 in presence of Sri Bhagaban Giri, Education Volunteer-cum-Secretary and the President of the EGS Centre along with other members of said Centre, whereby it was decided pursuant to direction of the District Project Co-ordinator the EGS Centre was declared closed. He has also taken this Court to peruse the record where in the document titled "Charge Report of Sri Bhagaban Giri, Education Volunteer, Dhipasahi, Uparbeda EGS Centre to the Headmaster, Uparbeda Nodal Upper Primary School" it is shown that Sri Bhagaban Giri handed over 22 items to the Headmaster and said Headmaster has acknowledged taking over the charge of 22 items from said Sri Giri on 25.04.2008. He has placed the fact borne on record to the effect that such exercise was carried by Sri Giri in pursuance of Letter No. 1791/EGS/2008, dated 26.03.2008 of the District Project Co-ordinator, District Primary Education Programme, Sarba Sikshya Abhijan, Mayurbhanj, whereunder it was requested to all Block Resource Centre Co-ordinators of Mayurbhanj District "to intimate all the Education Volunteers of EGS Centre to issue certificate of the students reading in EGS Centre for mainstreaming and to hand over all the records, teaching materials, pass book including mid-day meal food staff to the Headmaster of nearest Primary School by 5th of April, 2008". It is argued by Sri Ajodhya Ranjan Dash, learned Additional Government Advocate that since the records available at the Dhipasahi EGS Centre, Uparbeda, Kusumi Block manifest that the records are maintained by Sri Bhagaban Giri since 2006 till handing over in the year 2008 and he attended all the meetings held at the EGS Centre along with other members. Therefore, the name of the petitioner does not find place vide Letter No.2296 (26), dated 28.04.2008 (Annexure-9) issued by the District Project Co-ordinator, District Primary Education Programme, Sarba Sikshya Abhijan, Mayurbhanj addressed to all Block Development Officer of Mayurbhanj District enclosing therewith the list of verified EGS Centres with names of the Education Volunteers, where the name of Sri Bhagaban Giri-opposite party No.4 appeared.

7.4. It is, thus, submitted that said list is in consonance with the policy decision taken by the Government of Odisha vide Resolution No.3358/SME, dated 16.02.2008 of the School and Mass Education Department, which has the objective to rehabilitate such disengaged Education Volunteers as GANA SIKSHYAK under the Sarba Sikshya Abhijan.

7.5. Therefore, the claim of the petitioner is untrue. No maternity leave was allowed to the petitioner; on the other hand, having availed leave of her own for around three months without prior approval in contravention of clause (4) of the Agreement dated 30.05.2005 entered into between the petitioner and the President of Village Education Committee read with the Letter No.398 (225)-Bt.-V-42/2007/F, dated 01.10.2007 of the Government of Odisha in Finance Department, such conduct of the petitioner is to be construed to be abandonment of service with effect from 03.03.2006 from Dhipasahi EGS Centre. It is contended by the learned Additional Government Advocate that the petitioner cannot be found to be eligible to fall within the scope of Resolution No. 3358/SME, dated 16.02.2008 for rehabilitation of disengaged Education Volunteers vide Annexure-8.

7.6. Another pertinent objection has been raised by Sri Ajodhya Ranjan Dash, learned Additional Government Advocate that had the petitioner been sanguine about her claim, she should have taken appropriate step immediately in 2006 itself. Nonetheless, even though she claims to have submitted joining report on 01.06.2006 (vide Annexure-7) after the end of her self-claimed maternity leave from 03.03.2006 to 31.05.2006, she had filed the present writ petition on 21.05.2008, i.e., around two years after the end of her leave period. It appears after publication of the policy decision of the Government of Odisha vide Resolution No. 3358/SME, dated 16.02.2008 to rehabilitate the disengaged Education Volunteers, she has made attempt to supersede the opposite party No.4. The Additional Government Advocate has drawn further attention of this Court to the "Proceeding Book of Uparbeda EGS Centre, Dhipasahi", where Sri Bhagaban Giri, opposite party No.4, is seen to have taken part in the Meeting as also operated Bank Account and maintained Cash Book. It is also stated that said record stands testimony to the fact of attendance of Sri Bhagaban Giri since his engagement and receipt of remuneration. It is, therefore, urged by the learned Additional Government Advocate that the indolent petitioner should not be protected.

RELEVANT RESOLUTION AND LETTER OF THE GOVERNMENT OF ODISHA:

8. Resolution dated 16.02.2008 stood thus:

"Government of Orissa
Department of School & Mass Education
Bhubaneswar

No.3358/SME, dated 16.02.2008
R E S O L U T I O N

For the purpose of universalization of Elementary Education, Education Guarantee Scheme (EGS), an integral part of Sarba Sikshya Abhijan (SSA),was operationalised in Orissa from the year 2001-02. Due to up-gradation of E.G.S. Centres to regular schools and for various reasons, the Education Volunteers engaged in such E.G.S.Centres have been disengaged and would be facing disengagement in the above process.

Government after careful consideration of the problems of the Education Volunteers under the Education Guarantee Scheme, decided to rehabilitate Education Volunteers in E.G.S. Centres who have been disengaged or facing disengagement under the Education Guarantee Scheme on the following manner:

1. Such disengaged education volunteers will be rehabilitated as "GANA SIKSHYAKA" under Sarba Sikshya Abhijan.

2. Such disengaged Education Volunteers who are trained (Matric, 10th (H.S.C.)/+2 with C.T., B.A./B.Sc./B.Com. with B.Ed.) will be engaged as GANA SIKSHYAKA with a consolidated remuneration of Rs.2,000/- per month. Those who are untrained (minimum qualification of Matric, 10th (H.S.C.E.)/+2) will be engaged with a consolidated remuneration of Rs.1,750/- per month.

3. Such disengaged education volunteers who are having 10th Qualification (H.S.C. Examination) will have to acquire +2 qualification within a period of 3 years from their engagement as "GANA SIKSHYAKA" to be considered eligible for C.T.Training. Those who are having +2 minimum qualification will be allowed to complete C.T. Training on a distance mode either through IGNOU or from the Directorate of TE & SCERT within a period of 3 years. And after completion of C.T. Training the "GANA SIKSHYAKA" will be eligible to get consolidated remuneration of Rs.2,000/- from the date of passing C.T. Training.

4. The engagement of GANA SIKSHYAK will be made on basis of annual contract, honorary and would be renewed by the Zilla Parishad through the Collector-cum-Chief Executive Officer of Zilla Parishad basing on the positive certificate given by the Village Education Committee (VEC) about their attendance and performance in the school. In case of the Zilla Parishad decided not to renew the contract, appeals shall lie to the State Project Director, OPEPA.

5. The GANA SIKSHYAK will be engaged against the existing created vacancies of SIKSHYA SAHAYAKS and their consolidated remuneration etc. will be borne out of S.S.A. Budget. They will be engaged in the Government Primary Schools.

6. The GANA SIKSHYAK will be responsible for making enrolment drive in the particular educational institution, check dropout rate of the students, bring the out of school children to the school, assist the regular teachers in teaching work, besides other works as would be entrusted by the Headmaster of the school from time to time.

7. An agreement as may be prescribed by the Govt. between the C.E.O., Zilla Parishad-cum-Collector & GANA SIKSHYAK is to be signed on stamped paper. The State Project Director, OPEPA will furnish the draft copy of agreement to Govt. for approval.

8. The GANA SIKSHYAK can be removed from the engagement within the 30days prior notice, if she/he violates the conditions as stipulated in the engagement contract or considered unsuitable latter on by the authorities or on the basis of the adverse report of the Village Education Committee (VEC).

9. The GANA SIKSHYAK can avail casual leave of 12 days during one calendar year. She/he shall not be entitled to any other authorised absence beyond the above mentioned period. If she/he remains absent with permission and if she/he does not have authorised leave at her/his credit, the proportionate amount from the consolidated remuneration shall be deducted.

10. Any lady GANA SIKSHYAK who is having less than two surviving children will be entitled to avail maternity leave for 3 months.

11. The GANA SIKSHYAK will continue to avail of the benefits in the process of selection for engagement of SIKSHYA SAHAYAK as extended in the Government in School & Mass Education Department Office Order No.23845/SME, dated 04.12.2007.

12. The engagement of GANA SIKSHYAK is co-terminus with that of SSA Scheme, or other scheme as would be decided by Govt.

13. This decision will be given effect to from the date of their engagement as "GANA SIKSHYAKA".

By Order of Governor
Sd/- (S.C.Patnaik)
Commissioner-cum-Secretary to Govt."

9. Finance Department Letter No. 39847(225)-Bt.-V-42/2007/F, dated 01.10.2007 reads as follows:

"Finance Department
*****
No.39847 (225)/ Bt.-V-42/07 F., date : 01.10.2007

To
The All Secretaries/All Heads of the Department.Sub.: Absence from duty on maternity ground by Female Contractual Employees engaged in Different Departments of Government.

The Government has adopted contractual mode of engagement of personnel in different Government Establishments on bare administrative necessity after abolition of regular base level vacant entry posts. The policy of Government has been set out in Finance Department Circular No.Bt-V-47/04-55764/F., dated 31.12.2004.

2. In accordance with the above guidelines, various Departments of Government have been making contractual engagement with prior concurrence of Finance Department when there is absolute necessity in the interest of public service.

3. It is found necessary to extend maternity leave to female employees considering the fact that maternity is an inseparable right of a woman irrespective of her employment status. Besides, this benefit has already been extended to Sikhya Sahayaks engaged under Sarba Sikhya Abhijan Scheme in Orissa.

4. Now, the Government, after careful consideration have been pleased to decide that all female employees engaged in Government establishments on contract basis with consolidated remuneration and having less than two surviving children would be eligible to get full consolidated remuneration for a period not exceeding 90 days of her absence from duty on maternity ground on following conditions:

i. Prior approval of competent authority for remaining absent from duty on maternity ground shall be obtained.

ii. Detailed address of the employee during pre and post natal period shall be furnished.

iii. Such contractual, employee resumes duty after expiry of the period of absence from duty on maternity ground.

iv. A certificate from the treating physician for absence from duty on maternity ground shall be furnished.

This shall come into force with immediate effect.

Sd/- D.P.Das
Special Secretary to Government"

DISCUSSIONS AND ANALYSIS:

10. From the record as produced before this Court by the learned Additional Government Advocate it transpires that the petitioner having submitted application availing maternity leave from 03.03.2006 to 31.05.2006, step was taken to engage Education Volunteer and consequent thereto Sri Bhagaban Giri, opposite party No.4 joined as Education Volunteer in Dhipasahi EGS Centre, Uparbeda, Kusumi Block. The records are maintained by said opposite party No.4, who attended all the meetings till the EGS Centre was closed. It is emanating from the record that pursuant to Resolution dated 16.02.2008 of the Government of Odisha in School and Mass Education, the name of the opposite party No.4 was considered and his name found place in the list of disengaged EGS prepared by the District Project Co-ordinator, District Primary Education Programme,Sarba Sikshya Abhijan, Mayurbhanj, so as to be rehabilitated as GANA SIKSHYAK.

10.1. Glossing through the documents enclosed to the writ petition, it is perceived from Annexure-7, i.e., joining report dated 01.06.2006 stated to have been submitted to the Sub-Inspector of Schools, Circle-II, Kusumi Block that no acknowledgment is endorsed thereto by any authority. For ready reference the joining report which is made part of writ petition is reproduced hereunder:

"To
The Sub-Inspector of Schools,
Circle-II, Kusumi Block.

Sub.: Submission of joining report

Sir,
*I have availed maternity leave from 03.03.2006 to 31.05.2006 and at present I am fit by the Doctor to resume my duty (**Copy of fitness certificate enclosed**). The same may kindly be accepted.*

Your faithfully
Sd/-
01.06.2006 *(Smt. Sujata Mohanta)*
Education Volunteer
Dhipasahi EGS Centre
Uparbeda Kusumi Block Mayurbhanj

Copy to : President VEC, Dhipasahi EGS Centre for favour of information."

10.2. During the course of hearing when this Court made enquiry from the counsel for the petitioner as to why the fitness certificate stated to have been enclosed to the joining report is not furnished to this Court along with writ petition, he failed to proffer any explanation. He also expressed his inability to furnish such vital document at this stage also. Minute scrutiny of records produced by Sri Biplab Mohanty, learned Additional Government Advocate transpires that no such document is available on record. Therefore, this Court is of the opinion that Annexure-7, i.e., joining report, dated 01.06.2006 is a self-generated document which does not even contain copy of the fitness certificate of the doctor, as claimed by the petitioner.

10.3. In the context withholding vital document, it has been observed in *Smt. Badami (deceased) by her LR Vrs. Bhali, (2012) 6 SCR 75*, as follows:

> *"19. Presently, we shall refer as to how this Court has dealt with concept of fraud. In S.B. Noronah Vrs. Prem Kumari Khanna, AIR 1980 SC 193 while dealing with the concept of estoppel and fraud a two-Judge Bench has stated that it is an old maxim that estoppels are odious, although considerable inroad into this maxim has been made by modern law. Even so, 'a judgment obtained by fraud or collusion, even, it seems a judgment of the House of Lords, may be treated as a nullity'. (See Halsbury's Laws of England, Vol. 16 Fourth Edition para 1553).The point is that the sanction granted under Section 21, if it has been procured by fraud or collusion,cannot withstand invalidity because, otherwise, high public policy will be given as hostage to successful collusion.*
>
> *20. In S.P. Chengalvaraya Naidu (dead) by L.Rs. Vrs. Jagannath (dead) by L.Rs. and others, AIR 1994 SC 853 this Court commenced the verdict with the following words:*
>
> *"Fraud-avoids all judicial acts, ecclesiastical or temporal' observed Chief Justice Edward Coke of England about three centuries ago, It is the settled proposition of law that a judgment or decree obtained by playing fraud on the Court is a nullity and non est in the eyes of law. Such a judgment/decree— by the first Court or by the highest Court—has to be treated as a nullity by every Court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings.'*
>
> *21. In the said case it was clearly stated that* ***the Courts of law are meant for imparting justice between the parties and one who comes to the Court, must come with clean hands. A person whose case is based on falsehood has no right to approach the Court. A litigant who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If a vital document is withheld in order to gain advantage on the other side he would be guilty of playing fraud on Court as well as on the opposite party****.*
>
> *22. In Smt. Shrist Dhawan Vrs. M/s. Shaw Brothers,AIR 1992 SC 1555 it has been opined that fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It has been defined as an act of trickery or deceit. The aforesaid principle has been reiterated in Roshan Deen Vrs.Preeti Lall AIR 2002 SC 33, Ram Preeti Yadav Vrs.U.P.Board of High School, (2003) 8 SC 311 and Intermediate Education and other and Ram Chandra Singh Vrs. Savitri Devi and others, (2003) 8 SCC 319.*

23. State of Andhra Pradesh and anather Vrs. T. Suryachandra Rao, AIR 2005 SC 3110 after referring to the earlier decision this Court observed as follows:

'In Lazaurs Estate Ltd. Vrs. Beasley, (1956) 1 QB 702, Lord Denning observed at pages 712 &713,

'No judgment of a Court, no order of a Minister can be allowed to stand if it has been obtainedby fraud. Fraud unravels everything.'

In the same judgment Lord Parker LJ observed that fraud vitiates all transactions known to the law of however high a degree of solemnity.'

24. Yet in another decision Hamza Haji Vrs. State of Kerala & Anr., AIR 2006 SC 3028 it has been held that no Court will allow itself to be used as an instrument of fraud and no Court, by way of rule of evidence and procedure, can allow its eyes to be closed to the fact it is being used as an instrument of fraud. The basic principle is that a party who secures the judgment by taking recourse to fraud should not be enabled to enjoy the fruits thereof.

*25. *** All these reasonings are absolutely non-plausible and common sense does not even remotely give consent to them. It is fraudulent all the way. The whole thing was buttressed on the edifice of fraud and it needs no special emphasis to state that what is pyramided on fraud is bound to decay. In this regard we may profitably quote a statement by a great thinker:*

*'Fraud generally lights a candle for justice to get a look at it; and rogue's pen indites the warrant for his own arrest.' ***"*

10.4. Identical view has also been taken following aforesaid Judgment in *Smriti Madan Kansagra Vrs. Perry Kansagra, (2021) 10 SCR 742*.

10.5. Bearing in mind such discussion of the Hon'ble Supreme Court of India, as it is found in the instant case this Court does not find a scrap of paper with respect to certificate of fitness of doctor. No material particulars are also available neither in the record relating to writ petition nor in the records produced by the learned Additional Government Advocate in this regard. It is interesting to note that though in the joining report (as claimed to have been submitted to Sub-Inspector of Schools) mentions about "copy of fitness certificate enclosed" the said document does not find place.Therefore, this Court is not in a position to accept the argument of the learned counsel for the petitioner.

10.6. This Court when delved deep into the matter further, it has taken into consideration the Letter No.39847 (225)-Bt.-V-42/2007/F, dated 01.10.2007, addressed to all Secretaries/all Heads of the Department by the Government of Odisha in Finance Department, which is relied on by Sri Banshidhar Satapathy, learned Advocate for the petitioner. Paragraph 4 of said Letter dated 01.10.2007 clearly depicts that "all female employees engaged in Government establishments on contract basis with consolidated remuneration and having less than two surviving children would be eligible to get full consolidated remuneration for a period not exceeding 90 days of her absence from duty on maternity ground" inter alia on the conditions that "prior approval of competent authority for remaining absent from duty on maternity ground shall be obtained".

This apart such employee is required to furnish "detailed address of the employee during pre and post natal period" and "a certificate from the treating physician for absence from duty on maternity ground shall be furnished".

10.7. The record is silent about "prior approval of competent authority for remaining absent from duty on maternity ground" and "certificate from treating physician for absence from duty on maternity ground". Besides this there is no detailed address contained in the application for maternity leave vide Annexure-6.

10.8. It is trite that whenever any benefit is claimed, the person claiming benefit is required to comply with conditions and adhere to the procedure laid for availing such benefit. In the instant case, material available on record does not evince the fact that the petitioner has at any point of time was being treated or under care of any physician during 03.03.2006 to 31.05.2006.

Entertainment of writ petition on the objection of delay and laches:

11. This Court is not persuaded by the cause shown for availing around 90 days' leave on maternity ground inasmuch as the petitioner even though claims to have submitted joining report on 01.06.2006, she has not shown promptness in approaching the appropriate forum for ventilation of her grievance. As it seems, as is urged by the Additional Government Advocate, that the petitioner has filed the writ petition on 21.05.2008, i.e., after publication of Resolution No.3358/SME, dated 16.02.2008, whereby policy decision was taken by the Government in the School and Mass Education Department to rehabilitate disengaged Education Volunteer to be engaged as GANA SIKSHYAK. It is borne on the record that by the date of closure of the Dhipasahi EGS Centre at Uparbeda in Kusumi Block of Mayurbhanj district on 31.01.2008, Sri Bhagaban Giri-opposite party No.4 was continuing as Education Volunteer since 2006. The records produced by the Additional Government Advocate reveals that he was operating the Bank Account as also maintaining other records. The opposite party No.4 was attending the meetings of Village Education Committee. Therefore, it appears false claim has been made by the petitioner in the present case by not furnishing material documents, like prior approval of competent authority for remaining absent from duty on maternity ground and certificate from the treating physician for absence from duty on maternity ground as predicated in Letter dated 01.10.2007 issued by the Finance Department.

11.1. No explanation or justification is found mentioned in the writ application filed by the petitioner with respect to delay in approaching this Court.

11.2. Sri Ajodhya Ranjan Dash, learned Additional Government Advocate for the opposite parties is correct in raising objection as to entertainment of writ petition to show indulgence in the matter since the petitioner failed to apprise this Court with regard to inordinate delay in filing writ petition. Whereas the cause of action for the petitioner to claim for resumption of duty arose on

01.06.2006, the writ petition has been filed on 21.05.2008. No cause is shown by the petitioner that led to the delay in filing writ petition.

11.3. It may be noted that writs are not a device to restart proceedings after unreasonable and inordinate delay. It is often seen that litigants, who sleep over their right of appeal/revision or any other statutory mode for redressal, decide at a much later time after unreasonable and inordinate time to re-agitate the matter especially against the Government or its functionalities. Such a device seldom requires to be attended to. Invocation of the extraordinary jurisdiction of the High Court by filing writ petition under Article 226 of the Constitution of India craving for direction for consideration of fresh plea or evidence with a hope to re-enliven the proceeding, which had lapsed with the passage of time, is liable to be deprecated. The Hon'ble Supreme Court as also this Court has consistently held that indolent person is not to be protected and delay and laches on part of the litigant disentitles him to any relief.

11.4. In *K.V. Raja Lakshmiah Vrs. State of Mysore, AIR 1967 SC 973*, the Supreme Court which held that the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic and that the Court may decline to intervene and grant relief in exercise of its writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The Court observed that if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also causing injustice to the third parties. See also State of Madhya Pradesh Vrs. Nandlal Jaiswal, AIR 1987 SC 251.

11.5. Regard may be had to *Northern Indian Glass Industries Vrs. Jaswant Singh, 2002 Supp (3) SCR 534*, wherein the Hon'ble Court cautioned that the High Court cannot ignore the delay and latches in approaching the Writ Court and there must be satisfactory explanation by the petitioner as to how he could not come to the Court well in time. In P.S. Sadasivaswamy Vrs. State of Tamil Nadu, (1975) 1 SCC 152, it was laid down that a person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time, but it should be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for the relief.

11.6. In *New Delhi Municipal Council Vrs. Pan Singh and others, (2007) 9 SCC 278*, it was opined that though there is no period of limitation provided

for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time. In the said case the Court took note of the delay and laches as relevant factors and set aside the order passed by the High Court which had exercised the discretionary jurisdiction.

11.7. It is also well-settled principle of law that 'delay defeats equity'. The principle underlying this rule is that the one who is not vigilant and diligent and does not seek intervention of the Court within reasonable time from the date of accrual of cause of action or alleged violation of constitutional, legal or other right is not entitled to relief under Article 226 of the Constitution. Another reason for the High Court's refusal to entertain belated claim is that during the intervening period rights of third parties may have crystallized and it will be inequitable to disturb those rights at the instance of a person who has approached the Court after long lapse of time and there is no cogent explanation for the delay.

11.8. In *Shankara Co-op. Housing Society Ltd. Vrs. M. Prabhakar and Others, (2011) 5 SCC 607*, the Supreme Court reiterated settled position of law and affirmed the well-established criteria which has to be considered before exercise of discretion under Article 226 of the Constitution of India. The relevant portion is extracted herein below:

> *"53. The relevant considerations, in determining whether delay or laches should be put against a person who approaches the writ court under Article 226 of the Constitution is now well settled. They are:*
>
> *1. there is no inviolable rule of law that whenever there is a delay, the court must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts;*
>
> *2. the principle on which the court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because court should not harm innocent parties if their rights had emerged by the delay on the part of the Petitioners;*
>
> *3. the satisfactory way of explaining delay in making an application under Article 226 is for the Petitioner to show that he had been seeking relief elsewhere in a manner provided by law. If he runs after a remedy not provided in the Statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the Petitioner chooses to believe in regard to the remedy;*
>
> *4. no hard and fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts;*
>
> *5. that representations would not be adequate explanation to take care of the delay."*

11.9. A reference to the decision of the Hon'ble Supreme Court in the case of Union of India Vrs. M.K. Sarkar, (2010) 2 SCC 59 in support of the view that delay and laches would not protect the indolent to approach Writ Court. It has been observed thus:

"15. When a belated representation in regard to a 'stale'or 'dead' issue/dispute is considered and decided, in compliance with a direction by the Court/Tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the 'dead' issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a Court's direction. Neither a Court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.

16. A Court or Tribunal, before directing 'consideration'of a claim or representation should examine whether the claim or representation is with reference to a 'live' issue or whether it is with reference to a 'dead'or 'stale' issue. If it is with reference to a 'dead' or 'stale' issue or dispute, the Court/Tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court or tribunal deciding to direct 'consideration' without itself examining the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the Court does not expressly say so, that would be the legal position and effect."

11.10. In *C. Jacob Vrs. Director of Geology and Another, (2008) 10 SCC 115*, it has been observed thus:

"6. Let us take the hypothetical case of an employee who is terminated from service in 1980. He does not challenge the termination. But nearly two decades later, say in the year 2000, he decides to challenge the termination. He is aware that any such challenge would be rejected at the threshold on the ground of delay (if the application is made before Tribunal) or on the ground of delay and laches (if a writ petition is filed before a High Court). Therefore, instead of challenging the termination, he gives a representation requesting that he may be taken back to service. Normally, there will be considerable delay in replying such representations relating to old matters.

Taking advantage of this position, the ex-employee files an application/writ petition before the Tribunal/High Court seeking a direction to the employer to consider and dispose of his representation. The Tribunals/High Courts routinely allow or dispose of such applications/petitions (many a time even without notice to the other side), without examining the matter on merits, with a direction to consider and dispose of the representation.

The Courts/Tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly they assume that a mere direction to consider and dispose of the representation does not involve any 'decision' on rights and obligations of parties. Little do they realize the consequences of such a direction to'consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to 'consider'.

If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The Tribunals / High Courts routinely

entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored."

11.11. A Constitution Bench of the Hon'ble Supreme Court of India in *Senior Divisional Manager, Life Insurance Corporation of India Ltd. Vrs. Shree Lal Meena, (2019) 4 SCC 479*, considering the principle of delay and laches, opined as under:

"36. We may also find that the appellant remained silent for years together and that this Court, taking a particular view subsequently, in Sheel Kumar Jain v. New India Assurance Company Limited, (2011)12 SCC 197 would not entitle stale claims to be raised on this behalf, like that of the appellant. In fact the appellant slept over the matter for almost a little over two years even after the pronouncement of the judgment.

37. Thus, the endeavour of the appellant, to approach this Court seeking the relief, as prayed for, is clearly a misadventure, which is liable to be rejected, and the appeal is dismissed."

11.12. In *State of Uttaranchal Vrs. Sri Shiv Charan Singh Bhandari, (2013) 12 SCC 179* while considering the issue regarding delay and laches it has been observed that even if there is no period prescribed for filing the writ petition under Article 226 of the Constitution of India, yet it should be filed within a reasonable time. Relief to a person, who puts forward a stale claim can certainly be refused relief on account of delay and laches. Anyone who sleeps over his rights is bound to suffer. At this juncture, it is useful to refer to Ex. Capt. Harish Uppal Vrs. Union of India, 1994 Supp. (2) SCC 195, wherein the following was the observation:

"8. The petitioner sought to contend that because of laches on his part, no third party rights have intervened and that by granting relief to the petitioner no other person's rights are going to be affected. He also cited certain decisions to that effect. This plea ignores the fact that the said consideration is only one of the considerations which the court will take into account while determining whether a writ petition suffers from laches. It is not the only consideration. It is a well-settled policy of law that the parties should pursue their rights and remedies promptly and not sleep over their rights. That is the whole policy behind the Limitation Act and other rules of limitation. If they choose to sleep over their rights and remedies for an inordinately long time, the court may well choose to decline to interfere in its discretionary jurisdiction under Article 226 of Constitution of India— and that is what precisely the Delhi-High Court has none. We cannot say that the High Court was not entitled to say so in its discretion."

11.13. In the case of *State of Maharashtra Vrs. Digambar, (1995) 4 SCC 683* it has been laid down as follows:

"14. How a person who alleges against the State of deprivation of his legal right, can get relief of compensation from the State by invoking writ jurisdiction of the High Court under Article 226 of the Constitution even though, he is guilty of laches or undue delay is difficult to comprehend, when it is well settled by decisions of this Court that no person, be he a citizen or otherwise, is entitled to

obtain the equitable relief under Article 226 of the Constitution if his conduct is blameworthy because of laches, undue delay, acquiescence, waiver and the like. Moreover, how a citizen claiming discretionary relief under Article 226 of the Constitution against a State, could be relieved of his obligation to establish his unblameworthy conduct for getting such relief, where the State against which relief is sought is a Welfare State, is also difficult to comprehend. Where the relief sought under Article 226 of the Constitution by a person against the Welfare State is founded on its alleged illegal or wrongful executive action, the need to explain laches or undue delay on his part to obtain such relief, should, if anything, be more stringent than in other cases, for the reason that the State due to laches or undue delay on the part of the person seeking relief, may not be able to show that the executive action complained of was legal or correct for want of records pertaining to the action or for the officers who were responsible for such action not being available later on. Further, where granting of relief is claimed against the State on alleged unwarranted executive action, is bound to result in loss to the public exchequer of the State or in damage to other public interest, the High Court before granting such relief is required to satisfy itself that the delay or laches on the part of a citizen or any other person in approaching for relief under Article 226 of the Constitution on the alleged violation of his legal right, was wholly justified in the facts and circumstances, instead of ignoring the same or leniently considering it. Thus, in our view, persons seeking relief against the State under Article 226 of the Constitution, be they citizens or otherwise, cannot get discretionary relief obtainable thereunder unless they fully satisfy the High Court that the facts and circumstances of the case clearly justified the laches or undue delay on their part in approaching the Court for grant of such discretionary relief. Therefore, where a High Court grants relief to a citizen or any other person under Article 226 of the Constitution against any person including the State without considering his blameworthy conduct, such as laches or undue delay, acquiescence or waiver, the relief so granted becomes unsustainable even if the relief was granted in respect of alleged deprivation of his legal right by the State."

11.14. In ***Chennai Metropolitan Water Supply and Sewerage Board Vrs. T.T. Murali Babu reported in (2014) 4 SCC 108***, the Hon'ble Supreme Court held as follows:

"16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinise whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant— a litigant who has forgotten the basic norms, namely, 'procrastination is the greatest thief of time' and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis."

11.15. The Madras High Court in the case of S. Vaidhyanathan Vrs. Government of Tamil Nadu, 2018 SCC OnLine Mad 11463, held as under:

"13. Though reasonable time is not prescribed in the rules framed under Article 229 of the Constitution of India, the words 'reasonable time', as explained in Veerayeeammal Vrs. Seeniammal reported in (2002) 1 SCC 134, at Paragraph 13, is extracted hereunder:

'13. The word 'reasonable' has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word 'reasonable'. The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the 'reasonable time' is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit. In P. Ramanatha Aiyar's The Law Lexicon it is defined to mean:

'A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than 'directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea.'

14. There is an inordinate delay and laches on the part of the appellant. What is laches is as follows:

'Laches or reasonable time are not defined under any Statute or Rules. 'Latches' or 'Lashes' is an old French word for slackness or negligence or not doing. In general sense, it means neglect to do what in the law should have been done for an unreasonable or unexplained length of time. What could be the latches in one case might not constitute in another. The latches to non-suit, an aggrieved person from challenging the acquisition proceedings should be inferred from the conduct of the land owner or an interested person and that there should be a passive inaction for a reasonable length of time. What is reasonable time has not been explained in any of the enactment. Reasonable time depends upon the facts and circumstances of each case.'

15. Statement of law has also been summarized in Halsbury's Laws of England, Para 911, pg. 395 as follows:

'In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it;

> *or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches." ***"*

11.16. Pertinent in the present context to take note of the following observation of the Allahabad High Court vide Judgment dated 18th March, 2021 rendered in *Ganga Sahay and 2 Others Vrs. Deputy Director of Consolidation and 14 Others, WRIT - B No. 302 of 2021*:

> *"13. Law has long set its face against delay in approaching the court. The courts have consistently declined to condone the delay and denied relief to litigants who are guilty of laches. Litigants who are in long slumber and not vigilant about their rights are discouraged by the courts. Belated claims are rejected at the threshold. Rip Van Winkles have a place in literature, but not in law.*
>
> *14. All this is done on the foot of the rule of delay and laches. Statutes of limitation are ordained by the legislature, rule of laches was evolved by the courts. Sources of the law differ but the purpose is congruent. Statutes of limitation and the law of delay and laches are rules of repose.*
>
> *15. The rule of laches and delay is founded on sound policy and is supported by good authority. The rule of laches and delay is employed by the courts as a tool for efficient administration of justice and a bulwark against abuse of process of courts.*
>
> *16. Some elements of public policy and realities of administration of justice may now be considered.*
>
> *17. While indolent litigants revel in inactivity, the cycle of life moves on. New realities come into existence. Oblivious to the claims of the litigants, parties order their lives and institutions their affairs to the new realities. In case claims filed after inordinate delay are entertained by courts, lives and affairs of such individuals and institutions would be in a disarray for no fault of theirs. Their lives and affairs would be clouded with uncertainty and they would face prospects of long and fruitless litigation.*
>
> *18. The delay would entrench independent third party rights, which cannot be dislodged. The deposit of subsequent events obscures the original claim and alters the cause itself. The refusal to permit agitation of stale claims is based on the principle of acquiescence. In certain situations, the party by its failure to raise the claim in time waives its right to assert it after long delay.*
>
> *19. The rule of delay and laches by preventing the assertion of belated claims puts to final rest long dormant claims. This policy of litigative repose, creates certainty in legal relations and curtails fruitless litigation. It ensures that the administration of justice is not clogged by pointless litigation."*

11.17. While considering the issue of delay and laches in ***State of Odisha Vrs. Laxmi Narayan Das, (2023) 10 SCR 1049 = 2023 INSC 619***, referring to ***Union of India Vrs. N. Murugesan, (2022) 2 SCC 25***, it was observed that a neglect on the part of a party to do an act which law requires must stand in his way for getting the relief or remedy. The Court laid down two essential factors, i.e. first, the length of the delay and second, the developments during the intervening

period. Delay in availing the remedy would amount to waiver of such right. Relevant paragraphs 20 to 22 of the above mentioned case are extracted below:

> *"20. The principles governing delay, laches, and acquiescence are overlapping and interconnected on many occasions. However, they have their distinct characters and distinct elements. One can say that delay is the genus to which laches and acquiescence are species. Similarly, laches might be called a genus to a species by name acquiescence. However, there may be a case where acquiescence is involved, but not laches. These principles are common law principles, and perhaps one could identify that these principles find place in various statutes which restrict the period of limitation and create non-consideration of condonation in certain circumstances. They are bound to be applied by way of practice requiring prudence of the court than of a strict application of law. The underlying principle governing these concepts would be one of estoppel. The question of prejudice is also an important issue to be taken note of by the court.*
>
> *21. The word "laches" is derived from the Frenchlanguage meaning "remissness and slackness". It thus involves unreasonable delay or negligence in pursuing a claim involving an equitable relief while causing prejudice to the other party. It is neglect on the part of a party to do an act which law requires while asserting a right, and therefore, must stand in the way of the party getting relief or remedy.*
>
> *22. Two essential factors to be seen are the length of the delay and the nature of acts done during the interval. As stated, it would also involve acquiescence on the part of the party approaching the Court apart from the change in position in the interregnum. Therefore, it would be unjustifiable for a Court of Equity to confer a remedy on a party who knocks its doors when his acts would indicate a waiver of such a right. By his conduct, he has put the other party in a particular position, and therefore, it would be unreasonable to facilitate a challenge before the court. Thus, a man responsible for his conduct on equity is not expected to be allowed to avail a remedy.*
> *****
>
> *37. We have already dealt with the principles of law that may have a bearing on this case. *** there was an unexplained and studied reluctance to raise the issue.****
>
> *38. *** Hence, on the principle governing delay, laches *** Respondent No. 1 ought not to have been granted any relief by invoking Article 226 of the Constitution of India.".*

11.18. Given the position of law as discussed above on the question of exercise of discretion under Article 226/227 of the Constitution of India, it is difficult to ignore the delay and laches on part of the instant petitioner, as it is apparent on record that there is no explanation in the writ petition. The explanation for laches is self-serving and lacks credibility. It may worthy of repeat that after 01.06.2006, when the petitioner has stated to have joined the service (in fact, there was no resumption in service as per records), she had arisen from slumber in 2008 by claiming that she has made representation dated 02.05.2008 (Annexure-1) to the opposite party Nos.1 and 2. In the meantime, the EGS Centre has been closed on abolition of the Scheme and Sri Bhagaban Giri, opposite party No. 4, who was engaged as Education Volunteer since 2006 continued in

Dhipasahi EGS Centre, Uparbeda under Kusumi Block in Mayurbhanj District. Subsequent events carry weight in deciding whether to exercise power under Article 226/227 of the Constitution of India.

CONCLUSION & DECISION:

12. Having analysed the pleading, carefully scrutinised the documents enclosed to the brief by respective parties, perused the records produced by the Additional Government Advocate and noticed the judgment rendered by this Court, it is baffling to note that even though the writ petition has been filed by the petitioner affirming by way of affidavit that she had submitted joining report dated 01.06.2006 enclosing therewith "copy of fitness certificate", no such document is forthcoming. At the stage of hearing also when asked by this Court, learned counsel for the petitioner expressed his helplessness to furnish such vital document to justify the leave from 03.03.2006 to 31.05.2006 on account of maternity ground. Had the record not been called for vide Order dated 16.01.2023 directing the Additional Government Advocate "to produce the entire file maintained by the Village Education Committee of Uparbeda, Dhipasahi EGS Centre containing all relevant details of the appointment of the petitioner, opposite party No.4, attendance of the volunteers in the classes, remuneration, etc." correct affairs would not have come to fore. Since nothing tangible is available on record to show that the petitioner has complied with the terms of conditions stipulated in the Letter dated 01.10.2007 of the Finance Department (which was relied on by Sri Banshidhar Satapathy, Advocate appearing on behalf of the petitioner), this Court is of the opinion that the so-called joining report available at Annexure-7 of the writ petition is inchoate and cannot be taken into consideration as evidence. There is no truthfulness in the statement at paragraph 5 of the writ petition as asserted by the petitioner that "she joined in duties on 01.06.2006 and continued there to the best of satisfaction of all concerned". Added to this, even after Sri Bhagaban Giri-opposite party No.4 was allowed to function as the Education Volunteer with effect from 31.12.2006 pursuant to execution of an agreement, the petitioner kept silent; nevertheless, she has stated to have approached the Collector-cum-Chief Executive, Zilla Parishad, Mayurbhanj and the District Project Co-ordinator, Sarba Sikshya Abhijan, Mayurbhanj by way of representation dated 02.05.2008 to incorporate her name in the list of disengaged Education Volunteers. Thereafter on 21.05.2008 she filed this writ petition with prayer to direct the Collector-cum-Chief Executive (opposite party No.1) and the District Project Co-ordinator (opposite party No.2) to engage the petitioner as GANA SIKSHYAK in tune with Resolution No.3358/SME, dated 16.02.2008.

12.1. It may be noteworthy to have regard to the following observation of the Hon'ble Supreme Court of India in the case of *Sarvepalli Radhakrishnan University Vrs. Union of India, (2019) 1 SCR 920* rendered in the context of false affidavit asserting fact to mislead the Court:

*"11. *** The brazen attempt by the College in taking this Court for a ride by placing on record maneuvered documents to obtain a favourable order is a clear-cut act of deceit. The justification given by the College regarding the absence of certain residents has turned out to be a concocted story. Had we not initiated an enquiry by the Committee of Experts, the fraud played by the College on this Court would not have come to light. It is trite that every litigant has to approach the Court with clean hands. A litigant who indulges in suppression of facts and misrepresentation is not entitled for any relief. The conduct of the College in this case to mislead this Court for the purpose of getting a favourable order is reprehensible and the College deserves to be dealt with suitably.*

12. In Re. Suo Motu Proceedings against R. Karuppan, Advocate, (2001) 5 SCC 289, this Court observed as under:

'13. Courts are entrusted with the powers of dispensation and adjudication of justice of the rival claims of the parties besides determining the criminal liability of the offenders for offences committed against the society. The courts are further expected to do justice quickly and impartially not being biased by any extraneous considerations. Justice dispensation system would be wrecked if statutory restrictions are not imposed upon the litigants, who attempt to mislead the Court by filing and relying upon false evidence particularly in cases, the adjudication of which is dependent upon the statement of facts. If the result of the proceedings are to be respected, these issues before the courts must be resolved to the extent possible in accordance with the truth. The purity of proceedings of the court cannot be permitted to be sullied by a party on frivolous, vexatious or insufficient grounds or relying upon false evidence inspired by extraneous considerations or revengeful desire to harass or spite his opponent. Sanctity of the affidavits has to be preserved and protected discouraging the filing of irresponsible statements, without any regard to accuracy.'

In ***Mohan Singh Vrs. Amar Singh case, (1998) 6 SCC 686*** *it was observed by this Court:*

*'36. *** Tampering with the record of judicial proceedings and filing of false affidavit in a court of law has the tendency of causing obstruction in the due course of justice. It undermines and obstructs free flow of the unsoiled stream of justice and aims at striking a blow at the rule of law. The stream of justice has to be kept clear and pure and no one can be permitted to take liberties with it by soiling its purity.' ***"*

12.2. As the petitioner has not brought on record pertinent material to demonstrate that prior approval of competent authority was obtained for remaining absent from duty on maternity ground. In furtherance thereto, no iota of evidence is placed to evince that the absence from duty was on account of maternity ground supported by certificate from the treating physician. Scrutiny of records clearly indicates that the application for availing maternity leave does not disclose detailed of address of the petitioner during pre and post natal period. The records produced by the Additional Government Advocate manifestly lead to indicate that the petitioner has not resumed in duty after expiry of the period of absence from duty on maternity ground. Having not fulfilled the conditions stipulated in the Government of Odisha in Finance Department Letter

No. 39847 (225)-Bt.-V-42/2007/F, dated 01.10.2007, there is no scope to grant any relief to the petitioner.

13. This matter can be considered on different prism. It is quite clear from the discussion made in foregoing paragraphs that the writ petition is not entertainable on finding delay and laches in approaching the Writ Court invoking Article 226/227 of the Constitution of India.

13.1. It deserves to be quoted from *State of Jammu & Kashmir Vrs. R.K. Zalpuri, (2015) 15 SCC 602*, while the Supreme Court of India was considering the issue regarding delay and laches while initiating a dispute before the Court. It was opined that the issue sought to be raised by the petitioners therein was not required to be addressed on merits on account of delay and laches. The relevant paragraphs thereof are extracted below:

> *"27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias— thanks to God.*
>
> *28. Another aspect needs to be stated. A writ court while deciding a writ petition is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. Stale claims are not to be adjudicated unless non-interference would cause grave injustice. The present case, needless to emphasise, did not justify adjudication. It deserves to be thrown overboard at the very threshold, for the writ petitioner had accepted the order of dismissal for half a decade and cultivated the feeling that he could freeze time and forever remain in the realm of constant present."*

13.2. In *Karnataka Power Corporation Ltd. Vrs. K. Thangappan, AIR 2006 SC 1581* it is held that delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution of India. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the petitioner to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Ofcourse, the discretion has to be exercised judicially and reasonab

14. Under aforesaid premises, this Court is, therefore, declines to direct the authorities concerned, the opposite party No.1-Collector-cum-Chief Executive, Zilla Parishad and the opposite party No.2-District Project Co-ordinator, to engage the petitioner as GANA SIKSHYAK in terms of Resolution No.3358/SME, dated 16.02.2008 by incorporating the name of Smt. Sujata Mahanta in place of Sri Bhagaban Giri, the opposite party No.4.

15. Accordingly, the writ petition stands disposed of in the above terms, but in the circumstances, there shall be no order as to costs.

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2024 (I) ILR-CUT-655

SANJAY KUMAR MISHRA, J.

WP(C) NO.21215 OF 2019

ANUSHRAV GANTAYAT .….Petitioner

-V-

STATE OF ODISHA & ORS. …..Opp.Parties

(A) RIGHT OF PERSON'S WITH DISABILITY ACT, 2016 – Section 2(r) r/w Resolution & Corrigendum dated 05.09.2017 & 16.07.2018 respectively – Whether the authority can issue resolution/corrigendum contravening the statute? – Held, No – Resolution made by State Govt. being contrary to the statute is bad & deserve interference.

(Paras 21-26)

(B) SERVICE LAW – Appointment – Whether the petitioner after knowing fully well about the eligibility criteria so also terms of advertisement & participating in the recruitment process, can challenge the same at a subsequent stage on technical ground that one of such terms of advertisement is contrary to the statute? – Held, Yes – In a situation where a candidate alleges misconstruction of statutory rules & discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it – The candidate by agreeing to participate in the selection process only accepts the prescribed procedure not the illegality in it.

Case Laws Relied on and Referred to :-

1. (2022) 12 SCC 579 : Ajay Kumar Shukla & Ors. Vs. Arvind Rai & Ors.
2. 1992 SCC (L & S) Supp-1: Indra Sawheny Vs. Union of India.
3. AIR 1993 Orissa 180 : State of Odisha Vs. Janamohan Das & Ors.
4. 2006 SCC (L & S) 926 : Maharastra State Mining Corporation Vs. Sunil.
5. (2007) 1 SCC (L & S) 247 : Sekhar Ghosh Vs. Union of India.
6. 2010 (II) OLR (SC) 636 : Union of India & Ors. Vs. Miss Pritilata Nanda.
7. (2018) 2 SCC (L & S) 241: ESI Cor. Vs. Mangalam Publications India Pvt. Ltd.
8. (2018) 1 SCC (L & S) 523 : Raminder Singh Vs. State of Punjab.
9. (2018) 2 SCC (L & S) 102 : Gaurav Pradhan Vs. State of Rajasthan.
10. (2020) 1 SCC (L & S) 728 : Brigadier Nalin Kumar Bhatia Vs. Union of India.
11. (2021) 1 SCC (L & S) 704 : Dr. (Major) Meeta Sahai Vs. State of Bihar.
12. (2021) 1 SCC (L & S) 752 : Saurva Yadav Vs. State of U.P.
13. (2022) 5 SCC 179 : Gambhirdan K. Gadhvi Vs. State of Gujarat.
14. 2021 (Supp.) OLR 951: Prasanta Kumar Nayak Vs. State of Odisha & Ors.
15. (2020) 5 SCC 689 : K. Meghachandra Singh & Ors. Vs. Ningam, Siro & 42 Ors.
16. 1987 AIR SC 2267 : Durga Charan Mishra Vs. State of Odisha & Ors.
17. (2011) 3 SCC 436 : State of Odisha & Anr. Vs. Mamata Mohanty.
18. 100 (205) CLT 465 : Miss Madhusmita Das & Anr. Vs. State of Odisha & Ors.
19. (2019) 20 SCC 17 : Dr (Major) Meeta Sahai Vs. State of Bihar & Ors.
20. 1992 Supp.(3) SCC 212 : 1992 SCC (L&S) Supp.1 : Indra Sawhney Vs. Union of India.
21. (1997) 6 SCC 283 : PG Institute of Medical Education & Research, Chandigarh & Ors. Vs. K.L. Narasimhan.

For Petitioner : Mr. P.K. Sinha, Mr. A.K. Chhatoi
For Opp.Parties : Mr. S.K. Samal & Mr. S.N. Pattnaik, AGA
Mr. P.K. Mohanty, Senior Adv., Mr. Pronoy Mohanty
Mr. P.K. Pasayat.
Mr. P.C. Mahapatra.

JUDGMENT Date of Hearing: 25.07.2023 : Date of Judgment: 19.12.2023

S.K. MISHRA, J.

Being aggrieved by the Order dated 19.12.2018 (Annexure-8) so also the decision of Odisha Public Service Commission communicated vide letter dated 02.04.2019 (Annexure-15), the Petitioner has preferred the present Writ Petition. A prayer has been made to set aside the said communications and direct the Opposite Parties to include the name of the Petitioner in the merit list in appropriate place and give him appointment as an unreserved candidate in the post of Odisha Administrative Service, Group-A (JB).

2. The factual matrix of the case, in hand, is that an Advertisement No.11 of 2017-18 was published by the OPSC to submit application through online for the post of Odisha Civil Services (OCS) Examination, 2017. Having all the criterion, the Petitioner submitted his application, which was duly accepted by the OPSC. In the said advertisement, OPSC invited applications to fill up 106 nos. of posts, out of which 36 were meant for OAS and 24 for OFS.

It is further case of the Petitioner that he has acquired B. Tech degree in Mining Engineering from NIT, Rourkela and has secured 1st Division with higher percentage of mark in all examinations despite physical disabilities. Petitioner got disability certificate from the Competent Authority declaring him 40% disable and he belongs to unreserved community. Because of his physical disability, as per the provisions of the Rights of Persons with Disabilities Act, 2016, shortly, the Act, 2016, the Petitioner applied for OCS examination as a candidate belonging to Person with Disability (PwD) category.

It is further case of the Petitioner that as his application and other required documents were in order, OPSC called him to appear in preliminary examination along with others, which was scheduled to be held on 18.02.2018. Since his performance was satisfactory, the Petitioner was declared provisionally qualified along with 1295 candidates for OCS (main) Examination. In this regard, OPSC published the preliminary examination result vide notice bearing No.301667.

It has been further pleaded that the Petitioner, after successfully passed the preliminary examination, was called upon by the OPSC to appear in written/main examination, which was held in between 25.06.2018 to 16.07.2018. The result of the examination was declared vide notice No.8435 dated 14.11.2018 of OPSC, in which 212 nos. of candidates, including the Petitioner, were declared provisionally qualified. Thereafter, it was intimated to the successful candidates, including the Petitioner, that the verification of documents will be done from 01.12.2018 onwards.

The Petitioner appeared in the office of the OPSC on 01.12.2018 and officials verified his documents. Then, he was directed to appear in the personality test, which was held on 03.12.2018.

It is further case of the Petitioner that though he had done very well in the personality test, but to his utter surprise, the OPSC rejected the candidature of the Petitioner on the ground that he has 40% permanent disability. On the other hand, the OPSC provisionally selected 106 candidates ignoring the Petitioner, which was published in the notice dated 19.12.2018.

It is the case of the Petitioner that though he has secured more marks than his counterparts, his name could not find place in the provisional select list of 106 candidates on the ground that his candidature was rejected vide Order dated 19.12.2018. It is crystal clear from the document of OPSC that the Petitioner had secured more marks than many other selected candidates. It is alleged that though marks in OCS (main) examination and personality test were published, the Roll Number of the Petitioner was missing. It has been further averred that from the result sheet, as at Annexure - 9 and 10, it is crystal clear that the Petitioner secured much more marks than many other candidates and his name/roll number should have been placed in between serial nos. 17 & 18 of the merit list.

It is further case of the Petitioner that he has secured much more marks than the last candidate selected under unreserved male as well as Physically Handicapped (Visually Impaired) category. Being shocked with Notice No.10121 dated 19.12.2018, the Petitioner submitted representations to different quarters, such as Governor of Odisha, Chief Minister, Principal Secretary, Social Security and Empowerment of Persons with Disabilities (SSEPD) Department and the Special Secretary to Government, General Administration and Public Grievance Department (GA & PG) etc. Responding to his genuine grievance, the Principal Secretary, SSEPD Department, made communications with GA & PG Department and OPSC. The GA & PG Department also requested OPSC to do the needful to give justice to the Petitioner keeping in view the statutory Provision under the Act, 2016.

When the Petitioner did not receive any response from OPSC, he approached the Administrative Tribunal by filing O.A. No.422(c) of 2019, which was disposed of directing OPSC to take a decision on the letter of Government keeping in view the provisions under the Act, 2016 and pass a reasoned order taking into consideration the averments made in the O.A. within a period of one month. Without applying mind and provisions of law, the OPSC rejected the grievance of the Petitioner, who secured better marks in comparison to more than 88 candidates of the provisional select list. In the order of rejection, OPSC relied upon Para 2(2) of the Resolution of SSEPD Department bearing No.7140 dated 05.09.2017 and ignored Paras 5, 8 & 12 of the Resolution and Section 2(r) of Act, 2016 so also Corrigendum to said Resolution published in Odisha Gazette on 17.07.2018. OPSC rejected the candidature of the Petitioner as the Petitioner has only 40% disability. It

is also stated that the grounds taken in the impugned Order of rejection dated 02.04.2019 (Annexure-15) is contrary to the provisions of Act, 2016.

The Petitioner has not availed relaxation with respect to upper age limit, standard of selection, extra chances in recruitment test etc. As he has scored more marks, he is to be considered against unreserved vacancies first on merit and then against reserved vacancies meant for his category. Among the PWD candidates of his category, the Petitioner secured highest mark and among others, his name should have been placed between serial Nos. 17 and 18 of the select list as per law. Being aware about violation of the provisions of the Act, 2016, both SSEPD Department and GA & PG Department requested OPSC to do the needful to give justice to the Petitioner vide their letters dated 11.02.2019 and 25.02.2019. Thus, it has been stated that in order to uphold the rule of law, the impugned order of rejection deserves to be quashed directing the Opposite Parties to give appointment to the Petitioner in the Post of OAS, Group-A (JB). As the Petitioner has done fairly well in all the examinations, his case for appointment is to be considered against unreserved vacancies on merit as per his preferential options following Paragraphs 5, 8 & 12 of the Resolution dated 05.09.2017 (Annexure-16).

The Petitioner, in his application form, has preferred to be appointed in OAS as first option and OFS was his second choice. Without availing reservation the Petitioner could have been appointed as UR candidate on the basis of his merit. Though the Petitioner has no personal grievance against Abhisek Dash, Tushar Jyoti Ranjan, Bibhuti Bhusan Nayak, Nilayam Sarangi & Sanoth Kumar Barik, he has impleaded them as Opposite Party Nos. 8 to 12 respectively in the Writ Petition as the Petitioner has secured more marks than them and others.

After publication of provisional select list (Annexure-8) and during pendency of the O.A. before Tribunal, orders of appointment were issued in which good number of candidates securing lesser marks than the Petitioner have been appointed. In such backdrop, the Petitioner has filed the present Writ Petition.

3. Being noticed, the OPSC (Opposite Party No.7) has filed its Counter Affidavit, inter alia, stating that basing on the requisition received from the Government in G.A. & P.G. Department and as per provisions of relevant recruitment Rules & Resolution, Advertisement No.11 of 2017-18 for Odisha Civil Services Examination, 2017 was issued by the Commission. The Petitioner applied for Odisha Civil Services Examination, 2017 as a PwD candidate. It has further been stated that the Petitioner furnished a disability certificate, where from it is revealed that he has only 40% disability. Para 2(2) of the SSEPD Department Resolution No.7140/SSEPD, dated 05.09.2017 stipulated that persons with more than 40% of any disability as certified by a Competent Certifying Authority appointed under Section 57(1) of the Rights of Persons with Disabilities Act, 2016, irrespective of nature of disability, shall be eligible for reservation. Accordingly, the OCS Advertisement No. 11 of 2017-18 had been prepared in strict compliance of the

aforesaid SSEPD Department Resolution, incorporating the said provision at Paragraphs-3 & 10 (h) of the Advertisement. As the Petitioner had furnished the certificate of having only 40% disability and the same was not in consonance with the enforced SSEPD Resolution dated 05.09.2017 and the Advertisement No.11 of 2017-18, the candidature of the Petitioner was rejected by the OPSC.

4. Being noticed, the private Opposite Party No.9 has also filed a Counter Affidavit, inter alia, taking the same stand, as has been taken by the Opposite Party No.7. That apart, it has been averred that the candidature of a candidate shall be rejected at any stage of recruitment process, when discrepancy is noticed/detected. In that way, the candidature of the Petitioner was rightly rejected before the publication of the result. Hence, claim for his fitment in the merit list (Annexure-8), on the basis of marks secured, does not arise at all. It has further been stated that since the Petitioner has not deposited the fees to be paid by UR category of candidates, he cannot claim to be a candidate for UR category. To counter the averments made under Paragraph No.18 of the Writ Petition, it has been stated that since the Petitioner's candidature was rejected as a PwD candidate, he cannot claim to be considered for any other category, more specifically as a general category candidate. On the ground of non-deposit of examination fees, the candidatures of more than 3000 candidates for the year 2017 have been rejected by the OPSC vide Notice dated 03.02.2018 and on this ground alone, the Writ Petition deserved to be dismissed. It has further been averred that the Petitioner has admitted that he had filed O.A. No.422(c)/2019 and the order passed by the Tribunal has been complied with by the OPSC. Hence, the order of rejection made by the Opposite Party No.7 is not a new cause of action to be challenged in form of present Writ petition. A further stand has been taken in the Counter, if the Petitioner's claim is entertained to any extent, it will certainly affect the interest of all private Opposite Parties because, the number of posts are limited and any addition to the list is only possible through displacement by some other person.

5. The State-Opposite Party No.3-Principal Secretary, Government of Odisha, Social Security and Empowerment of Persons with Disabilities Department, has also filed an Affidavit, inter alia, stating therein that the OPSC has accepted the application of the Petitioner and allowed him to appear in the OCS Examination, which leads to the fact that the Petitioner was found eligible for his 40% disability and his name is to be placed in the merit list of UR category.

6. In response to the Affidavit and Counter Affidavit filed by the Opposite Party Nos. 3, 4, 7 and 9, a Rejoinder Affidavit has been filed by the Petitioner stating therein that the said Opposite Parties have admitted that the Petitioner has secured 1365 marks, whereas last selected candidate under UR category scored 1302 marks and selected PwD (VI) candidate scored 1065 marks. The grievance of the Petitioner has been admitted in the Counter reply of SSEPD Department, whereas OPSC has taken the ground that on the basis of Resolution of SSEPD Department,

the candidature of the Petitioner has been rejected after personality test, despite admitting in the Counter Affidavit and Affidavit of Opposite Party No.3 that Para 2 (2) of the said Resolution was contrary to Section 2(r) of the Act, 2016 and the State Government issued appropriate corrigendum on such Resolution to rectify the said error. Apart from the same, it has been specifically pleaded that the OPSC committed grave error in not considering the candidature of the Petitioner either against PH quota or against UR category, despite specific advice from the SSEPD Department so also G.A. & P.G. Department. The Chief Secretary, Government of Odisha, in response to the grievance petition of the Petitioner, vide letter dated 11.03.2020 (Annexure-24), intimated the Petitioner that the OPSC has been requested to reconsider its earlier decision and include the Petitioner in the select list in UR category.

7. It is seen from the record that notices were duly served on private Opposite Party Nos. 8 to 12. Since one of the private Opposite Parties has already appeared in the present case and is contesting the case opposing the prayer made in the Writ Petition and despite service of notice, the private Opposite Party Nos. 8 to 12, except Opposite Party No.9, did not appear, on consent of the learned Counsel for the Parties, the matter was taken for final disposal. It may not be out of place to mention here that the Apex Court in **Ajay Kumar Shukla and others v. Arvind Rai and others**, reported in **(2022) 12 SCC 579**, vide Paragraph-47, held as follows:

> *"47. The present case is a case of preparation of seniority list and that too in a situation where the appellants (original writ petitioners) did not even know the marks obtained by them or their proficiency in the examination conducted by the Commission. The challenge was on the ground that the Rules on the preparation of seniority list had not been followed. There were 18 private respondents arrayed to the writ petition. The original petitioners could not have known who all would be affected. They had thus broadly impleaded 18 of such Junior Engineers who could be adversely affected.* ***In matters relating to service jurisprudence, time and again it has been held that it is not essential to implead each and every one who could be affected but if a section of such affected employees is impleaded then the interest of all is represented and protected. In view of the above, it is well settled that impleadment of a few of the affected employees would be sufficient compliance of the principle of joinder of parties and they could defend the interest of all affected persons in their representative capacity. Non-joining of all the parties cannot be held to be fatal."*** ***(Emphasis supplied)***

8. Learned Counsel for the Petitioner submitted that the State, as an ideal employer, holds recruitment examination through recruiting Agencies to select the best from among the rest. But, in the instant case, by rejecting the candidature of the Petitioner after he successfully cleared all the examinations, the recruiting Agency tried its best to select the less meritorious candidates as per their documentary admission. It is further submitted that while submitting application before OPSC, the Petitioner has not suppressed any material fact and approached the Agency with clean hands. After scrutiny of such documents, his application was allowed and the Petitioner was given chance to appear in preliminary examination. The candidature

of the Petitioner was rejected on the sole ground that he is suffering from 40% permanent disability though allegedly it should have been more than 40%. The Petitioner has not availed age relaxation in the examination meant for PwD candidates.

It was further submitted that the law is well settled that if any person belonging to reserved category is selected on the basis of merit in open competition along with general category candidates, then he would be considered as unreserved candidate and he shall not be adjusted against reserved vacancies. In case he secures less marks, then only his merit is to be weighed along with other candidates of such reserved category.

Learned Counsel for the Petitioner further submitted that Section 2(r) of RPwD Act, 2016 defines bench mark disability of a person. It means a person with not less than 40% of a specified disability. When the certifying Authority certified the Petitioner as 40% disabled, rejection of his candidature is contrary to the RPwD Act, 2016. After rejection of candidature of the Petitioner, OPSC selected several candidates having 40% disability as has been detailed in the Writ Petition. Rejection of candidature of the Petitioner on the ground that he has 40% disability, is illegal and discriminatory, being contrary to the provisions of Article 14 & 16 of the Constitution of India as well as the Section 2(r) of the Act, 2016.

It was further submitted, law is well settled that resolution/notification/ administrative instructions cannot supersede the provisions of statutory Act and Rules. Para 2(2) of the Resolution dated 05.09.2017, at Annexure-16, is non est in the eye of law, as it is contrary to the Act, 2016. Any action taken on the basis of said provision of Resolution dated 05.09.2017 is also illegal. Being aware of such illegality, State Government issued corrigendum dated 16.07.2018, in which defect in Resolution dated 05.09.2017 was rectified. Unfortunately, without following constitutional as well as legal provisions, the OPSC is harping upon Para 2(2) of the Resolution even after it is corrected. When the Act, 2016 is very clear to give benefits to persons having not less than 40% disability, such legal right cannot be taken away by any Resolution. Thus, Para-2(2) of the Resolution at Annexure-16, being contrary to the Act, 2016, is to be treated as void in the eye of law.

Mr. Sinha, learned Counsel for the Petitioner, further submitted that among the PwD candidates of his category, the Petitioner secured highest mark and among others, his name should have been placed in between serial Nos. 17 and 18 of select list as per law. Being aware about violation of the provisions of the Act, 2016, both SSEPD Department and GA & PG Department requested OPSC to do the needful to give justice to the Petitioner vide their letters dated 11.02.2019 and 25.02.2019. Thus, in order to uphold the rule of law, the impugned order of rejection deserves to be quashed directing the Opposite Parties to give appointment to the Petitioner in the post of OAS, Group-A (JB). As the Petitioner has done fairly well in all the examinations, his case for appointment is to be considered against unreserved

vacancies on merit as per his preferential options following Paragraphs 5, 8 & 12 of the Resolution dated 05.09.2017. Since the Petitioner, in his application form, has preferred to be appointed in OAS as first option and OFS is his second choice, without availing reservation, he could have been appointed as UR candidate on the basis of his merit.

Learned Counsel for the Petitioner further submitted that after publication of provisional select list as at Annexure-8 and during pendency of the O.A. before Tribunal, order of appointments were issued in which good number of candidates, securing lesser marks than the Petitioner, have been appointed.

To substantiate the stand of the Petitioner, Mr. Sinha, learned Counsel for the Petitioner relied upon the judgments of the Apex Court in **Indra Sawheny vs. Union of India**, reported in 1992 SCC (L & S) Supp-1, **State of Odisha vs. Janamohan Das and others**, reported in AIR 1993 Orissa 180, **Maharastra State Mining Corporation vs. Sunil**, reported in 2006 SCC (L & S) 926, **Sekhar Ghosh vs. Union of India**, reported in (2007) 1 SCC (L & S) 247, **Union of India and others vs. Miss Pritilata Nanda**, reported in 2010 (II) OLR (SC) 636, **ESI Corporation vs. Mangalam Publications India Private Limited**, reported in (2018) 2 SCC (L & S) 241, **Raminder Singh vs. State of Punjab**, reported in (2018) 1 SCC (L & S) 523, **Gaurav Pradhan vs. State of Rajasthan**, reported in (2018) 2 SCC (L & S) 102, **Brigadier Nalin Kumar Bhatia vs. Union of India**, reported in (2020) 1 SCC (L & S) 728, **Dr. (Major) Meeta Sahai vs. State of Bihar**, reported in (2021) 1 SCC (L & S) 704, , **Saurva Yadav vs. State of U.P.,** reported in (2021) 1 SCC (L & S) 752, **Gambhirdan K. Gadhvi v. State of Gujarat**, reported in (2022) 5 SCC 179 and the judgment of this Court in **Prasanta Kumar Nayak vs. State of Odisha and others**, reported in 2021 (Supp.) OLR 951.

9. Mr. Samal, learned Counsel for the State-Opposite Party No.3, reiterated the stand taken in the Affidavit filed by the State, which supports the stand of the Petitioner.

10. Mr. Mohanty, learned Senior Counsel for the Opposite Party No.7 (OPSC), reiterating the stand in the Counter Affidavit, submitted that the role of OPSC is limited. It has to act basing on the requisition received from the Government and as per the provisions of relevant recruitment Rules and Regulations. Accordingly, it issued the Advertisement No.11 of 2017-18 for OCS Examination, 2017. The Petitioner applied for the said examination as a PwD candidate. He further submitted that Para 2(2) of the SSEPD Department Resolution dated 05.09.2017 stipulates that person with more than 40% of disability, as certified by the Competent Certifying Authority appointed under Section 57(1) of the Act, 2016. As the Petitioner is having only 40% disability, his candidature was rightly rejected by the Commission. Being directed by the Administrative Tribunal in O.A. No.422(C) of 2019, the Commission had considered the matter and intimated its decision to the Petitioner vide communication dated 02.04.2019 (Annexure-15), which is under challenge in

the present Writ Petition. There is no infirmity in the impugned order deserving interference. Rather, the Writ Petition deserves to be dismissed in *limine* as the OPSC has acted strictly in terms of requisition of the Government in G.A. and P.G. Department.

11. Mr. Mahapatra, learned Counsel for the private Opposite Party No.9, submitted that inclusion of the name of the Petitioner in the select list (Annexure-8) to the Odisha Civil Services Examination, 2017 shall alter the position of all the candidates from the point where the name of the Petitioner is proposed to be included in terms of the prayer made in the Writ Petition. As a result, person selected and served for a period more than three years in Group-A service, may be reverted back to Group-B service having substantial difference in his status of the service condition and the last man in the select list may be out of employment, who has not been made a party and without affording him any opportunity of being heard, the prayer of the Petitioner may not be entertained. He further submitted that the Advertisement No.11 of 2017-18 for recruitment of OCS Examination, 2017 was published by the OPSC (O.P. No.7) in consultation with the requisition made by the State Government. In terms of the said Advertisement, one post under PwD for blind has been reserved under horizontal reservation. In terms of Point No.5 (V) of the said Advertisement, only those candidates, who possess the requisite qualification and fulfilled other eligibility conditions, are to be considered eligible. Similarly, in terms of Point No.9 (XIV), admission to examination will be provisional. If on verification, at any stage before or after the examination, it is found that a candidate does not fulfill all the eligibility conditions, his or her candidature is liable to be rejected. Hence, there is no infirmity or illegality committed by the OPSC Authority while rejecting the representation of the Petitioner.

Mr. Mahapatra, referring to Point No.10 (h) so also Point No.11 of the Advertisement, further submitted that in terms of the said points of the Advertisement and the noting below Point No.11, the application/candidature of a candidate can be rejected at any stage of recruitment process, when discrepancy is noticed/detected. Even though the Petitioner was allowed to participate in the written examination followed by other process of selection, his candidature was rightly rejected by OPSC vide Notice dated 19.12.2018. He further submitted that even though by way of corrigendum the Government in the concerned Department, vide Odisha Gazette Notification dated 16.07.2018, clarified and corrected the error crept in the Resolution dated 5.09.2017 by substituting the same that the person with not less than 40% of any disability shall be eligible for reservation, as the Advertisement was made inviting online application on 14.12.2017, such corrigendum issued vide Notification dated 16.07.2018 will apply prospectively. The Petitioner cannot rely on the said corrigendum issued by the Opposite Party No.3. He further submitted that ignoring the claims of the private Opposite Parties, the Petitioner cannot be included in the select list long after the select list has been acted upon and in the meantime, the private Opposite Parties have served for a period of more than three years.

Mr. Mahapatra, relying on the judgment of the Apex Court in **K. Meghachandra Singh & others vs. Ningam, Siro & 42 others**, reported in (2020) 5 SCC 689, submitted that unless a candidate joins in the cadre physically, he cannot incur any seniority in the inter position. His inter se seniority shall only be counted from the date he actually joins the post and not prior to that. In view of the settled position of law in **K. Meghachandra Singh** (supra), if the Petitioner is allowed to be included in the select list, he has to submit an unconditional undertaking in shape of an Affidavit that he shall be at the bottom of the select list and shall not claim any seniority over the selected candidates, who have joined since 21.06.2019.

Mr. Mahapatra further submitted that as per the settled position of law, once the norms were published in the advertisement for notice of all, the same cannot be changed at a later stage without notice to any of the candidates and general public and without issuing any corrigendum of the advertisement in question. Since no corrigendum was issued pursuant to Advertisement No.11 of 2017-18 making inclusion therein in terms of the corrigendum issued by the State Government dated 16.07.2018, thereby, giving opportunity to similarly placed other candidates, that would amount to changing the norms without any notice to the citizens, giving them equal of opportunity in relation to employment.

Mr. Mahapatra, relying on the Resolution of the Government of Odisha, General Administration & Public Grievance Department dated 09.09.2021, which has been appended to Additional Written Notes of Submission filed by the Opposite Party No.9, drew attention of this Court as to the manner of fixation of inter-se-seniority and the principles regarding, which was resolved by the concerned Department relying on the judgment in **K. Meghachandra Singh** (supra) and submitted that if the prayer of the Petitioner to appoint him in the post of OAS, Group-A (JB) is allowed, his seniority has to be fixed in terms of the said Resolution of the Government dated 09.09.2021 and not as claimed by the Petitioner.

To substantiate his argument, Mr. Mahapatra further relied on the judgments of the Apex Court in **Durga Charan Mishra vs. State of Odisha and other**, reported in 1987 AIR SC 2267, **State of Odisha and another vs. Mamata Mohanty**, reported in (2011) 3 SCC 436 and judgment of this Court in **Miss Madhusmita Das & another vs. State of Odisha and others**, reported in 100 (205) CLT 465.

12. Apparently an error was crept in Para 2 (2) of the Resolution No.7140/SSEPD dated 05.09.2017, which was for implementation of the Act, 2016. Subsequently, the said Para being found to be contrary to the Act, 2016, it was rectified by issuing necessary Corrigendum to the said effect vide Corrigendum No.5334 dated 16.07.2018. The Petitioner became a victim of the said error made by the State Authority. From the discussions and admitted facts as detailed above, the following issues emerge for adjudication/decision.

(i) Whether the Petitioner, after knowing fully well about the eligibility criteria so also terms of Advertisement, and participating in the recruitment process can challenge the same at a subsequent stage on technical ground that one of such terms of Advertisement was contrary to the statute?

(ii) Whether any action taken by the Authority concerned, including the OPSC (O.P. No.7), based on the Resolution dated 05.09.2017, which was subsequently rectified vide corrigendum dated 16.07.2018, being contrary to the Statute i.e. Section 2(r) of the Rights of Persons with Disabilities Act, 2016, can be held to be legal and justified?

(iii) If not, what relief the Petitioner is entitled to?

13. Before delving with the issues, as detailed above, it would be apt to reproduce below relevant provisions under the Rights of Persons with Disabilities Act, 2016.

*"2(r) "**person with benchmark disability" means a person with not less than forty percent of a specified disability** where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority;*

3.(1) The appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.

(2) The appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.

(3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.

(4) No person shall be deprived of his or her personal liberty only on the ground of disability.

(5) The appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities.

12. (1) The appropriate Government shall ensure that persons with disabilities are able to exercise the right to access any court, tribunal, authority, commission or any other body having judicial or quasi-judicial or investigative powers without discrimination on the basis of disability.

*20. (1**) No Government establishment shall discriminate against any person with disability in any matter relating to employment**:*

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, exempt any establishment from the provisions of this section.

(2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.

3) No promotion shall be denied to a person merely on the ground of disability.

(4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service:

Provided that, if any employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(5) The appropriate Government may frame policies for posting and transfer of employees with disabilities.

33. The appropriate Government shall—

(i) ***identify posts in the establishments which can be held by respective category of persons with benchmark disabilities in respect of the vacancies reserved in accordance with the provisions of section 34****;*

(ii) constitute an expert committee with representation of persons with benchmark disabilities for identification of such posts; and

(iii) undertake periodic review of the identified posts at an interval not exceeding three years.

*34. (1****) Every appropriate Government shall appoint in every Government establishment, not less than four per cent. of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent. for persons with benchmark disabilities under clauses (d) and (e), namely:—***

(a) blindness and low vision*;*

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learning disability and mental illness;

(e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities:

Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:

Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may, having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.

(2) Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of the appropriate Government.

***56. The Central Government shall notify guidelines for the purpose of assessing the extent of specified disability in a person**.*

57. (1) The appropriate Government shall designate persons, having requisite qualifications and experience, as certifying authorities, who shall be competent to issue the certificate of disability.

(2) The appropriate Government shall also notify the jurisdiction within which and the terms and conditions subject to which, the certifying authority shall perform its certification functions.

58. (1) Any person with specified disability, may apply, in such manner as may be prescribed by the Central Government, to a certifying authority having jurisdiction, for issuing of a certificate of disability.

(2) On receipt of an application under sub-section (1), the certifying authority shall assess the disability of the concerned person in accordance with relevant guidelines notified under section 56, and shall, after such assessment, as the case may be,—

(a) issue a certificate of disability to such person, in such form as may be prescribed by the Central Government;

(b) inform him in writing that he has no specified disability.
(3) The certificate of disability issued under this section shall be valid across the country.

*89. Any person who contravenes any of the provisions of this Act, or of any rule made thereunder shall for first **contravention be punishable with fine which may extend to ten thousand rupees and for any subsequent contravention with fine which shall not be** less than fifty thousand rupees but which may extend to five lakh rupees."*

(Emphasis supplied)

14. From the said provisions under the Act, 2016, it is amply clear that Section 2 (r) is in respect to person with benchmark disability of 40% and above, whereas Section 3 of the said Act speaks about equality and non-discrimination. Section 12 of the Act deals access to justice. Section 20 of the RPwD Act, 2016 has warned that no Government Establishment shall discriminate against any person with disability in any manner relating to employment. Sections 33 and 34 of the said Act deal with identification of posts for reservation whereas Sections 56, 57 and 58 speak about procedure for issue of disability certificate by the designation of certifying authority. Similarly, Section 89 of the Act, 2016 prescribes as to punishment for contravention of any of the provisions of the said Act.

15. **So far as Issue No.(i)**, after promulgation of the RPwD Act, 2016, which came into effect from 19.04.2017, the State Government issued a Resolution dated 05.09.2017, wherein an error was crept in vide Para 2 (2) of the said Resolution, which speaks that persons with more than 40% disability, as certified by the competent Certifying Authority appointed under Section 57(1) of the Act, 2016, irrespective of nature of disability, shall be eligible for reservation. Admittedly the said clause in the Resolution dated 05.09.2017 was contrary to the provisions enshrined under Section 2(r) of the Act, 2016. Hence, the State Government issued corrigendum dated 16.07.2018 in which it is clearly mentioned that Sub-Para-2 of

Para-2 of SSEPD Department Resolution dated 05.09.2017 shall be substituted as follows:

> *"**Persons with not less than 40% of any disability** as certified by a competent Certifying Authority appointed under Section 57(1) of 'Rights of Persons with Disabilities Act, 2016' **irrespective of nature of Disability, shall be eligible for reservation**".*
>
> ***(Emphasis supplied)***

16. Such a corrigendum was issued after about ten months to rectify the said error crept in the Resolution dated 05.09.2017, the same being contrary to the statute. The dictionary meaning of the word "**corrigendum**" is an error in a printed work discovered after printing and shown with its correction on a separate sheet.Law is well settled that "**ratification**" by definition means, to correct an error and such correction is to be accepted from the date and time the error was made. In **Maharashtra State Mining Corporation** (supra), the Apex Court, vide Paragraphs-7 and 8, held as follows.

> *"7. The High Court was right when it held that an act by a legally incompetent authority is invalid. But it was entirely wrong in holding that such an invalid act cannot be subsequently 'rectified' by ratification of the competent authority. **Ratification by definition means the making valid of an act already done. The principle is derived from the Latin maxim Ratihabitio mandato aequiparatur, namely, a subsequent ratification of an act is equivalent to a prior authority to perform such act". Therefore ratification assumes an invalid act which is retrospectively validated**.*
>
> *8. In Parmeshwari Prasad Gupta, the services of the General Manager of a company had been terminated by the Chairman of the Board of Directors pursuant to a resolution taken by the Board at a meeting. It was not disputed that that meeting had been improperly held and consequently the resolution passed terminating the services of the General Manager was invalid. However, a subsequent meeting had been held by the Board of Directors affirming the earlier resolution. The subsequent meeting had been properly convened.*
>
> *"Even if it be assumed that the telegram and the letter terminating the services of the appellant by the Chairman was in pursuance of the invalid resolution of the Board of Directors passed on 16-12-1953 to terminate his services, it would not follow that the action of the Chairman could not be ratified in a regularly convened meeting of the Board of Directors. The point is that even assuming that the Chairman was not legally authorized to terminate the services of the appellant, he was acting on behalf of the Company in doing so, because, he purported to act in pursuance of the invalid resolution. Therefore, it was open to a regularly constituted meeting of the Board of Directors to ratify that action which, though unauthorized, was done on behalf of the Company. **Ratification would always relate back to the date of the act ratified and so it must be held that the services of the appellant were validly terminated on 17-12-1953."***
>
> *The view expressed has been recently approved in High Court of Judicature for Rajasthan V. P.P. Singh (supra)."* ***(Emphasis supplied)***

17. The RPwD Act, 2016 is a Central Act and any provisions of the said Act can only be interfered with by the judiciary, provided such a provision is unconstitutional. Further, Section 3 of the said Act, 2016 prescribes that the

appropriate Government shall ensure that the person with disabilities enjoys the right to equality, life with dignity and respect of his or her integrity equally with others. The appropriate Government shall take steps to utilize the capacity of persons with disabilities by providing appropriate environment. No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim. No person shall be deprived of his or her personal liability only on the ground of disability and the appropriate Government shall take necessary steps to ensure reasonable accommodation for person with disabilities.

As per Section 2(r) of the RPwD Act, 2016, "**person with benchmark disability**" means a person with not less than forty per cent of a specified disability, where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measured terms, as certified by the certifying Authority. Similarly, Sub-Section (s) of Section (2) of the said Act, 2016 defines "**person with disability**" means a person with long term physical, mental, intellectual or sensory impairment, in interaction with barriers, hinders his full and effective participation in society equally with others. Para 2 (2) of the Resolution dated 05.09.2017, being contrary to the provisions under Section 2(r) of the RPwD Act, 2016, the concerned Department of the State Government, realizing said error crept in the said Resolution, issued Corrigendum on 16.07.2018 in consonance with the provisions enshrined under Section 2(r) of the Act, 2016.

18. The Apex Court in **Dr (Major) Meeta Sahai vs. State of Bihar and others**, reported in (2019) 20 SCC 17 held that candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. Paragraphs 15 to 17, 21 and 22 of the said judgment are extracted below:

> *"15. Furthermore, before beginning analysis of the legal issues involved, it is necessary to first address the preliminary issue. The maintainability of the very challenge by the appellant has been questioned on the ground that she having partaken in the selection process cannot later challenge it due to mere failure in selection. The counsel for the respondents relied upon a catena of decisions of this Court to substantiate his objection.*
>
> *16. It is well settled that the principle of estoppels prevents a candidate from challenging the selection process after having failed in it as iterated by this Court in a plethora of judgments, including Manish Kumar Shahi v. State of Bihar, reported in 2008 SCC Online Pat 321 : (2008) 4 PLJR 93, observing as follows: (SCC p.584, para 16)*
>
> *"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the appellant is not entitled to challenge the criteria or process of selection. Surely, if the appellant's name had appeared in the merit list, he would not have been dreamed of challenging the selection. The appellant invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the appellant clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.*

The underlying objective of this principle is to prevent candidates from trying another shot at consideration, and to avoid an impasse wherein every disgruntled candidate, having failed the selection, challenges it in the hope of getting a second chance.

*17. **However, we must differentiate from this principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it. The constitutional scheme is sacrosanct and its violation in any manner is impermissible. In fact, a candidate may not have locus to assail the incurable illegality or derogation of the provisions of the Constitution, unless he/she participates in the selection process.***

21. It is the responsibility of the courts to interpret the test in a manner which eliminates any element of hardship, inconvenience, injustice, absurdity or anomaly. This principle of statutory construction has been approved by this Court in Modern School v. Union of India, reported in (2004) 5 SCC 583, by reiterating that a legislation must further its objectives and not create any confusion or friction in the system. If the ordinary meaning of the text of such law is non-conducive for the objects sought to be achieved, it must be interpreted accordingly to remedy such deficiency.

***22. There is no doubt that executive actions like advertisements can neither expand nor restrict the scope or object of laws**. It is therefore necessary to consider the interpretation of the phase "government hospital" as appearing in the Rules. Two interpretations have been put forth before us which can be summarized as follows:*

(a) Only hospitals run by the Government of Bihar.

(b) Hospitals run by the Bihar Government or its instrumentalities, as well as any other non-private hospital within the territory of Bihar.

The former interpretation to the term, as accorded to it by the respondents, forms a narrower class whereas the latter interpretation used by the appellant is broader and more inclusive." ***(Emphasis supplied)***

19. Relying on the said judgment of the Apex Court, this Court in **Prasanta Kumar Nayak** (supra), vide Paragraph-27, held as follows:

*"27. In the above judgment, their Lordships have differentiated the principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. **In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it**. The prescribed qualification is a prescribed procedure, which the petitioner accepted. There is no doubt about it. As Jammu University, from which the petitioner acquired the training qualification, is duly recognized by NCTE and affiliated to Utkal University, therefore, he approached the Odisha Administrative Tribunal.* (**Emphasis supplied**)

20. As to contention of the learned Counsel for the private Opposite Party No.9 for rejection of the prayer of the Petitioner on the ground of non-deposit of Examination Fees, the stand of the private Opposite Party is not sustainable in the eye of law, as the Petitioner was exempted from paying Examination Fees in view of Point No.3 of the Advertisement No.11 of 2017-2018, he being a handicapped person having 40% disability in terms of the Act, 2016.

Hence, this Court is of the view that even though the Petitioner acted in terms of the Advertisement knowing fully well about the eligibility criteria, has rightly approached this Court, the action so also decision of the Authority concerned being contrary to the statute, Issue No.(i) is answered accordingly in favour of the Petitioner.

21. **So far as Issue No. (ii)**, the OPSC (O.P. No.7), to substantiate its action to be legal and justified, has relied on the requisition sent to it by the concerned Department of the State Government. Such requisition was admittedly sent to OPSC based on the erroneous Resolution dated 05.09.2017 of the SSEPD Department, which was subsequently rectified by the Department on 16.07.2018, as the terms of the Resolution dated 05.09.2017 was contrary to Section 2(r) of the Act, 2016. Admittedly, the OPSC processed the application of the Petitioner in terms of the provisions prescribed under the Act, 2016. However, at final stage of selection, when the Petitioner was called for personality test, it came to the notice of the OPSC that the percentage of disability of the Petitioner to be 40% only instead of "more than 40%", as prescribed in the erroneous requisition sent by the concerned Department. Hence, invoking the note under Clause-11 of the said Advertisement No.11 of 2017-18, the candidature of the Petitioner was rejected by the OPSC. Such a mistake being dehors the law, was rightly rectified by the concerned Department of the State Government (Opposite Party No.3).

22. The State-Opposite Party No.3, instead of filing Counter, has filed an Affidavit. Paragraph No. 3 of the said Affidavit, being relevant to answer Issue No.(ii), is extracted below for ready reference:

> *"3. That,* ***in reply to the averments made in Paragraphs 1-37 of the Writ Petition it is submitted that, OPSC has accepted the application of the petitioner and allow him to appear the Odisha Civil Services (OCS) Examination which leads to the fact that he was found eligible for his 40% of disability****. Further, the provisions under law provide the following.*
>
> *a) Section 2(r) of the Rights of Persons with Disabilities Act, 2016 provides that "person with benchmark disability" means a person with not less than forty percent, of a specified disability where specified disability has not been defined in measureable terms and includes a person with disability where specified disability has been defined in measureable terms, as certified by the certifying authority;*
>
> *b) Section 34(1) of the Act provides that "Every appropriate Government shall appoint in every Government establishment, not less than four percent, of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities under clauses (a), (b) and (c) and one percent, for persons with disabilities under clauses (d) and (e)". xxx.*
>
> *c)* ***Para 2(2) of Resolution no.7140 dated 5th Sept 2017 wherein it has been mentioned that Persons with more than 40% of any disability shall be eligible for reservation, has subsequently been amended through corrigendum as the specifications were not in consistent to the Act provisions. In the corrigendum Para 2(2) of the resolution substituted as "persons with not less than 40% of any disability as certified by a competent certifying Authority appointed under section 57(1) of Rights of Persons with Disabilities Act, 2016***

irrespective nature of Disability, shall be eligible for reservation*". xxx.*

In view of the above facts, the ***petitioner is eligible for recruitment in PWD quota****. Further, said Resolution provides the following:*

"5. ***Persons with Disabilities selected on their merit without relaxed standards, along with other candidates shall not be adjusted against the reserved share of vacancies.****xxx".*

As per the averment of the petitioner, he has come out successfully in the examination and placed in the merit list with rank better than candidates under UR category. ***The provisions of the said law and resolution denotes that the petitioner is eligible under PWD category basing on his application and eligible to be placed in the merit list of UR category and denial of the benefit of the said provisions may affect natural justice in this particular case." (Emphasis supplied)***

23. Admittedly Para 2(2) of the Resolution of the Opposite Party No.3, being contrary to the provisions enshrined under Section 2(r) of the RPwD Act, 2016, the appropriate Government issued necessary Corrigendum dated 16.07.2018 to rectify the said error crept in the Resolution dated 05.09.2017. Hence, there being no dispute that such a provision erroneously crept in the Resolution dated 05.09.2017, the same being contrary to the statute, i.e. RPwD Act, 2016, was rectified by the appropriate Government. Despite request made by the State Government, vide letters dated 11.02.2019 and 25.02.2019, as at Annexures-12 and 13 of the Writ Petition, copies of which were marked to the Petitioner, the OPSC did not include the name of the Petitioner in the select list of UR category. Further, being directed by the Tribunal, instead of acting in a positive manner, the OPSC mechanically rejected the prayer of the Petitioner relying on a faulty Requisition made to it. At this juncture, it would be apt to reproduce below the contents of the said letters dated 11.02.2019 and 25.02.2019 :

"No. 1351 PRS **Date:11.02.2019**

From

Niten Chandra, IAS
Principal Secretary to Government

To

Special Secretary to Government
GA & PG Department

Sir,

This is the case of Sri Anushrav Gantayat, S/o Sri Bijayananda Gantaya of Boriguma, District Koraput. Sri Gantayat, a 40% visually impaired person. Sri Gantayat has successfully passed the Preliminary & Main Examination of Odisha Civil Service Examination, 2017. In this regard a letter was issued to the address of Secretary, OPSC vide this Department letter No.S12/PRS dated 28.12.2018 (copy enclosed). But no reply has yet been received. He met me today and submitted his mark sheets that he has secured in the OCS (Pre.), OCS Main & Viva Voce Test Examination. **As it appears from the mark-sheets he has secured 1365 marks in Main Examination and in interview. It is also observed that cut off marks of UR category in Main (plus interview) is 1302 (Mark sheets and OPSC Notice are enclosed for reference). But his name has not found place in the final list and his Roll Number is in the reject list.**

2. Parliament has enacted Rights of Persons with Disabilities Act, 2016 which has come into force from 19 April, 2017. According to Section 2(r) of RPwD Act, 2016 "person with benchmark disability" means a person with not less than forty per cent, of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority. In this regard a Corrigendum has been issued vide this Department letter No.5334 dated 16.07.2018 in which it is mentioned that "Persons with not less than 40% of any disability as certified by a competent Certifying Authority appointed under Section 57(1) of Rights of Persons with Disabilities Act, 2016 irrespective of nature of Disability, shall be eligible for reservation". (Copy of Corrigendum enclosed for reference).

3. **I shall appreciate if the case of Sri Anushrav Gantayat is considered by issuing suitable instruction to Secretary, OPSC. Since he has obtained marks sufficient to qualify him among the general candidates, his case may he considered on priority**.

Encl: As above.

Yours faithfully,
Sd/-
Principal Secretary"
(Emphasis supplied)

"No. PT1-GAD-SER2-CSE-0007-2016-6184/SCS. BBSR, **dated the 25" February,2019**

From

Shri Abanikant Pattanaik
Additional Secretary to Government

To

The Secretary.
Odisha Public Service Commission,
19 Dr. P.K. Parija Road, Cuttack, Odisha.

Sub : Grievance petition filed by Shri Anushrav Gantayat, a candidate for OCS Examination 2017, applied under PwD category, bearing Roll No.301667.

Sir,

In inviting a reference to subject cited above, I am directed to say that one Shri Anushrav Gantayat, bearing Roll No.301667, having applied under Unreserved-PwD (PH-VI Category (visual Impairment of 40%), had appeared and cleared the Preliminary as well as the Mains stage of the Exam and was subsequently shortlisted for the Personality Test However, his candidature for Odisha Civil Services was rejected by the OPSC vide Notice No. 10121/PSC dated 19.12.2018, on the Ground that the Petitioner was suffering from "only 40% Permanent Disability".

The Marks secure by Shri Gantayat with reference to the cut-off marks published by the OPSC is given below.

	Marks secured by the petitioner	Official cut-off Marks (UR-PH-VI-Male Category)	Official cut-off Marks (UR-Male Category)
Preliminary	Paper-I - 135.845	Paper-I - 78.780	Paper-I-107.585
Exam	Paper-II - 117.763	Paper-II- Qualifying	Paper-II- Qualifying
Mains Exam	1164	Not Available	Not Available
Personality Test + (Total Marks)	1365	1065	1302

Having cited the above facts, the Petitioner has contended the decision of OPSC to reject his candidature, on the following grounds (stated in his representation).

1. The Definition of Persons with Disability, as mentioned under Sub-Para-2 of Para-2 of the SSEPD Department Resolution No.7140 dated 05.09.2017 defining Disability as "Persons with more than 40% of any Disability" (based on which the Petitioner was disqualified), though was amended vide a Corrigendum issued by the SSEPD Department as "Persons with not loss than 40% of any Disability, the Petitioner has been disqualified despite his eligibility to avail PwD reservation as per the amended definition of PwDs cited above.

2. He has cited reference to a similar case of another candidate, Shri Samarjit Kar, selected and given appointment through OCS Examination-2016 under Unreserved-PwD (PH-VI)-Male Category with 40% Visual Impairment, which is identical to the case of the present petitioner.

3. The Union Public Service Commission (UPSC) also considers 40% or more as Benchmark Disability.

Besides, on the occasion of rejecting his candidature by the OPSC, for reasons discussed above, the claim of Shri Gantayat is to have been selected under the "UR-Male" category (since he has cleared the UR-Male Cut-off) in terms of the provisions envisaged under Point No.5 of the SSEPD Department resolution No.7140 dated 05.09.2017 wherein is clearly stated that the PwDs selected on their Merit without relaxed standards, along with other candidates, shall not be adjusted against the reserved share of vacancies.

In view of the on-going process of appointment of the candidates selected through OCS Examination-2017, it is required to sort out the grievance of Shri Gantayat at the earliest to avoid any legal issues arising out of the above case.

It is, therefore, requested to kindly look into the above points raised by the petitioner, and any clarification in this regard, if considered appropriate, may kindly be furnished to this Department, at the earliest, so as to enable this Department to decide upon the further course of action relating to disposal of the Grievance petition of Shri Anushrav Gantayat.

Yours faithfully,
Sd/-
Additional Secretary Government"

(Emphasis supplied)

That apart, the Chief Secretary, Government of Odisha, intimated the Petitioner through mail indicating therein that OPSC has been requested to reconsider its earlier decision and include the name of the Petitioner in the select list in UR category, which is reproduced below:

"Chief Secretary

Office of the Chief Secretary Secretariat Bhubaneswar – 751001
Dated: 11-03.2020

To

Shri Anushav Gantayat
Lane-3, Mill Sahi, Borigumma, Koraput-764056
Borigumma

Subject : e-Grievance – Report on grievance petition on Registration No.CS100/P/2020/00061

OPSC has been requested to reconsider its earlier decision and include Shri Anushrav Gantayat in the selected list in UR category.

N.B.:- Computer generated copy. Needs no signature" **(Emphasis supplied)**

24. In **Gambhirdan K. Gadhvi (supra),** the Apex Court in Paragraph-50 held as follows:

"50. It cannot be disputed that the UGC Regulations are enacted by the UGC in exercise of powers under Sections 26(1)(e) and 26(1) (g) of the UGC Act, 1956. Even as per the UGC Act every rule and regulation made under the said Act, shall be laid before each House of Parliament. Therefore, being a subordinate legislation UGC Regulations becomes part of the Act. ***In case of any conflict between the State legislation and the Central legislation, Central legislation shall prevail by applying the rule/principle of repugnancy as enunciated in Article 254 of the Constitution*** *as the subject "education" is in the Concurrent List (List III) of the Seventh Schedule to the Constitution. Therefore, any appointment as a Vice-Chancellor contrary to the provisions of the UGC Regulations can be said to be in violation of the statutory provisions, warranting a writ of quo warranto."* ***(Emphasis Supplied)***

Similarly, in **ESI Corporation (supra)** in Paragraph-16, the Apex Court held as follows:

*"**In our considered opinion, the High Court has ignored to appreciate that the effect of ESI Act enacted by the Parliament cannot be circumvented by the department office memorandum**. The High Court has also failed to appreciate that the payment of interim relief/wages emanates from the provisions contained in terms of the settlement, which forms part of the contract of employment and forms the ingredients of "wages" as defined under Section 2(22) of the ESI Act and that the respondent paid interim relief, as per a scheme voluntarily promulgated by it as per the notification dated 20.04.1996, issued by the Government of India, in view of the recommendations of "Manisana' Wage Board, pending revision of rates of wages. It was not an ex-gratia payment. xxx"*

(Emphasis supplied)

In **Raminder Singh (supra),** vide Paragraph Nos. 23.1, 23.3 and 25, held as follows.

*"**23.1** First, it is an admitted case that the appellant being an in-service candidate, his case for promotion from the post of Silt Observer/Analyst to the next promotional post of "Research Assistant, Grade B" was required to be considered as an in-service candidate as provided in Rule 10.*

23.3 *Third, the appellant had admittedly fulfilled the eligibility criteria and qualification prescribed in Rules 10(1)(b)(i) and (2) as also the qualifications prescribed for appointment to the post in question for direct recruits.*

25. *As held supra, the appellant had fulfilled the necessary criteria prescribed in Rule 10. It was, in our view, sufficient compliance for the in-service candidate.* ***Anything prescribed in the advertisement, which was dehors the Rules was bad in law.***

(Emphasis supplied)

25. From the discussions made above, this Court is of the view that the Advertisement No.11 of 2017-18 of OPSC for recruitment of OCS Examination, 2017 pertaining to Point No. 5(1), with regard to reservation of one post under the PwD for blind, should not have been contrary to the statute i.e. provisions enshrined under Section 2(r) of the Act, 2016. Hence, action of the Authority concerned, including the OPSC, thereby debarring the Petitioner from his legitimate legal right to seek for appointment under the reserved category of PwD for Blind/Low vision based on such faulty advertisement, is illegal, arbitrary and unreasonable.

26. In view of the above admitted facts on record so also settled position of law, as discussed above, this Court is of further view that any action, based on the said erroneous Resolution made by the State Government, being contrary to statute, is bad and deserves interference. Hence, Issue No.(ii) is answered in favour of the Petitioner. Accordingly, both the impugned rejection orders, as at Annexures 7 and 15, are hereby set aside.

27. **So far as Issue No. (iii)** as to the relief to be extended in favour of the Petitioner, a prayer has been made in the Writ Petition to appoint him in the post of OAS, Group-A (JB). A further prayer has been made to direct the State Government to grant the Petitioner all service and financial benefits with effect from the date the other candidates of UR/PwD-VI category availed such benefits in terms of the Notification dated 20.06.2019 (Annexure-21) vide which the candidates, who came out successful in OAS Examination, 2017, were appointed to Odisha Administrative Service, Group-A (Junior Branch) in Cell-1, Level-12 of the pay matrix under the Odisha Revised Scale of Pay Rules, 2017.

28. Admittedly, the Petitioner applied under the PwD-B/LV category claiming himself to be eligible under the PwD Blind/Low vision category in terms of Point No.2 of the Advertisement No.11 of 2017-2018. He was also exempted from paying examination fee in terms of Point No.3 of the said advertisement. At this stage, it would be apt to reproduce below Point No.2(a) of the said Advertisement.

> 2. **POSITION OF VACANCIES AND RESERVATION THEREOF**:
>
> **XXX**.
>
> *(a)* ***Out of the vacancies mentioned above, 05 posts are reserved for PWD category (1-Blindness or Low Vision****, 1-Deaf & hard of hearing, 1-Locomotor Disabilities including Cerebral Palsy, Leprosy cured, dwarfism, Acid attack victims and muscular dystrophy, 1-Autism, Intellectual Disability, Specific Learning Disability and Mental Illness, 1-Multiple Disability as mentioned above including deaf-blindness in the posts identified for each disability time to time). The exchange of reservation between SC & ST will not be considered.*
>
> *Further, out of the above 05 posts reserved for PWDs, one post shall be earmarked for women with disabilities.*
>
> ***Candidates belonging to PWD, when selected as per reservation provided for them, shall be adjusted against the categories to which they belong****, which means that the PWD, if belonging to Scheduled Caste will claim the vacancy reserved for S.C., if*

belonging to Scheduled Tribe will claim the vacancy reserved for S.T. and so on. ***Thus the PWD, who do not belong to either any of the reserved communities i.e. S.C./S.T./S.E.B.C., would claim the unreserved vacancies.***

(b) In case of non-availability of the eligible/suitable women candidate(s) belonging to respective category, the unfilled vacancies of that category shall be filed up by eligible & suitable male candidate(s) of the same category.

(c) The exchange of reservation between SC & ST will not be considered.

(d) The number of vacancies to be filled up on the basis of this recruitment is subject to change by the Government without notice, depending upon the exigencies of public service at the discretion of the State Government." ***(Emphasis supplied)***

29. Admittedly, the Petitioner has secured 1365 marks, which is more than the cut-off marks i.e. 1302 for UR category candidate. Had he been selected as a PwD candidate, he would have claimed an unreserved vacancy in terms of Clause-2(a) of Advertisement No.11 of 2017-18, as has been extracted above.

30. The law is well settled that reserved category candidates, selected in open competition, shall not be counted in reserved quota and they shall be treated as open category candidates. There cannot be any dispute with the general proposition, which stands well settled, as laid down by the 9 Judge Constitution Bench of the Apex Court in **Indra Sawhney v. Union of India**, reported in 1992 Supp. (3) SCC 212 : 1992 SCC (L&S) Supp.1, wherein it has been held that if the members belonging to the reserved category get selected in the open competition on the basis of their own merit, they will not be counted against the quota reserved for Scheduled Castes and they would be treated as open competition candidates. Paragraph-811 of the said judgment is extracted below:

*"**811**. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."*

31. The Apex Court in **Gaurav Pradhan** (supra), relying on the said nine-judge Bench judgment in Indra Sawhney vs. Union of India (1992) Suppl.(3) SCC 217, held that candidates belonging to reserved category, who had taken relaxation of age, were not entitled to migrate to unreserved vacancies. Paragraphs-19 to 21 and 49 to 51.2 of the said judgment are extracted below:

"19. Judgment of learned Single Judge in Chandra Bhan Yadav (supra) was a judgment where circulars issued by the State Government which are referable to Rule 7(1) of 1989 Rules relevant in the context of selection in question, were neither referred to nor considered. The learned Single Judge only relied on the judgments laying down that reserved category candidates selected in open competition shall not be counted in reserved quota and they shall be treated as open category candidates. There cannot be any dispute with the general proposition which stands well settled as laid down by nine Judge Bench in ***Indra Sawhney and others vs. Union of India and others.*** *This Court in paragraph 811 laid down the following:*

"8…'811. In this connection, it is well to remember that the reservations under members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quoto reserved for Scheduled Castes; they will be treated as open competition candidates.' " (Indra Sawhney case, SCC p. 735)"

20. Another judgment of learned Single Judge in Mangala Ram Bishnoi relied on in the impugned judgment was a judgment where the learned Single Judge has placed heavy reliance on Jitendra Kumar Singh (supra). The Circular of the State Government dated 04.03.2002 as applicable was considered in para 37. But learned Single Judge held that in view of the law laid down by this Court in Jitendra Kumar Singh, the Circular dated 4.3.2002 does not remain operative. We thus need to look into the judgment of this Court in Jitendra Kumar Singh's case (supra). The Division Bench further held that since the judgment of Mangala Ram Bishnoi which was Judge-made law was holding field, the State Government was required to permit migration of the reserved category candidates having obtained age relaxation into general category candidates and no exception can be taken in following the Circular dated 11.05.2011.

21. ***As noted above, the nine Judge Constitution Bench had laid down that if the members belonging to the reserved category get selected in the open competition field on the basis of their own merit, they will not be counted against the quota reserved for Scheduled Casts and they would be treated as open competition candidates. In Post Graduate Institute of Medical Education & Research v. K.L. Narasimhan, a three Judge Bench of this Court in paragraph 5 has laid down the following:***

"5......It is settled law that if a Dalit or Tribe candidate gets selected for admission to a course or appointment to a post on the basis of merit as general candidate, he should not be treated as reserved candidate. Only one who does get admission or appointment by virtue of relaxation of eligibility criteria should be treated as reserved candidate."

49. In view of the foregoing discussion, we are of the considered opinion that the candidates belonging to SC/ST/BC, who had taken relaxation of age, were not entitled to be migrated to the unreserved vacancies: the State of Rajasthan has migrated such candidates, who have taken concession of age against the unreserved vacancies which resulted displacement of a large number of candidates who were entitled to be selected against the unreserved category vacancies. The candidates belonging to unreserved category who could not be appointed due to migration of candidates belonging to SC/ST/BC were clearly entitled for appointment which was denied to them on the basis of the above illegal interpretation put by the State. We, however, also take notice of the fact that the reserved category candidates who had taken benefit of age relaxation and were migrated on the unreserved category candidates, are working for more than last five years. The reserved category candidates who were appointed on migration against unreserved vacancies are not at fault in any manner. Hence, we are of the opinion that SC/ST/BC candidates, who have been so migrated in reserved vacancies and appointed, should not be displaced and allowed to continue in respective posts. On the other hand, the unreserved candidates who could not be appointed due to the above illegal migration are also entitled for appointment as per their merit. The equities have to be adjusted by this Court.

> *50. On the question of existence of vacancies, although the learned counsel for the appellant submitted that vacancies are still lying there, which submission, however, has been refuted by the learned counsel for the State of Rajasthan. However, neither the appellants had produced any details of number of vacancies nor has the State been able to inform the Court about the correct position of the vacancies.*
>
> *51. We, thus, for adjusting the equity between the parties, issue the following directions:*
>
> *51.1. The appellant-writ petitioners who as per their merit were entitled to be appointed against unreserved vacancies which vacancies were filled up by migration of SC/ST/BC candidates, who had taken relaxation of age, should be given appointment on the posts. The State is directed to work out and issue appropriate orders for appointment of such candidates who were as per their merit belonging to general category candidates entitled for appointment, which exercise shall be completed within three months from the date, copy of this order is produced.*
>
> *51.2.* ***The State shall make appointments against the existing vacancies, if available, and in the event there are no vacancies available for the above candidates, the supernumerary posts may be created for adjustment of the appellants which supernumerary posts may be terminated as and when vacancies come into existence."***
>
> ***(Emphasis supplied)***

32. Similarly, in **Post Graduate Institute of Medical Education & Research, Chandigarh and others v. K.L. Narasimhan**, reported in (1997) 6 SCC 283, a three Judge Bench of the Apex Court, in Paragraph 5, held as follows:

> *"5…… It is settled that if a Dalit or Tribe candidate gets selected for admission to a course or appointment to a post on the basis of merit as general candidate, he should not be treated as reserved candidate.* ***Only one who does get admission or appointment by virtue of relaxation of eligibility criteria should be treated as reserved candidate."***
>
> ***(Emphasis supplied)***

33. It is also the admitted case of the Petitioner, though he belongs to unreserved community, because of his physical disability, he applied as a candidate belonging to PwD category in terms of Section 2(r) of the Act, 2016. He was also exempted from paying the fee in terms of Clause- 3 of the Advertisement No.11 of 2017-2018 as extracted above. His application for selection was processed till its rejection under the PwD category (UR) and not as a general UR candidate. Hence, in terms of the judgments of the Apex Court, as detailed above so also the case of the Petitioner and Clause- 2(a) of the said Advertisement, as extracted above, this Court is of the view that pursuant to request made by the State Government, the Petitioner ought to have been adjusted and appointed against unreserved (UR) vacancies as a PwD candidate.

So far as his claim for appointment under the reserved category of PwD (UR), such a right accrued in favour of the Petitioner in terms of the Act, 2016. The action of the OPSC in rejecting the application of the Petitioner was based on a requisition by the concerned Department, which was based on an erroneous Resolution of the State Government dated 05.09.2017 (Annexure-16). The said error was subsequently rectified by the State Government on 16.07.2018 (Annexure-17). The concerned Department of the State Government, in its Affidavit, has admitted

the said mistake as has been extracted above. Hence, this Court is of the view that such a rectification should relate back to the date of act rectified.

34. Admittedly, the online application submitted by the Petitioner was accepted and processed till a rejection order was passed on 19.12.2018 and thereafter, based on the grievance petition of the Petitioner, the Principal Secretary, Government of Odisha, Department of SSEPD wrote to the Special Secretary to Government, G.A. & P.G. Department on 11.02.2019 to issue suitable instruction to the Secretary, OPSC to do the needful. Immediately, thereafter, on 25.02.2019 the Addl. Secretary to Government, G.A. & P.G. Department wrote to the Secretary, OPSC to do the needful, as has been extracted above. Hence, this Court is of further view that the Petitioner has a right to be appointed as OAS, Group-A (Junior Branch) under the PwD category (UR), as has been alternatively prayed by him.

35. It may not be out of place to mention here that pursuant to order dated 19.09.2022 passed by this Court, the State-Opposite Party No.4 filed an Affidavit stating therein the names of the selected candidates of OCS Examination, 2017 under UR/URPH category, who have left their services after joining in the post of OAS Group-A (JB). It has been stated in the said Affidavit that Sri Manas Ranjan Sahu, appointed as OAS Group-A(JB) under UR category of Direct Recruit of 2017, so also one Bibhuti Bhusan Nayak joined under the SC-PwD category have left the service. It is further stated that candidature of one Vincent Lakra under ST category has lapsed as he failed to join within the stipulated time. After verification of record, it is found that no selected candidate in UR-PwD category has left the service.

36. Though State-Opposite Party No.3 (Social Security and Empowerment of Persons with Disabilities Department) has filed an Affidavit indicating there in that the Petitioner is eligible to be placed in the merit list of UR category and denial of the benefit of the said provisions may affect natural justice, contrary to such stand so also communications made by various State authorities, including Chief Secretary, Government of Odisha, as has been extracted above, learned State Counsel again filed an Affidavit on 23.05.2023 on behalf of Opposite Party No.2- Additional Secretary to Government, G.A. & P.G. Department, Lokaseva Bhawan, stating that pursuant to order of this Court dated 17.08.2022, the feasibility of accommodating the Petitioner against non-joining/resignation vacancy without disturbing the seniority of the private Opposite Parties was examined by the Department. Vacancies accrued due to resignation of candidates, after joining in the civil services, are treated as new vacancies for the subsequent year of recruitment and can only be filled up by the candidates selected afresh through subsequent Odisha Civil Service Examination. Hence, there is no scope to accommodate/appoint the Petitioner against the vacancy arising due to resignations of Manas Ranjan Sahu and Bibhuti Bhusan Nayak, the candidates who were selected through Odisha Civil Service Examination, 2017.

Similarly, it has been stated in the said Affidavit that so far as vacancies arising due to non-joining of provisionally selected candidates are concerned, as per the provision of the General Administration Department Office Memorandum dated 10.02.1987, in case of initial recruitment through competitive examination, the recommendation of Public Service Commission shall remain valid for a period of one year from the date of its approval by the Government. But, in the instant case, the final select list of successful candidates of Odisha Civil Service Examination, 2017 was communicated to G.A. & P.G. Department by the Odisha Public Service Commission, Cuttack, vide letter dated 24.12.2018 and same was accepted vide Government Order dated 05.02.2019. Therefore, the recommendation of the OPSC has become invalid after one year from the said date of acceptance of the Government. Hence, the unfilled vacancies arising due to non-joining of the provisionally selected candidates have been carried forward for recruitment through the subsequent Odisha Civil Service Examination.

37. Admittedly, because of fault on the part of the State, while passing Resolution for implementation of the Act, 2016, an error being crept in the said Resolution dated 05.07.2017 that the percentage of disability should be more than 40%, the Petitioner suffered a lot and had to approach different forums for redressal of his genuine grievance, including this Court. Also, despite his best effort to expedite the conclusion of pending litigation, this matter is pending since 2019. The conduct of the State is also in contravention of various provisions under the Act, 2016 and is punishable under Section 89 of the Act, 2016. The same is extracted below:

> *" 89. Any person who contravenes any of the provisions of this Act, or of any rule made thereunder shall* ***for first contravention be punishable with fine which may extend to ten thousand rupees and for any subsequent contravention with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees."***
>
> ***(Emphasis supplied)***

38. The State so also OPSC have committed grave illegality by denying appointment to the Petitioner solely on the ground that his percentage of disability was 40% and not more than 40%. The terms of the Advertisement No.11 of 2017-18 admittedly was incorrect and contrary to the provisions under the Act, 2016. The said error in the Resolution made by the State was subsequently rectified by issuing necessary corrigendum to the said effect. Law is well settled that ratification should always relate back to the date the act ratified, as was held in **Maharastra State Mining Corporation** (supra)

39. It may not be out of place to mention here that the Division Bench of this Court in OJC No.9958 of 2001, decided on 05.08.2008 (**Miss Pritilata Nanda vs. Union of India**), vide Paragraph-8, held as follows:

> ***"8. In view of the aforesaid stand taken by the Railway authority, the averments made by the petitioner remain uncontroverted and are affirmed. The recruitment process started in the year 1987 through an advertisement and thereafter, written test and Viva Voce test were***

held in the year 1989 and the select list of candidates was published on 14.1.1992. It is indeed necessary to note the very sorry state of affairs of the manner in which the authorities concerned are dealing with the life and livelihood of common citizens. It needs to be reiterated that whereas physical handicapped candidates are required to be approached with a more compassionate manner, the authorities seem to have acted in a callous and heartless manner.

Once the petitioner's application was accepted by the authorities and she was allowed to appear in the written and viva voce test and after name find mention at serial No.11 of the merit list, it was no longer open to the authorities concerned to raise any question relating to petitioner's application for the purpose of dis-entitling her from the benefit of issuing her with an appointment letter. We consider it to be a gross abuse of the statutory power. *In the case at hand, the plight of the petitioner is writ large in the averments contained in the writ application and accompanying documents and unfortunately, the utter callous attitude of the authorities are writ large in the counter affidavit filed on behalf of Opp. Party No.5. It is indeed unfortunate that a physically handicapped female candidate who had applied in the year 1989 and more than 20 years have lapsed by now, has been denied appointment by the Railway authorities which is none else, but the Union of India, which is supposed to be an ideal employer."* ***(Emphasis supplied)***

The said judgment of the Division Bench, being challenging before the Apex Court by the Union of India and others, which is reported in 2010 (II) OLR (SC) 636 (**Union of India and others vs. Miss Pritilata Nanda**), the Apex Court, though confirmed the said observation and direction of this Court, so far as direction for payment of full salary with retrospective effect, the same was modified with the following observation/direction:

"We also agree with the High Court that once the candidature of the respondent was accepted by the concerned authorities and she was allowed to participate in the process of selection i.e., written test and viva voce, it was not open to them to turn around and question her entitlement to be considered for appointment as per her placement in the merit list on the specious ground that her name had not been sponsored by the employment exchange.

In our considered view, by denying appointment to the respondent despite her selection and placement in the merit list, the appellants violated her right to equality in the matter of employment guaranteed under Article 16 of the Constitution.

However, there is a small aberration in the operative part of the impugned order. ***While the High Court was fully justified in directing the appellants to appoint the respondent from the date persons lower in merit were appointed, but it is not possible to confirm the direction given for payment of full salary with retrospective effect. In our view, the High Court should have directed the appellants to notionally fix the pay of the respondent with effect from the date person placed at Sl. No.12 at the merit list was appointed and give her all monetary benefits with effect from that date.***

In the result, the appeal is dismissed. However, the operative part of the impugned order is modified in the following terms:

(1) The concerned competent authority of the South Eastern Railway shall, within a period of two weeks from today, issue order appointing the respondent on a Class III post. The appointment of the respondent shall be made effective from the date person placed at Sl. Nos.12 in the merit list was appointed. ***The pay of the respondent shall be notionally fixed with effect from that date and she shall be given actual monetary benefits***

with effect from 5.9.2008 i.e., the date specified in the order passed by the High Court.

(2) The pay of the respondent shall also be fixed in the revised pay scales introduced from time to time and she be paid arrears within a period of four months.

(3) The seniority of the respondent among Class III employees shall be fixed by placing her below the person who was placed at Sl. No.10 in the merit list.

(4) If during the intervening period, any person junior to the respondent has been promoted on the next higher post, then her candidature shall also be considered for promotion and on being found suitable, she shall be promoted with effect from the date any of her junior was promoted and she be given all consequential benefits.

(5) The General Manager, South Eastern Railway is directed to ensure that the respondent is not victimised by being posted in a remote area.

(6) ***Since the respondent has been deprived of her rights for almost 21 years, we direct the appellants to pay her cost of Rs.3,00,000/-. The amount of cost shall be paid within 2 months from today.***

The Divisional Railway Manager, South Eastern Railway, Khurda Road shall send compliance report to this Court on or before 22nd November, 2010."

(Emphasis supplied)

So far as the case of the Petitioner is concerned, this Court is of the view that the same is in a far better footing than the case in **Miss. Pritilata Nanda** (supra), as has been detailed above.

40. Since the Petitioner was eligible to be considered and appointed as PwD candidate in terms of Act, 2016, this Court is of the view that once his candidature is accepted by the concerned Authority and he was allowed to participate in the process of selection i.e. written test and viva voce, it was not open for the OPSC to turn around and question his entitlement to be considered for appointment as per his placement in the selection list on the ground that he is having only 40% disability. Hence, the present Opposite Parties have violated the Petitioner's right of equality in the matter of employment, guaranteed under Article 16 of the Constitution of India so also right in terms of the provisions enshrined under the Act, 2016, as has been detailed above. So far as the Petitioner's case is concerned, this Court is of the view that the same is in a far better footing than the judgment in **Miss. Pritilata Nanda (supra).**

41. In the peculiar facts and circumstances, applying the ratio of the above noted judgments as detailed above, this Court directs the Opposite Parties as follows:

(i) The name of the Petitioner be included in the select list dated 20.06.2019, as at Annexure-21, and he be given appointment as per his placement in the merit list within two months from the date of communication of the certified copy of this order. Appointment order be issued in favour of the Petitioner as an unreserved candidate in the post of Odisha Administrative Service, Group-A (Junior Branch) in terms of Point No.2(a) of the Advertisement No.11 of 2017-2018. If so required, a supernumerary post be created for adjustment of the Petitioner, which post may be terminated as and when vacancies come in to existence.

(ii) The appointment of the Petitioner shall be made effective from the date similarly placed person (s) in the select/merit list were appointed.

(iii) The pay of the Petitioner shall be fixed notionally w.e.f. from the said date and he shall be given actual monetary benefit w.e.f. the date he joins in the said post, as ordered by this Court.

(iv) The pay of the Petitioner shall also be fixed in the revised pay scale introduced from time to time and he be paid in terms of the said revised scale of pay, as is being paid to his counterparts.

(v) Since the issue is pending from 2019, if during the interregnum period, any person junior to the Petitioner has been promoted to the next higher post, then his candidature shall also be considered for promotion and on being found suitable, he shall be promoted w.e.f. the date any of his junior was promoted and he be given consequential benefits accordingly.

(vi) In addition to above, since the Petitioner has been deprived of his legitimate rights accruing out of the Act, 2016 so also Article 16 of the Constitution of India, to mitigate the hardship so also loss caused to the Petitioner, who is a disabled person, this Court directs the State-Opposite Parties to pay the Petitioner a cost of Rs.1,00,000/- (rupees one lakh) within a period of two months from today.

(vii) The State-Opposite Parties are also directed to implement the directions as above and send compliance report thereof to this Court on or before 31.03.2024.

42. Accordingly, the Writ Petition is allowed to the extent, as directed above.

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2024 (I) ILR-CUT-684

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.14495 OF 2006

ORISSA STATE CIVIL SUPPLIES CORP.LTD, KHURDA …….Petitioner

-V-

SONI HUSEN & ORS. …….Opp.Parties

COMPENSATION – The petitioner is the owner of offending vehicle – The Learned Motor Accident Claim Tribunal directed the insurance company to disburse the compensation & reimburse the same from the petitioner being the owner of vehicle – Whether the direction for reimburse is sustainable? – Held, Yes – The injured persons were travelling as gratuitous passengers in the offending vehicle – As the offending vehicle is a goods carrier, it is not permitted to carry any passenger – So, the owner of the offending vehicle is liable to pay the compensation. (Paras 4-7)

Case Laws Relied on and Referred to :-

1. AIR 2019 SC 3934 : Anu Bhanvara Etc. Vs. Iffco Tokio General Insurance Company Ltd.
2. AIR ONLINE 2022 KAR 502 : National Insurance Company Ltd. Jodumarga Vs. Netty D 'Souza.
3. AIR 2018 SC 3726 : Shamanna & Anr. Vs. Div.Manager Oriental Ins. Co. Ltd & Ors.

4. AIR 2018 SC 592 : Pappu & Ors. Vs. Vinod Kumar Lamba & Anr.
5. AIR ONLINE 2023 CAL 1383 : Sulakha Pandit Vs. National Insurance Company Ltd.

For Petitioner : Mr. A.K. Mishra
For Opp.Parties:

JUDGMENT Date of Hearing & Judgment: 11.01.2024

S.K.MISHRA, J.

1. The present Writ Petition has been preferred seeking modification/setting aside of the judgment dated 28.01.2005 passed by the learned District Judge-cum-M.A.C.T, Phulbani as at Annexure-1, vide which the Opposite Party No.3-Insurance Company (Opposite Party No.2 before the Court below) was directed to pay the compensation of Rs.2,000/- each to Opposite Party Nos.1 & 2 (Petitioner before the Court below) within two months and reimburse the same from the Petitioner (Opposite Party No.1 before the Court below).

2. Mr. Mishra, learned Counsel for the Petitioner submits, vide the impugned judgment dated 28.01.2005, the court below, though ordered that the Insurance Company (present O.P. No.3) shall pay the compensation, but illegally it was observed that the same shall be reimbursed from the present Petitioner, who was Opposite Party No.1 before the court below.

3. Paragraph Nos. 7 & 8 of the impugned judgment, being germane to the present lis, are extracted below for ready reference:-

> *7. In absence of any injury report, it is to be presumed that both the injured persons have sustained some simple injuries and as such each of the petitioners are entitled to get Rs.2000/- as compensation. From the seizure list Ext-3, it appears that the insurance policy of the vehicle was seized and the same was valid till 14.4.2001.* ***So at the time of accident, the vehicle had valid insurance policy. Moreover, the learned Counsel for O.P. No.2 has filed a copy of the insurance policy. As such I am of the opinion that the offending vehicle had valid insurance policy at the time of accident****.*
>
> *8. It is contended by the learned Counsel for the O.P. No.2 that the injured persons were travelling in the offending vehicle* ***in violation of the conditions of the policy and as such, the Opp. Party No.2 is not liable to pay the compensation****. No doubt, the injured persons were travelling as gratuitous passengers in the offending vehicle.* ***As the offending vehicle is a goods carrier, it was not permitted to carry any passenger. So the O.P. No.1 owner of the offending vehicle is liable to pay the compensation. Since the offending vehicle had valid insurance policy, the Opp. Party No.2 is liable to pay the compensation and reimburse the same from the Opp. Party No.1****. Both the issues are answered accordingly. Hence ordered.* ***(Emphasis Supplied)***

4. Law is well settled that if the offending vehicle is having valid license as on the date of accident, but the Insurance Company denies to pay the compensation on the ground of violation of the policy conditions, still the Insurance Company is liable to pay the compensation to the claimants at the first instance with a right of recovery of the said amount from the owner of the vehicle.

5. In **Anu Bhanvara Etc. Vs. Iffco Tokio General Insurance Company Limited**, reported in AIR 2019 SC 3934, the apex Court held as follows:

> *"**9.** The next question is as to which of the respondents, that is the owner and driver, or the insurer of the vehicle, would be liable for payment of such compensation. As regard the liability for payment of compensation, it has been contended by the learned counsel for the appellants that since the vehicle was admittedly insured with the respondent no.1 insurance company, the principle of pay and recover would be invoked even in case of a gratuitous passenger in a goods vehicle. The insurance company should thus be made liable for the payment of compensation to the appellants and in turn they would have the right to realise/recover the same from the owner and driver of the vehicle. In support of his submission, learned counsel for the appellants has relied on the following decisions of this Court, namely, Manuara Khatoon v. Rajesh Kumar Singh (2017) 4 SCC 796, Puttappa v. Rama Naik Civil Appeal No.4397 of 2016, disposed of on 2nd April, 2018); Manager, National Insurance Co. Ltd. v. Saju P. Paul (2013) 2 SCC 41; New India Assurance Co. Ltd. v. Vimal Devi (Civil Appeal Nos.15781579 of 2004, disposed of on 5th October, 2010); National Insurance Co.Ltd. v. Challs Upendra Rao (2004) 8 SCC 517; New India Assurance Co. Ltd. v. C. M. Jaya (2002) 2 SCC 278; Amrit Lal Sood v. Kaushalya Devi Thapar (1998) 3 SCC 744.*
>
> ***10.** Per contra, learned counsel for the respondent insurance company has contended that since the claimants were gratuitous passengers in a goods vehicle, in which case the liability for payment of compensation for death or body injury to the passengers of such goods vehicle would not be covered, hence the principle of pay and recover would not apply. It has thus been contended that the order of the High Court is perfectly justified in law and calls for no interference by this Court. In support of her submission, learned counsel has relied on following decisions, namely, New India Assurance Co. Ltd. v. Asha Rani (2003) 2 SCC 223; National Insurance Co. Ltd. v. Baljit Kaur (2004) 2 SCC 1; National Insurance Co. Ltd. v. Kaushalya Devi (2008) 8 SCC 246; National Insurance Co. Ltd. v. Rattani (2009) 2 SCC 75; National Insurance Co. Ltd. v. Prema Devi (2008) 5 SCC 403; Bharat AXA General Insurance Co. Ltd. v. Adani MANU/TN/6503/2018; Bajaj Allianz General Insurance Co. Ltd. v. Lal Singh (2015) SCC Online Del 7508.*
>
> ***11.** We have heard learned counsel for the parties and perused the record as well as the various decisions cited by learned counsel for the parties. **The insurance of the vehicle, though as a goods vehicle, is not disputed by the parties**. The claimants in the present case are young children who have suffered permanent disability on account of the injuries sustained in the accident. **Thus, keeping in view the peculiar facts and circumstances of this case, we are of the considered view that the principle of "pay and recover" should be directed to be invoked in the present case.***
>
> ***12. Accordingly, these appeals are disposed of with the direction that the respondent no.1 – insurance company shall be liable to pay the awarded compensation to the claimants in both the appeals. However, respondent no.1 – insurance company shall have the right to realize the said amount of compensation from the respondents no. 2 and 3 (driver and owner of the vehicle) in accordance with law."***
>
> ***(Emphasis supplied)***

6. In a recent decision, in **National Insurance Company Ltd. Jodumarga Vs. Netty D 'Souza**, reported in **AIR ONLINE 2022 KAR 502**, referring to the Decisions of the Hon'ble Supreme Court in **Shamanna and another Vs. Divisional Manager Oriental Insurance Co. Ltd. and others**, reported in **AIR 2018 SC 3726**

and **Pappu and Others Vs. Vinod Kumar Lamba and Another**, reported in **AIR 2018 SC 592**, the Karnataka Court held as follows:

> *"8. The decisions of the Hon'ble Supreme Court in Shamanna and another Vs. Divisional Manager Oriental Insurance Co. Ltd., and others reported in AIR 2018 SC 3726 and Pappu and Others Vs. Vinod Kumar Lamba and Another reported in AIR 2018 SC 592 are on the point.* ***The Hon'ble Supreme Court in the said decisions has clearly held that in the cases where the victim is a third party and there is violation of the policy condition without involving fraud or misrepresentation on the Insurance Company in taking out policy of insurance, the Insurance Company cannot totally absolve itself from the liability to pay the compensation, but in the first instance it has to pay the compensation awarded and subsequently recover the same from the owner insured in the same proceedings****. On consideration of these two decisions and several other decisions, on the subject, the Full Bench of this Court in New India Assurance Company Limited, Bijapur by its Divisional Manager Vs. Yallavva and Another reported in ILR 2020 KAR 2239 : (2020 (2) AKR 484 (FB), has reiterated the same. In that view of the matter, there is no merit in this appeal and it is liable to be dismissed."*
>
> ***(Emphasis supplied)***

7. Similarly in **Sulakha Pandit v. National Insurance Company Ltd.**, reported in **AIR ONLINE 2023 CAL 1383**, the Calcutta High Court held as follows:

> *"9. Having heard the submission and on perusal of the record and judgments as referred by the appellants,* ***this Court finds there is no dispute regarding the findings of the learned Tribunal regarding the victim Pratap Pandit was a gratuitous passenger of an offending vehicle i.e. pickup van on the date of accident****. Accordingly, the condition of Insurance Policy was flouted by the owner of the offending vehicle. It is true that when the insurance policy was violated by the owner of the offending vehicle, the Insurance Company is not liable to pay compensation****. However, the Hon'ble Supreme Court time and again on similar facts and circumstances of the present case directed the Insurance Policy to pay the compensation to the claimants at the first instance, when it is found that the insurance policy was valid on the date of accident and further given liberty to recover the amount from the owner of the offending vehicle in accordance with law****. The Hon'ble Supreme Court further observed that there is no need to file a separate suit or fresh proceeding for recovery of the compensation amount awarded by the ld. Tribunal from the owner or driver of the offending vehicle.*
>
> ***(Emphasis supplied)***

8. In view of the reasons assigned by the court below, as extracted above, vide which liberty was granted to the Opposite Party No.2 (Insurance-Company) to seek for reimbursement of the compensation amount from Opposite Party No.1, so also settled position of law, this court is not inclined to entertain the writ petition.

9. Accordingly, the writ petition stands dismissed.

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2024 (I) ILR-CUT-688

CHITTARANJAN DASH, J.

CRLMC NO. 379 OF 2023

Sk. SADAB KADIR & ORS …Petitioners

-V-

SAHER SANIYA …Opp.Party

PROTECTION OF WOMEN FROM THE DOMESTIC VIOLENCE ACT, 2005 – Section 12 – Relief under the section – Whether the Magistrate before granting relief under the section is mandatorily required to adhere the report of the Protection Officer or Service Provider? – Held, No.

Case Laws Relied on and Referred to :-

1. MANU/MH/0957/2009 : Nandkishor vs. Kavita and Ors.
2. MANU/JK/0075/2019 : Ajay Kaul & Ors. v. State of J&K.

For Petitioners : Mr. D. Panda
For Opp.Party : --

ORDER Date of Order : 01.12.2023

CHITTARANJAN DASH, J.

1. Heard learned counsel for the Petitioners and the State.

2. By means of the present application, the Petitioners seek the indulgence of this Court praying to quash the criminal proceeding in Criminal Misc. Case No. 134 of 2022 pending before the learned S.D.J.M., Angul.

3. The background facts of the case are that the Opposite Party No.2 initiated a proceeding U/s. 12 of the Protection of Women from the Domestic Violence Act, 2005 (herein after called the "PWDVA") against the Petitioners seeking various reliefs under the said Act registered as Criminal Misc. Case No. 134 of 2022 alleging that the Opposite Party No.2 got married to the Petitioner No.1 on 03.02.2021 in accordance with the Muslim Personal laws and her father had given a dowry i.e. the fixed deposit of Rs.3,00,000/- besides ornaments, furniture and other household articles as per the demand of the bride groom side. Subsequent to the marriage, the bride groom side demanded further sum of Rs.10,00,000/- or Kia Seltos car. Due to non-fulfillment of the said demand, the O.P. No.2 was assaulted by the Petitioner No.1 with slaps and kicks, they stopped giving her food and restrained her from talking to her parents. Few days thereafter when the Petitioner No.1 and the complainant shifted to Hyderabad, the Petitioner No.1 asked her to demand money from her father for purchasing a flat in an apartment and on her refusal, he allegedly to have assaulted her and she could over hear that the Petitioner No.1 would kill her by using pillow for which she asked her father to come and rescue her. The Opposite Party also narrated various instances and mental harassment and trauma inflicted on her by the Petitioners.

4. The Petitioners denying the above allegations, inter alia,contended that the proceeding is not maintainable since the same has not been filed in consonance with the statute which requires the application to be filed in accordance with Rule-6 of the Protection of Women from Domestic Violence in Form No.II and affidavit to be filed in Form No.III and the rules having not complied with by the Opposite Party in the complaint, the same is required to be quashed.

5. In course of argument however, the learned counsel for the Petitioners emphatically pointed out that the report from the Protection officer having not furnished in the complaint violates the relevant provision and the same being mandatory in nature the complaint is not maintainable.

6. Learned counsel for the State on the other hand vehemently opposed the contentions raised by the learned counsel for the Petitioners.

7. Needless to mention that the PWDVA is a civil law that defines domestic violence, recognizes women's rights to reside in a violence-free-home and provides remedies in cases of violation of this right. In its Statement of Objects and Reasons, the PWDVA recognizes domestic violence as a serious human rights concern and deterrent to development. It further mentions that since existing criminal law does not address this phenomenon in its entirety, there is a need to enact a civil law aimed "to provide for more effective protection of rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family".

8. Section 12(1) requires the Magistrate to take into consideration the Domestic Incident report. However the Domestic Incident Report is not mandatory for passing orders and/ or shall be taken into consideration only in cases where it has been filed.

9. The Apex Court in the matter of ***Nandkishor vs. Kavita and Ors. MANU/MH/0957/2009*** held that the trial court can grant relief under the Act without considering the report of Protection Officer. Observation of the court: The point as regards calling of the report from the Protection Officer or Service Provider is concerned one will have to interpret provisions of Section 12 of the Act and the said interpretation has to be in favour of the person, who is in need of maintenance and in particular interim maintenance. Report from the Protection Officer or Service Provider has to be gathered and it would assist the Court for the purposes of doing complete justice in the matter. At the same time, it is expected that the trial Court has to pass an interim order as early as possible. If the trial Court, who is required to pass an interim order, keeps on waiting to get the report of the Protection Officer or Service Provider, it would entail the delay and the idea of considering the case of a needy person at the interim stage will be actually defeated. Therefore, the court observed that it is not necessary in each and every case to obtain a report from the Protection Officer or Service Provider to decide application for interim relief. If on the basis of record before the Court, the Court is in a position to arrive at a just and proper conclusion, it will be open for the Court to do so.

10. The Apex Court in the matter of ***Ajay Kaul & Ors. v. State of J&K MANU/JK/0075/2019*** reiterating the earlier view held that before passing any order under section 12 of the Act, it is not mandatory for the judicial magistrate to consider DIR i.e. “Domestic Incident Report” and observed as follows:

> On a conjoint reading of Sections 9 and 12 of the DV Act, it is manifestly clear that it is duty of the Protection Officer to work under the control and supervision of the Magistrate and to perform duties imposed upon him by the Magistrate and in case, he has received a complaint on domestic violence then to make a domestic incident report and submit it to the Magistrate, as well as to forward copies of the complaint to the Police Officer in charge of the police station within local limits of whose jurisdiction, domestic violence is alleged to have been committed. The proviso added to Section 12(1) of the DV Act is only to the effect that in case a domestic incident report has been received by the Magistrate, the same shall be considered before passing any order on an application received. ***Section 12 of the DV Act per sedoes not hold that a Magistrate on receipt of complaint is obligated to call for a domestic incident report, before passing any order on an application. So it is not mandatory for a Magistrate to obtain a domestic incident report before the Magistrate passes any order provided under various section of Act***; so receipt of domestic incident report is not a prerequisite for issuing a notice to the respondent. Magistrate, on the basis of an application supported by affidavit, on being satisfied can even grant ex parte orders in favour of the aggrieved person under Sections 18, 19, 20, 21 or 22 of the DV Act. Proviso to Section 12(1) only stipulates that the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider. Section 12(1) does not directly stipulate that a report 'shall' be called for, before any relief can be granted.

11. In view of the principles enunciated as above, the solitary ground on which the Petitioner assailed the complaint finds no merit to sustain.

12. The CRLMC being devoid of merit stands dismissed.

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2024 (I) ILR-CUT-690

CHITTARANJAN DASH, J.

CRLMC NO. 4314 OF 2023

J. SRINIVAS KUMAR & ORS. ….. Petitioners

-V-

STATE OF ODISHA & ANR. …..Opp.Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 156(3) – Complaint under the section – Whether the Complaint having the verification only without the support of affidavit is maintainable? – Held, No.

Case Laws Relied on and Referred to :-

1. (2015) 6 S.C.C.287: Priyanka Srivastava & another Vrs. State of Uttar Pradesh & Ors.
2. 2023 (1) OLR-389 : Anil Kumar Agarwal @ Mandothia Vrs. State of Odisha & Anr.

For Petitioners : Mr. M.K. Mohanty
For Opp.Parties: Mr. B.K. Ragada, AGA & Ms. P. Naidu (for O.P.2)

JUDGMENT Date of Judgment :09.01.2024

CHITTARANJAN DASH, J.

1. Heard learned counsel for the Petitioners and the State.

2. By means of the present application, the Petitioner seeks the indulgence of this Court to quash the proceeding in G.R. Case No. 697 of 2011 on the files of learned S.D.J.M., Berhampur along with the order dated 10.07.2014 passed by the learned S.D.J.M., Berhampur in G.R. Case No. 697 of 2011.

3. The background facts of the case are that the Opp. Party No. 2 filed complaint case bearing ICC No. 83 of 2011 against present petitioners in the Court of SDJM, Berhampur in which it has been alleged that she married to the Petitioner No.1 herein who is the son of one J. Sareswar Rao and J. Krishna Beni of Visakhapatnam on 30.09.2009 at Visakhapatnam as per Hindu Vedic Rights and customs in presence of family members. At the time of marriage the Opp. Party No.2's father had given an amount of Rs. 5,00,000/- towards dowry and besides that 15 Tola gold and more than one Kg. Silver Ornaments and other household articles. After one month of marriage the mother-in-law and sister-in-law inflicted torture on the Opp. Party No.2 demanding more dowries. After the marriage, for first time the Opp. Party No.1 came to the house of her parents at Berhampur on 01.12.2009 and the in-laws asked Opp. Party No.2 to bring additional amount of Rs.15,00,000/- towards dowry. The mother-in law, two Sister-in-laws and Husband of 2nd Sister-in-law persuaded the father of Opp. Party No.2 for giving an amount of Rs.15,00,000/- towards additional dowry for purchasing a house adjoining to the house of the present petitioner in the name of Opp. Party No.2. However, the demand for the sum of Rs.15,00,000/-, could not be fulfilled by the father of Opp. Party No.2. The Opp. Party No.2 went to Visakhapatnam on 23.01.2010 and thereafter they once again started inflicting torture both physically and mentally. During her stay in Visakhapatnam on 09.03.2010 it was found that the Opp. Party No.2 became pregnant.As her husband compelled for abortion and the Opp. Party No.2 did not agree for the same, her husband physically assaulted her and attempted to kill her by strangulation. The said fact was intimated by Opp. Party No.2 to her father. In any case for the ill treatment of the in-laws, the Opp.Party wife lodged a complaint before the Mahila P.S. Berhampur on 12.04.2011 but the said case was not registered for which she filed the complaint petition in the court of learned SDJM, Berhampur which was registered as ICC No. 83 of 2011.

4. It is submitted by learned counsel for the Petitioner that the complaint Petition is only appended with a verification and is not supported by any affidavit, whereas the learned S.D.J.M., Berhampur directed the OIC of Gosaninuagaon P.S. to investigate the matter U/s. 156(3) Cr.P.C and on the basis of the said direction the concerned P.S registered the FIR vide Gosaninuagaon P.S Case No. 59(13) of 2011

which corresponds to the G.R. Case No. 697 of 2011 on the files of the S.D.J.M., Berhampur. It is further submitted by learned counsel for the Petitioner that in the meanwhile the charge sheet was submitted and cognizance has been taken. It is also submitted by learned counsel for the Petitioner that the Criminal Proceeding in G.R. Case No.697 of 2011 as well as the order of cognizance under Annexure-3 is not in conformity with law and as such is liable to be quashed.

5. The Apex Court in the matter of ***Priyanka Srivastava & another Vrs. State of Uttar Pradesh & others reported in (2015) 6 Supreme Court cases 287*** held as follows:-

> XXX XXX XXX
>
> A stage has come in this country where 156(3) CrPC applications must be supported by an affidavit duly sworn by the applicant who seeks invocation of the jurisdiction of the Magistrate under the said provision. This affidavit can make the applicant more responsible. There is compulsion to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. The warrant for giving a direction that an application under Section 156(3) CrPC be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3) Cr.P.C

6. The learned counsel relied on the decisions in the matter of ***Anil Kumar Agarwal @ Mandothia Vrs. State of Odisha and another reported in 2023 (1) OLR-389***, wherein this Court has held as follows-

> 3. Mr. Mohit Agarwal, learned counsel appearing for the Petitioner places reliance on the decision in Priyanka Srivastava v. State of Uttar Pradesh (2015) 6 SCC 287 to urge that the complaint, even if it were to be treated as an application under Section 156(3) Cr.P.C, had to be supported by an affidavit. As explained by the Supreme Court, this was a safeguard against abuse of the power thereunder.
>
> 4. Despite notice having been served, none appears on behalf of Opposite Party No.2.
>
> 5. Indeed, it is seen that there was no denial of the averments in the petition that the complaint filed by Opposite Party No.2 was not supported by an affidavit. In fact, there was no prayer for treating it as an application under Section 156(3) Cr.P.C. Therefore, the order dated 31st October, 2016 of the S.D.J.M., Angul referring the complaint under Section 156(3) Cr.P.C. to the PS Angul for registration of the FIR was itself beyond jurisdiction.
>
> 6. Assuming that such a complaint could be treated as anapplication Section 156(3) Cr.P.C. then as explained by the Supreme Court in Priyanka Srivastava (supra), it had to be supported by an affidavit which obviously was not. The legal positions as explained by the Supreme Court in the aforementioned case are as under:

> "29.At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A Court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same.
>
> 30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible.We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons.That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.
>
> 31. We have already indicated that there has to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/ family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari v. State of U.P. (2014) 2 SCC 1 are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."
>
> 7. Indeed, in the present case, in absence of an affidavit in support of a complaint, the learned S.D.J.M., Angul ought not to have entertained it at all much less passed an order under Section 156(3) Cr.P.C. requiring the P.S. Angul to register it as an FIR. Consequently, the aforementioned order dated 31st October, 2016 of the learned S.D.J.M., Angul in 1CC No. 187 of 2016 and the consequential Angul P.S. Case No.625 of 2016 dated 3rd December, 2016 are hereby quashed.

7. Having regard to the aforesaid discussion by the Apex Court as well as the coordinate Bench of this Court, it is no more res integra that the complaint filed by the Complainant ought to have appended with an affidavit so as to ensure that the averments made therein are genuine. Further, the truthfulness and genunity of the allegations as well as the veracity of the allegations made in the complaint can be assured and would no way prove abortive not only in the context of the case but

would not be prejudicial to the interest of the accused. In the instant case, the complaint is simply appended with a verification and is not supported by affidavit and whereas the cognizance has been taken by the learned court below without being alive of the same that has already been set at rest as of now and as such cannot be sustained in the eye of law. The further proceeding in G.R. Case No. 697 of 2011 corresponding to Gosaninuagaon P.S Case No. 59(13) of 2011 on the files of the S.D.J.M., Berhampur stands quashed.

8. The CRLMC is accordingly disposed of.

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2024 (I) ILR-CUT-694

SIBO SANKAR MISHRA, J.

W.P.(C) NO.31572 OF 2021

Dr. KSHETRABASI THATOI ....Petitioner

-V-

STATE OF ODISHA & ANR. ...... Opp.Parties

SERVICE LAW – Double Jeopardy – Due to pendency of criminal proceeding the petitioner's case was not considered for promotion although DPC had recommended for promotion – Sealed cover procedure has been adopted – Whether non-completion of proceeding amounts to double Jeopardy? – Held, Yes – Un-explained prolongation of criminal trial not only violate the constitutional rights of an accused but also the statutory and other rights, for that matter a delinquent officer/government servant impending such delayed trial is indeed a case of double Jeopardy. (Para 8)

Case Laws Relied on and Referred to :-

1. (1991) 4 SCC 109 : Union of India & Ors. Vs. K.V. Jankiraman & Ors.
2. (1995) 2 SCC 570 : State of Punjab & Ors. Vs. Chaman Lal Goyal.
3. (1992) 1 SCC 225 : A.R.Antulay Vs. R.S.Nayak & Anr.

For Petitioner : Mr. G. Sinha, Mr. A. K. Parida
For Opp.Parties : Mr. A. K. Nanda, AGA

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 consider to give promotion to him to the cadre Group A (Senior Branch) to Junior Administrative Officer (Joint Director) and Selection Grade-II (Additional Director Level-II) and to grant him all consequential service benefits. The Petitioner is facing

a criminal prosecution initiated in the year 2010, 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 a disciplinary proceeding initiated by the department against him0n 12.09.2011.

2. The said Writ Petition indeed was heard at length on 08.10.2021. The Coordinate Bench of this Court after hearing both parties was pleased to allow the Writ Petition. Relevant is to reproduce the order dated 08.10.2021 passed by learned Single Judge :-

> *"2. Heard learned counsel for the parties.*
>
> *3. The petitioner has filed this application seeking direction to the opposite parties to give him promotion to the rank of Junior Administrative Grade (Joint Director) from 06.10.2018 and Selection Grade-II (Additional Director Level-II) from 30.04.2020 in Odisha Medical & Health Service Cadre, i.e., the date from which his immediate juniors got such promotion, and to grant all consequential service and financial benefits including further promotion within a stipulated time.*
>
> *4. 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.*
>
> *5. This Court considering such situation has already Order No. 01 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.*
>
> *6. Fact involving the case reveals that there is one disciplinary proceeding pending against the petitioner and one the vigilance proceeding pending in the court of Special Judge, Vigilance, Bhubaneswar in T.R. Case No.37 of 2011 arising out of Bhubaneswar Vigilance P.S. Case No.23 of 2010. Involving the allegation against the petitioner, it appears the Vigilance Proceeding initiated in the year 2010, but charge-sheet involving the Vigilance case was submitted in the year 2011. However the said vigilance case is yet to be disposed of. Pleading also further made clear that one disciplinary proceeding is pending against the petitioner on the same allegation. In this background of case an allegation is made that promotion of the petitioner taking effect in the year 2018 & 2020 has been kept in sealed cover only on the premises that a vigilance proceeding and disciplinary proceeding involving the petitioner are pending since 2010 and 2011 respectively. 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 and departmental proceeding. It is also not known when the Vigilance Proceeding initiated in the year 2020 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, Health & Family Welfare Department-O.P. No.1 to give promotion to the petitioner to the rank of Junior Administrative Grade (Joint Director) & Selection Grade-II Page 3 of 3 (Additional Director Level-II) in OMHS cadre from the date of his juniors and batchmates got such promotion. However the promotion 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 the rank of Junior Administrative Grade (Joint Director) & Selection Grade-II (Additional Director Level-II) in OMHS cadre 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.*

7. 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 08.10.2021 being W.A. No.293 of 2022 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 disposal of the Writ Petition. Relevant is to quote the order of the Division Bench dated 27.03.2023:-

"1. In this writ appeal, the impugned order dated 7th September, 2021 was passed by the learned Single Judge on the very first day of hearing without giving an opportunity to the Appellants/State to file any reply.

2. In identical matters, which have been listed today, this Court has while setting aside the impugned order, remanded the matter to the learned Single Judge with specific time-bound directions. In those appeals, the Respondents have been represented by their respective lawyers.

3. As far as the present writ appeal is concerned, since none is appearing for the Respondent yet despite notice, this Court, instead of again issuing fresh notice in this writ appeal, considers it appropriate to set aside the impugned order of the learned Single Judge and direct that the writ petition shall be listed in the Roster Bench of the learned Single Judge on 27th June, 2023. The Registry will telephonically inform the learned counsel appearing for the Respondent herein, i.e., the writ Petitioner to remain present before the learned Single Judge on that date. The learned counsel for the State will of course remain present before the learned Single Judge on that date.

4. The learned Single Judge is requested to issue directions for completion of pleadings in a time bound manner and fix the date of hearing of the writ petition so that it can be expeditiously disposed of along with other similar writ petitions which have been directed to be listed before the learned Single Judge in the Roster Bench on 17th July, 2023.

5. The writ appeal is disposed of with these directions.

6. An urgent certified copy of this order be issued as per rules."

After relegation, the matter was heard by the learned Single Judge on 27.06.2023, 11.09.2023, 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 three opportunities to file the counter affidavit, but preferred not to file the same, hence the matter was heard.

4. Heard Mr. G. Sinha, 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. G. Sinha, 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 ad-hoc 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 2018 & 2020, the DPC has recommended the case of the Petitioner for promotion, which has been kept in the sealed cover without even once subjecting 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 2010 being Bhubaneswar Vigilance P.S. Case No.23 of 2010 corresponding to T.R. Case No.37 of 2011. Although charge-sheet was filed on 26.07.2011, but the trial of the proceeding is moving in the snail's pace since last about 13 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 withhold 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 held 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."*

10. 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."*

11. Therefore, for the foregoing reasons I feel it appropriate to allow the Writ Petition directing the State-Opposite Parties to give promotion to him to the cadre Group A (Senior Branch) to Junior Administrative Officer (Joint Director) and Selection Grade-II (Additional Director Level-II) 06.10.2018 and 30.04.2020 respectively 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), Bhubaneswar in Bhubaneswar Vigilance P.S. Case No.23 of 2010 under Section 13(2) r/w 13(1) (d) PC Act.

12. With the above direction, the Writ Petition stands disposed of.

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2024 (I) ILR-CUT-700

SIBO SANKAR MISHRA, J.

CRLMC NO. 279 OF 2023

RAKESH CHANDRA SAHU ..….Petitioner

-V-

STATE OF ODISHA ……Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Petitioner seeks to quash the entire criminal proceeding along with cognizance order passed by special Judge, Phulbani on the ground that other co-accused persons have been acquitted – Petitioner is the owner of the offended vehicle – However there is no material placed on record or any allegation made against him regarding his presence on the spot where the contraband was apprehended from the other accused person – Whether petition for quashing should be allowed? – Held, Yes – Putting the petitioner to trial on the strength of the evidence available on record would be a futile exercise. (Paras 6-7)

Case Law Relied on and Referred to :-

1. AIR 1966 ALL 19 : Diwan Singh Vs. the State.

For Petitioner : Mr. J. Bhuyan
For Opp.Party : Mr. B. K. Ragada, AGA

ORDER Date of Order : 31.01.2024

SIBO SANKAR MISHRA, J.

1. Heard learned counsel for the Petitioner and learned counsel for the State.

2. The Petitioner has filed the present petition under Section 482 Cr.P.C. seeking quashing of the entire criminal proceedings initiated against him and the cognizance order dated 26.12.2022 passed by the learned Special Judge, Phulbani in C.T. Case No.38 of 2022 on the ground that the other co-accused persons namely Rajesh Chandra Sahoo @ Liton, Arjun Behera and Debaraj Pradhan @ Dadhia have been acquitted by the learned trial Court after facing trial vide judgment dated 14.08.2023.

3. The gravamen of allegation against the Petitioner is that he is the owner of the offended vehicle. However, there is no material placed on record or any allegation made against him regarding his presence in the spot where the contraband was apprehended from the other accused persons. The Petitioner has brought to the notice of this Court the judgment of the learned Special Court Phulbani dated 14.08.2023 in C.T. Case No.38 of 2022 & 38(A) of 2022. The paragraph Nos.12 and 13 of the said judgment is relevant for the purpose of disposal of this petition which is reproduced below:-

"12. From the analysis of the evidences adduced by the prosecution, in its entirety, doe not inspire confidence about the allegations of search and seizure of ganja by the police especially when the independent witnesses have completely denied the factum of seizure, the brass seal has never been produced before the Court, the chemical examination report has not been brought to the record and that there are serious discrepancies in the evidences adduced by the prosecution and the same are not cogent and trustworthy to hold the accused persons guilty of the offence punishable under section 20(b)(ii)(C)/29 of the N.D.P.S. Act.

13. To sum up, I find that the prosecution has failed to prove its case and prove the charges leveled against the accused persons. Resultantly, the accused persons are found not guilty for the offence punishable under section 20(b)(ii)(C)/29 of the N.D.P.S. Act and are hereby acquitted under section 235(1) Cr.P.C. The accused person namely Rajesh Chandra Sahu @ Liton be set at liberty forthwith, if his detention is not required in any other cases. The accused persons namely Arjuna Behera and Debraj Pradhan be discharged from their bonds for bail and the same be cancelled and they are set at liberty forthwith, subject to restrictions/limitations-imposed U/s. 437(A) of Cr.P.C."

4. Perusal of the judgment indicates that the prosecution has not even filed the chemical analysis report in the present case and none of the independent witnesses have supported the prosecution. Therefore, the trial Court recorded an acquittal order in favour of the co-accused persons those who were apprehended from the spot. The allegation against the Petitioner is that he is the owner of the offending vehicle. He was not in the spot from where the contrabands were seized.

5. Mr. Ragada, learned Additional Government Advocate for the State has opposed the prayer made by the Petitioner. However, he could not controvert the fact that no chemical analysis report is placed on record and none of the independent witnesses have supported the prosecution while the other main co-accused persons were subjected to trial.

6. Taking into consideration the aforementioned facts and circumstances of the case, I am of the opinion that putting the Petitioner to trial on the strength of the evidence available on record would be a futile exercise. Therefore, to meet the ends of justice, it would be appropriate that the entire prosecution against the Petitioner is quashed. Benefit would be to rely upon two separate judgments of different High Courts which are dealt with the similar circumstances. The Allahabad High Court in the case of **Anant Mishra @ Amit Mishra @ Surya Prakash Mishra vs. State of U.P. and another** while dealing with the similar situation interfered under Section 482 Cr.P.C. and quashed the entire proceeding. The relevant part of the judgment reads as under:-

"After going through the judgments relied by learned counsel for the applicant, it is very much clear that Court has held that considering the testimony of witnesses, if one accused is acquitted, no criminal proceeding can be sustained against co-accused of the same set of witnesses and in the present case too, there is no separate witness and on the basis of testimony of same prosecution witnesses, main accused was acquitted by the court below, Whenever there is no prospect of the case ending in conviction, valuable time of court should not be wasted for holding trial only for the purpose of completing

> *the procedure to pronounce the conclusion on future date. Therefore, criminal proceeding cannot be permitted to continue against the applicant."*

Similarly, the Allahabad High Court in another judgment in the case of **Diwan Singh vs. the State** reported in **AIR 1966 ALL 19** have also taken the similar view. The relevant part of the said judgment reads as under:-

> *"5. The judgment of the learned Sessions Judge in Criminal Appeal No.262 of 1963 setting aside the conviction and sentence of Manoliar was not challenged by the State by filing an appeal and, as such, has become final. It is no doubt true that the learned Sessions Judge acquitted Manohar on a technical ground because, in his opinion, "the prosecution suffers from a patent infirmity creating reasonable doubt regarding the identity of the alleged fire arms." He did not disbelieve the evidence of the prosecution on facts. The reasoning given by the learned Sessions Judge in acquitting Manohar is not very appealing but the fact remains that Manohar who was arrested along with the applicant on the same charge and against whom the same evidence has been produced by the prosecution, has been acquitted, while the appeal of the applicant against his conviction was dismissed by the learned 1st Additional Sessions Judge of Etawah. In view of the acquittal of Manohar on the same facts and on the same evidence which has become absolute, it is not possible to maintain the conviction of the applicant.*
>
> *6. If two persons are prosecuted, though separately, under the same charge for offences having been committed in the same transaction and on the basis of the same evidence, and if one of them is acquitted for whatever may be the reason and the other is convicted, then it will create an anamalous position in law and is likely to shake the confidence of the people in the administration of justice. Justice is not only to be done but also seem to be done. Therefore, I am clearly of opinion that as has been held in the case of Pritam Singh v. State of Punjab. (S) AIR 1956 SC 415, the principle of stare decisis will apply in the present case and the applicant's conviction cannot be sustained."*

7. Accordingly, the petition is allowed and the cognizance order dated 26.12.2022 passed by the learned Special Judge, Phulbani in C.T. Case No.38 of 2022 is quashed and the entire prosecution lodged against the Petitioner is dropped in the case relating to the subject F.I.R. is concerned.

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2024 (I) ILR-CUT-702

A.C. BEHERA, J.

SA NO.188 OF 1987

PARA MAHANTA & ORS. ….Appellants

-V-

DURSU MUNDA ….Respondent

(A) CODE OF CIVIL PROCEDURE, 1908 – Order 26 Rule 10 – Report of Civil Court Commissioner – Evidentiary Value – Discussed.

(B) CODE OF CIVIL PROCEDURE, 1908 – Section 96 – First Appeal – Whether in this stage re-hearing/re-open of suit is permissible? - Held, Yes.

Case Laws Relied on and Referred to :-

1. 2008(4) CCC 239 (P&H) : Gurbax Singh Vrs. Karnail Singh.
2. 2008 (3) CCC 173 (P. & H.) : Jagat Singh and others Vrs. Srikishan Dass & Ors.
3. 2017 (I) CLR (SC) 256 : Kundan Lal & another Vrs. Kamruddin & another.
4. 2018 (II) OLR (NOC) 987 : Smt. Susama Rani Dhala Vrs. Nirupama Biswal & another.
5.1996 (I) OLR 342 : Smt. Lalteomoni Mohanty Vrs. First Addl. Dist. Judge, Cuttack & Ors.
6. 2023 (3) CCC 87 (Raj.) : Umar Khan (Deceased) Vrs. Sumer Khan.

For Appellants : Mr. S. Mahanta (On behalf of Mr.K.B.Patnaik)
For Respondent: Mr. A. Routray

JUDGMENT Date of Hearing : 08.11.2023 : Date of Judgment :30.11.2023

A.C.BEHERA, J.

1. This Second Appeal has been preferred against the reversing judgment.

2. The predecessors of the Appellant Nos.1 to 6 along with Appellant No.7 of this Second Appeal were the plaintiff Nos.1 to 3 in the suit vide T.S. No.12 of 1978 and they were the Respondent Nos.1 to 3 in the First Appeal vide T.A. No.14/1 of 1983-84-I.

The Respondent No.1 of this Second Appeal was the defendant No.1 in the suit vide T.S. No.12 of 1978 and he was the sole Appellant in the First Appeal vide T.A. No.14/1 of 1983-84-I.

The Respondent Nos.8 and 9 of this Second Appeal were the defendant Nos.2 and 3 in the suit vide T.S. No.12 of 1978 and they were the Respondent Nos.4 and 5 in the First Appeal vide T.A. No. 14/1 of 1983-84-I.

3. The suit of the plaintiffs vide T.S. No.12 of 1978 was a suit for declaration, confirmation of possession and permanent injunction, in alternative for delivery of possession.

4. The case of the plaintiffs in the suit vide T.S. No.12 of 1978 was that, the suit properties are two plots i.e. Plot No.83 measuring area Ac.0.47 decimals under Khata No.16/Ka and Plot No.83/1/416 measuring area Ac.0.12 decimals under Khata No.16/Ka/74 in village Gaduatopa under Barbil Tahasil in the District of Keonjhar.

The suit properties were settled in the name of the plaintiff No.1 and as well as the father of the plaintiff Nos.2 and 3 in Jagiri Case No.116 of 1967 after abolition of the estates as per Orissa Estates Abolition Act, 1951 and accordingly, the plaintiffs being the owners of the suit properties, they had been possessing the same.

In the year 1975, the defendant No.1 forcibly entered into the suit properties, for which, at the instance of the plaintiff No.1, a proceeding under Section 145 of the Cr.P.C. vide Crl. Misc. Case No.60 of 1975 was initiated against the defendant No.1 in respect of the suit properties. In that proceeding under Section 145 of the Cr.P.C., the suit properties were attached. But, subsequent thereto, that proceeding vide Crl. Misc. Case No.60 of 1975 was dropped. For which, the plaintiffs approached the Civil Court by filing the suit vide T.S. No.12 of 1978 against the defendant No.1 arraying defendant Nos.2 and 3 as the proforma defendants praying for declaration of their right, title and interest over the suit properties and also for confirmation of their possession thereon and also for permanent injunction, in alternative for delivery of possession through Court, if they (plaintiffs) are found to be dispossessed from the suit properties by the defendant No.1 forcibly during the pendency of the suit.

5. The defendant Nos.2 and 3 were set ex parte without filing any written statement being the supporters of the plaintiffs.

The defendant No.1 contested the suit of the plaintiffs by filing his written statement denying the averments made by the plaintiffs in their plaint by taking his stands specifically that, the suit properties are under Plot No.86, but not under Plot No.83. The plaintiffs were never in possession over the suit properties. He (defendant No.1) is in possession over the suit properties since last 20 years.

The further case of defendant No.1 was that, if it will be found that, the suit properties are in the name of the plaintiffs, still then, he (defendant No.1) has acquired right, title and interest over the suit properties by way of adverse possession through his continuous peaceful possession over the same for more than 12 years. For which, the suit of the plaintiffs is not maintainable under law and as such the plaintiffs have no cause of action to file the suit. The suit of the plaintiffs is also bad for nonjoinder and misjoinder of parties. So, the suit of the plaintiffs is liable to be dismissed.

6. Basing upon the aforesaid pleadings and matters in controversies between the plaintiffs and defendant No.1, altogether seven numbers of issues were framed by the Trial Court in T.S. No.12 of 1978 and the said issues are:-

Issues

(i) Is there any cause of action to bring the suit by the plaintiffs?
(ii) Is the suit barred by limitation?
(iii) Is the defendant No.1 acquired title over the suit land by adverse possession?
(iv) Whether the suit is bad for nonjoinder and misjoinder of the parties?
(v) Whether the suit plots are under Plot No83 and 83/1/416?
(vi) Whether the plaintiffs are the owner of the suit land?
(vii) To what relief the plaintiffs is entitled?

7. In order to substantiate the aforesaid reliefs sought for by the plaintiffs against the defendant No.1, they examined altogether three 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 12. But, on the contrary, the defendant No.1 examined four (4) witnesses from his side including him as D.W.1 and relied upon two (2) documents on his behalf vide Exts.A and B.

8. After conclusion of hearing and on perusal of the materials, documents and evidence available on Record, the Trial Court answered all the issues in favour of the plaintiffs and against the defendant No.1 and basing upon the findings and observations made in the issues in favour of the plaintiffs and against the defendant No.1, the Trial Court decreed the suit of the plaintiffs on contest against the defendant No.1 and ex-parte against the defendant Nos.2 and 3 vide its judgment and decree dated 18.10.1982 and 08.11.1982 respectively and declared the right, title and interest of the plaintiffs over the suit properties and injuncted the defendant No.1 permanently from entering into the suit properties entitling them (plaintiffs) to get possession of the suit properties through Court, as they are found to have been dispossessed in the meantime during the pendency of the suit assigning the reasons that, the plaintiffs have proved their ownership over the suit properties, but the defendant No.1 has no interest on the same.

9. On being dissatisfied with the aforesaid judgment and decree dated 18.10.1982 and 08.11.1982 respectively passed by the Trial Court in the suit vide T.S. No.12 of 1978 in favour of the plaintiffs and against the defendant No.1, the defendant No.1 challenged the same by preferring the First Appeal vide T.A. No.14/1 of 1983-84-I being the Appellant against the plaintiffs and the Respondent Nos.2 and 3 by arraying them as Respondents.

10. After hearing, the First Appellate Court allowed the First Appeal vide T.A. No.14/1 of 1983-84-I of the defendant No.1 on contest against the respondents vide its judgment and decree dated 31.03.1987 and 10.04.1987 respectively and set aside the judgment and decree of the Trial Court on the ground of inacceptability of the report of Civil Court Commissioner.

11. On being aggrieved with the aforesaid judgment and decree dated 31.03.1987 and 10.04.1987 respectively passed by the First Appellate Court in T.A. No. 14/1 of 1983-84-I in favour of the defendant No.1 and against the plaintiffs, they (plaintiffs) along with proforma Respondent Nos.2 and 3 challenged the same by preferring this Second Appeal being the Appellants against the defendant No.1 by arraying him (defendant No.1) as Respondent.

12. This Second Appeal has been admitted vide its Order No.5 dated 03.02.1988 on formulation of the substantial question of law i.e.:-

> *"if without recording any finding the appellate court could reverse the decision of the trial court?"*

13. I have already heard from the learned counsels of both the sides.

14. The suit properties are Plot No.83 under Khata 16/Ka and Plot No.83/1/416 under Khata No.16/Ka/74. The R.O.Rs. of the suit properties vide Exts.1 and 2 under Khata Nos.16/Ka and 16/Ka/74 stand in favour of the plaintiffs.

The defendant No.1 (Respondent in the Second Appeal) has specifically pleaded in his written statement that, the suit properties are in Plot No.86, but not in Plot no.83 and he (defendant No.1) is the owner and in possession over the Plot no.86 and if the suit properties will be found in the name of the plaintiffs, still then, he (defendant No.1) has acquired right, title and interest over the suit properties through adverse possession by remaining in peaceful possession on the same for more than 12 years.

Through the aforesaid pleadings of the defendant No.1 in his written statement in one way, he has claimed his ownership and possession over Plot No.86, but not over any of the suit plots, because the suit plots are Plot No.83 and 83/1/416.

15. Undisputedly, the R.o.Rs. of the suit properties vide Khata Nos.16/Ka and 16/Ka/74 (Exts.1 and 2) stand in favour of the plaintiffs.

As such, when the plaintiffs are claiming their title over suit Plot Nos.83 and 83/1/416, but in one way the defendant is claiming his title over an another plot vide Plot No.86, which is not the suit plot. Undisputedly, the suit plots and the undisputed Plot No.86 are separate plots in the R.O.Rs. and maps.

Through the aforesaid pleadings of the defendant No.1 in his written statement in an another way, he (defendant No.1) has claimed his title over the suit properties through adverse possession.

16. As per law, the claim of adverse possession of the defendant No.1 over the suit plots itself is his indirect admission to the ownership of the plaintiffs over the suit plots and as well as to the identities of the suit properties.

17. On this aspect, the propositions of law has already been clarified in the ratio of the following decisions:-

(i) ***2008(4) CCC 239 (P&H)—Gurbax Singh Vrs. Karnail Singh—Adverse Possession***— The plea of adverse possession necessarily implies the admission of the title of the other side.

(ii) ***2008 (3) CCC 173 (P. & H.)—Jagat Singh and others Vrs. Srikishan Dass and others—Suit for possession filed by plaintiff***—Defendant raised plea of adverse possession over the suit land—Held, once a plea of adverse possession is raised, it pre-supposes the title of the plaintiff over the suit land.

When the title of the plaintiff over the suit land is deemed to be admitted by the defendant, then the contention/argument of the defendant that, the suit property is not identifiable falls to the ground.

18. When in view of the ratio of the above decisions, as per law, the defendant No. 1 has admitted the title of the plaintiffs over the suit properties by claiming his

own title on the same through adverse possession without disputing the identities of the suit properties and when the suit plots and the undisputed Plot No.86 are different and separate plots in all the revenue records including in the R.o.Rs. and maps and when the document vide Exts.1 and 2 coupled with the oral evidence adduced on behalf of the plaintiffs are showing the ownership of the plaintiffs over the suit properties, then at this juncture, the suit of the plaintiffs for declaration of their title over the suit properties can never be denied. Because, the defendant No.1 has no claim over any of the suit plots, as he has claimed his ownership over an undisputed plot vide Plot No.86, which is not the suit plot and he (defendant No.1) has admitted to the ownership of the plaintiffs over the suit properties through his plea of adverse possession.

19. The conclusion drawn above in support of the ownership of the plaintiffs over the suit properties finds support from the ratio of the following decisions:-

> (i) ***2017 (I) CLR (SC) 256—Kundan Lal & another Vrs. Kamruddin and another—Civil Trial***—When the appellant was in possession and was allotted different survey number, then he has no right to claim the suit property.
>
> (ii) ***2018 (II) OLR (NOC) 987—Smt. Susama Rani Dhala Vrs. Nirupama Biswal and another—CPC, 1908—Section 100***—Second Appeal—Title of both the parties with respect to their respective plots is not disputed—Both the Court on an anatomy of pleadings and evidences held that the defendants have not encroached upon the plaintiff's land—There is no perversity in the findings of the Courts below—The appeal fails and is dismissed.

20. When as per the discussions and observations made above, it is held that, the identity of the suit properties are not under dispute and when the title of the plaintiffs over the suit properties finds support from the undisputed documents vide Exts.1 and 2 in their favour and when the defendant No.1 has no claim over the suit plots and when he (defendant No.1) is claiming his title over an undisputed separate plot vide Plot No.86 and when the defendant No.1 has indirectly admitted the ownership of the plaintiffs over the suit properties, then at this juncture, the First Appellate Court should not have discarded the findings and observations made by the Trial Court only on the ground of inacceptability of the report of Civil Court Commissioner without considering the other oral and documentary evidence available in the record. Because, the report of the Civil Court Commissioner is like any other evidence in the suit and the same is to be considered along with other evidence on Record.

21. On that aspect, the propositions of law has already been clarified in the ratio of the following decision:-

> ***1996 (I) OLR 342—Smt. Lalteomoni Mohanty Vrs. First Addl. Dist. Judge, Cuttack and others—Paragraph 5—CPC, 1908—Order 26 Rule 10—Report of the Civil Court Commissioner—Evidential value***— Report of Civil Court Commissioner is like any other piece of evidence in the suit— It is to be considered along with other evidence on record.

22. When the aforesaid other materials in the record than the report of the Civil Court Commissioner are establishing the ownership of the plaintiffs over suit properties and when the Trial Court has declared the right, title and interest of the plaintiffs over the suit properties taking into account all the evidence available on record and when as per law, the report of the Civil Court Commissioner is like any other evidence in the suit and the same is to be considered along with other evidence on Record, then at this juncture, the First Appellate Court should not have set aside the judgment and decree of the Trial Court only on the ground of inacceptability of the report of the Civil Court Commissioner without taking into account the other materials and evidence available in the record.

23. Here in the suit at hand, when other materials and evidence on Record as discussed above are in support of the claim of ownership of the plaintiffs over the suit properties, then at this juncture, the First Appellate Court should not have discarded the findings of the Trial Court assessing the report of the Civil Court Commissioner only.

As per law, it was the duty of the First Appellate Court to assess the entire evidence available on Record without assessing the report of the Civil Court Commissioner only.

24. The law in respect of the duties of the First Appellate Court has already been clarified in the ratio of the following decision:-

> ***2023 (3) CCC 87 (Raj.)—Umar Khan (Deceased) Vrs. Sumer Khan (Now deceased)—Paragraphs 10 & 13.9—CPC, 1908—Section 96—First Appeal***—First Appeal is always treated as the continuation of the civil suit—Virtually, First Appeal is re-hearing of civil suit and whole case is open for reconsideration.

25. When the First Appellate Court has passed the judgment in the First Appeal without considering the whole case, but only considering the report of the Civil Court Commissioner, then at this juncture, the judgment and decree of the First Appellate Court cannot be sustainable under law.

26. On analysis of the facts and law concerning to the substantial question of law of this Second Appeal, it is held that, there is justification under law for making interference with the judgment and decree passed by the First Appellate Court through this Second Appeal filed by the plaintiffs (Appellants). For which, there is merit in the Appeal of the Appellants. The same must succeed.

27. In the result, the Appeal filed by the Appellants is allowed on contest, but without cost.

The judgment and decree dated 31.03.1987 and 10.04.1987 respectively passed by the First Appellate Court in T.A. No.14/1 of 1983-84-I are set aside.

The judgment and decree dated 18.10.1982 and 08.11.1982 respectively passed by the Trial Court in T.S.No.12 of 1978 in favour of the plaintiffs and against the defendant No.1 are hereby confirmed.

2024 (I) ILR-CUT-709

A.C. BEHERA, J.

R.S.A. NO.269 OF 2014

ROHITA SAMAL ….Appellant

-V-

BILASH @ BILASINI MOHANTY & ANR. ….Respondents

(A) PARTITION ACT, 1893 – Section 04 – Dwelling House – Test to determine – Whether mere non-occupation of house for sometimes by the members of family will be sufficient indication of abandonment of dwelling house? – Held, No.

(B) PARTITION ACT, 1893 – Section 04 – Stranger – Meaning of – Discussed.

Case Laws Relied on and Referred to :-

1. 2019 (II) CLR-855 : Janardan Das (dead) through his L.Rs. and Others vrs. Durgadevi Thakurani and Others
2. 36(1970) CLT-275 : Kuntala Debi and others vrs. Nagu Naik & Ors.
3. AIR 1959 Orissa-173 : Bikal Swain vrs. Iswar Swain
4. AIR 1952 Allahabad-207 : Bhagirath vrs. Afag Rasul & another.
5. AIR 1969 Patna-270 : Kalipada Ash and another vrs. Tagar Bala Dasi & Ors.
6. AIR (37) 1950-Calcutta-111 : Boto Krishna Ghose vrs. Akhoy Kumar Ghose & Ors.
7. AIR 1971(Orissa) 198 : Bhim Singh and another vrs. Ratnakar Singh & Ors.
8. AIR 1990 (S.C.)-867 : Dorab Cawasji Warden vrs. Coomi Sorab Warden & Ors.
9. 2014(II) OLR-623 : Rajanibala Sahoo vrs. Manju Biswal & Ors.
10. AIR 1963 Madras-298 : Rukia Bi vrs. Rajia Bibi & another.
11. AIR 1971 Orissa-284 : Ahmad Khan and another vrs. Shaik Maijar & Ors.
12. 1998(I) OLR-586 : Surendranath Sahoo vrs. Mohendra Samantray & Ors.

For Appellant : Mr. A.K. Tripathy, C. Das, P.K. Moharana, P.K. Nayak

For Respondents : Mr. Bhaktahari Mohanty, Sr. Advocate, D.P. Mohanty, R.K. Nayak, T.K. Mohanty, P.K. Swain & M. Pal.

JUDGMENT Date of Hearing :08.11.2023 : Date of Judgment :30.11.2023

A.C. BEHERA, J.

1. This 2nd Appeal has been preferred against the reversing judgment.

2. The Respondent No.1 of this 2nd Appeal was the sole plaintiff in the suit filed in C.S. No.460 of 2009 and she was the appellant in the 1st appeal vide R.F.A. No.01 of 2011.

The appellant and the Respondent No.2 of this 2nd appeal were the defendants in the suit vide C.S. No.460 of 2009 and they were the respondents in the 1st appeal vide R.F.A. No.01 of 2011.

The suit of the plaintiff Bilash @ Bilasini Mohanty vide C.S. No.460 of 2009 was a suit for permanent injunction simpliciter.

As per the averments made by the plaintiff in her plaint, the suit land is Ac.0.09 decimals out of Ac.0.14 decimals of Plot No.2232 under Khata No.95 in village Rasasingh under Sadar Police Station in the district of Dhenkanal.

3. According to the plaintiff, Madan Khatua was her common ancestor. Madan Khatua died leaving behind his two sons, i.e. Bhaiga Khatua and Jogi Khatua. Bhaiga Khatua died leaving behind his two sons, i.e., Sanatan and Dibakar (defendant no.2) along with his wife Raibari.

The 2nd son of Madan Khatua, i.e., Jogi Khatua died in the year 1983 leaving behind his widow wife, three daughters and the children of his pre-deceased son Sridhar. The plaintiff Bilalsh @ Bilasini Mohanty is the 2nd daughter of Sridhar. Since Sridhar had no son, he had adopted Bikash, i.e., to the son of Bilalsh (plaintiff). The two sisters of the plaintiff Bilash is Kamili and Sumitra. Her mother Debaka Khatua is also alive. So, in the house of deceased Sridhar, plaintiff, her widow mother, her son (who was adopted by Sridhar) and her two sisters are residing.

4. Total area of suit Plot No.2232 is Ac.0.140 decimals. The total area of one undisputed Plot No.2233 is Ac.0.270 decimals. Both the plots vide Plot Nos.2232 and 22333 is under Khata No.95. All the properties under Khata No.95 including the suit land have been recorded jointly in the names of Sanatan Khatua and Dibakar Khatua sons of Late Bhaiga Khatua along with Raibari wife of Bhaiga and Jogi son of Madan.

5. According to the genealogy, Bhaiga's share is half and Jogi's share is half in both the plots vide Plots.2232 and 2233. Both the plots vide Plot Nos.2232 and 2233 are their ancestral joint undivided dwelling house. After the death of Madan Khatua, his two sons, i.e., Bhaiga and Jogi possessed the suit Plot Nos.2232 and 2233 amicably as per their convenience and constructed houses thereon. Jogi constructed his house over Plot No.2233 and Bhaiga constructed his house over suit Plot No.2232. The suit Plot No.2232 situated to the South of Plot No.2233 and the length of both the plots are East to West. Their ancestral houses (those were standing over the above two plots vide Plot Nos.2232 and 2233) have been demolished, for which, they are raising seasonal crops on the said Plot Nos.2232 and 2233 without abandoning their idea of erecting their residential houses on the same as before. Therefore, Plot Nos.2232 and 2233 are their undivided dwelling house. The recoded owners of suit Khata No.95 are now residing on other plots in the suit village at the nearby area of Plot Nos.2232 and 2233. The defendant no.1 (Rohita Samal) is a stranger to the family of the plaintiff. The defendant no.1(Rohita Samal) has managed to purchase the suit land, i.e., Ac.0.09 decimals out of Ac.0.14 decimals of suit Plot No.2232 from defendant no.2 on dated 19.08.2009 through Sale Deed No.4988 behind the back of the plaintiff. The husband of the plaintiff has purchased Ac.0.048 decimals out of Ac.0.14 decimals of that Plot No.2232 from Sanatan Khatua (brother of the defendant no.2). After obtaining the certified copy of the sale

deed of the defendant no.1, when, she (plaintiff) came to know that, he(defendant no.1) being a stranger to her family has purchased Ac.0.09 decimals out of Ac.0.14 decimals of suit Plot No.2232 from defendant no.2 and when the entire suit Plot No.2232 is their undivided dwelling house and when he (defendant no.1) is not entitled to possess the suit land (which is their undivided dwelling house) jointly with the plaintiff along with her family members being a stranger to their family and when she (plaintiff) apprehended that, the entry of defendant no.1 into the suit land on the strength of the sale deed executed by the defendant no.2 shall cause much inconvenience to their family, then, without getting any way, she (plaintiff) approached the civil court by filing the suit vide C.S. No.460 of 2009 against the defendants praying for restraining the defendant no.1 permanently from entering into or occupying the suit land on the basis of the Sale Deed No.4988 dated 19.08.2009 along with other reliefs to which, she (plaintiff) is entitled for as per law and equity.

6. Having been noticed from the trial court in C.S. No.460 of 2009, both the defendants contested the suit of the plaintiff by filing their written statement jointly taking their stands inter alia therein that, the suit of the plaintiff is bad for non-joinder of necessary parties, i.e. Sanatan and all the successors of Jogi and Sridhar. Section 44 of the T.P. Act, 1882, has got no applicability to the suit of the plaintiff. The plaintiff has not approached the court with clean hands. As the plaintiff has admitted separate possession and abandonment of Plot Nos.2232 and 2233 by her family members, she (plaintiff) is estopped under law to claim the relief of injunction against him (defendant no.1). It was the specific case of the defendants that, Jogi (2nd son of Madan) had demolished first his house over Plot No.2233 and shifted from there to an another place in the same village, which is about 400 meters away by digging a well there since last 40 years and the suit land has been utilizing by growing different types of crops. Thereafter, the members of the branch of Bhaiga also demolished their house on suit Plot No.2232 and shifted to an another place of the said village, which is about 300 meters away from there and they are residing there. For which, suit plot No.2232 was utilizing in growing different crops and vegetables. So, suit Plot No.2232 has lost its sanctity as dwelling house. When the recorded owners of suit Plot No.2232 and Plot No.2233 have demolished their respective houses on the same and they have shifted to other places in the same village for their residential purpose and when they were using the Plot Nos.2232 and 2233 in growing the vegetables and other crops, then under such circumstances, it is to be held and accepted that, the owners of suit Plot Nos.2232 and 2233 had abandoned their idea of erection of any house there later on. So, the purchase of the suit land from the defendant no.2 by the defendant no.1 through the aforesaid sale deed is a genuine and lawful purchase and the defendant no.2 has rightly exercised his power of selling the suit land to the defendant no.1. The husband of the plaintiff is also a stranger purchaser of the part of the suit plot like the defendant no.1. So, the suit land is not a part of any undivided dwelling house of the recorded owners thereof. That part, the defendant no.1 has already taken delivery of possession of the

suit land from the defendant no.2 since the date of his purchase and he (defendant no.1) has become the owner of the suit land. So, the question of affecting the privacy of the plaintiff through the purchase of the suit land by the defendant no.1 does not arise. Therefore, plaintiff is not entitled for the relief, i.e., permanent injunction in respect of the suit land against him(defendant no.1). So, the suit of the plaintiff is liable to be dismissed.

7. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether six numbers of issues were framed by the trial court in C.S. No.460 of 2009 and the said issues are:-

I S S U E S

(i) Whether the plaintiff has a cause of action to file the present suit?

(ii) Whether the suit is maintainable in its present form?

(iii) Whether the suit is bad for non-joinder of necessary parties?

(iv) Whether the suit land is the undivided dwelling house of Bhaiga and Jogi, the son, those are the sons of Madan Khatua?

(v) Whether the defendant no.1 is a stranger transferee and can be permanently injucted from entering into upon the suit land?

(vi) Whether the plaintiff is entitled to any other relief?

8. In order to substantiate the aforesaid reliefs sought for by the plaintiff, she (plaintiff) examined one witness from her side, i.e., her husband as P.W.1 and relied upon three documents on her behalf vide Exts. 1, 2 and 3. But, on the contrary, the defendants examined two witnesses from their side including the defendant no.2 as D.W.1 and relied upon one document vide Ext.A on their behalf.

9. After conclusion of hearing and on perusal of the materials, evidence and documents available in the record, the trial court answered all the issues except issue no.(iii) against the plaintiff and in favour of the defendants and basing upon the findings and observations made by the trial court in issue nos.4, 5, 1, and 2 dismissed the suit of the plaintiff on contest against the defendants vide its judgment and decree dated 19.11.2010 and 03.12.2010 respectively assigning the reasons that, when the suit Plot No.2232 has remained vacant for long years without any house on the same, then at this juncture, it is meaningless to treat it as an undivided dwelling house, for which, the question of injuncting the defendant no.1 from entering into the same does not arise.

10. On being dissatisfied with the aforesaid judgment and decree of the dismissal of the suit of the plaintiff vide C.S. No.460 of 2009 passed by the trial court, she (plaintiff) challenged the same by preferring 1st appeal vide R.F.A. No.01 of 2011 being the appellant against the defendants by arraying them (defendants) as respondents.

11. After hearing from both the sides, the 1st appellant court allowed the first appeal of the plaintiff vide R.F.A. No.01 of 2011 vide its judgment and decree dated

25.02.2014 and 07.03.2014 respectively and set aside the judgment and decree of the trial court and decreed the suit of the plaintiff on contest against the defendants and restrained the defendant no.1 permanently from entering and occupying the suit land on the basis of the registered Sale Deed No.4988 dated 19.08.2009 assigning the reasons that, the kissam of the suit Plot No.2232 had/has been continuing as "GHARABARI" in the RoR vide Ext.1 and there is no metes and bounds partition of the suit plot between the recorded joint owners thereof including the members of the branches of the plaintiff and the defendant no.1 is a stranger to the family of the recorded owners of the suit land including the plaintiff. Even though, they are presently residing on other plots and they are growing seasonal vegetables on the suit plot, still then, it cannot be held that, suit land has lost its sanctity as their undivided dwelling house. For which, the suit Plot No.2232 is held to be the undivided dwelling house of the plaintiff. Therefore, defendant no.1 being a stranger to the family of the recorded owners of the suit plot including the plaintiff is not entitled to posses the suit land jointly with the plaintiff and her co-sharers in view of the provisions of Section 44 of the T.P. Act, 1882.

12. On being aggrieved with the aforesaid judgment and decree passed by the 1st appellate court in R.F.A. No.01 of 2011 against the defendant no.1 and in favour of the plaintiff, he (defendant no.1) challenged the same by preferring this 2nd appeal being the appellant against the plaintiff by arraying her (plaintiff) as Respondent No.1 and so also arraying his vendor, i.e., defendant no.2 as Respondent No.2.

13. This 2nd Appeal has been admitted on the following substantial questions of law:-

> 1. Whether the findings of the lower appellate court are vitiated by misconception on the point of law regarding the dwelling house and his findings are based on no evidence?
>
> 2. Whether the land, which is not within the compact area of the residential house can be treated as part of the dwelling house under Section 44 of the T.P. Act?

14. I have already heard from the learned counsels of both the sides.

In order to assail the impugned judgment and decree of the 1st appellate court, the learned counsel for the appellant (defendant no.1) relied upon the ratio of the following decisions:-

> ***(i) 2019 (II) CLR-855 : Janardan Das (dead) through his L.Rs. and Others vrs. Durgadevi Thakurani and Others (Para-10)***
> ***Transfer of Property Act, 1882—Section 44—Suit****—Where the suit plots are not within the vicinity of the plaintiff's house and homestead and are not indispensable for his use and occupation of his dwelling house, suit under Section 44 of the Transfer of Property is not maintainable (Para-10)*
>
> ***(ii) 36(1970) CLT-275 : Kuntala Debi and others vrs. Nagu Naik and others****— Partition Act, 1893—Section 4 and Transfer of Property Act, 1882, Section 44— Dwelling house", meaning of—Pond of 2 acres situated at some distance from the residential house intervened by some cultivated land, if appurtenant to dwelling—While*

it is true that Courts in this country have taken the view that dwelling house would embrace not merely the actual structure or building but would include any adjacent building, cartilage, garden, courtyard and orchard and all that land is necessary for the convenient use and occupation of the house, it cannot cover land or a tank which would be located at a distance and there would be no physical affinity or appurtenance. (Para-6).

(iii) AIR 1959 Orissa-173 : Bikal Swain vrs. Iswar Swain Partition Act (1893), S.4—Scope and object—Conditions for applicability—Dwelling house not existing at time of transfer but constructed after words—Privilege of S.4 cannot be claimed.

Partition Act, 1893—Section 4 read with T.P. Act, 1882—Section 44—In order to attract the operation of Section4.

(1) There must be a dwelling house in existence belonging to an undivided family;

(2) A share thereof should have been transferred to a person who is not a member of such family;

3. The transferee should sue for a partition;

4. That a member of the family being a share-holder claims or undertakes to buy the share of the stranger transferee. It is incumbent upon the plaintiff to plead that there was in existence an undivided dwelling house and he must prove that a share thereof was transferred to the defendant before he can claim privilege under S.4.(Para-5)

Where the finding of the Court was that there was no dwelling house belonging to the undivided family in existence on the date of the transfer, the plaintiff is not entitled to the benefit of S.4 of the Partition Act. .(Para-6)

15. It is the undisputed genealogy of the parties that, Madan is common ancestor of the plaintiff and defendant no.2. Madan died leaving behind his two sons, i.e., Bhaiga and Jogi. Jogi died leaving behind his widow, three daughters and the children of his pre-deceased son Sridhar. The plaintiff is the 2nd daughter of Sridhar. Accordingly, the plaintiff belongs to the branch of Jogi.

16. Likewise, the defendant no.2 belongs to branch of Bhaiga. The suit Khata No.95 stands jointly in the name of the members of both the branches, i.e., Bhaigo and Jogi. Undisputedly, the existing kissam of the suit Plot No.2232 under Khata No.95 is "GHARABARI". GHARABARI KISSAM, which means that, the nature of the suit land is "HOMESTEAD"

17. It is the undisputed case of the parties that, the suit plot is the joint and undivided property of the recorded owners of both the branches, i.e., the branches of Bhaiga and Jogi. The suit Plot No.2232 has not been partitioned as yet between the members of the branches of Bhaiga and Jogi including the plaintiff through metes and bounds partition.There were ancestral houses of the plaintiff, defendant no.2 and their other family members over the suit plot along with the Plot No.2233, in which, the members of both the branches were residing and they were using and enjoying the said houses as their undivided dwelling houses. It is also the undisputed case of the parties that, the members of the aforesaid both the branches are residing in other

plots of the suit village by constructing houses thereon and they are using the suit plot for raising vegetables on the same.

Now, it will be seen, whether the above conduct of the members of both the branches including the plaintiff for their residing on other plots of the suit village by constructing houses thereon after pulling down their old residential houses on the suit plot shall automatically change/cease the nature and character of the suit plot including the suit land from their undivided dwelling house and whether it will be held that, the recorded owners thereof, including the plaintiff have abandoned their idea for all times to come to raise any residential structures on the same.

18. On this aspect, the propositions of law has already been clarified in the ratio of the following decisions:-

(***i) AIR 1952 Allahabad-207 : Bhagirath vrs. Afag Rasul and another—(Para-8)—Partition Act, 1893—Dwelling house—Test to determine—***In order to determine, whether a particular house is a family dwelling house within Section 4 of the Partition Act. The question is to be decided in each case, i.e., whether the family has abandoned all idea of occupying the house as residential house and not the estate in which a house is. A person may not be able to reconstruct his house for a considerable length of time owing to poverty or owing to disputes with strangers to the family regarding its occupation. The house may fall into a complete state of disrepair owing to these circumstances, but it will nevertheless continue to be a family residential house if the members of the family intend to use it as such as soon as they can conveniently do so.

(ii) ***AIR 1969 Patna-270 : Kalipada Ash and another vrs. Tagar Bala Dasi and others(Para Nos.3&4).***—Mere non-occupation of house for sometime by the members of family will not be sufficient indication of their abandoning the intention of keeping the house as a dwelling house, more particularly where such house is admittedly ancestral dwelling house.

(iii) ***AIR (37) 1950-Calcutta-111 : Boto Krishna Ghose vrs. Akhoy Kumar Ghose and others(Para-12)***—Partition Act—1893, Section 4 and T.P. Act, 1882—Section 44—Undivided Dwelling house—the essence of the matter is that, the house itself should be undivided amongst the members of the family, who are its owners. The emphasis is really on the undivided character of the house and it is this attribute of the house which imparts to the family its character of an undivided family. For the members of the family may have partitioned all their other joint properties and may have separated in mess and worship, but, they would still be an undivided family in relation to the dwelling house so long as they have not divided it amongst themselves.

(iv) ***AIR 1971(Orissa) 198 : Bhim Singh and another vrs. Ratnakar Singh and others— (para-18)***—Family Dwelling house—Even a vacant site upon which there used to be the family dwelling, but the same has been pulled down or has fallen, would continue to be dwelling house until parties have abandoned their intention to raise residential structures thereon.

(v) ***AIR 1990 (S.C.)-867 : Dorab Cawasji Warden vrs. Coomi Sorab Warden and others (Para-21)—***Section 44 of the T.P. Act, 1882 and Section 4 of the partition Act, 1893 are complementary to each other—

Terms “undivided family” and “dwelling house” have the same meaning in both the sections.

19. Here, in this suit at hand, when undisputedly the suit Plot No.2232 is vacant at present, on which there was the joint and undivided dwelling house of the plaintiff and her co-sharers and when, the members of both the branches, i.e. the members of the branches of Bhaiga and Jogi including the plaintiff are presently residing on other plots at a little distance from the suit Plot No.2232 constructing houses thereon due to demolition of their old undivided dwelling house on the suit plot and when the kissam of the suit plot is continuing as before as "GHARABARI", i.e., "HOMESTEAD" in the RoR jointly in the name of the members of both the branches, then, at this juncture, by applying the principles of law enunciated in the ratio of the aforesaid decisions of the Hon'ble Courts and Apex Court, it cannot held that, the recorded owners of suit Plot No.2232 including the plaintiff have abandoned their idea and intention for all times to come to raise any residential structures on the suit plot including on the suit land. For which, it cannot be held as per law that, the nature and character of the suit land has been changed/ceased from the undivided dwelling house. Rather it can be held that, the nature and character of the suit land is continuing as before as per law as the undivided dwelling house of the recorded owners thereof including the plaintiff. Because, on conjoint reading to the oral and documentary evidence adduced by the parties, it is going to show that, all the co-owners of the suit Plot No.2232 including the plaintiff have not abandoned their idea and intention of raising residential structures on the same in future.

20. The main object of Section 44 of the T.P. Act, 1882 is to prevent the intrusion of strangers into the undivided dwelling house of the members of a family, which is to be enjoyed by the members of the family alone in spite of transfer of share therein to strangers.

21. On that aspect, the propositions of law has already been clarified in the ratio of the following decision:-

> ***(i) 2014(II) OLR-623 : Rajanibala Sahoo vrs. Manju Biswal and others—T.P. Act, 1882***—Section 44—It prevents intrusion of strangers into such family residence, which is to be enjoyed by members of the family alone in spite of transfer of share therein to strangers.

22. The stranger to the dwelling house means, one who has no connection with the family. It is to be understood that, in terms of blood or marriage, i.e., a person, who is unconnected with the family either through blood or through marriage. Foster child is not a stranger.

23. Here, in this suit at hand, undisputedly the so-called purchaser (defendant no.1 Rohita Samal) has no connection with the family members of plaintiff either in terms of blood or in terms of marriage. For which, it is held that, the defendant no.1 (Rohita Samal) is a stranger to the family of the plaintiff.

Now, it will be seen, whether after marriage of the plaintiff, her membership has been ceased from the undivided dwelling house of the suit land and whether the

husband of the plaintiff shall be treated as a stranger to the undivided dwelling house in question.

24. On this aspect, propositions of law has already been clarified in the ratio of the following decisions:-

> (***i)AIR 1963 Madras-298 : Rukia Bi vrs. Rajia Bibi and another(Para 3)—Partition Act, 1893—Section 4***— It is not necessary that, the co-sharer applying for relief should continue to be a member of the family. Where, therefore, there is no doubt that, the house is a family dwelling house and that, the petitioner is a co-sharer, who is entitled to a share in that house on partition, she would be entitled to maintain the application under Section 4 of the Partition Act.

> (***ii)AIR 1971 Orissa-284 : Ahmad Khan and another vrs. Shaik Maijar and others—(Paras-3 and 6)—Partition Act, 1893—Section 4—Dwelling house***—the term "Family" in Section 4 includes the co-sharer's son-in-law, who frequently used to come and stay with his father-in-law. He is not a stranger for the purpose of Section 4 of the Partition Act.

25. As per the discussions and observations made above, when undisputedly there was old undivided dwelling house of the recorded owners of the suit Plot No.2232 on that Plot and when due to demolition of that old house on the suit plot, they are residing on the other plots in the same village and when it is held as per law that, the suit property has not lost the character of joint family qua the dwelling house of the recorded owners thereof including the plaintiff and when the defendant no.1 is a stranger to the family of the plaintiff and her co-sharers and when as per the clarifications has made in the ratio of the above decisions of the Hon'ble Courts reported in ***AIR 1963 (Madras) 298 and AIR 1971 (Orissa) 284***, the plaintiff and her husband (P.W.1) cannot be treated as strangers to the undivided dwelling house, i.e., to the suit land, then at this juncture, as per Section 44 of the T.P. Act, 1882, the defendant no.1 should be prevented from possessing the suit land jointly with the plaintiff and her other co-sharers in spite of being a purchaser of the same from one of the co-sharers thereof, i.e., from defendant no.2. For which, the decisions relied upon by the learned counsel for the appellant indicated in para no.14 of this judgment are not applicable to this 2nd appeal on facts, as the said decisions are quite distinguishable from the facts and circumstances of the suit at hand.

The conclusion drawn above finds support from the ratio of the following decision:-

1998(I) OLR-586 : Surendranath Sahoo vrs. Mohendra Samantray and others—T.P. Act, 1882—Section 44(Para-7)—2. HINDU LAW—Joint family property(Dwelling House)—No partition held—A stranger purchaser cannot have joint possession of the dwelling house belonging to a joint family.

26. Therefore, the findings of the 1st Appellate court holding that, the suit land is the joint and undivided dwelling house of the family members of the plaintiff including the plaintiff cannot be vitiated by misconception on the point of law

regarding the dwelling house and also it cannot be held that, the findings of the 1st appellate court is based on no evidence. For which, the question of interfering with the judgment and decree of the 1st appellate court through this 2nd Appeal filed by the defendant no.1 does not arise. So, there is no merit in the appeal of the appellant, the same must fail.

27. In the result, appeal filed by the appellant is dismissed on contest, but, without cost.

The judgment and decree 19.11.2010 and 03.12.2010 respectively passed by the 1st appellate court in R.F.A. No.01 of 2011 setting aside the judgment and decree of the trial court in C.S. No.460 of 2009 are hereby confirmed.

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2024 (I) ILR-CUT-718

A.C. BEHERA, J.

R.S.A. NO. 310 OF 2014

GANDHARBA PRADHAN & ORS. ……...Appellants

-V-

BISHNU CHARAN PRADHAN & ORS. ………Respondents

TRANSFER OF PROPERTY ACT, 1882 – Section 44 r/w Section 4 of Partition Act, 1893 – The suit plot was/is neither the undivided qua dwelling house of the plaintiffs and defendant No. 3 nor the defendant No. 1 and 2 are the purchasers of the undivided dwelling house of the defendant No. 3 – Whether the plaintiffs now entitled for decree of permanent injunction as per section 44 of the Act? – Held, No – The suit plot is situated at some distance from the houses of the plaintiffs and defendant No.3 being intervened by so many plots belonging to outsiders, the provisions of section 44 of the Act are not attracted.

Case Laws Relied on and Referred to :-

1. AIR 1959 (SC) 57: Deity Pattabhiramaswamy Vs. S. Hanymayya and Ors.
2. (1995) 6 SCC-213: Kashibai W/o Lachiram & Anr Vs. Parwatibai W/o Lachiram & Ors.

For Appellants : Mr. B.Ch. Panda, M. Dash & Debsis Nanda

For Respondents : Mr. N.K. Sahu, B.S. Swain & Pranaya Swain

JUDGMENT Date of Hearing :16.11.2023 : Date of Judgment :21.12.2023

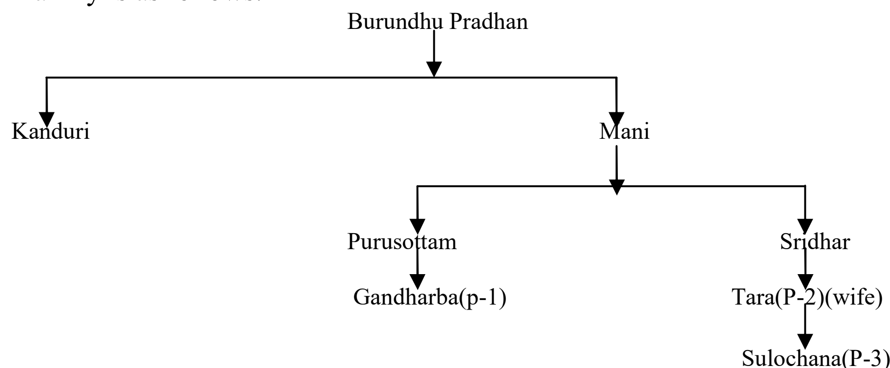
A.C. BEHERA, J.

This 2nd Appeal has been preferred against the confirming judgment.

2. The appellants and respondents of this 2nd Appeal were the plaintiffs and the defendants in the suit vide T.S. No.192 of 2002 and they were the appellants and respondents respectively in the 1st Appeal vide T.A. No.73 of 2007.

The suit of the plaintiffs (appellants) vide T.S. No.192 of 2002 was a suit for permanent injunction against the defendants (respondents) under Section 44 of the T.P. Act, 1882.

As per the averments made by the plaintiffs in the plaint, the genealogy of their family is as follows:-



3. According to the aforesaid genealogy provided by the plaintiffs, Burundhu Pradhan was their common ancestor. Burundhu Pradhan died leaving behind his two sons, i.e., Kanduri and Mani Kanduri died leaving behind his only son Saunti (defendant no.3).

The 2nd son of Burundhu, i.e., Mani died leaving behind his two sons, i.e., Purusottam and Sridhar. Purusottam died leaving behind his only son Gandharba (plaintiff no.1).

Sridhar died leaving behind his widow wife Tara (plaintiff no.2) and one daughter, namely, Sulochana (plaintiff no.3).

4. As per the averments made by the plaintiffs in their plaint, the suit properties described in Schedule-B of the plaint, i.e., Plot No.1576 Ac.0.26 decimals under Khata No.179 in Mouza Rahana under Binjharpur Police Station (Now Bari) in Jajpur District are the undivided homestead qua dwelling house of the plaintiffs and defendant no.3 and the major settlement record of right of the same stands jointly in favour of the plaintiffs and defendant no.3. The plaintiffs and defendant no.3 have their ancestral dwelling house over Plot No.1563. The suit properties covered under Plot No.1576 described in Scheduled-B is adjacent to their dwelling house situated on Plot No.1563. The plaintiffs have been using the suit properties as their kitchen garden. The plaintiff no.1 had a fuel-shed and cowshed over the suit properties, which was broken in 1999 super cyclone. The plaintiffs have not abandoned their idea of raising a house over the "B" Schedule suit properties. The plaintiffs have also been using the suit properties as their threashing floor. The suit properties described in Schedule "B" vide M.S. Plot No.1576 is within one enclosure and the same is a part and parcel of their dwelling house situated on Plot No. 1563. They (plaintiffs) cannot spare any part of the suit properties, because the

suit properties is their undivided homestead area and the same has not been partitioned through metes and bounds between them and their co-sharers. They (plaintiffs) have been cremating their ancestors on the suit properties and as such, the graveyard of their ancestors exist over a part of the suit properties described in Schedule-"B" of the plaint. They (plaintiffs) also cannot spare any part of the graveyard of their ancestors and also cannot allow to disturb the sanctity of their graveyard situated on the suit properties, i.e., over Plot No.1576. The suit properties are very much essential for their beneficial enjoyment as their undivided dwelling house.

The defendant nos.1 and 2 are the strangers to their family, i.e., to the family of the plaintiffs and defendant no.3. The defendant nos.1 and 2 have no right of joint possession of "B" schedule suit properties with the plaintiffs. Surprisingly, on dated 12.08.2002, the defendant nos.1 and 2 attempted to enter upon the "B" schedule suit properties forcibly and tried to interfere with the smooth possession of the plaintiffs over the suit properties and also tried to make construction thereon, but, they (defendant nos.1 and 2) could not succeed in their such attempt by the protests of the plaintiffs. When the plaintiffs protested against the above illegal activities of the defendant nos.1 and 2, then, they (defendant nos.1 and 2) disclosed that, they have purchased 8 anna share of defendant no.3 in suit Plot No.1576. As, the defendant nos.1 and 2 are the strangers, they have no right of joint possession of the "B" schedule suit properties with the plaintiffs and as any entry of the defendant nos.1 and 2 into the suit properties will spoil their family prestige and dignity and as by the entry of the defendant nos.1 and 2 into the suit properties, the female members in the family of the plaintiffs cannot move freely over the "B" scheduled suit properties, for which, the plaintiffs approached the civil court by filing the suit vide T.S. No.192 of 2002 against the defendants under Section 44 of the T.P. Act, 1882 praying for restraining them (defendant nos.1 and 2) from entering upon the suit properties.

5. The defendant no.3 was set ex parte.

The defendant nos.1 and 2 contested the suit of the plaintiff by filing their joint written statement denying the averments made by the plaintiffs in their plaint taking their stands that, the suit of the plaintiffs is not maintainable. The plaintiffs have no *locus standi* to file the suit. They (defendant nos.1 and 2) have already been put into possession of their purchased land from suit Plot No.1576 by their vendor, i.e. defendant no.3. For which, no relief of injunction is maintainable against them. The suit properties was/is not the undivided dwelling house of the plaintiffs. The plaintiffs, defendant no.3 along with their other family members have/had been residing on an another plot vide Plot No.1563 under Khata No.179. The suit Plot No.1576 is neither adjacent nor nearer to Plot No.1563. The suit properties are open bari and some portions thereof are fellow land. There was no house on the same at any point of time. The suit Plot No.1576 is half kilometer away on road from Plot No. 1563, on which the plaintiffs and defendant no.3 are residing. The suit Plot No.

1576 is adjacent to the land of defendant nos.1 and 2, i.e., to their Plot No.1578. After purchasing the half share of defendant no.3 from the suit Plot No.1576 through registered sale deed no.1318 dated 26.07.2002, they (defendant nos.1 and 2) are possessing the same by amalgamating their purchased land from the suit Plot No.1576 with their homestead land. Because, the defendant no.3 has delivered the possession of the sold land to them (defendant nos.1 and 2). The suit properties were/are not the undivided dwelling house of the plaintiffs and the same were never used as the graveyard of the family of the plaintiffs and defendant no.3. The residential houses of the plaintiffs and defendant no.3 is on Plot No.1563. That Plot No.1563 and the suit Plot No.1576 is intervened by 15 to 16 private plots of other persons. The plaintiffs and defendant no.3 have been residing separately being separated in mess and properties since last 30 years and they were/are possessing their properties including the suit Plot No.1576 separately as per partition between them. They (plaintiffs and defendant no.3) have transferred parts/portions of their respective allotted properties to others including the defendant nos.1 and 2 according to their sweet will. After partition, the defendant no.3 and his predecessors were in exclusive possession over the Eastern half of suit Plot No.1576. The suit Plot No.1576 was/is not the undivided dwelling house of the plaintiffs and defendant no.3. So the suit of the plaintiffs under Section 44 of the T.P. Act, 1882 against the defendants is liable to be dismissed.

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether five numbers of issues were framed by the trial court in T.S. No.192 of 2002 and the said issues are:-

ISSUES

1. Whether the suit is maintainable?
2. Whether there was any cause of action to bring the suit?
3. Whether the disputed property is the undivided dwelling house area?
4. Whether the defendant nos.1 and 2 are strangers to the family of the plaintiffs?
5. Whether the plaintiffs are entitled to get the reliefs as sought for?

7. In order to substantiate the aforesaid reliefs sought for by the plaintiffs against the defendants, they (plaintiffs) examined three witnesses from their side as P.Ws.1 to 3 including the plaintiff no.1 as P.W.1 and relied upon two documents on their behalf vide Exts.1 and 2. On the contrary, the contesting defendant nos.1 and 2 examined four witnesses on their behalf as P.Ws.1 to 4 including defendant no.1 as D.W.1 and relied upon series of documents vide Exts.A to Z.

8. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial court answered all the issues against the plaintiffs and basing upon the findings and observations made by the trail court against the plaintiffs in all the issues, the trial court dismissed the suit of the plaintiffs on contest against the defendant nos.1 and 2 and ex parte against the defendant no.3 without cost vide its judgment and decree dated 12.10.2007 and

06.12.2007 respectively assigning the reasons that, the suit land is not appurtenant or part and parcel of the undivided qua dwelling house of the plaintiffs and defendant no.3 and the same is not necessary for the beneficial use and enjoyment of the plaintiffs and defendant no.3. So, the plaintiffs are not entitled to get the relief under Section 44 of the T.P. Act, 1882 and the defendant nos.1 and 2 have mutated their purchased land from suit Plot No.1576 into their names and after mutation, separate RoR vide Khata No.934/9 and Plot No.1576/2789 Ac.0.13 decimals has already been prepared in their names and they (defendant nos.1 and 2) are paying rent for their above purchased Ac.0.13 decimals under Khata No.934/9 Plot No.1576/2789 and they (defendant nos.1 and 2) are possessing their above purchased land from suit Plot No.1576 exclusively.

9. On being dissatisfied with the aforesaid judgment and decree of the dismissal of the suit vide T.S. No.192 of 2002 of the plaintiffs, they (plaintiffs) challenged the same by preferring 1st appeal vide T.A. No.73 of 2007 being the appellants against the defendants by arraying them (defendants) as respondents.

10. After hearing from both the sides, the 1st appellate court dismissed the 1st appeal vide T.A. No.73 of 2007 of the plaintiffs on contest vide its judgment and decree against the defendants (respondents) concurring the findings and observations made by the trial court in dismissing the suit of the plaintiffs vide T.S. No.192 of 2002.

11. On being aggrieved with the aforesaid judgment and decree passed by the 1st appellate court in T.A. No.73 of 2007 confirming the dismissal of the suit of the plaintiffs passed by the trial court in T.S. No.192 of 2002, they (plaintiffs) preferred this 2nd appeal being the appellants against the defendants by arraying them (defendants) as respondents.

12. This 2ndAppeal has been admitted on formulation of the following substantial questions of law:-

> I. Whether the defendant nos.1 and 2 as the stranger purchasers of the Hindu coparcenary properties from one of the coparceners are entitled to joint possession without suing for partition?
>
> II. Whether the suit land is the joint family property qua dwelling house so as to attract the provisions of Section 44 of the T.P. Act and whether the finding of the lower appellate court that, the land in question does not came under the definition of dwelling house so as to attract said provisions of T.P. Act is correct especially in view of the reason assigned that, the dwelling house and the suit land is intervened by some lands of others?

13. I have already heard from the learned counsels of both the sides.

In order to nullify the judgments and decrees of the trial court and as well as 1st appellate court in T.S. No.192 of 2002 and T.A. No.73 of 2007, the learned counsel for the appellants (plaintiffs) relied upon the following decisions:-

(i) AIR 1966 S.C. 470 Para-5, 19 : M.V.S. Manikayala Rao vrs. M. Narasimhaswami and ors.;
(ii) AIR 1953 SC 487 : Sidheshwar Mukherjee vrs. Bhubaneshwar Prasad;
(iii) AIR 2007 Ori 65 Para-8;
(iv) AIR 1990 SC 867 : in Dorab Cawasji Warden vrs. Coomi Sorab Warden;
(v) (2002) 6 SCC 359 : Srilekha vrs. Parth;
(vi) AIR 1969 Ori Pg. 18 para-1;
(vii) 2008 (suppl-1) OLR 477 Para-8;
(viii) Mulla Hindu Law Art.260 and Art.269, Lexicon on Revenue Terms;
(ix) AIR 1960 Cal. 467 Para-17;
(x) AIR 1955 Ori 143 Para-5, Vol XXI CLT Bhabani Bewa & ors vrs. Akshoy Kumar Das & another;
(xi) 1970(1) CWR 283 : Jati Bewa and others vrs. Shyam Sundar Sahu and others;
(xii) 1970(1) CWR 183;
(xiii) 1972(1) CWR 221;
(xiv) AIR 1968 Cal 245;
(xv) (2002) 2 CALLT 147; H.C. Sankar Ghose vrs. Rakshit Kumar Cal. HC;
(xvi) AIR 1969 Pat 270 at para3 and 4;
(xvii) AIR 1952 All. 207 at para-8;
(xviii) Civil Appeal Nos.7363, 7364 and 7365 of 2000 : State of Rajasthan and others vrs. Shiv Dayal and others;
(xix) Civil Appeal No.4905 of 2012 : Vishwanath vrs. Sarla Vishwanath Agrawal;
(xx) Civil Appeal No.1374 of 2008 : Union of India (UOI) vrs. Ibrahim Uddin and others;
(xxi) Second Appeal No.50 of 1075 decided on 31.01.1978 : Pratap Chandra Patnaik vrs. Kamala Kanta Das and others;
(xxii) AIR 1966 S.C. 470(V 53 C 98) : M.V.S. Manikayala Rao vrs.M. Narasimhaswami and others;
(xxiii) AIR 1966 S.C. 478 (V 53 C 99) : The Joint Chief Controller of Imports and Exports, Madras (In all the Appeals) vrs. M/s. Aminchand Mutha etc.;
(xxiv) AIR 2007 Orissa 65 : Purna Chandra Mallik vrs. Smit Renuka Jena and Ors.;
(xxv) AIR 2007 Orissa 69 : Smt. Shantilata Masanta and Ors. vrs. Smit Rajanimani Nayak & Ors.;
(xxvi) AIR 1990 S.C. 876 : Dorab Cawasji Warden vrs. Coomi Sorab Warden and others;
(xxvii) AIR 1990 S.C. 879 : M/s. Babu Ram Gopal and others vrs. Mathra Dass;
(xxviii) (2002) 6 SCC-359 : Srilekha Ghosh(Roy)and another vrs. Partha Sarathi Ghosh;
(xxix) AIR 1969 Orissa 19 (V 59 C 10) : Sri Gopinath Deb and others vrs. Jagannath Baral and others;
(xxx) 2008(Supp.-I)OLR-477 : Nitei Ranjan Swain and others vrs. Krushna Swain (after his death) Suni Dei and others;
(xxxi) AIR 1960 CALCUTTA 467 (V 47 C 125);
(xxxii) AIR 1955 Orissa 143 (V 42, C. 38 Sept.) : Bhabani Bewa and ors vrs. Akshoy Kumar Das and another;
(xxxiii) 1972(1) C.W.R. 221 : Purusottam Sutar vrs. Chuin Majhi and others;
(xxxiv) AIR 1968 CALCUTTA 245 (V 55 C 45) : Manick Lal Singh vrs. Gouri Sankar Shah;
(xxxv) AIR 1969 PATNA 270 (V 56 C 70) : Kalipada Ash and another vrs. Tagar Bala Dasi and others and
(xxxvi) AIR (39) 1952 Allahabad 207 [C.N.80] (LUCKNOW BENCH) : Bhagirath vrs. Rasul and another.

14. On the contrary, in support of the impugned judgments and decrees passed by the trial court and as well as by the 1st Appellate Court in T.S. No. 192 of 2002

and in T.A. No.73 of 2007 against the plaintiffs and in favour of the defendant nos.1 and 2, the learned counsel for the respondent nos.1 and 2 (defendant nos.1 and 2) relied upon the following decisions:-

(i) AIR 1959 SC 57 : Deity Pattabhiramaswamy vrs. S. Hanymayya and others;

(ii) (1995) 6 SCC 213 : Kashibai W/o Lachiram and another vrs. Parwatibai W/o Lachiram and others;

(iii) (1995) 6 SCC 219 : State of H.P. vrs. Nikku Ram and others and

(iv) 1970(1) C.W.R.-283 : Jati Bewa and Ors vrs. Shyam Sundar Sahu & Ors.

The trial court and as well as the 1st appellate court after appreciating the oral and documentary evidence of the parties of both the sides including the village map vide Ext.-G have given same and one finding on facts regarding the physical location (topographical situation) as well as the status of the suit Plot No.1576 that, the houses of the plaintiffs and defendant no.3 on Plot No.1563 is situated at a far distance from the suit Plot No.1576 being intervened by Plot Nos.1565, 1566, 1567, 1568, 1569, 1578, 1579 and 1577 along with a road plot and accordingly, good numbers of plots belonging to other persons are situated in between Plot No.1563 and suit Plot No.1576. There was/is no house of the plaintiffs and defendant no.3 on suit Plot No.1576 at any point of time. So, from the evidence on record and as per the location of the suit Plot No.1576 according to the village map vide Ext.G, the suit Plot No.1576 is not the part, parcel and appurtenant to the houses of the plaintiffs and defendant no.3 situated on Plot No.1563.

15. When it is the settled propositions of law as per the ratio of the decisions of the Apex Court reported in ***AIR 1959 (SC) 57*** ; ***Deity Pattabhiramaswamy vrs. S. Hanymayya and others and*** **(1995) 6 SCC-213;** ***Kashibai W/o Lachiram and another vrs. Parwatibai W/o Lachiram and others—*** that, the 2nd appellate court, i.e., High Court has no jurisdiction to entertain a 2nd appeal even on the ground of erroneous finding of facts based on appreciation of relevant evidence, except any gross error therein, then at this juncture, when the trial court as well as 1st appellate court have given same and one finding on facts after appreciating the relevant oral and documentary evidence of both the sides including the village map vide Ext.G that, there was no house of the plaintiffs and defendant no.3 over suit Plot No.1576 and they (plaintiffs and defendant no.3) have their houses on Plot No.1563 and the said Plot No.1563 and the suit Plot No.1576 is intervened by so many plots of other persons and the suit Plot No.1576 has/had never been used as an appurtenant to the houses of the plaintiffs and the defendant no.3 situated on Plot No.1563 and the suit Plot No.1576 is not a part and parcel of the dwelling house of the plaintiffs and defendant no.3 on Plot No.1563, for which, in view of the principles of law enunciated by the Apex Court in the ratio of the above decisions, the question of interfering with the concurrent findings on above facts by the trial court and 1st appellate court through this 2nd appeal does not arise.

16. As per the discussions and observations made above, without interfering with the concurrent findings on facts as appreciated above by the trial court and 1st appellate court, when it is held that, though the Kissam of the suit Plot No.1576 in the RoR is as homestead, but there is totally absence of evidence regarding any house either in past or at present on the same and when the plaintiffs have not been able to establish, about the existence of any house on suit Plot No.1576 at the time of selling of the same by the defendant no.3 in favour of the defendant nos.1 and 2 and when there are materials in the record that, the suit Plot No.1576 is situated at some distance from the houses of the plaintiffs and defendant no.3 being intervened by so many plots belonging to outsiders and when the suit Plot No.1576 is not associated with the houses of the plaintiffs and defendant no.3 on Plot No.1563, then at this juncture, it is held concurring to the findings of the trial court and 1st appellate court that, the suit Plot No.1576 was/is not the undivided qua dwelling house of the plaintiffs and defendant no.3 either with the theory of convenience or physical affinity or appurtenance or on the theory of physical integrity of parts of the component. For which, the plaintiffs are not entitled for the decree of permanent injunction as per Section 44 of the T.P. Act, 1882 against the defendant nos.1 and 2, because, the suit Plot No.1576 was/is neither the undivided qua dwelling house of the plaintiffs and defendant no.3 nor the defendant nos.1 and 2 are the purchasers of the undivided dwelling house of the defendant no.3.

17. The conclusions drawn above finds support from the ratio of the following decisions :-

(i) AIR 1990 (S.C.)-867 : Dorab Cawasji Warden vrs. Comi Sorab Warden and others (Para-21)—Partition Act, 1893—Section 4 and T.P. Act, 1882—Section 44— Both the Sections under partition acted and T.P. Act are complementary to each other. The terms undivided family and dwelling house" have same meaning in both the sections.

(ii) AIR 1959 Orissa-173 : Bikal Swain vrs. Iswar Swain

Partition Act (1893), S.4—Scope and object—Conditions for applicability—Dwelling house not existing at time of transfer but constructed after words—Privilege of S.4 cannot be claimed.

Partition Act, 1893—Section 4 read with T.P. Act, 1882—Section 44—In order to attract the operation of Section-4:-

(1) There must be a dwelling house in existence belonging to an undivided family;

xx xx xx xx

Where the finding of the Court was that there was no dwelling house belonging to the undivided family in existence on the date of the transfer, the plaintiff is not entitled to the benefit of S.4 of the Partition Act. (Para-6)

(iii) 1970(1) C.W.R.-283 : ***Jati Bewa and others vrs. Shyam Sundar Dashoo and others***—Partition Act, 1893—Section 4—(para nos.2 and 4)—Dwelling house—the question, whether a particular plot of adjacent land is or is not necessary for the enjoyment of a house is to be determined on evidence.

In the present case, the disputed land is situated at some distance from the petitioner's house intervened by lands belonging to outsiders. Section 4 of the Partition Act or Section 44 of the T.P. Act shall not apply.

(iv) 36(1970) CLT-275 (para-6) : Kuntala Debi and others vrs, Nagu Naik and others—T.P. Act, 1882—Section 44—Once a garden or open land or a tank is disassociated from the structure or huilding, it is no longer a dwelling house either with theory of convenience or physical affinity or appurtenance or on the theory of physical integrity of parts of competent.

(v) 2019(II) CLR-855 : ***Janardan Das and others vrs. Durgadevi Thakurani and others(Para-10)—T.P. Act, 1882—Section 44—***Where the suit plots are not within the vicinity of the plaintiff's house and homestead and are not indispensable for the use and occupation of his dwelling house, suit under Section 44 of the T.P. Act, 1882 is not maintainable.

(vi) 2013(Supp-1) OLR-410 : Dillip Kumar Sahoo vrs. Smt. Malati Rout and others(Para-42)—Partition Act, 1893—Section 4 read with T.P. Act, 1882—Section 44—Gharabari Kissam, which means that, nature of the suit plot is homestead, but in the absence of any evidence with regard to the existence of dwelling house or even house on the suit property, provisions relating to transfer of undivided property, i.e., dwelling house under Section 44 of the T.P. Act are not attracted.

18. On analysis of the materials on record as discussed above along with the propositions of law enunciated by the Apex Court and Hon'ble Courts in the ratio of the aforesaid decisions, it is held that, the provisions of Section 44 of the T.P. Act, 1882 are not attracted to injuct the defendant nos.1 and 2, for which, the decisions relied upon by the appellants indicated above in Para no.13 of this judgment have become inapplicable to this suit and appeal at hand on facts.

19. As per the discussions and observations made above, when it is held that, the concurrent findings of the trial court and 1st Appellate Court made in the judgments and decrees of T.S. No.192 of 2002 and T.a. No.73 of 2007 in dismissing the suit of the plaintiffs are not erroneous, then at this juncture, the question of interfering with the same through this 2nd appeal filed by the (appellants/plaintiffs) does not arise. As such, there is no merit in this 2nd appeal filed by the appellants (plaintiffs). The same must fail.

20. In the result, the 2nd appeal preferred by the appellants (plaintiffs) is dismissed on contest, but without cost.

The judgments and decrees passed in T.S. No.192 of 2002 and in T.A. No.73 of 2007 by the trial court and 1st appellate court respectively are hereby confirmed.

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