

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

Present:

The Hon'ble Justice Shekhar B. Saraf

W.P.O. 119 of 2020

Susmita Gayen

Versus

The State of West Bengal & Others

For the Petitioner

: Mr. Anjan Bhattacharya, Adv.,
Ms. Anita Shaw, Adv.

For the Respondent

: Mr. Santanu Kumar Mitra, Adv.,
Mr. Amartya Pal, Adv.

Heard on : January 27, 2021 & February 4, 2021

Judgment on : 11.02.2021

Shekhar B. Saraf, J.:

1. The writ petitioner has challenged an impugned order dated November 19, 2012 issued by the West Bengal Council of Higher Secondary Education (hereinafter referred to as the "Council") directing adverse action against the writ petitioner for allegedly not discharging her duties in evaluating answer scripts of the Higher Secondary Examination conducted in 2012. As a result of such impugned order November 19, 2012, the School Management concerned, which employs the services of the writ petitioner as an Assistant Teacher reacted by prohibiting three financial increments

due to the petitioner (amounting to Rs. five thousand per month) from September 2015 onwards and such a prohibition continues as on date.

2. When the matter was taken up for hearing on February 2, 2021 and before the Court could have an opportunity to take up this writ petition on merits, Mr. Santanu Kumar Mitra, learned counsel appearing on behalf of the Council raised a preliminary objection on the maintainability of this writ petition on the Original Side of this Court. Mr. Mitra's primary contention for such an objection was the reason that the cause of action arose beyond the territorial limits of the Original Side of this Court as well as the fact that the writ petitioner and none of the respondents arraigned in this writ petition, were subject to the Original Side jurisdiction of this Court.

3. Mr. Anjan Bhattacharya, the learned counsel appearing for the writ petitioner, sought to repel such an objection by submitting that such an objection was extremely 'technical' in nature and for such reason, should not be entertained by this Court. In furtherance of this submission, Mr. Bhattacharya sought to place his reliance on certain precedents passed by Division Benches of this Court to repel the preliminary objection so pressed and prayed for some accommodation to produce the same. Accordingly, such liberty was granted.

4. On February 4, 2021 when the matter was next taken up, Mr. Bhattacharya was armed with a catena of precedents to prove that this

Court was well within its powers to hear this writ petition on the Original Side. Mr. Bhattacharya placed his reliance on the following judgments to buttress his argument:

- a) ***Sakti Steel Traders –v- Ashok Chakraborty*** reported in ***AIR 1992 Cal 187***;
- b) ***Sri. Balaram Poddar –v- Sri. Bhaskar Chandra Mondal***, reported in ***(1998) 3 SLR 545***;
- c) An unreported decision rendered by a Division Bench of this Court dated November 21, 2013, in ***Mrs. Ila Chakraborty –v- the State of West Bengal & Ors*** (APOT No. 349 of 2013);
- d) ***Bimal Kumar Ghosh –v- Kolkata Municipal Corporation*** reported in ***2015 SCC OnLine Cal 3811***;
- e) An unreported decision rendered by a Division Bench of this Court dated April 16, 2019, in ***Ramnagar Atul Vidyalaya (H.S.) & Ors. – v- Tapas Kumar Das & Ors*** (APO No. 58 of 2019);
- f) An unreported decision of a coordinate Bench dated July 25, 2019 passed in ***Amlan Singha –v- the State of West Bengal & Ors*** in W.P. 289 of 2019;
- g) An unreported decision rendered by a Division Bench of this Court dated July 8, 2019, in ***M/s. Eastern Coalfields Ltd. & Ors. –v- Premlata Devi & Ors*** (APOT No. 49 of 2019);

5. Not to be left far behind, Mr. Mitra placed his reliance of two coordinate bench decisions of this Court to buttress his argument that this writ

petition was not maintainable on the Original Side and that his preliminary objection is not without substance. These precedents are as follows:

- a) ***Ajoy Kumar Ghosh –v- the State of West Bengal & Ors.***, reported in ***(1995) 1 CLJ 121***;
- b) An unreported decision dated July 21, 2016 passed in ***Nirmalya Bose –v- West Bengal Council of Higher Secondary Education & Anr.***, in W.P. 528 of 2016;

6. I have heard the learned counsels appearing on behalf of both the parties and perused the materials placed on record.

7. Therefore, the question of law that falls for consideration is as follows:

- I. Whether this writ petition is entertainable on the Original Side of this Court when a preliminary objection has been raised on two counts:
 - a) That the writ petitioner as well as all the respondents arraigned reside or carry on their businesses beyond the Original Side jurisdiction of this Court and,
 - b) That the cause of action or any part thereof has also arisen beyond the Original Side jurisdiction of this Court.
- II. In the event that this writ petition is not entertainable on the Original Side, what is the lawful course of action?

8. It would be prudent to reproduce the relevant Rules¹ of 1986, which continues to serve as a compass to determine when a writ petition should be pressed on the Original Side or the Appellate Side. Rules 4, 5 and 7 enumerated in the Rules of 1986 under Chapter-1 provide for the following:

“4. All applications for Writs in the nature of *Mandamus*, Prohibition and *Quo Warranto*, in which all the respondents reside or carry on business or have their offices situate within the Ordinary Original Civil Jurisdiction of this High Court, whether they relate to a person or Court, or Authority, whether exercising civil, criminal or other jurisdictions, shall be dealt with by the Original Side and shall be marked as “Original Side” application.

5. All applications for Writ in the nature of *Certiorari*, wherein the records are located or are available within the Ordinary Original Civil Jurisdiction of this High Court, whether they relate to an authority or Court exercising civil or criminal or other jurisdiction, shall be dealt with by the Original Side and shall likewise be marked as “Original Side” applications, where such authority or court and any other person, having custody of the records, have their offices situate within the aforesaid Ordinary Original Civil Jurisdiction of this High Court.

6. ***

7. All other applications whether they relate to a person or authority or Court exercising Civil or Criminal or other jurisdiction shall be dealt with by the Appellate Side of the High Court and marked as “Appellate Side” applications.

9. Rules 4 and 5, as quoted above, read *strict sensu*, prescribes that all applications for writs in the nature of *mandamus*, *quo warranto*, prohibition and *certiorari* shall be dealt with by the Original Side and shall

¹Rules of High Court at Calcutta relating to Applications under Article 226 of the Constitution of India. These Rules framed by the High Court at Calcutta came into force with effect from May 23, 1986.

be marked as “Original Side” if all the respondents reside or carry on their business or have their offices situated or if such records are located/available within the ordinary original civil jurisdiction of this High Court. On the other hand, Rule 7, read *lato sensu* and by ‘necessary implication’, takes *within its ambit all other applications which are beyond the original civil jurisdiction of this High Court* and shall be dealt with by the Appellate Side of the High Court and marked as “Appellate Side” applications.

10. *Apropos*, the application of Rules 4, 5 and 7 of the Rules of 1986 framed by the High Court, a Division Bench of this Court in the decision of ***University of Calcutta –v- Subrata Mukhopadhyay***, reported in **(1986) 1 CHN 169**, had ruled:

“5. Thus, Rule 4 applies only in case all the respondents reside or carry on business or have their offices within the Ordinary Original Civil Jurisdiction of this Court. Rule 5 deals with applications for writ of Certiorari. All other applications according to Rule 7 whether relating to a person or authority or court exercising civil or criminal or other jurisdiction shall be dealt with by the Appellate Side of this Court and marked as ‘Appellate Side Application’, In the instant case, the Secretary, Institute of Post-Graduate Medical Education and Research has been made the respondent No. 4 whose office is situated outside the limits of Ordinary Original Civil Jurisdiction of this Court. Therefore, Rule 4 of the High Court Rules relating to Article 226 of the Constitution is inapplicable and the matter is to be dealt with by the Appellate Side in term of Rule 7.

6. Mr. Gupta, the learned Additional Advocate General, tried to submit before us that the Secretary, Institute of Post graduate Medical Education and Research was not a necessary party to the writ applications and the alleged causes of action of the writ petitioners are really against the remaining respondents to

the writ applications all of whom have their offices situate within the limits of the Ordinary Original Civil Jurisdiction of this Court. We are not prepared to entertain at the appellate stage the objection, for the first time, raised regarding the propriety of joinder of the Secretary, Institute of Post graduate Medical Education and Research as a respondent in the two writ applications. The writ applications have yet to be heard on merits and in these two appeals preferred against interlocutory orders of temporary injunction, we cannot adjudicate upon points outside the scope of the appeals before us or pass orders for exhuming of the name of any respondent Rule 4 of the Rules of this Court relating to applications under Article 226 of the Constitution does not apply to the two writ applications out of which the appeals before us arise. **Since the office of at least one of the respondents is outside the Ordinary Original Civil Jurisdiction of this Court, the writ applications are to be dealt with by the Appellate Side of this Court.**

7. The question whether a particular writ application is to be dealt with in the Appellate or the Original Side of this Court cannot be decided by referring to clause (1A) of Article 226 of the Constitution inserted by the 15th Amendment Act, 1963 and since re-numbered as Clause (2) by the 42nd Amendment Act, 1976. The object of the said clause is to vest the High Court within whose territorial jurisdiction cause of action wholly or in part, may arise to exercise power under Article 226 of the Constitution notwithstanding that the seat of such government or authority or the residence of such person is not within those territories. **As already observed, the question whether a particular writ application is to be dealt with in the Original or the Appellate Side of this Court pertains to distribution business of the court and same is regulated by Rules framed by the High Court.**

8. We may also observe that it is well-settled principle of law that no decree or order shall be reversed or substantially varied in appeal on account of any mis-joinder of causes of action or any errors, defect or irregularity in any proceeding not affecting the merits of the case or jurisdiction of the Court (S. 99 of the Civil Procedure Code embodied these principles of law). For the foregoing reasons, we are not prepared to allow the appellants to raise objection at the appellate stage to the filing of the writ application in the Appellate Side of the High Court.”

Emphasis supplied.

11. Another Division Bench of this Court in **University of Calcutta -v- Sri**

Shyamal Kumar Das reported in **1985 (1) CHN 187**, had held that if all

the respondents arraigned in a writ petition are within the original jurisdiction of this Court and no cause of action arose within the Appellate Side, then the resultant proceedings could not be maintainable in the Appellate Side of this Court. The relevant extract from **Shyamal Kumar Das (supra)** is reproduced below:

“ Para. 12) In the absence of any such rules in a case in which the cause of action either wholly or in part arises within the territorial jurisdiction of the High Court at Calcutta, a writ petition may be filed either in the Original Side or in the Appellate Side, according to the choice and convenience of the petitioner.

Para. 13)in this case, admittedly no part of the cause of action arose within the Appellate jurisdiction of this Court and in fact, the entire or whole of the cause of action arose within the Original jurisdiction of this Court.

Para. 14) Above being the position, we hold that the concerned application was not maintainable and entertainable in the Appellate Side of this Court and the same should have been moved and entertained in the Original Side.”

12. Interestingly however, the Division Bench in **Shyamal Kumar Das (supra)** had failed to take note of previous Division Bench dictums on related points of law. This anomaly was noted by a coordinate bench of this Court in **Sakti Steel Traders (supra)**. The detailed extract of the Court's findings in **Sakti Steel Traders (supra)** is reproduced as follows:

*“7. Prior to this Division Bench judgment there are two Division Bench judgments on this point. The Division Bench of this Court presided over by B. C. Mitra, J. sitting with Janah, J. in the case of (2) Messrs Arther Butler & Co. Mazuffarpur Ltd. & Anr. v. Union of India & Ors. in delivering the judgment on 20th September 1973 held that **"This Court in entertaining the writ petitions and dealing with the same derives it's jurisdiction not from the rules framed by this Court, but from Article 226 of the Constitution. It is the Constitution which has conferred upon***

this court the jurisdiction to entertain and deal with the writ petition and the rules set out above have been framed only for convenience of business". Subsequently, this very question came up for consideration before a Division Bench of this Court in the case of (3) United Province Electric Supply & Co. & Ors. v. Industrial Tribunal (III) Allahabad & Ors. reported in (1975) 79 CWN page 312 wherein Mr. S. P. Mitra the Chief Justice of this court sitting with Mr. S. K. Roy Chowdhury, J. agreed with the view expressed by the earlier Division Bench in Messrs. Arther Butler & Co.'s case (Supra), and observed that "In the absence of any such rules in a case in which the cause of action either wholly or in part arises within the territorial jurisdiction of the High Court at Calcutta, a writ petition may be filed either in the Original Side or in the Appellate Side according to the choice and convenience of the petitioner". In para 17 the Division Bench observed that "the question referred to us is whether an application under Art. 226 of the Constitution can be maintained on the Original Side of this court where all the persons and authorities against whom the rule is asked for are outside the jurisdiction of this High Court, but where part of the cause of action is alleged to have arisen within the Original jurisdiction of this Court. Our answer to this question is in the affirmative". The earlier Division Bench judgment presided over by B. C. Mitra, J. in Arther Butler & Co.'s case is the authority for the proposition that the writ rules have been framed only for the purpose of convenience and that does not 'take away the jurisdiction of a particular Judge whether sitting in Appellate Side or in Original Side. The later judgment of this Court in 1985 C.H.N. 187 had only considered the Division Bench judgment of this Court in United Province Electric Supply Co.'s case (Supra), and sought to distinguish the same on the ground that this case was an authority for jurisdiction in regard to a case where part of cause of action arose within the Original Jurisdiction of this Court but the later judgment of Division Bench had completely overlooked and failed to take into consideration of the earlier Division Bench judgment of this Court in Arther Butler & Co.'s case (Supra).

9. Rules 3,4 and 5 of the said rules of this Court had simply stated under what circumstances a writ application should be dealt with by the Original Side and marked as 'Original Side 'application and in some case it should be dealt with by the Appellate Side and marked

as 'Appellate Side' application. Reading the said rules it is also clear that it was never intended by the Rule making authority that this rule is mandatory in nature. If the reference is made to the relevant provisions of Civil Procedure Code, it would be abundantly clear that the provision of the Civil Procedure Code in this regard is clear and mandatory and there is no scope for making any departure.....[T]he rule framed under Article 226 of the Constitution of India is completely silent on this aspect of the matter. The provision of the Civil Procedure Code is expressly inapplicable in case of writ proceeding. So far as the writ petitions are concerned, it has to be presented to the Judge having writ jurisdiction. No provision has been made in the writ rules for return of the writ petition if it was filed before an appellate side Judge when it was an original side writ. If the Original Side writ Judge had writ jurisdiction to hear and dispose of the matter, in that event, it can also dismiss the same. A petition can be dismissed if the court had jurisdiction to deal with it. If the Court had no jurisdiction to deal with it, it cannot dismiss it. **The only requirement under the rules was to make certain petitions in the Appellate Side and certain petitions in the Original Side.** It does not lay down any other embargo with regard to the jurisdiction of a particular Judge, either taking Appellate Side or the Original Side. In my view, this artificial distinction between the Appellate Side and the Original Side of this Court cannot take away the jurisdiction of a Judge, should have been empowered to deal with the writ application by the learned Chief Judge. It is not a case of entertaining a writ application by the learned Judge who had no determination. It is a case where a particular Judge sitting in the Appellate Side or Original Side, has entertained a writ application and that under such circumstances, I am unable to hold that simply because, the application should have been marked as Appellate Side, the application should be dismissed by a Judge sitting in Original Side because the Judge sitting in Original Side has no jurisdiction to hear it. If it was the intention of the writ rules that the classification of the Original Side and the Appellate Side should be strictly followed and that these rules are mandatory in nature, in that event, that should have a provision akin to the Civil Procedure Code in this regard and that there would have been certain provisions declaring that unless this rule is strictly followed, the writ application should be incompetent and should not be followed by this court by a particular side. **Looking at the provision of Rule 4 in case of mandamus, it should be dealt with Original Side application. In case of certiorari, records must be in the Original Side.** The said rules are strictly construed and an

impracticable situation will be brought about. The said rules are not substantive rules, but rules of procedures. When there are two Division Bench judgments and in the absence of special bench judgment of this Court, **this Court is entitled to follow the earlier Division Bench of this Court in the case of Messrs. Arther Butler & Co. (Supra), and that the Division Bench judgment reported in (1985) 1 CHN 187 cannot be treated to be a precedent as it is a decision of sub-silentio.** The principle of sub-silentio applies where the case is fully argued and a decision sub-silentio cannot be regarded as a precedent and/or cannot claim to be an authority. A decision of sub-silentio cannot be regarded to be an authoritative precedent...

10. In my view, this artificial classification of the Appellate Side and the Original Side jurisdiction is a matter of convenience and is directory in so far as the writ application is concerned. In so far as the writ applications are concerned, writ applications are entertained by the High Court under Article 226 of the Constitution of India. In my view, whether it is Original Side application or Appellate Side application, is a question and the litigant cannot have any right to say that any application moved in one side, is bad for simple reason that it would be contrary to public policy. When a writ application has been entertained by the learned Judge having jurisdiction to entertain the petition under Article 226 of the Constitution of India in the absence of any provision for transfer of the writ application from one side to another side and in the absence of provisions for non-compliance of the said rules, it would be mere harassment to the litigant from moving the writ application. It would result in wastage of public money and public time.

11. The last submission of Mr. Roy Chowdhury was that if the Court decides that the writ application should be filed in the Appellate Side then the Registrar Original Side of this Court may please be directed to send the records of this case to the Registrar, Appellate Side to register the same as a mandamus application in the Appellate Side. Mr. Bose opposed such submission of Mr. Roy Chowdhury and submitted that this writ application must be dismissed and fresh application be filed in Appellate Side. I am unable to accept such contention of Mr. Bose.

12. The Calcutta High Court is one High Court only for the purpose of administrative facility, there are two sides namely, Original Side and

*Appellate Side. It cannot be said that the Calcutta High Court has been divided into two High Courts namely, Calcutta High Court Original Side, Calcutta High Court Appellate Side. A Judge of the Calcutta High Court is a Judge of the Calcutta High Court as a whole it cannot be said that the Judge sitting in the Original Side is a Judge of the Original Side of the Calcutta High Court and a Judge sitting in the Appellate Side is a Judge of the Appellate Side of the Calcutta High Court. It is the determination made by the Hon'ble Chief Justice of the Calcutta High Court and a Judge takes up a matter relating to Original Side and matters relating to the Appellate Side but fact remains, a Judge of a High Court is a Judge of the High Court Cal. which includes Original Side and also the Appellate Side. When a litigant filed an application under the Article 226 of the Constitution of India the description constitutional writ jurisdiction is the description of the jurisdiction of the High Court. The word "Original Side" or the word "Appellate Side" are superfluous. The said words do not confer any jurisdiction on the High Court whatsoever. It is for the identification for the facility of the administration that the application will be heard in the Original Side and/or in the Appellate Side. When a litigant files an application in the High Court and the application is entertained by the Calcutta High Court, it cannot be said that the application was filed before the Original Side of the High Court, Calcutta or the application is filed in the Appellate Side of the High Court, Calcutta. I have already pointed out that the Calcutta High Court is one High Court and not two High Courts and when an application filed before the Calcutta High Court and is entertained by any Judge of this Court whether in the Original Side or in the Appellate Side in its writ jurisdiction, **the said application got to be decided on merit and it cannot be thrown away or dismissed on the ground that the same should be filed in the Appellate Side or in the Original Side and/or the lack of jurisdiction of the Judge concerned in the Calcutta High Court.** Since the present application was entertained by this Court, I hold the applicant cannot be denied justice by holding that this matter should be heard by a Judge of the Appellate Side and as such the application should be dismissed. As the same is tantamount to denial of justices to a litigant which he is entitled to under Article 226 of the Constitution of India, and this Court will be failing in it's duty if the application is not disposed of on merit."*

Emphasis supplied.

13. *Apropos* the maintainability of writ applications/petitions under Article 226 of the Constitution but filed irregularly on either of the two 'administrative' Sides of this Court *de hors* the Rules of 1986, a subsequent Division Bench judgment of this Court in **Sri. Balaram Poddar (*supra*)** while considering the previous decision of **Shyamal Kumar Das (*supra*)**, held:

"11) In support of the other preliminary point regarding the lack of jurisdiction of this court in entertaining the writ application on the Appellate Side, the learned advocate appearing for the appellants drew our attention to a Division Bench judgment of this court in the case of *University of Calcutta & Ors. v. Sri Shyamal Kumar Das & reported in 1984 (2) CLJ 320*. It was very strongly urged that in the light of the ratio laid down in that judgment, the writ petition of the petitioners ought to have been filed on the original side of this court since it was not maintainable on the appellate side and, therefore, the same having wrongly been filed on the Appellate Side, following the analogy of the Order passed in abovereferred case, **it attracted straight dismissal by the Court. We are not at all impressed by this submission.** First of all, we want to make it very clear that the jurisdiction of this court under Article 226 of the Constitution is not at all dependent upon any subsidiary Rules as such. Jurisdiction under Article 226 is exercisable by this court under this court's constitutional power since any person approaching this court for the exercise of such of power does so based on his guaranteed right under this Article of the Constitution. Such constitutionally guaranteed right cannot be taken away or frustrated merely because the writ application for enforcing a right, filed under Article 226 may have wrongly been classified in terms of such subsidiary Rules on the Original Side or the Appellate Side. **If a writ application under Article 226, even though otherwise maintainable constitutionally speaking, comes to be wrongly filed or entertained on the Appellate Side because of some so-called infraction of some Rule on the subject, in our opinion, it cannot entail the dismissal on this ground alone. The filing of the writ application either on the Original Side or the Appellate Side, as the case may be has nothing to do with its maintainability.** The question of maintainability of a writ application is totally unrelated to any subsidiary Rules framed on

the Administrative Side of this court for entertaining writ applications either on the Original Side or the Appellate Side. This is one aspect of the matter. The other aspect, even by following the ratio laid down in the aforesaid Division Bench judgment in University of Calcutta v. Shyamal Kumar Das (supra), it is clearly found that the writ application of the petitioners in the present case was maintainable even in accordance with the Rules relating to the division of writ applications either on the Original Side or the Appellate Side, as the case may be."

Emphasis supplied.

14. As is evident from the enunciation of the law in **Sri. Balaram Poddar (supra)** extracted above, if a writ application or petition under Article 226 of the Constitution of India is so maintainable but comes to be erroneously filed or entertained on either of the designated 'administrative' Sides, Appellate or Original, and runs afoul of a subsidiary Rule governing such an administrative classification, that *ipso facto* would not make such a writ petition or application liable to a dismissal.

15. Mr. Mitra, the learned counsel appearing on behalf of the Council, had strenuously submitted that this writ petition should be dismissed and filed afresh in the Appellate Side. *In arguendo*, Mr. Mitra additionally submitted that if this writ petition did not merit a dismissal, then the same be transferred to the Appellate Side of this Court. Now, this very aspect had been considered by the learned Single Judge in **Sakti Steel Traders (supra)** as well as the Division Bench in **Sri. Balaram Poddar (supra)**. Specifically, when submissions were made with reference to both aspects of 'transfer of the pre-existing writ petition' to the Appellate Side and 'dismissal of the pre-existing writ petition for a fresh filing in the Appellate

Side' in **Sakti Steel Traders (supra)**, the learned Single Judge had explicitly rejected such submission which espoused the cause of a dismissal and a subsequent fresh filing [See quoted paragraph 11 in **Sakti Steel Traders (supra)**]. Such a view was reiterated by the Division Bench in **Sri. Balaram Poddar (supra)**. Therefore, in line with the decisions of **Sakti Steel Traders (supra)** and **Sri. Balaram Poddar (supra)**, Mr. Mitra's argument seeking a dismissal of Mr. Bhattacharya's writ petition is hereby rejected.

16. On the point pertaining to where a cause of action might have arisen, Mr. Bhattacharya had relied on the Division Bench judgment rendered in **Bimal Kumar Ghosh (supra)**. However, in actuality, **Bimal Kumar Ghosh (supra)** was the *fourth precedent* on the point in an established line of decisions rendered by the Division Bench comprising Pranab Kumar Chattopadhyay and Sudip Ahluwalia, JJ. The first of these decisions was **Bagadiya Brothers Pvt. Ltd. -v- Union of India & Ors.**, reported in **2015 SCC OnLine Cal 2811**, which is closely followed by the decisions in **Dr. Pradip Kumar Ray Chaudhuri -v- The Kolkata Municipal Corporation & Ors.**, reported in **2015 SCC Online Cal 3252**, **Acknit Industries Limited & Ors. -v- The Kolkata Municipal Corporation & Ors.**, reported in **2015 SCC Online Cal 3645** and lastly, followed by **Bimal Kumar Ghosh (supra)**.

17. In **Bagadiya Brothers (supra)**, an appeal was preferred from an order before the Division Bench. A learned Single Judge of this Court vide such impugned order under appeal, had **dismissed the writ petition** upon

determining that such writ petition was not maintainable on the Original Side of the Court since **‘some of the respondents had their offices’ outside the jurisdiction of the Original Side of the Court.** Similarly, in **Dr. Pradip Kumar Ray Chaudhuri (supra)**, a learned Single Judge had **dismissed the writ petition as withdrawn** upon holding that the writ petition was not maintainable on the Original Side jurisdiction of this Court. In **Acknit Industries (supra)** as well, a learned Single Judge of this Court in an impugned order under appeal, had **dismissed the writ petition** upon determining that such writ petition was not maintainable on the Original Side of the Court since **‘one of the respondents was residing beyond the territorial jurisdiction of the Original Side of the Court.** Finally, in **Bimal Kumar Ghosh (supra)**, a learned Single Judge of this Court in the impugned order under appeal, had **dismissed the writ petition** upon determining that such writ petition was not maintainable on the Original Side of the Court since **‘some of the respondents had their offices’ beyond the territorial jurisdiction of the Original Side of the Court.**

18. In **Bagadiya Brothers (supra)**, the Division Bench of this Court comprising Pranab Kumar Chattopadhyay and Sudip Ahluwalia, JJ. had considered the previous Division Bench decisions rendered in **Shyamal Kumar Das (supra)** and **Sri. Balaram Poddar (supra)**. It had also considered the anomaly as stated above and recorded in the coordinate bench decision in **Sakti Steel Traders (supra)**. Upon such consideration, the Division Bench had ruled that the writ application filed by the

petitioner in that case was very much maintainable on the Original Side jurisdiction of this Court specifically since ***a substantial part of the cause of action had arisen within the Original Side jurisdiction of the Court*** and accordingly the writ petition should not have been dismissed on the ground of maintainability. In all the following cases of ***Dr. Pradip Kumar Ray Chaudhuri (supra)***, ***Acknit Industries (supra)*** and ***Bimal Kumar Ghosh (supra)***, the Division Bench had explicitly relied on ***Bagadiya Brothers (supra)*** to rule that in all the three subsequent cases, the writ petitions were maintainable since a substantial part of the cause of action had arisen within the Original Side jurisdiction of this Court. Therefore, the precedential analysis (***United Province Electric Supply & Co. (supra)***, ***Bagadiya Brothers (supra)***) and the subsequent 3 decisions rendered by the Division Bench comprising of Pranab Kumar Chattopadhyay and Sudip Ahluwalia, JJ.) reveals that while some respondents may reside beyond the Original Side jurisdiction of the Court, the 'determinative criterion' now is the fact that for a writ application/petition to be entertained on the Original Side, the cause of action or any part thereof must arise within the Original Side jurisdiction of the Court. Additionally, sight cannot be lost in complying in with Rule 5 of the Rules of 1986 in so far as writ of *certiorari* is sought.

19. Mr. Bhattacharya passionately argued that the preliminary objection surrounding the maintainability of this writ petition on the Original Side ought to be repelled. To buttress his argument, he placed his reliance on the Division Bench decisions of this Court rendered in ***Mrs. Ila***

Chakraborty (supra), Ramnagar Atul Vidyalaya (supra), M/s. Eastern Coalfields Ltd. (supra), and the coordinate bench order rendered in **Amlan Singha (supra).**

20. In **Mrs. Ila Chakraborty (supra),** the Division Bench entertained the intra-court appeal on the Original Side. The Court had observed that it was vested with the requisite territorial jurisdiction and the counsel appearing for the school authorities had not challenged such a finding notwithstanding their contention that the writ petition ought to have been filed on the Appellate Side. The Court had also observed that “allocation of business is only made for matters to be disposed of expeditiously.” In **M/s. Eastern Coalfields Ltd. (supra),** the Division Bench did not find any cogent and justifiable reason to interfere with the judgment and order since the filing of a writ petition in the High Court is a “matter of administrative convenience” only.

21. In the Division bench decision rendered in **Ramnagar Atul Vidyalaya (supra),** wherein the cause of action had arisen outside the Original Side jurisdiction of this Court while all the respondents were also residing outside the Original Side jurisdiction of this Court, the Court had categorically held *inter alia* **that this was a technical plea which could be availed of by the appellants before the learned Single Judge.** The learned Single Judge in **Amlan Singha (supra),** chose to entertain the writ petition, in spite of the preliminary objection stating that material respondents were residing outside the Original Side jurisdiction of this

Court, upon a perusal of the papers as well as upon hearing the submissions made by the learned counsels in Court.

22. In the present case, the cause of action has clearly arisen beyond the mandated Original Side jurisdiction of this Court. Furthermore, the arraigned respondents as well as the writ petitioner also reside or conduct their business beyond the Original Side jurisdiction of this Court. Mr. Mitra had expressly brought it to my notice that the writ petitioner was seeking a writ of *certiorari*, while such records were beyond the scope of the Court's Original Side jurisdiction. Therefore, I am of the considered view that this writ petition runs counter to both Rules 4 and 5 of the Rules of 1986 and is therefore not entertainable on the Original Side of the Court. Accordingly, the first question under consideration is answered in the negative.

23. In my considered opinion, a preliminary objection raised on the grounds of a mere 'technical plea such as the maintainability of a writ petition itself on the Original Side or Appellate Side', can very well be considered by a learned Judge sitting singly. If no objection is forthcoming from the Respondents, it is a patent display of 'acquiescence' or 'waiver of right'. However, if an appeal is preferred before a Division Bench taking this technical plea, such Respondents will be barred from agitating the same as a result of their acquiescence or waiver of right, as was rightly reflected in the order rendered in ***Ramnagar Atul Vidyalaya (supra)***. As far as the observations in ***Mrs. Ila Chakraborty (supra)*** and ***M/s. Eastern Coalfields Ltd. (supra)*** are concerned, both these observations are in line

with **Subrata Mukhopadhyay (supra)** but one must not be oblivious to the fact that distribution of business of the Court is regulated by the Rules of 1986.

24. Moving on to the second issue under consideration, Mr. Mitra relied on a coordinate bench decision of this Court rendered in **Ajoy Kumar Ghosh (supra)** to showcase the appropriate process that ought to be followed in such cases wherein even if an outright dismissal of a writ application/petition is ruled out, the same could not be said as regards its transfer from one administrative side to the other, upon a procedural conversion of the same i.e. from a “WPO” nomenclature to a “WPA” nomenclature or vice versa. While relying on the Division Bench decisions of **Shyamal Kumar Das (supra)** and **Subrata Mukhopadhyay (supra)**, the learned Single Judge had held as follows:

*“3. This court in exercise of its jurisdiction under Article 226 of the Constitution of India has framed rules relating to applications under Article 226 of the Constitution of India. Rule 4 of the said rules provide for filing of an application, whether it relates to a person or authority, whether exercising the civil, criminal or other jurisdiction, to be dealt with by the Original Side. Similarly, rule 7 of the aforesaid rules specifies that all other applications, whether they relate to person, authority or court in exercising civil, criminal or other jurisdiction, shall be dealt with by the Appellate side of this court and the application will be marked as “Appellate Side Application”. **There cannot be any doubt that ordinarily all applications, the cause of action whereof arises within the territorial jurisdiction of the Original Side of this court, is to be filed in terms of rule 4 aforementioned where as all other applications are to be filed in terms of rule 7.***

4. The Division Benches of this court in the decisions-referred to by Mr. Dutt held that an application filed in the Original Side of this court shall not be entertained if the same was

entertainable on the Appellate Side and similarly an application which was entertainable on the Appellate Side should not have been entertained on the Original Side of this Court.

5. Article 226 of the Constitution of India confers jurisdiction upon the High Court to issue appropriate writ in relation to any matter, the cause of action whereof arises within their territorial jurisdiction. This court exercises its jurisdiction under Article 226 of the Constitution of India not be reason of rules framed by this court but in terms of the constitutional mandate as engrafted in Article 226 itself. **This bench has also been given determination by the Hon'ble the Chief Justice to entertain writ application both on the Original Side as also on the Appellate Side.**

6. **In such a situation, in my opinion, there can not be any bar in exercise of this court's inherent jurisdiction to give liberty to the petitioner convert an application filed on the Original Side as an application filed on the Appellate Side. Such inherent power of the court is not and cannot be curtailed by the rules framed by this court particularly when this court, as indicated hereinbefore, has the requisite determination to entertain the matter both on the original side as also on the Appellate Side.** The Supreme Court, times without number, has clearly held that the rules are handmaid of justice, reference can be made to the case of (3) Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon reported in (1969) 1 SCC 869: AIR 1969 Supreme Court page 1267. It is also well-settled that in the event an appeal is not maintainable this court in exercise of its inherent power can direct conversion thereof into a civil revision application and vice versa.

7. **In this view of the matter, in my opinion, there can not be any reason, whatsoever, as to why this court can not exercise its inherent jurisdiction to permit the writ petitioner to convert this application into one on the Appellate Side. Let this application be converted into an application filed on the Appellate Side of this court, as prayed for by Mr. Chakraborty.**

Emphasis supplied.

25. Therefore, in light of the observations laid down in **Ajoy Kumar Ghosh (supra)**, there remains no doubt that in cases of writ petitions/applications wherein the cause of action or *any part thereof* were to arise within the Original Side jurisdiction of the Court, such applications are to be filed in consonance with Rule 4 of the Rules of 1986 (i.e. the Original Side) whereas other applications are to be filed in consonance with Rule 7 of the aforesaid Rules (i.e. the Appellate Side). While 'cross-entertainment' of such applications has been discouraged, the inherent power vested in the High Court permits the conversion and transfer of such writ applications/petitions from one administrative side to another, given that a Judge of the Court normally possesses requisite determination in both the Original as well as Appellate Sides, as allocated by the Hon'ble Chief Justice of the High Court who is the 'Master of the Roster' (for more, see: **State of Rajasthan -v- Prakash Chand**, reported in (1998) 1 SCC 1 in paragraph 59).

26. A coordinate bench of this Court in the unreported decision of **Nirmalya Bose (supra)**, by an order dated July 21, 2016 had accepted the view laid down in **Ajoy Kumar Ghosh (supra)** and as a consequence had permitted the release of the writ petition bearing no. W.P. 528 of 2016 from the jurisdiction of the Original Side, with a direction upon the Registry to register the same in the Appellate Side of the Court given that no part of the cause of action had arose within the Original Side jurisdiction.

27. One must also not lose sight of the fact that the grant of a writ by a constitutional court under Article 226 of the Constitution of India, irrespective of the ‘administrative nomenclature of Appellate/Original Side’, is purely a ‘discretionary remedy’. The Supreme Court in its judgment rendered in ***Hari Krishna Mandir Trust –v- State of Maharashtra and Ors.*** reported in **(2020) 9 SCC 356**, had reiterated the scope of the powers of a High Court exercising its powers under Article 226 of the Constitution of India, in the following words:

“104. The High Court is not deprived of its jurisdiction to entertain of a petition under Article 226 merely because in considering the petitioner’s right to relief, questions of fact may fall to be determined. In a petition under Article 226, the High Court has jurisdiction to try issues both of fact and law. **Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles.**”

Emphasis supplied.

28. As regards the exercise of the writ jurisdiction by the Court on either administrative side, while I am in agreement with the findings of the learned Single Judge in ***Sakti Steel Traders (supra)*** with regards to the nature of the Rules of 1986 being directory, it cannot be interpreted in such a manner so to render it ‘otiose’. The Rules of 1986 essentially have been formulated under Article 225 of the Constitution of India which indubitably vests the High Court with such power to frame rules and regulations to govern the rules of procedure vis-à-vis the internal management of cases. Therefore, the Rules of 1986 have to be harmoniously construed so as to not render it inconsequential.

THE NEED FOR HARMONIOUS INTERPRETATION

29. The application of the doctrine of harmonious and purposive interpretation by constitutional courts in our country is now commonplace. Such an application of the stated doctrine is resorted to as a measure to enable the working of a statute. Furthermore, when it comes to the invocation of the doctrine *apropos* subordinate Rules or delegated legislations, as was laid down by the Supreme Court in **A.N. Sehgal -v- Raje Ram Sheoran** reported in **1992 Supp (1) SCC 304 : 1993 SCC (L&S) 675**:

“12.It is settled law that all the rules should be harmoniously construed giving life, force and effect to every part of the rule or clause or word so that no part would be rendered redundant, ineffectual, nugatory or otiose....”

Emphasis supplied.

30. As early as 1961, a three Judges Bench of the Supreme Court reported in **J.K. Cotton Spinning & Weaving Mills Co. Ltd. -v- State of U.P.** reported in **(1961) 3 SCR 185 : AIR 1961 SC 1170** had applied the rule of harmonious construction to subordinate legislation and had ruled as follows:

“7....and undoubtedly we have to apply the rule of harmonious construction. In applying the rule, however, we have to remember that to harmonise is not to destroy. In the interpretation of statutes the court, always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. These presumptions will have to be made in the case of **rule-making authority also....”**

Emphasis supplied.

The Supreme Court subsequently in ***Ajeet Singh Singhvi –v- State of Rajasthan*** reported in **1991 Supp (1) SCC 343** had relied upon, *inter alia*, ***J.K. Cotton Spinning & Weaving Mills Co. Ltd (supra)*** to apply the doctrine of harmonious construction and purposive interpretation to a subordinate legislation as well.

31. In a subsequent decision of ***Ahmedabad Municipal Corpn. –v- Nilaybhai R. Thakore*** reported in **(1999) 8 SCC 139**, the Supreme Court had yet again relied upon the doctrine of harmonious construction to a subordinate legislation. In that case, the constitutional validity of Rule 6(i) and Rule 7 of the Rules for admission to Smt. N. H. L. Municipal Medical College on the ground that the said Rules which defined “local students” was violative of Articles 14 and 15 of the Constitution of India. While the High Court of Gujarat had struck down the Rules on the grounds of arbitrariness, the Supreme Court opined that the solution did not lie in striking down the impugned Rules which was necessary in the larger interests of both the medical institution as well as the population dwelling within the jurisdiction of the Ahmedabad Municipal Corporation. The Supreme Court had opined that it was a rare occurrence when a local body had considered it was its own duty to provide higher and professional education whereby the Ahmedabad Municipal Corporation ought to have been complimented for providing medical education to its resident students in excess of the previous 30 years or so. Therefore, to protect this “laudable object” of the said Corporation, the Supreme Court applied the doctrine of harmonious construction and stated as follows:

“14. Before proceeding to interpret Rule 7 in the manner which we think is the correct interpretation, we have to bear in mind that it is not the jurisdiction of the court to enter into the arena of the legislative prerogative of enacting laws. However, keeping in mind the fact that the rule in question is only a subordinate legislation and by declaring the rule ultra vires, as has been done by the High Court, we would be only causing considerable damage to the cause for which the Municipality had enacted this rule. We, therefore, think it appropriate to rely upon the famous and oft-quoted principle relied on by Lord Denning in the case of *Seaford Court Estates Ltd. v. Asher* [(1949) 2 All ER 155 (CA)] wherein he held:

“[W]hen a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, ... and then he must supplement the written word so as to give ‘force and life’ to the intention of the legislature. ... A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.”

This statement of law made by Lord Denning has been consistently followed by this Court starting in the case of *M. Pentiah v. Muddala Veeramallappa* [AIR 1961 SC 1107] and followed as recently as in the case of *S. Gopal Reddy v. State of A.P.* [(1996) 4 SCC 596, 608 : 1996 SCC (Cri) 792 : AIR 1996 SC 2184, 2188] (SCC at 608 : AIR at p. 2188). **Thus, following the above rule of interpretation and with a view to iron out the creases in the impugned rule which offends Article 14, we interpret Rule 7 as follows:**

“Local student means a student who has passed HSC (sic SSC)/New SSC Examination and the qualifying examination from any of the high schools or colleges situated within the Ahmedabad Municipal Corporation limits and includes a permanent resident student of the Ahmedabad Municipality who acquires the above qualifications from any of the high schools or colleges situated within the Ahmedabad Urban Development Area.” ”

Emphasis supplied.

32. Thus, the solution which flows from the principles cited in the foregoing paragraphs is to construe the Rules of 1986 in such a manner so as to not render it otiose but to make it effective and workable to the extent possible while being mindful of the overall writ jurisdiction under Article 226 of the Constitution of India. Therefore, based on the above discussion, in my opinion, in the absence of a subsidiary rule regarding the transfer of such a writ application/petition from one administrative side to another, there does not exist any proscription which hinders a learned Judge from transferring it by an order in the judicial side and seeking a conversion of such writ application/petition while complying with Rules 4, 5 and 7 of the Rules of 1986. The second question is so answered.

33. For the sake of convenience and in light of the preceding discussion, I pen down the principles that emerge:

- I. The exercise of the writ jurisdiction under Article 226 of the Constitution of India is 'discretionary', but such discretion must be exercised on sound judicial principles.
- II. As laid down by the Division Bench in **Sri. Balaram Poddar (*supra*)**, the filing of a writ application/petition, either on the Original Side or the Appellate Side, as the case may be, has nothing to do with the aspect of its maintainability under Article 226 of the Constitution of India before the High Court.
- III. Any preliminary objection as regards the 'entertainability' of the writ petition on either the Appellate/Original Side, **if** raised before a Single Judge, **must** be considered. If such an objection is not raised

by the Respondent(s) in any case, the same ought to be considered as patent display of **acquiescence** or **waiver of right** and such Respondent(s) would subsequently, be precluded from challenging such a technical point in an intra-court appeal.

IV. As stated in ***Subrata Mukhopadhyay (supra)***, as per the Rules of 1986, the aspect of whether a particular writ petition/application is to be dealt with in the Original or the Appellate Side of this Court pertains to distribution of business of the Court and same is regulated by the Rules of 1986, framed by the High Court. Accordingly, the Rules of 1986, primarily Rules 4, 5 and 7 have to be so construed and read in a harmonious manner so as to not render it otiose while also ensuring that it does not throw a spanner in the works when it comes to the overall exercise of the Court's writ jurisdiction, which is essentially governed by Article 226 of the Constitution of India and which cannot be circumscribed by the 'subsidiary' Rules of 1986.

V. If such a preliminary objection is raised before a Judge, the grounds of examination for the same, as directed by the Rules 4, 5 and 7 of the Rules of 1986, shall be the following:

- a) Rules 4 and 5, read *strict sensu*, prescribes that all applications for writs in the nature of *mandamus*, *quo warranto*, prohibition and *certiorari* shall be dealt with by the Original Side and shall be marked as "Original Side" if all the respondents reside or carry on their business or have their

offices situated or such records are located/available within the ordinary original civil jurisdiction of this High Court.

- b) Rule 7 read *lato sensu* and by ‘necessary implication’, takes *within its ambit all other applications which are beyond the original civil jurisdiction of this High Court* and shall be dealt with by the Appellate Side of the High Court and marked as “Appellate Side” applications.
- c) In cases of writ petitions/applications wherein the cause of action or any part thereof were to arise within the Original Side jurisdiction of the Court, such writ petitions/applications are to be filed in consonance with Rules 4 and 5 of the Rules of 1986 (i.e. the Original Side) whereas other applications are to be filed in consonance with Rule 7 of the aforesaid Rules (i.e. the Appellate Side).

VI. If such writ petition/application under Article 226 of the Constitution of India, notwithstanding that it is constitutionally sound, appears to be run afoul of Rules 4, 5 or 7 of the Rules of 1986, and as a result is filed under a wrong administrative nomenclature (Original Side/Appellate Side), it cannot entail the dismissal on this ground alone.

VII. While ‘cross-entertainment’ of such applications has been discouraged, the inherent power vested in the High Court permits the conversion and transfer of such writ applications/petitions from one administrative side to another, considering that a Judge of this

Court normally possesses requisite determination in both the Original as well as Appellate Sides.

VIII. If a Judge deems it fit that such a writ petition/application runs afoul of Rules 4, 5 and 7 of the Rules of 1986, she can transfer such writ petition from one administrative Side to the other, upon a procedural conversion of the same i.e. from a “WPO” nomenclature to a “WPA” nomenclature or vice versa, by issuing necessary directions in this regard to the concerned Registry.

IX. Notwithstanding the points already made hereinabove, if an irregular filing of a writ application/petition is made, in either the Original Side or the Appellate Side of this Court, it would not preclude the learned Judge from entertaining the matter when grounds of urgency or any other ground, which the learned Judge upon an application of her mind and discretion deems it fit.

34. Therefore, in light of the foregoing reasons discussed in detail, since a preliminary objection has been raised in limine, the question under consideration is answered in the negative. This writ petition is not entertainable on the Original Side since no cause of action or any part thereof arose within the Original Side jurisdiction of this Court. Notwithstanding such a finding, vested with the inherent power under Article 226 read with the Rules of 1986, I hereby direct the release of this case from the Original Side with a direction upon the Registry to register the same in the Appellate Side. Such a conversion and transfer of the writ petition to the Appellate Side should be done within one week from the

date of this order and the matter should appear under the heading 'Motion' in the Appellate Side supplementary list immediately thereafter.

35. I would go amiss if I did not acknowledge the superlative assistance and the passion displayed by both learned counsels for both sides in adjudicating this invigorating question of law.

36. Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)