V.GOPALA GOWDA, CJ & B.N.MAHAPATRA, J.

W.P.(C) NOS. 1455,1456 & 1457/2008 & 3214/2010 (Decided on 10.2.2011)

GURI BEHERA & ORS. .. . . Petitioners.

.Vrs.

D.R.M.,EAST COAST RAILWAY,
KHURDA & ORS. ……. Opp.Parties.

RAILWAYS ACT, 1989 (ACT NO. 24 OF 1989) – S.124.

Railway accident at unmanned level crossing – Three children expired and one survived with severe injuries – Railway administration has not posted guard or kept the railway gate closed at the time when the train was due to pass at the level crossing area – Non-compliance of statutory obligation as provided U/s.18 of the Railways Act – Writ petitions filed claiming compensation – Held, writ petition is maintainable – No fault liability of Rs.4 lakhs for passengers expired in railway accident as provided U/s.124 of the Railway Act read with the Railway Accidents and Untoward Incidents (Compensation) Rules 1990 – District Medical Board found the injured-petitioner having 85% permanent physical disability who requires continuous medical treatment and she has to suffer throughout her life – Had the Railway Administration taken due precaution such accident could not have happened – Accident occurred due to deliberate act of negligence on the part of the Railway Administration – Held, this Court finds it an appropriate case and while discharging constitutional duties has passed orders awarding compensation of Rs.3.50 lakhs to each of the petitioners whose child died and Rs.5.00 lakhs to the injured claimant with 7% interest per annum to be paid by the Railway Administration.

(Para 22,23,29,31)

Case laws Referred to:-

1.AIR 1963 Assam 117 : (Swarnalata Barua-V- Union of India & Ors.)
2.AIR 1980 SC 1354 : (N.K.V. Bros. (P) Ltd.-V-M.Karumai Ammal & Ors.).
3.AIR 1983 SC 1086 : (Rahul Sah-V-State of Bihar & Anr.).
4.AIR 1989 H.P. 5 : (Smt.kalawati & Ors.-V-State of Himachal Pradesh & Anr.)
5.AIR 1994 H.P. 139 : (Kumari Seema @ Seema-V-Himachal Pradesh State Electricity Board & Ors.).
6.AIR 1992 SC 2069 : (Smt. Kumari-V-State of Tamil Nadu & Ors.).

7. 1997(II) OLR, 69 : (Parikhita Behera & Anr.-V-Divisional Railway Manager,South Eastern Railway,Khurda Division).
8. (1997) 8 SCC 683 : (United of India-V-United India Insurance Co.Ltd. & Ors.)
9. 2004 (Supp.) OLR 914 : (Sajida Begum-V- DRM).
10. AIR 2005 SC 3971 : (S.D.O., Grid Corporation of Orissa Ltd. & Ors. -V-Timudu Oram).
11.(2009) SCC 54 : (Priya Vasant Kalgutkar-V-Murad Shaikh & Ors.)
12.(2001) 8 SCC 197 : (Lata Wadhwa-V-State of Bihar).
13.(1911-13) All ER Rep 160(HL) : Taff Vale Railway Co.-V-Jenkins).
14.ILR 2004 KAR 2471 : (K.Narasimha Murthy-V-The Manager, M/s. Oriental Insurance Co.Ltd.,Bangalore & Anr.).

For Petitioner - M/s. Kishore Ku.Jena. A.K.Mohapatra & S.N.Das.
For Opp.Parties - Mr. Anindya Mishra.
For Petitioner - M/s. Kishore Ku. Jena, A.K.Mohapatra & S.N.Das.
For Opp.parties - M/s. A.K.Mishra, S.K.Ojha, N.R.Pandit, H.M.Das, A.K.Sahoo & B.Panda.

V.GOPALA GOWDA, C.J. These writ petitions have been filed by the fathers of the deceased children who died on account of railway accident claiming compensation and praying for issuance of writ of mandamus against the opposite parties to take appropriate steps in the unmanned level crossing near Mangalajodi (Katia Sahi) so that future accidents can be avoided and to pay compensation to each of the petitioners to the tune of Rs.4 lakh, which is the minimum liability of the Railway authority to a passenger as per Section 124 of the Railways Act, 1989.

2. All these writ petitions have been listed together as the facts and reliefs sought for are common and they arise out of the same accident. Therefore, they are heard together and disposed of by this common judgment.

3. Brief facts as have been narrated in the above writ petitions with a view to find out as to whether the petitioners are entitled to reliefs as prayed for and to appreciate the legal contentions raised are as follow :

On 5.8.2006 at about 2.30 P.M. the petitioner (in W.P.(C) No.3214 of 2010) while going along with other three children through the Mangalajodi (Katia Sahi) level crossing in between Kalupadaghat and Bhusandpur in the district of Khurda, Puri-Ahmedabad Express came from another track and dashed against four children. In the said accident, three children expired on

the spot and the petitioner in W.P.(C) No.3214 of 2010 sustained severe injuries in her person. The petitioner in W.P.(C) No.3214 of 2010 appeared before the District Medical Board, Khurda for determination of percentage of disability. The Medical Board assessed the disability at 85% as per Annexure-1.

4. It is the case of the petitioners in all the writ petitions that while the aforesaid children were crossing the level crossing, which is an unmanned level crossing, as their houses are situated on the both the sides of the railway line and railway line has been constructed in the middle of the village Mangalajodi, the accident occurred. Besides the villagers of Mangalajodi, everyday about thousands of people are going through the said unmanned level crossing to either side. The said level crossing is a busy level crossing without having any check gate and guard, for which several accidents had occurred there in the past. Annexure-2 is the particulars of 24 number of accidents, which had occurred in the past. In spite of several complaints by the public, the Railway authorities have neither appointed a guard nor put a check gate nor taken sufficient precautionary measures to avoid frequent accidents, for which number of accidents have occurred in the past, which is within the knowledge of the Railway authorities. The petitioners in W.P.(C) 1456 of 2008 have lost their daughter Kamini Behera in the said accident, whose age was 12 years and she was studying in Class-VII. After the said accident, the train remained and the Railway police and other Railway authorities conducted their enquiries and found that the accident occurred while the said children were standing on the railway line and were looking the goods train. Against the said accident, an U.D. Case was registered in the court of the Sub-Divisional Magistrate, Khurda, copies of the said F.I.R., Final Report and original certified copies of the Inquest Report and Post Mortem Report, Dead Body chalan of Kamini Behera and Final Report in U.D.G.R. Case No.86/2006 are annexed herewith as Annexures-3 to 7. There was also paper publication for the said accident in the local dailies, i.e., *The Samaja* and *The Sambad* dated 6.8.2006, xerox copies of which are annexed as Annexure-8 series. The father of Guri Behera along with his brother Ram Behera whose only daughter expired, filed a joint petition before the Divisional Railway Manager claiming suitable compensation by their letter dated 17.10.2006, but till date the Railway authorities have not intimated the petitioners either by rejecting or granting compensation to them. The copy of the said letter is filed herewith as Annexure-9.

5. It is the further case of the petitioners that all the children were minor and while they were passing through the railway track they stopped going when they found the goods train was passing on a track. Due to the sound of goods train they could not hear the sound of other train and for that they could not be conscious about Puri-Ahmedabad Express, which was coming

on other track and caused accident for no fault of the children. In the Final Form it has been stated that when the 4 children were looking at the goods train standing on the line being the inhabitants of the nearby village, they faced the accident by another train, i.e., Puri-Ahmedabad Express. Under Section 11 of the Railways Act, 1989 the Central Government is empowered to execute all necessary works for convenient running of the trains in the country. Under Section 18 of the Railways Act, 1989 that corresponds to Section 13 of the Railways Act, 1890 for the said convenient running of the train the authorities may construct suitable gates, chains, bars etc. at the level crossing. The aim and object of the legislation is to protect the living beings who are supposed to be affected by the running of the trains and for that the Parliament authorizes the Railway authorities to work in a responsible manner with a view to see that the persons who will be crossing the Railway crossing either to reach residences or other places shall not be affected. The Railways would work in crossing a foot way on level, as to the mode of working their railway, as to the rate of speed, and signaling and whistling and other ordinary precautions in the working of a railway to do every thing which is reasonably necessary to secure the safety of persons who have to cross the railways by means of the foot way.

6. It is the further case of the petitioners that a level crossing is on the one hand is a dangerous spot in view of the possible movement of trains and on the other hand it is an invitation to the passersby crossing the railway line through the said level crossing. This is a public level crossing and not merely one by private accommodation. Therefore, it is stated by them that it is the legal duty of the Railways to assure the reasonable safety. The most obvious way of doing it is to provide gates or chain barriers or to post a watchman who should close the same shortly before train passes. But, failure to do so is not by itself an act of negligence provided that the Railway had taken other steps sufficient in those circumstances to caution effectively a passerby of average alertness of prudence. It is stated that at a reasonable distance of either side prominently written boards can be fixed asking the road users to be aware of trains will be passing through railway tracks. If the train in either side is visible from near the caution-board or within a short distance of crossing, this should be sufficient because a diligent road user could look round and see the train. On the other hand, if there is bend in the track or there are trees and bushes in between or the road on the either side of crossing is very far below, the level of the railway tracks or for any other similar reasons the railway track is not visible beyond a short distance, then even the certain boards are useless. In the present case the railway track was not visible from the spot of accident for which the accident occurred on the fateful day. The accident occurred at the particular level crossing is not

for the first time, but on number of occasions accidents occurred due to the aforesaid reasons.

7. Petitioners placed reliance upon the decision of the Assam High Court in ***Swarnalata Barua v. Union of India and others***, *AIR 1963 Assam 117*, wherein it is held by the said High Court that there is an obligation on the part of the Railway Company or Administration to ensure that whenever a train passes over a thoroughfare adequate warning should be given to the public of the passing of the train at the time they pass, so that accident may be avoided. The said duty need not necessarily be a statutory duty. It is implied and inherent in the functions to be discharged by the Railway Administration in the matter of running their railways. It is not disputed that had the Railway Administration taken the precautionary measure either by putting a railway gate for keeping it closed at the time the train was due to pass or putting some other obstruction which could have prevented the public from passing over the level crossing that would be the information and notice to the public that the train will pass through the railway track, then accident of this kind that had happened in this case would not have occurred.

8. It is the further case of the petitioners that soon after such accident occurred, after receiving notice under Section 113 as per the Railways Act, 1989 an enquiry must have been conducted under Section 114 or 115 of the Railways Act, 1989. If such report could have been called for by the competent authority of the Railways, the same would have disclosed the negligence on the part of the Railway authorities, which had resulted the accident.

9. It is the further case of the petitioners that due to the negligence of the Railway authorities the accident occurred and three innocent children died. Therefore, the Railway administration should have come forward to compensate the petitioners for their irreparable loss suffered on account of the death of their children. Further, it is stated that the road traffic accidents Special Courts and special provisions have been created by the legislature to help the distressed people who have become victims by granting just and reasonable compensation. In the present case, small children have expired due to train accident, but in the circumstance, had it been by a road traffic accident, the parents would have been granted with the compensation under the provisions of the M.V. Act.

10. The petitioners placed reliance upon the judgment of the Apex Court in ***N.K.V Bros. (P) Ltd. V. M. Karumai Ammal and others***, A.I.R.1980 SC 1354, wherein it is observed that Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. Accidents Tribunals must take special care to see that innocent victims do

not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there.

11. The petitioners further placed reliance upon Section 124 of the Railway Act read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, whereunder no fault liability of the passenger who expires in a railway accident has been fixed at Rs.4.00 lakh. The said facility should also be extended to the accident victims who lost lives or became disabled on account of the Railway accident in the level crossing due to the negligence of the Railway Administration, particularly when level crossing is a place where the public are allowed to cross the railway track.

12. Reliance has also been placed on ***Rahul Sah v. State of Bihar and another***, AIR 1983 SC 1086, wherein the Apex Court observed that in appropriate cases, the Court discharging constitutional duties can pass orders of payment of money in the nature of compensation consequent upon deprivation of a fundamental rights to life and liberty of a petitioner as State must repair the damage done by its officers to the petitioner's right.

13. Learned counsel also placed reliance upon the decision in ***Smt. Kalawati and others v. State of Himachal Pradesh and another***., AIR 1989 H.P. 5 and also in the case of ***Kumari Seema alias Seema v. Himachal Pradesh State Electricity Board and others***, AIR 1994 H.P. 139, wherein the aforesaid High Court ruled that the writ court can grant relief to the petitioners claiming damages for the injuries arising out of the accident occurred due to the negligence of the State authorities like the Electricity Board. In the case of ***Smt. Kumari v. State of Tamil Nadu and others***, AIR 1992 SC 2069, the Apex Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution of India can be invoked by the Writ Court for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. In that case six years' old child had fallen down in the uncovered sewerage tank. The High Court refused to entertain the claim of compensation in a writ petition under Article 226 of the Constitution, but the Apex Court directed the State to pay compensation. ***In the case of Parikhita Behera and another v. the Divisional Railway Manager, South Eastern Railway, Khurda Division,*** 1997 (II) OLR, 69, this Court also took the same view that jurisdiction under Articles 226 and 227 of the Constitution can be invoked and direction for payment of compensation can be awarded in favour of the claimants, if there was deliberate act of negligence on the part of the statutory authorities, namely, the Railway Administration.

14. Therefore, it is pleaded by the petitioners' counsel that the accident occurred on account of the negligence on the part of the railway authorities for not putting gates, bars and not appointing watchman on that unmanned

level crossing and not taking sufficient precautionary measures. The accident occurred due to deliberate act of negligence on the part of the railway administration. Therefore, the petitioners are entitled to compensation claimed in these writ petitions.

15. A common counter affidavit has been filed on behalf of the opposite parties. It is stated therein that the writ petitions are not maintainable both on facts and in law as they involve disputed questions of facts, which cannot be adjudicated by this Court in writ jurisdiction. It is further stated that writ is not maintainable in law, as no fault can be attributed to the Railways for the alleged death and injury caused to the children due to the said accident. Certain background facts of the case are stated briefly in the counter, which are as follows :

16. Howrah-Vishakhapatanum main line runs in between two locations of a single village named Mangalajodi under Tangi Police Station situated in Khurda district of Orissa. There is an unmanned level crossing existing at KM494/27-29 ub the UP direction and 494/30-28 in DOWN direction for movement of the villagers from one side to the other. As per the provisions contained in Indian Railways Permanent Way Manual, the said unmanned level crossing has been provided with (1) Stop Board, (2) Caution Board (3) Speed Braker Board, (4) Speed Brakers. The said level crossing also complies with clear visibility towards both sides. The said level crossing till date does not qualify for manning as yet as per the latest Railway Board Guidelines. The copy of the said guidelines is annexed to the counter as Annexure-A/1.

17. It is stated that the Train Vehicle Unit in respect of the level crossing is less than 6000 and there is also no restricted visibility from both the sides i.e. less than 800 meters for the road users. The level crossing is equipped with all kinds of safety provisions as per the norms of the Railway Administration. Without using level crossing for passage at random railway lines elsewhere is being trespassed for which the said unfortunate incident has occurred. On 5.10.2006 Down Train No.208-B/KIT-BBS. DMU passenger train left Kaluparaghat Station at 15.29 hours and Train No.8403 Puri-Adi Express left Bhusandpur Station at 15.30 hours. While DMU passenger train was passing over Down line near Mangalajodi village under Tangi Police Station of Khurda District, four children aged 8, 6, 5 and 3 years respectively were standing on the UP line Railway track which is about 100 meters away from the level crossing, the same parallel Train No.8403 Puri-Ahmaddabad Express dashed the children on the UP line track for which three children died on the spot and one female child of three years escaped narrowly injured. In this connection, the Divisional Transportation Inspector (Planning), East Coast Railway, Khurda Road conducted an enquiry and submitted his report, which reveals that the mishap has taken place due to

carelessness of their guardians in allowing their children to trespass the Railway track at KM 495/1 violating the provisions of Article 147 of Railway Act, 1989. Hence the Railway Administration is no way responsible for this tragic incident and it is not liable to pay compensation as claimed by them and, therefore, this Court need not award compensation. The sketch of level crossing at the site of accident is annexed as Annexure-B/1.

18. It is further stated that on investigation it came to light that on 5.8.2006 all the four children were standing in UP Line track shouting and gesticulating towards the running of the Down train DMU 208/B. They were ignorant of running of UP train No.8403 Express and also failed to attend the continuous whistling and the sound of the express train due to whistling and running sound of Down Train No.208/B DMU to which they were looking to. Besides, it was not safe to stop the high speed train running over the section to avoid the accident which might invite another major mishap. The fact finding is annexed as Annexure-C/1.

19. Further, it is stated that there being violation of Section 147 of the Railways Act, 1989, the Railway Administration cannot be held responsible for the said mishap. The allegation of the petitioners that the incident occurred due to unmanned level crossing is not correct. It is reiterated that the accident has occurred at about a distance of 100 meters towards Vishakhapanam end from the existing unmanned level crossing which is equipped with all the safety measures as per the Railway norms. It is also stated that the unfortunate incident has taken place due to carelessness of the children and their guardian/petitioners for trespassing the Railway track on violation of Article 147 of the Railway Act.

20. Learned Counsel for the opposite parties placing reliance in ***United of India v. United India Insurance Co. Ltd. And others***, (1997) 8 SCC 683, and ***Sajida Begum v. DRM***, 2004 (Supp.) OLR 914, contended that under Section 18 of the Railway Act there is no statutory obligation on the part of the Railway Administration to fence throughout the Railway line including the level crossing unless the Central Government so requires them to do. There are serious questions of disputed facts including the place of incident as well as respective negligence, the case does not merit consideration under Article 266 of the Constitution of India in view of the fact that in the present case the level crossing does not qualify to be a manned one nor the accident has occurred at the level crossing. Therefore, learned counsel would urge that the negligence cannot be attributed to the Railway Administration for the said unfortunate incident. In support of his contention, he placed reliance upon the decision ***S.D.O., Grid Corporation of Orissa Ltd. and others v. Timudu Oram***, AIR 2005 SC 3971, and contended insofar as W.P.(C) No.3214 of 2010 is concerned, the s ame is grossly

barred by limitation as the same has been filed in the year, 2010 whereas the alleged incident occurred in the year 2006.

21. With reference to the aforesaid rival legal contentions raised at the Bar, the questions that fall for consideration by this Court are as follow:

(i) Whether the writ petitions are maintainable in law ?

(ii) Whether the accident occurred on account of negligence on the part of the Railway Administration by not providing sufficient protection at the level crossing and without deploying guard or putting check gate as required under Section 18 of the Railway Act, 1989 ?

(iii) Whether on account of not providing safeguard to the level crossing by the Railway Administration, the petitioners are entitled to compensation as claimed ?

(iv) What order ?

22. To answer the above points, we have carefully examined the facts and rival legal contentions urged in the above writ petitions. As can be seen from the provisions of Section 18 of the Railway Act, 1989, the Railway Administration has the statutory obligation to provide sufficient safeguards to the level crossing by putting railway check gate and keeping it closed at the time when train is due to pass at the level crossing area. In the instant case, had the Railway Administration taken the precautionary measure either by putting a railway gate and keeping it closed at the time the train was due to pass, or put up some other obstruction which could prevent the public from passing over the level crossing giving them information and notice of the approaching train, the accident of the kind that had happed in this case could have been avoided. After receiving notice under Section 113 from the petitioners as per the Railways Act, 1989, an enquiry must have been conducted by the Railway Authorities under Sections 114 and 115 of the Railways Act, 1989. If such report would have been produced, then it could have disclosed whether there is negligence on the part of the Railway Administration on account of which the accident took place resulting in death of three poor children and severe injury to a minor girl. Therefore, the said enquiry report as required under Section 113 of the Railways Act having not been produced, this Court draws an adverse inference against the Railways that there is negligence on the part of the Railway Administration in not taking sufficient precautionary measures by posting guard or keeping the railway gate closed at the time while the train was due to pass through that level crossing. Non-compliance with the aforesaid statutory obligations by the Railway Administration, we reject the contentions urged by the learned counsel for the Railways that there are serious questions of disputed facts and due to carelessness on the part of the children and their guardians the alleged accident occurred on the fateful day resulting in death of three poor

children and severe injury to the minor girl caused. For the above reasons, we hold that the writ petitions are maintainable in law. Further, the Apex Court in N.K.V Brothers' case (supra) upon which reliance is placed by the learned counsel for the petitioners made certain observations, the relevant portion of which is extracted as hereunder :

> ".…….Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of *res ipsa loquitur*. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasizing this aspect because we are often distressed by transport operators getting away with thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their neighbour. Indeed, the State must seriously consider no fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practiced by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Courts should insist upon quick disposal so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard……"

23. Further, the High Court of Assam in Swarnalata Barua's case (supra) has held that there is an obligation on the part of the Railway Administration to ensure that whenever a railway passes over a thoroughfare adequate warning should be given to the public about passing of the train at the time they pass so that accidents may be avoided. This duty need not necessarily be a statutory duty. It is implied and inherent in the functions to be discharged by the Railway Administration in the matter of running their

railways. It is not disputed that had the Railway Administration taken the precaution of either putting up of a railway gate and keeping it closed at the time the train was due to pass or put up some other obstruction which could prevent the public from passing over the level crossing giving them information and notice of the approaching train, the accident of the kind that happened in this case could not have happened.

24. Having answered point nos. 1 and 2 in favour of the petitioners, and against the Railway Administration, we are required to answer point no.3 with regard to compensation in favour of the petitioners with the following reliefs.

25. Under Section 124 of the Railway Act read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, the no fault liability of the passenger who expires in a railway accident has been fixed at Rs. 4.00 lakh. In the instant case, the victims lost their lives or became disabled in the said accident due to the negligence on the part of the Railway Administration in putting gates at the level crossing is placed or public are allowed to cross the railway line without providing precautionary measures as indicated above. Further, the Apex Court in Rahul Sah's case (supra) has observed that in appropriate cases, the court discharging Constitutional duties can pass orders for payment of money in the nature of compensation. Consequent upon deprivation of the fundamental right to life and liberty of a petitioner the State must repair the damage done by its officers to the petitioner's right.

26. Further, in Kalawati's case (supra) and in Kumari Seema alias Seema's case (supra), the High Court of Himachal Pradesh ruled that writ Court can grant relief to the petitioners claiming damages for the injuries arising out of negligence of the State authorities like the Electricity Board. In the case of Smt. Kumari's case (supra), the apex Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution can be invoked for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. The same view has been taken by this Court in Parikhita Behera's case (supra), wherein it is observed that jurisdiction under Articles 226 and 227 of the Constitution can be invoked and direction for payment of compensation can be given if there is deliberate act of negligence on the part of the Railway Administration.

27. In this regard, the undisputed fact is that in the said accident three children died and one sustained severe injuries. Under Section 124 of the Railway Act read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, no fault liability of the passenger who expires in a railway accident has been fixed at Rs.4.00 lakh. The same amount can

be awarded to the petitioners for the reason that there cannot be any discrimination between passenger and non-passenger who died in railway accident.

28. It will be useful to refer to the judgment of the Supreme Court in the case of ***Priya Vasant Kalgutkar v. Murad Shaikh and others***, (2009) SCC 54, wherein the Supreme Court considered the case of a minor aged 9 years who met with an accident and suffered 10% permanent disability and after examining the provisions under Section 163-A and Schedule-II of the M.V. Act, 1988, observed that the compensation for injuries suffered by a person in a motor vehicular accident can be determined either on the basis of actual damages suffered or upon application of structured formula. In the said judgment at paragraph-7, the Supreme Court has referred to the case of ***Lata Wadhwa v. State of Bihar***, (2001) 8 SCC 197. In the said case, compensation awarded in respect of the minor children was divided into two groups, i.e., the first group between the age group of 5 to 10 years and the second group between the age group of 10 to 15 years. In the case of children between the age group of 5 to 10 years, a uniform sum of Rs.50,000/- has been held to be payable by way of compensation, to which the conventional figure of Rs.25,000/- is to be added and as such to the heirs of the 14 children, a consolidated sum of Rs.75,000/- each, has been awarded. So far as the children in the age group of 10 to 15 years are concerned, there are 10 such children who died on the fateful day and having found their contribution to the family at Rs.12,000/- per annum, 11 multiplier has been applied, particularly, depending upon the age of father and then the conventional compensation of Rs.25,000/- has been added to each case and consequently, the heirs of each of the deceased above 10 years of age, has been granted compensation to the tune of Rs.1,57,000/-. After referring to the case of ***Taff Vale Railway Co. v. Jenkins***, (1911-13) All ER Rep 160 (HL), it has been observed that in the case of Lata Wadhwa (supra) no iota of material was produced to enable the learned Judge to arrive at a just compensation in such case. Therefore, he determined the same on an approximation on the basis of the submission of the learned Sr. Counsel appearing for TISCO that compensation determined for the children of all age groups could be doubled, as in his view also, the determination made is grossly inadequate. On the basis of the said submission made in the said case it was directed that the compensation amount for the children between the age group of 5 to 10 years should be three times. In other words, it should be Rs.1.5 lakh, to which the conventional figure of Rs.50,000/- should be added and thus the total amount in each case would be Rs.2.00 lakh. In so far as children between the age group of 10 to 15 years are concerned, they are all students of Class VI to X and are children of employees of TISCO. Having

regard to the facts of the said case, the contribution of Rs.12,000/- per annum was on the lower side and, therefore, the contribution should be Rs.24,000/- and instead of 11 multiplier, the appropriate multiplier would be 15 which is worked out to Rs.3.60 lakh to which an additional sum of Rs.50,000/- has to be added, thus making the total amount payable at Rs.4.10 lakh for each of the claimants of the aforesaid deceased children. Keeping the aforesaid criteria followed in awarding the compensation in view, though Section 124 of the Railways Act, 1989 read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 provides for a compensation for no fault liability to the passenger who expires in railway accident of Rs. 4,00,000/-, considering the facts situation of the case and keeping in view the future prospect of the deceased children and prospective loss of future earning which would have benefited the parents, we deem it appropriate to award Rs. 3.50 lakh to the legal representatives of each one of the deceased children.

29. In the instant case, the disability certificate (Annexure-1) dated 01.09.2008 issued in favour of petitioner-Guri Behera in W.P.(C) No.3214 of 2010 by the District Medical Board of Khurda discloses that petitioner Guri Behera sustained "*Traumatic Bronchial Plexus Injury (Rt) causing placid Paralysis of (Rt) hand"* on her person. It is further certified that she suffers from 85% permanent physical disability. In this view of the matter, the petitioner throughout her life has to suffer. More so, placid paralysis of right hand indicates that she requires assistance throughout her life and she has to suffer from mental agony as she has lost ability of using right hand. There will be loss of enjoyment of her marital status on account of such disability. She has lost amenity of using her right hand on account of which she will be suffering from mental agony and she requires continuous medical treatment. She will not be in a position to use her right hand for doing any work even for taking bath. Taking all these aforesaid aspects into consideration, the petitioner-claimant is entitled to compensation of Rs.5.00 lakh under the aforesaid heads. However in case of death, compensation of Rs.4.00 lakh from all heads to each of the claimant-petitioners would be just and proper.

30. It is worthwhile to extract the relevant paragraphs from the judgment of Karnataka High Court in the case of ***K.Narasimha Murthy v. the Manager, M/s Oriental Insurance Co. Ltd., Bangalore and another***, ILR 2004 KAR 2471, wherein the Division Bench in an appeal preferred by the claimant under Section 173 of the M.V. Act, 1988 succinctly laid down the legal principle after extracting the relevant paragraphs from the decision of the appeal cases in (1922) 2 AC 242, (1880) 5 App Case 25, (1963) 2 All ER 625, (1965) 1 All ER 563, ILR 1987 Karnataka 1399, (170) AC 1 at 22, (1874) 4 QBD 406 (1970) 114 Sol Jo 193, (1969) 3 ALL ER 1528 and

referring to Mc Gregor on Damages (14th Edition) in support of our conclusion for determination of the compensation for personal injury both for pecuniary and non-pecuniary losses in favour of the injured petitioners, which reads as under :

"***Para-18.*** VISCOUND DUNEDIN, in AMIRALTY COMRS vs. S.S., (1922) 2 AC 242, Valeria has observed thus :

> "The true method of expression, I think, is that in calculating damages you are to consider what is the pecuniary consideration which will make good to the sufferer, as far as money can do so, the loss which he has suffered as the natural result of the wrong done to him"

Para-19. LORD BLACKBURN IN LIVINGSTONE vs. RAWYARDS COAL CO., (1880) 5 App Case 25, has observed thus :

> "Where any injury is to be compensated by damages, in settling the sum f money to be given……you should as nearly as possible get at that sum of money which will, put the person who has been injured….in the same position as he would have been in if he had not sustained the wrong."

Para-21. Lord Morris in his memorable speech in H.WEST AND SONS, (1963) 2 All ER 625, point out this aspect in the following words:

> "Money may be awarded so that some thing tangible may be procured to replace of like nature which has been destroyed or lost. But the money cannot renew a physical frame that has been scattered and shattered. All the Judges and Courts can do it to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent must be reasonable and must be assessed with moderation. Further more, it is eminently desirable that so far as possible comparative injuries should be compensated by comparable awards."

Para-22. In the above case, Their Lordships of the House of Lords, observed that the bodily injury is to be treated as a deprivation which entitles plaintiff to the damage and that the amount of damages varies according to the gravity of the injury. Their Lordships emphasized that in personal injury cases the Court should not award merely token damages but they should grant

substantial amount which could be regarded as adequate compensation.

Para-23. In WARDS, (1965) 1 ALL ER, speaking for the Court of Appeal in England, Lord Denning while dealing with the question of awarding compensation for personal injury laid down three basic principles:

"Firstly, assessability. In cases of grave injury, where the body is wrecked or brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity in awards so that similar decisions may be given in similar cases, otherwise, there will be great dissatisfaction in the community and much criticism of the administration of justice. Thirdly, predictability. Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceable and not brought to Court, a thing very much to the public good."

Para-25 . In BASAVARAJ v. SHEKAR, ILR 1987 KAR 1399, a Division Bench of this Court held :

"If the original position cannot be restored – as indeed in personal injury or fatal accident cases it cannot obviously be –the law must endeavour to give a fair equivalent in money, so far as money can be an equivalent and so make good the damage."

Para-26. "Therefore, the general principle which should govern the assessment of damages in personal injury cases is that the Court should award to injured person such a sum of money as will, put him in the same position as he would have been in if he had not sustained the injuries. But, it is manifest that no award of money can possibly compensate an injured man and renew a shattered human frame."

Para-27. Lord Morris of Borthy Gest in PARRY v. Cleaver, (1970) AC 1 at 22, said;

"To compensate in money for pain and for physical consequenencs is invariably difficult but…..no other process can be devised than that of making a monetary assessment."

Para-28. The necessity that the damages should be full and adequate was stressed by the Court of Queen's BENCH IN FAIR VS. LONDON AND NORTH WESTERN RLY. CO., (1869) 21 LT 326. In RUSTON v. NATIONAL COAL BOARD, (1953) 1 ALL ER 314, Singleton LJ said;

"Every member of this Court is anxious to do all he can to ensure that the damages are adequate for the injury suffered, so far as they can be compensation for an injury, and to help the parties and others to arrive at a fair and just figure."

Para-29. FIELD, J. said in Phillips VS. SOUTH WESTERN RAILWAY CO. held:

"You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. (The plaintiff) can never sue again for it. You have, therefore, now to give him compensation, once and for all. He has done no wrong; he has suffered a wrong at the hands of the defendants and you must take care to give him full fair compensation for that which he has suffered."

Para-33. It is well settled principle that in granting compensation for personal injury, the injured has to be compensated (i) for pain and suffering; (2) for loss of amenities; (3) shortened expectation of life if any; (4) loss of earnings or loss of earning capacity or in some cases for both; and (5) medical treatment and other special damages. In personal injury actions the two main elements are personal loss and pecuniary loss. Chief Justice Cockburn in FAIR v. LONDON AND NORTH WESTERN RAILWAY CO., distinguished the above two aspects thus:

"In assessing the compensation the jury should take into account two things, first, the pecuniary loss the plaintiff sustained by accident secondly, the injury he sustains in his person, or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss they have to take into account not only his present loss, but his incapacity to earn a future improved income."

Para-34. Mc Gregor on Damages (14th Edition) para 1157, referring to the heads of damages in personal injury actions states:

"The person physically injured may recover both for his pecuniary losses and his non-pecuniary losses. O f these the

pecuniary losses themselves comprise two separate items, viz., the loss of earnings and other gains which the plaintiff would have made had he not been injured and the medical and other expenses to which he is put as a result of the injury, and the Courts have sub-divided the non-pecuniary losses into three categories, viz., pain and suffering, loss of amenities of life and loss of expectation of life."

Para-35. Besides, the Court is well advised to remember that the measure of damages in all these cases should be such as to enable even a tort feasor to say that he had amply aloned for his misadventure. The observation of Lord Devlin that the proper approach to the problem or to adopt a test as to what contemporary society would deem to be fair sum, such as would allow the wrong doer to 'hold up his head among his neighbours and say with their approval that he has done the fair thing,' is quite apposite to be kept in mind by the Court in assessing compensation in personal injury cases."

Para-42. LORD REID IN BAKER V. WILLOUGHBY said:

"A man is not compensated for the physical injury; he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg; it is in his inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned……"

31. In view of the above, each of the claimant is entitled to compensation for the death of his child in the accident. Hence non-grant of the compensation to the petitioner-claimant by the railway administration is not sustainable in law. Hence we answer the point No.3 in affirmative by awarding compensation of Rs. 3.50 lakhs to each one of the petitioners whose child died in the railway accident and Rs.5.00 lakh to the injured claimant. The petitioners are also entitled to interest @7% per annum on the compensation amount from the date of claim made with the opposite parties till realization. The same shall be computed and disbursed to the claimant-petitioners within four weeks from the date of receipt of the certified copy of this judgment.

32. The writ petition are allowed to the aforesaid extent.

Writ petition allowed.

2011 (I) ILR – CUT- 488

V.GOPALA GOWDA, CJ & B.N.MAHAPATRA, J.

W.P.(C) NO.13176 OF 2010 (With Batch) (Decided on 17.02.2011)

ROURKELA DEVELOPMENT AUTHORITY, SHOP OWNERS ASSOCIATION & ORS. **.....** Petitioners.

.Vrs.

ROURKELA DEVELOPMENT AUTHORITY. **.....** Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART. 19 (1) (g), 21.

Licence fee – Enhancement of – Petitioners are unemployed small shopkeepers – They challenged enhancement of licence fee from Rs.2.50 to Rs.5.00 per sft in respect of RCC roof shop and Rs.4.50 in respect of asbestos roof shop – Action is arbitrary.

Revision of licence fee was necessary having regard to the price escalation in the country – Revision of licence fee made by the Development Authority is on the higher side which requires reconsideration – Held, impugned order quashed – Direction issued to shop owners to pay Rs.4/- and Rs.3.50 per sft in respect of RCC roof and asbestos roof shops respectively which is exclusive of service tax. (Para 11)

Case laws Referred to:-

1.AIR 1991 SC 855 : (Ashoka Marketing Ltd.-V-Punjab National Bank).
2.(1989) 3 SCC 293 : (M/s. Dwarkadas Marfatia & Sons-V-Board of Trustees of the Port of Bombay).

For Petitioners - M/s. Bijan Ray, C.Choudhury, B.Mohanty, D.Chhotray, S.Mohanty,D.R.Das & B.Maharana.
For Opp.Party - M/s. D.K.Mohapatra & Miss. M.Mishra.

V.GOPALA GOWDA, CJ. These writ petitions are filed by the individuals of different market complexes as well as different members of shop owners Associations under Rourkela Development Authority in the district of Sundargarh seeking for a writ of Certiorari to quash the impugned enhancement of license fees under Annexures-4 and 4/1 so also sought for waiver of penalty and service tax.

2. The brief facts of these cases are stated hereunder to appreciate the rival legal contentions to answer the issues that would arise in these cases. Rourkela Development Authority (for short, 'RDA') as well as Rourkela Municipality being State within the meaning of Article 12 of the Constitution of India, they have developed a number of market complexes at various localities of Rourkela town in the district of Sundargarh with the aim and objectives to achieve all round development of individuals and the locality as well. The shop rooms at different market complexes were having been leased out and the petitioners herein being unemployed small shopkeepers are carrying on their petty business by running provisional stores of different dimensions since long on payment of usual license fee.

3. The RDA and the Rourkela Municipality being creatures of the Statute are governed by the Orissa Development Authorities Act, 1982 and Rules, 1983, Municipal Act, 1950 respectively and the Orissa Public Premises (Eviction of Unauthorised Occupants) Act, 1971 is also attracted to these cases.

4. This is the 2nd round of litigation; the first one being W.P.(C). No.3953 of 2002 was disposed of on 18.07.2002 by this Court with the observation that the Development authority is bound to collect license fees at the rate prevailing in the market accompanied with reference to the Doctrine of the Public Trust and Rule-54 of the Rules, 1983. The license fee was originally fixed at Rs.1.85 per sft. exclusive of service tax payable under Section 68 of the Finance Act, 1994, and subsequently the same was enhanced to Rs.2.50 per sft. with effect from 01.01.202 for which the first writ petition was preferred. Now, in the present writ petition petitioners challenge the enhancement of licence fee from Rs.2.50/- to Rs.5/- per sft. in respect of R.C.C. roof shop and Rs.4.50/- in respect of asbestos roof shop, which according to them is arbitrary and unreasonable being not in consonance with Rule-54 of Rules, 1983; and the said act of the RDA violates the mandate of Article 14 of the Constitution.

5. Learned counsel for the petitioners submitted that the petitioners and their family members having no other alternative means of livelihood are earning their bread and butter out of the petty business. Therefore, revision of license fee at the rate of 130% is at the much higher side which would definitely throw them out of their business so also their livelihood and ultimately they would be deprived of fundamental rights guaranteed under Article 19(1)(g) and Article 21 of the Constitution.

Challenge is also made to the enhanced license fee for one more reason that for the reasons best known to the RDA, Municipality license fees in respect of shop rooms of different markets varying from Rs.1.25/- to Rs.2.50/- has been fixed in different locality. In this regard, reliance was placed on Annexure-6, the order dated 12.11.2007 passed by the Rourkela

Municipality fixing license fee on a varying rate. It is stated that the premises owned by the RDA/Rourkela Municipality being public in nature therefore revision of license fee in exercise of power under Rule 54 of Rules, 1983 more than what was fixed by the Municipality in question is violative of Public Trust. It is not only discriminatory but also arbitrary exercise of power by the Development Authority.

6. At the time of argument, it is suggested by the petitioners' Counsel that the rate of license fee can be fixed at part with the license fee fixed by the Municipality taking into consideration the period of occupation vis-à-vis prevailing market value for the current year. In this way, the rate of license fee would only come to Rs.4/- and Rs.3.50 per sft. in respect of R.C.C. and asbestos roof shop respectively.

7. Mr.Mohapatra, learned counsel for the RDA invited our attention to the counter affidavit filed by its Secretary and reliance is placed on paragraphs 7 and 12 of the said counter affidavit relevant portion of which reads thus:

> "7. ….Though petitioner No.2, in his individual capacity is a licensee under RDA, he has neither executed/renewed any license agreement nor paid the license fees regularly, as alleged. Petitioner No.2 is a chronic defaulter. A shop room was allotted in his favour on 08.09.2000 with license fee @Rs.3./- per sft….. He, however defaulted in payment of security deposit in full in the year 2000 and paid the balance amount of Rs.7000/- only in 2010. He defaulted in executing any license agreement from 2000 till date. He defaulted in paying monthly license fees from 01.01.2008 till 30.06.2010 for which his allotment of his shop room was cancelled. Only on payment of arrear outstanding and up to date license fee (in enhanced rate) with penalty and service tax and defaulted security deposit on his own volition and request for revocation of cancellation in represented dated 31.07.10…..,his cancellation was revoked. As such, petitioner No.2 is estopped from challenging the rate of license fees, the penalty on default and service tax in this writ petition.
>
> 12. ….(a) Rourkela Municipality is receiving Govt. aid in different shape and nature, where as RDA maintain itself and its staff from its own resources. The occasional grants given by the State Govt. and meant for particular development propose and are spent for that purpose only.
>
> (b) The decisions of Rourkela Municipality are taken by its (politically) elected councilor, where as the decisions of RDA are taken by its authority comprising of high level Govt. officials and chairpersons of different Municipalities under the territory of RDA (of course under the chairmanship of Urban Minister of the State).

(c) The 10% hike as stipulated under Annexure-5 makes the enhanced rate to Rs.5.36 per sft. But keeping in view the earlier judgment of this Hon'ble Court the rate was fixed to Rs.5/- per sft. (Rs.4.50 per sft. For asbestos roofed shops).

(d) The Municipality rate is not the sole criteria for determining the market price. The market price in Rourkela, as per the information gathered by RDA, prior to its 12th Authority Meeting dated 01.05.2010 was Rs.7.50 per sft.

(e) That it may be relevant for equitable consideration of fields other than license fee or rent of premises regarding enhanced price index. Viz:-

(i) The staff of RDA is getting higher salaries, as per 6th Pay Commission at higher rate w.e.f. 01.01.2006.

(ii) The rate of common salt has been increased in the market between 2002 to 2010 from Rs.0.50 to Rs.5/-/Rs.6/-

(iii) The rate of gold has suffered a 100% increase between 2002 to 2010."

Mr. Mohapatra sought to justify revision of the license fee made by the RDA in exercise of its power under Rule 54 of the Rules, 1983. Ten percent hike in the license fee is based on the decision of this Court and it could have worked out at Rs.5.36 per sft. However, the authority has fixed at Rs.5/- per sft. for R.C.C. roof shop and Rs.4.50 per sft. for asbestos roof shop. Therefore, the allegation made as against action of the RDA is violative of either Article 14 or 19(1)(g) and 21 is untenable in law. Learned counsel further submits that the revision of the license fee in respect of the shops in question was initiated to maintain its staff as they were required to be paid salary as per 6th Pay Commission with effect from 01.01.2006 and the rate of common salt has increased in the market between 2002 to 2010 from Rs.0.50 to Rs.5/-/Rs.6/-. Aforesaid materials facts are taken into consideration for the purpose of justifying the action of the RDA in increasing license fee while exercising power under Rule 54 of the Rules, 1983. Therefore, the same cannot either be termed as arbitrary or unreasonable or further comparison of license fee fixed by the Rourkela Municipality in respect of the premises which are public premises cannot be compared as the fixation of license fee of shop at Rs.2.50 per sft. in respect of shops at similar places are concerned in the year 2007, but the fixation of the license fee in respect of these shops which are under occupation of the petitioners since 2000-01, therefore, the ground urged that there is discrimination is not attracted to the facts of these case.

8. In view of the above rival contentions, the question falls for consideration of this Court is that as to whether the petitioners are right in

demanding quashing of revision of impugned license fee or the same is violative of Articles, 14, 19(1)(g) and 21 of the Constitution of India and what order.

9. As could be seen from Annexure-6, the order fixing license fee by the Rourkela Municipality, is no doubt allotment of shops for the year 2007 in respect of shops at similar places inside the Rourkela town at Rs.2.50 and Rs.2/- for RCC roof and asbestos roof shops respectively. Even assuming that 10% hike in respect of the shops in these cases from 2001-02 @Rs.1.85 and Rs.1.50 per sft. in respect of RCC roof and asbestos shops respectively if taken into consideration, no doubt 8 to 9 years have lapsed in the meantime; revision of license fee was necessary having regard to the price escalation in the country which was of relevant consideration for an Authority in exercise of Rule 54 of the Rules, 1983. While exercising power, learned Counsel for the RDA submitted that the Development Authority has taken into consideration the earlier judgment of this Court referred supra and enhanced the license fee at the rate of 10%. If 10% hike is taken into consideration, it would only come to Rs.3.70 and Rs.3/-per sft. in respect of RCC roof and asbestos shops. Ten percent cannot be taken for the purpose of arriving at the figure of Rs.5.36 on the basis of adding the revision of license fee every year as has been done in the present cases.

10. Even accepting for the sake of argument, if Rs.3/- per sft. license fee is fixed in the year 2000 in favour of some of the petitioners, then 10% increase from the date of allotment of the shops in their favour after ten years would come to 100% which means double the amount, i.e., Rs.6/- per sft. Whether 100% increase is justifiable or not is the question to be examined keeping in view the nature of business which is being undertaken by these petitioners-shop keepers vis-à-vis the market value prevailing in the Rourkela town. These materials were not verified while determining license fee by the Development Authority in exercise of Rule 54 of the rules. We feel determination of license fee on the basis of the criteria mentioned under clause- (d) and sub clause 1 to 3 of (e) of paragraph 12 of the counter affidavit. Development Authority being a statutory authority has to undertake all round development activities of a town and in that process construction of commercial shopping complexes is undertaken with a view to allot the same in favour of unemployed youths or persons with a view to see that they become self-employed. Generation of self-employment is one of the important functions of the State Government and the Statutory Authorities to mitigate the hardship of unemployment in the country. Therefore, this aspect of the matter is required to be taken into consideration by the Development Authority while revising the license fee under clause (d) and sub-clause 1 to 3 of (e) of paragraph 12 of the counter affidavit. Further, so far as letting out of public premises is concerned, the same is to be made in accordance with

Rule 54 of the Rule, 1983. Keeping the aforesaid material fact in view public premises, which are material resources for generating funds for the Development Authority, are required to be auctioned and the highest bidder should be allotted the shop room having regard to the fact that the population of the town is increasing day-by-day and the commercial shops are to be let out commercially either by the Municipality or by the Development Authority; they are being statutory authority, duty is also cast upon them to undertake such governmental functions so as to mitigate hardships by providing residence so also assistance to unemployed youths of the town/locality which is of relevant consideration. It is to be ensured that the commercial shops constructed by the Development Authority are let out on public auction and highest bidders are offered shops which is the normal procedure and the same is required to be followed by the Development Authority to generate revenue but simultaneously it is not expected to make profit out of it under the guise of revision of license fee at an exorbitant rate. The argument of revision of license fee is required for maintaining its staff and meeting out other expenses of the Development Authority; no doubt this factor is of relevant consideration but simultaneously other relevant factors discussed supra are also required to be taken into consideration at the time of re-determination of license fees.

11. In view of the above vivid discussion, we are of the considered view that re-determination/revision of license fee as made by the Development Authority is on the higher side and the same requires reconsideration. Hence, we quash the impugned order Annexures-4 and 4/1; and while quashing the same we direct the shop owners (licensees) to pay Rs.4/- and Rs.3.50 per sft. in respect of RCC roof and asbestos roof shops respectively which is exclusive of service tax from the date of revision of license fee fixed, till finalization/re-determination of license fee by the RDA as directed in these petitions.

12. In course of argument, it was brought to our notice that the issue of revision/payment of license fee of shops by the Development Authority in question had been challenged before the jurisdictional Civil Courts and some interim orders have been obtained for which the account of the Development Authority was attached to HUDCO for non-payment of the amount due for some time and subsequently the same has been paid and attachment of the account have got discharged by the Development Authority. Be that as it may, the Development Authority is at liberty to bring to the notice of the Civil Courts that wherever the cases of similar nature are pending and interim orders are still there, the same should be pressed for early disposal of such cases. If such an application is filed before the jurisdictional Civil Court, the said Court shall take into consideration that no licensee can be evicted except due process of law and dispose of the case keeping in view that the

premises are public premises as held by the apex Court in ***Ashoka Marketing Ltd. v. Punjab National Bank*****,** AIR 1991 SC 855.

> "28. We are also unable to hold that the inclusion of premises used for commercial purposes within the ambit of the definition of public premises', would render the Public Premises Act as violative of the right to equality guaranteed under Article 14 of the Constitution or right to freedom to carry on any occupation, trade or business guaranteed under Article 19(1)(g) of the Constitution or the right to liberty guaranteed under Article 21 of the Constitution. It is difficult to appreciate how a person in unauthorised occupation of public premises used for commercial purposes, can invoke the Directive Principles under Articles 39 and 41 of the Constitution. As indicated in the Statement of Objects and Reasons the Public Premises Act has been enacted to provide for a speedy machinery for the eviction of unauthorised occupants of public premises. It serves a public purpose, viz. making available, for use, public premises after eviction of persons in unauthorised occupation. The need to provide speedy machinery for eviction of persons in unauthorised occupation cannot be confined to premises used for residential purposes. There is no reason to assume that such a need will not be there in respect of premises used for commercial purposes. No distinction can, therefore, be made between premises used for residential purposes and premises used for commercial purposes in the matter of eviction of unauthorised occupants of public premises and the considerations which necessitate providing a speedy machinery for eviction of persons in unauthorised occupation of public premises apply equally to both the types of public premises. We are, therefore, unable to accept the contention of Shri Yogeshwer Prasad that the definition of public premises contained in Section 2 (e) of the Public Premises Act should be so construed as to exclude premises used for commercial purposes from its ambit.
>
> In our opinion, the provisions of the Public Premises Act, to the extent they cover premises falling within the ambit of the Rent Control Act, by override the provisions of the Rent Control Act and a person in unauthorised occupation of public premises under S. 2(e) of the Act cannot invoke the protection of the Rent Control Act.
>
> We are unable to cut down the scope of the provisions of the Public Premises Act on the basis of such an apprehension because as pointed out by this Court in M/ s. ***Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay***, (1989) 3 SCC 293 : (AIR 1989 SC 1642 at p. 1649):

> "Every activity of public authority especially in the background of the assumption on which such authority enjoys immunity from the rigours of the Rent Act, must be informed by reason and guided by the public interest. All exercise of discretion or power by public authorities (like Bombay Port Trust), in respect of dealing with tenants in respect of which they have been treated separately and distinctly from other landlords on the assumption that they would not act as private landlords must be judged by that standard."
>
> "When the State, the local bodies and public authorities which are "State" within the meaning of Art. 12 are exempted from purview of Rent Control Legislation, the basis of exemption is that such bodies would not be actuated by any profit making motive so as to unduly enhance the rents or eject the tenants from their respective properties as private landlords are or are likely to be. They would not act for their own purpose as private landlords do but must act for public purpose. It, therefore, follows that the public authorities which enjoy this benefit without being hidebound by the requirements of the Rent Act must act for public benefit."

This observation is made to facilitate the Development authority to get the interim orders regarding revision/payment of license fee vacated and get the cases disposed of on the question of maintainability of such proceeding before the Civil Courts.

13. With the above direction to re-determine the license fee in accordance Rule 54 of the Rules, 1983 after taking into consideration all material aspects which are required to re-determine the license fee, it is open for the opp. party to fix just and reasonable license fee taking all relevant factors into consideration which shall be acceptable by each one of the shop owners.

This decision is rendered keeping in view the facts of these cases vis-à-vis nature of the business these petitioners have undertaken. This decision shall not act as precedent in any other case.

Writ petitions allowed.

2011 (I) ILR – CUT- 496

V.GOPALA GOWDA, CJ & B.N.MAHAPATRA, J.

RVWPET NO.268 OF 2010 (Decided on 04.03.2011)

M/S. LARSEN & TOUBRO LTD. …… Petitioner.

.Vrs.

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

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 47, RULE 1.

Review of Judgment – Review lies when there is error apparent on the face of record and such an error crept in inadvertently or otherwise and it is in the interest of justice, such a mistake should be rectified .

In this case application for review filed to decide whether an apprentice trainee is a workman in view of the definition of employee given in Rule 3 (C) of the verification of Membership and Recognition of Trade Unions Rules, 1994 since Under Rule 3 (C) an employee is a workman as defined U/s.2 (s) of the I.D. Act, 1947 – Held, the well-known parameters of review having not been fulfilled the application stands dismissed.

(Para 14 & 15)

Case laws Referred to:-

1.AIR 1980 SC 2181 : (The Life Insurance Corporation of India-V- D.J.Bahadur & Ors.)
2.AIR 1979 SC 65 : (U.P. State Electricity Board & Anr.-V-Hari Shankar Jain & Ors)
3.AIR 1991 SC 855 : (Ashoka Marketing Ltd.& Anr.-V-Punjab National Bank & Ors)
4.AIR 1987 SC 1160 : (Devaraju Pillai-V- Sellayya Pillai)
5.AIR 2000 SC 3737 : (Delhi Administration-V- Gurdip Singh Uban & Ors.)
6.AIR 2006 SC 2686 : (Jain Studios Ltd.,through President-V-Shin Satellite Public Co. Ltd.).

For Petitioner - Mr. R.K.Rath, Sr.Advocate
M/s. D.P.Nanda, R.K.Kanungo, S.Rath & B.P.Panda.
For Opp.Parties - Government Advocate

B.N.MAHAPATRA,J. This Review Petition has been filed with a prayer to review the judgment dated 01.11.2010 passed by this Court in W.P.(C) No.18088 of 2010 holding that an apprentice is a workman in view of the definition of 'employee' given in Rule 3(c) of the Verification of Membership and Recognition of Trade Unions Rules, 1994 (for short "Rules, 1994"). Under Rule 3(c), an 'employee' is a 'workman' as defined under Section 2(s) of the I.D. Act, 1947. According to Section 2(s), 'workman' means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward.

2. Mr. R.K.Rath, learned Senior Advocate appearing for the Review petitioner challenges the impugned judgment on the following grounds:-

(i) Under Section 18 of the Apprentices Act, 1961 (for short, 'Act, 1961') apprentices are trainees and not workers and the provisions of any law with reference to labour shall not apply to or in relation to such apprentices. An apprentice is a person who is undergoing apprentices training in pursuance of contract of apprenticeship. Under Section 2(r) of the Act, 1961 a 'worker' is any person who is employed for wages in any kind of work and who gets his wages directly from the employer but shall not include an apprentice;

(ii) Though the standing orders have defined 'workman' to include apprentice, they have also defined 'apprentice' as a learner who is being trained for a fixed period in a skilled trade or in various branches of a profession with or without remuneration and who may or may not be employed by the Company after the period of training is over;

(iii) Letter to Assistant Labour Commissioner-cum-Returning Officer dated 06.11.2004 defines that advanced trainees are undertaking training as per the Scheme approved by the Director of Technical Education & Training, Orissa on the request of the Unions with the objective of helping the local youth to acquire skill so that they can have better job prospect elsewhere. There is no obligation on the part of the employer to offer any employment to the trainees. In support of his contention, Mr. Rath placed reliance on the decisions of the apex Court in National Small Industries Corporation Limited Vs. Lakshminarayanan, (2007) 1 SCC 214; Dhampur Sugar Mills Limited Vs. Bhola Singh, AIR 2005 SC 1790 and in Dharangadhra Chemical Workers Ltd. Vs. State of Saurastra & Ors., Manu/SC/0071/1956;

(iv) In view of the decisions of the apex Court in Ramesh Mehta Vs. Sanwal Chand Singhvi & Ors., AIR 2004 SC 2258 and Sri Chittaranjan Das Vs. Durgapore Project Limited & Ors., 1995 (2) CLJ 388 an apprentice is not a workman;

(v) An apprentice cannot come within the ambit of workman unless he is employed to do the work in an industry;

(vi) Opp. Party No.3, the Asst. Labour Commissioner, Rourkela had categorically directed O.P. No.4, the Returning Officer to discharge the duties laid down under Rule 6 of the Rules, 1994 which expressly provides that persons who are on regular roll of the establishment are to be included in the exercise of recognition and this important aspect of law has not been considered;

(vii) O.P. No.5 Union through it's General Secretary, who is also the General Secretary of O.P. No.6 Union, having already challenged the decision to exclude the trainees from the verification process in the earlier process of recognition and the same being negatived and such decision having not been challenged and attained finality, he cannot raise the same issue by clothing himself in a different character and such oblique attempt is barred by the principles of *res judicata* as well as the law of *estoppel*;

(viii) Neither the Returning Officer nor the High Court is empowered under law to decide the status of an employee to be either workman or otherwise;

(ix) A combined reading of Rule-3(c), Rule-6 and Rule-13 of Rules, 1994 makes it apparent that the apprentices or advanced trainees are neither permanent employees nor can be described as 'workmen' in view of the provisions of the Special Statute, i.e., Section 18 of the Apprentices Act, 1961 and the decision of the apex Court in Maya Mathew Vs. State of Kerala, (2010) 4 SCC 498;

(x) The terms of appointment of advanced trainees have not been taken into consideration and merely because statutory deduction are being made under EPF and ESI Act the same cannot confer them the legal rights as done under other labour laws and they are precluded from the exercise of recognition of trade unions;

(xi) The principle of *sub silentio* has been inadvertently given a wrong application in the present case inasmuch as it is squarely applicable to the acts of O.P. No.5 through its General Secretary.

3. The various grounds on which Mr. Rath, learned Senior Advocate seeks review of the impugned judgment can be classified under three different heads, i.e., (i) in view of certain provisions of the Apprentices Act, 1961 (for short, 'Act, 1961') an apprentice is not a worker, (ii) similarly, in view of some decisions of the apex Court which are directly covering the issue, an apprentice cannot be held as workman for the purpose of verification of membership and recognition of trade unions, and (iii) certain observations/findings of this Court are factually incorrect.

4. Placing reliance on Sections 18 and 2(r) of the Act, 1961, it is submitted that every apprentice who is undergoing apprenticeship training in a designated trade in an establishment shall be treated to be a trainee and not a workman. The provisions of any law with respect to labour shall not apply to or in relation to such apprentice. Further section 2(r) of the Act, 1961 states that a worker is any person who is employed for wages in any kind of work and who gets his wages directly from the employer but shall not include an apprentice. Therefore, according to Mr. R.K. Rath, since the Apprentices Act, 1961 is a special Act relating to apprentice, the same has overriding effect over the definition of workman provided under Section 2(s) of the I.D. Act, 1947 which defines that the term 'workman' includes apprentice.

5. Now, the question that falls for consideration, is whether the Rules, 1994 in which the definition of "employee" has been given in Rule 3(c) as well as the I.D. Act, 1947 is a special statute and the same has to prevail over the provisions of the Apprentices Act, 1961, while considering the issue as to whether an apprentice is a workman or not for the purpose of verification of membership and recognition of trade Unions. It is not in dispute that the issue as to whether apprentice is a workman shall be considered for the purpose of verification of membership and recognition of trade Unions under the Rules, 1994 and Rule 3(c) of Rules 1994 says 'Employee' means a 'workman' as defined in Section 2(s) of the I.D. Act, 1947.

6. At this juncture, it may be noted that Section 2(s)of the I.D.Act,1947 was substituted in 1984 which provides that 'workman' includes 'Apprentice' and the said definition is adopted in Rule3(c)of Rules,1994 for the purpose of verification of membership and recognition of trade Unions whereas Apprentices Act was enacted in 1961 with a view to regularize the training condition of the apprentices. The provisions of Apprentices Act,
1961 govern the field for which the said Act was enacted. We are here concerned with verification of membership and recognition of trade Unions. Therefore, provisions of the Rules, 1994 as well as Section 2(s) of the I.D. Act, 1947 which was substituted in the year 1984 being Special Statutes those prevail over the Apprentices Act, 1961, which is a general law.

7. At this juncture, it would be profitable to refer the decision of the apex Court in the case of **The Life Insurance Corporation of India vs. D.J. Bahadur and others**, AIR 1980 SC 2181, wherein it has referred to its earlier decision rendered in the case of the **U.P. State Electricity Board and another vs. Hari Shankar Jain and others,** AIR 1979 SC 65 and held that between the I.D. Act and LIC Act, the I.D. Act is a special statutory enactment**.** The relevant paragraphs of the said decision are quoted below:

> "49. The crucial question which demands an answer before we settle the issue is as to whether the LIC Act is a special statute and

the ID Act a general statute so that the latter pro tanto repeals or prevails over the earlier one. What do we mean by a special statute and, in the scheme of the two enactments in question, which can we regard as the special Act and which the general ? An implied repeal is the last judicial refuge and unless driven to that conclusion, is rarely restored to. The decisive point is as to whether the ID Act can be displaced or dismissed as a general statute. If it can be and if the LIC Act is a special statute the proposition contended for by the appellant that the settlement depending for its sustenance on the ID Act cannot hold good against s. 11 and s. 49 of the LIC Act, read with Reg. 58 thereunder. This exercise constrains me to study the scheme of the two statutes in the context of the specific controversy I am dealing with.

50**.** There is no doubt that the LIC Act, as its long title suggests, is an Act to provide for the nationalisation of life insurance business in India by transferring all such business to a corporation established for the purpose and to provide for the regulation and control of the business of the Corporation and for matters connected therewith or incidental thereto. Its primary purpose was to nationalise private insurance business and to establish the Life Insurance Corporation of India. Inevitably, the enactment spelt out the functions of the Corporation, provided for the transfer of existing life insurance business to the Corporation and set out in detail how the management, finance, accounts and audit of the Corporation should be conducted. Incidentally, there was provision for transfer of service of existing employees of the insurers to the Corporation and, sub-incidentally, their conditions of service also had to be provided for. The power to make regulations covering all matters of management was also vested in appropriate authorities. It is plain and beyond dispute that so far as nationalisation of insurance business is concerned, the LIC Act is a special legislation, but equally indubitably, is the inference, from a bare perusal of the subject, scheme and sections and understanding of the anatomy of the Act, that it has nothing to do with the particular problem of *disputes between employer and employees,* or investigation and adjudication of such disputes. It does not deal with workmen and disputes between workmen and employers or with industrial disputes. The Corporation has an army of employees who are not workmen at all. For instance, the higher echelons and other types of employees do not fall within the scope of workmen as defined in Section 2(*s*) of the ID Act. Nor is the Corporation's main business investigation and

adjudication of labour disputes any more than a motor manufacturer's chief business is spraying paints!

51. In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes — so too in life. The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega the ID Act has one special mission — the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, the ID Act is a special statute, and the LIC Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, of management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific or special place in the scheme of the LIC Act. And whenever there was a dispute between workmen and management the ID Act mechanism was resorted to.

52. What are we confronted with in the present case, so that I may determine as between the two enactments which is the special? The only subject which has led to this litigation and which is the bone of contention between the parties is *an industrial dispute between the Corporation and its workmen qua workmen.* If we refuse to be obfuscated by legal abracadabra and see plainly what is so obvious, the conclusion that flows, in the wake of the study I have made, is that vis-a-vis "industrial disputes" at the termination of the settlement as between the workmen and the Corporation, the ID Act is a special legislation and the LIC Act a general legislation. Likewise, when compensation on nationalisation is the question, the LIC Act is the special statute. An application of the generalia maxim as expounded

by English textbooks and decisions leaves us in no doubt that the ID Act being special law, prevails over the LIC Act which is but general law.

(Also see **Ashoka Marketing Ltd. and another vs. Punjab National Bank and others**, AIR 1991 SC 855)

8. In view of the above settled legal position, the Rules, 1994 is a special statute because it specifically deals with verification of membership and recognition of trade Unions. Rule 3(c) of the Rules, 1994 specifically provides that "employee" means a workman as defined under clause (s) of Section 2 of the I.D. Act, 1947. Hence, the I.D. Act, 1947 would override a general law like the Apprentices Act, 1961, which has been enacted to regularize training condition of the apprentices. Thus, the definition of Section 2(s) of the I.D. Act, 1947 must prevail over Section 2(r) and Section 18 of the Apprentices Act as the I.D. Act is a special Act. The Apprentices Act, 1961 may be a special Act as regards the regularization and training condition of the Apprentices are concerned but for the purpose of Verification of Membership and Recognition of Trade Unions, the Rules, 1994, which adopts the definition of 'workman' as provided in Section 2(s) of the I.D. Act, 1947 shall be special laws and the Apprentices Act, 1961 is a general law in that field.

9. Apart from the above, the Apprentices Act, 1961 is enacted in the year 1961 whereas Section 2(s) of the I.D. Act was substituted in the year 1984 and Rule 3(c) of the Rules, 1994 has come into force in the year 1994 which specifically provides that "employee" means a workman as defined under clause (s) of Section 2 of the I.D. Act, 1947. Therefore, the definition of "employee" provided under Rule 3(c) of the Rules, 1994 which adopts the definition of "workman" as provided in Section 2(s) of the I.D. Act, 1947 shall prevail over the provision provided in the Apprentices Act, 1961.

In **Maya Mathew** case (supra), the apex Court held that Special Rules being later in point of time would prevail over the General Rule. When the rule making authority being aware of existence of provisions concerned of General Rules, and it chooses to subsequently make a contrary provision in Special Rules, it is to be inferred that the subsequent rule was intended to prevail over the general rule.

Therefore, The I.D. Act, 1947 & Rules, 1994 must prevail over the Apprentices Act, 1961 so far the issue as to whether an apprentice is a workman for the purpose of verification of membership and recognition of Trade Union is concerned.

10. In view of our finding in the preceding paragraphs, the decisions relied upon by Mr. Rath, are of no help to the review petitioner.

11. In **Dhampur Sugar Mills Limited** (supra), the question for consideration by the apex Court was whether termination of services of an apprentice appointed under the Scheme after payment of compensation in terms of Section 6N of the U.P. I.D. Act sponsored by the State Government amounts to retrenchment/unfair labour practice. The apex Court held that the termination of services of the apprentices after payment of compensation in terms of Section 6N of the U.P. I.D. Act is not unfair labour practice, even assuming that the respondent was a workman.

In **Ramesh Mehta** (supra), the question raised before the Hon'ble Supreme Court for consideration was whether in counting the whole number of the Municipal Boards in terms of Rule 3(9) of the Rajasthan Municipality (Motion of No Confidence against the Chairman/Vice-Chairman) Rules, 1974 the nominated members are to be taken into consideration. In that context, the apex Court held that the nominated Municipal member cannot be counted for calculating the majority required for carrying a no confidence motion against a Chairman/Vice-Chairman of the members.

In **National Small Industries Corporation Limited** (supra), the point for decision was whether in view of Section 18 of the Act, 1961, the 1st Additional Labour Court, Chennai was justified in holding that the respondent who had been appointed as an apprentice by the appellant therein was a 'workman' within the meaning of Section 2(s) of the I.D. Act, 1947 and the termination of the respondent's apprenticeship was in violation of Section 25-F of the I.D. Act and consequently he was entitled to reinstatement and continuity in service with all back wages and other concessions accrued to him. The apex Court held that even if it is accepted that respondent was a 'workman' within the meaning of the I.D. Act on account of contractual tenure his case would come within the exception of Clause (bb) of Section 2(oo) of the Act thereof. In such case also the provision of Section 25-F of the I.D. Act, 1947 would have no application to the respondent's case.

For the reasons stated in paragraph-9 above, the decision of the apex Court in **Maya Mathew** case (supra) supports the case of the opposite parties and is of no help to the review-petitioner.

12. In none of the cases relied upon by the review petitioner, the question as to whether an apprentice/trainee is a workman for the purpose of verification of membership and recognition of trade Union has been decided with reference to the definition given in Rule 3(c) of the Rules, 1994 which adopts the definition of 'workman' given in Section 2(s) of the I.D. Act, 1947.

13. The other contention of the review-petitioner is that the observation of this Court in paragraph 7 is not factually correct. In paragraph 7 of the judgment, this Court observed as follows:

> "7. The first reason given by opposite party No.4-Returning Officer in the impugned order is that the "Advanced Trainees" being "Apprentices" as per clause 2(g) of the Certified Standing Orders of the Company and having performed their jobs with regular workmen in shifts with E.S.I. and E.P.F. coverage under the respective Acts are 'workmen' as defined under Section 2(s) of the I.D. Act and there is no challenge to this finding and observation of the opposite party No.4-Returning Officer in the entire writ petition."

Learned Senior Advocate Mr. Rath, referring to paragraphs 33, 34 and 35 of the writ petition submitted that the reason given by opposite party No.4-Returning Officer extracted above has been denied by the petitioner in the writ petition, but this Court wrongly held that there is no challenge to the above observation of opposite party No.4. Perusal of the paragraphs 33,34 and 35 does not show that the petitioner in any paragraph denied the finding of opposite party No.4-Returning Officer as extracted above. In all the three paragraphs the only contention is that the Returning Officer-opposite party No.4 has no jurisdiction to determine the status of apprentice/trainee and coming to a finding that there were workmen and that he has ignored the order of opposite party No.3 and the judgment of this Court and committed illegality in not adhering to the intendment and object of the Rules, 1994. Therefore, this contention also must fail.

14. All other grounds taken in the review petition cannot be the grounds for a review. The Hon'ble Supreme Court in Haridas Das v. U.R. Banik (Smt.) & Ors.,AIR 2006 SC 1634, held that a perusal of the Order XLVII, Rule 1 shows that review of a judgment or an order could be sought : (a) from the discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; (c) on account of some mistake or error apparent on the face of record or any other sufficient reason.

Law is well settled that the power of review should not be confused with the appellate power.

In ***Devaraju Pillai Vs. Sellayya Pillai,*** AIR 1987 SC 1160, the Hon'ble Supreme Court held that if a party is aggrieved by a judgment of a Court, the proper remedy for such party is to file an appeal against that judgment. Remedy by way of an application for review is entirely misconceived and if a Court entertained the application for review then it has totally exceeded its jurisdiction in allowing the review merely because it takes a different view on a construction of the document.

In ***Delhi Administration Vs. Gurdip Singh Uban & Ors***., AIR 2000 SC 3737, the Hon'ble apex Court deprecated the practice of filing review application observing that review, by no means, is an appeal in disguise and it cannot be entertained even if application has been filed for clarification, modification or review of the judgment and order finally passed for the reason that a party cannot be permitted to circumvent or bypass the procedure prescribed for hearing a review application.

The Hon'ble Supreme Court in ***Jain Studios Ltd., through its President Vs. Shin Satellite Public Co. Ltd.,*** AIR 2006 SC 2686***,*** held that the power of review cannot be confused with appellate power which enables a superior Court to correct all errors committed by a subordinate Court. It is not rehearing of an original matter. A review of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases. Thus, it is the settled position of law that review lies when there is error apparent on the face of record and such an error crept in inadvertently or otherwise and it is in the interest of justice, such a mistake should be rectified.

15. In the above facts situation, no case for review under Order XLVII, Rule 1, C.P.C. is made out. The well-known parameters of review, as indicated above, having not been fulfilled, there is no scope for review.

The Review petition is accordingly dismissed.

No order as to costs.

Review Petition dismissed.

2011 (I) ILR – CUT- 506

B.P.DAS, J & B.K.MISRA, J.

O.J.C. NO.8129 OF 1998 (Decided on 14.02.2011)

KUNI SAHOO …….. Petitioner.

.Vrs.

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

Service – Normal rule of "no work no pay" is not applicable to such cases where the employee, although he is willing to work is kept away from work by the authorities for no fault of his.

In the present case admittedly due to the illegal action of opposite parties the petitioner was kept away from her job for the period 1.11.1998 to 25.3.2003 – Held, direction issued for payment of 80% of the differential back salary for the above period as the petitioner under takes to forego some money out of her total entitlement.

(Para 8 & 9)

Case law Referred to:-

AIR 1991 SC 2010 : (Union of India -V- K.V.Jankiraman).

For Petitioners - M/s. A.K.Mishra & Associates.
For Opp.Parties-1&2- Additional Standing Counsel.
For O.P.3 - Mr. P.K.Mohapatra.

B.P.DAS, J. The petitioner was working as a Peon in the Bada Bazaar Girls' M.E. School under the Sambalpur Municipality having been appointed on regular basis with effect from 21.5.1993 and selected by the Selection Committee of the said Municipality with prescribed scale of pay meant for the post. It is worthwhile to mention here that the petitioner was working as an N.M.R. under the Municipality since 1982 continuously in different sections till her regular appointment on 21.5.93. However, the said appointment was for six months, which was extended from time to time and ultimately, the petitioner was allowed to draw the revised scale of pay with effect from 1.4.1994 in the scale of pay of Rs.750-12-870-EB-14-940/-. The petitioner's appointment was not extended with effect from 1.3.95 and she was allowed to continue as N.M.R. But on her representation to the Hon'ble Minister, Urban Development Department, she was allowed to draw regular pay scale as she was in receipt with effect from 1.8.95 vide order of the Sambalpur Municipality dated 3.8.95. But she has not been paid the regular pay scale of the post of Peon with effect from 1.3.1995 to 31.7.95.

2. Again vide order dated 1.12.97, the petitioner was appointed as a Peon for 44 days in the prescribed scale in supersession to all previous orders. In the said order of appointment, it was mentioned that the said appointment was purely temporary and can be terminable without prior notice on expiry of the term and she cannot claim her regular posting on the basis of this engagement in future. After completion of 44 days the petitioner was relieved by the Headmistress of Bada Bazar Girls' M.E. School, Sambalpur. However, the said termination was again regularized on the ground of Model Code of Conduct in view of ensuing parliamentary election and the petitioner's appointment was further extended for 44 days with effect from 16.1.98 to 28.2.98 in the time scale of Rs.750-940/-. It was further extended for 44 days with effect from 3.3.98 to 15.4.98 and again from 18.4.98 to 31.5.98. It is not out of place to mention here that the Service Book of the petitioner was opened by then with effect from 21.5.1993, i.e., from the date of her regular appointment as Peon. According to the petitioner, when she was holding a substantive post, receiving her regular salary, Service Book was opened, the G.P.F. number was allotted and the house rent allowance was allowed to be withdrawn, there is no reason as to why the said appointment is being made on different spells threatening the livelihood of the petitioner. After several representations, as it yielded no reason, the petitioner submitted an appeal in December, 1997 to O.P.1-Secretary to Government, Housing & Urban Development Department. As no action was taken on the said appeal, the petitioner filed this writ petition with the following prayer :-

To direct the opposite parties to regularize the services of the petitioner with effect from 21.5.93 and pay her the regular scale from 1.3.95 to 31.7.95 as well as allow her the annual increments with effect from 21.5.94 onwards.

3. Counter affidavit has been filed by the Executive Officer, Sambalpur Municipality indicating therein that the appointment of the petitioner at no point of time was regularized but purely on temporary basis. In the year 1997 the Government of Orissa in Housing and Urban Development Department issued a circular giving clarification on engagement of D.L.R./N.M.R./Adhoc staff in different Urban Local Bodies of the State. As the case of the petitioner was not come within the purview of the said circular, she was disengaged after 13.1.1998.

4. Mr.P.K.Mohapatra, learned counsel for the Sambalpur Municipality, submits that the petitioner was engaged in an irregular manner and she does not have any right for such engagement and she has been rightly disengaged.

5. The petitioner has filed Misc. Case No.9 of 2011 annexing copies of certain documents, out of which Annexure-21 is the communication dated

28.11.2002 made to the Director of Municipal Administration by the Executive Officer, Sambalpur Municipality, relevant portion of which is extracted hereunder :-

> "……The case is still subjudice. Her termination of service is without any basis.
>
> This is for favour of information."

Thereafter, Annexure-22, i.e., extract of order dated 25.3.2003 was passed by the Director, Municipal Administration in regard to regularization of services of the petitioner on her appeal petition dtd.30.5.2001. Learned counsel for the petitioner as well as Municipality submits that the petitioner has filed some representations before the Director, Municipal Administration during pendency of this writ petition. Relevant portion of the order dated 25.3.2003 is quoted hereunder :-

> "This would certainly not justify the illegal action of the chairman to oust her without any reason or justification and encroaching upon the authorities of Government as envisaged u/s.73-B of Orissa Municipal Act, 1950.
>
> It is a case where a low paid municipal employee should be given proper justice.
>
> Therefore, as per the power vested in me u/s.408 of Orissa Municipal Act, 1950 read with section 73(i) I bid it is ordered that,
>
> a) Smt. Kuni Sahu, Ex-Peon is reinstated in service with immediate effect.
> b) She will be entitled for her previous rank and scale of pay subject to condition that though her payment of salaries will be paid as notionally fixed but not to be paid for the period she has not actually worked under the municipality.
> c) There will be no breakage of service and it would count towards her pension.
> d) After reinstatement the municipality will take adequate steps for regularization of service and to absorb her in the sanctioned and vacant post and if necessitates to seek orders of Government."

6. Thereafter, in the meantime the Executive Officer of the Municipality passed the order on 5.4.2003 reinstating the petitioner in her previous post with the following conditions.

> (1) She will be entitled for her previous rank and scale of pay subject to condition that though her payment of salaries will be paid

as notionally fixed but not to be paid for the period she has not actually worked under the Municipality.

(2) There will be no breakage of service and it would count towards her pension."

7. So admittedly, due to fault or illegal action of the opposite parties, the petitioner was kept away from her job for the period now she is claiming, i.e., 1.11.1998 to 25.3.2003. When there is no breakage of service, there is no reason as to why the petitioner cannot be allowed to get the salary, for which she was kept out of job for the faulty action of the opposite parties.

8. Law in this regard is well settled that the normal rule of "no work no pay" is not applicable to such cases where the employee although he is willing to work is kept away from work by the authorities for no fault of his. (See**- Union of India vrs. K.V.Jankiraman** AIR 1991 SC 2010)

9. It is further stated by the learned counsel for the petitioner that now the petitioner is suffering from Cancer and getting treatment. He further submits that if the entire amount is computed and paid to the petitioner, she can get better treatment. He also undertakes that if the said amount is paid within two months from today, the petitioner shall forego 25% of her total entitlement.

Accordingly, we allow this writ application and direct the opposite parties to compute the differential back salary of the petitioner from 1.11.1998 to 25.3.2003 and pay 80% of the said amount to the petitioner within a period of two months from the date of communication of this judgment.

Let a copy of this judgment be communicated to the opposite parties by registered Post with A.D. Requisites shall be filed by 28th February, 2011. Writ petition allowed.

Writ petition allowed.

2011 (I) ILR – CUT- 510

B.P.DAS, J & S.PANDA, J.

W.P.(C) NO.2617 OF 2005 (Decided on 12.01.2011)

CHITTARANJAN MAHAPATRA & ORS. ….. Petitioners.

.Vrs.

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

ORISSA EDUCATION ACT, 1969 (ACT NO.15 OF 1969) – S.24-B.

Teaching and non-teaching staff of an aided College – Prayer for release of Grant-in-Aid in terms of Grant-in-Aid Order, 1994 – Grant-in-Aid refused due to financial crunch of the Govt. – Apex Court did not approve such stand – Held, direction issued to the State Govt. to examine the eligibility of each of the petitioners and release Grant-in-Aid in their favour in accordance with the Grant-in-Aid Order, 1994.

(Para 7,8)

Case law Relied on :-

2003 (I) OLR-91 : (Prafuklla Kumar Sahoo-V-State of Orissa & Ors.)

For Petitioners - M/s. B.Routray, D.K.Mohapatra, B.N.Satapathy, B.B.Routray, D.Routray & D.Mohapatra.
For O.Ps 1 to 3 - Mr. J.Pattnaik Learned Addl. Government
For O.P. 4 - Mr. S.D.Das.

B.P.DAS, J. The case of the petitioners, as delineated in the writ petition, is as follows :-

The petitioners are the teaching and non-teaching staff of an aided College, namely, Prahallad Mahavidyalaya at Padmabati in the district of Nayagarh. The said College is admitted to be +2 College established in the year 1986 and got the Government concurrence on 5.9.1986. On 4.3.1995 the College submitted application in the prescribed Form-A for release of Grant-in-Aid in terms of the Grant-in-Aid Order, 1994. Ultimately, on 13.3.1997 the Director of Higher Education after verifying the original records and being fully satisfied recommended the case of the petitioners to the Government for release of Grant-in-Aid under the Grant-in-Aid Order, 1994 vide letter no.2195 dated 13.3.1997 (Annexure-6). Since no action was taken despite the recommendation of the Director, the petitioners filed O.J.C. No.9612/1999 and this Court by order dated 4.8.1999 while disposing of the same directed that if the matter was pending before the Government, a

decision be taken within four months. Thereafter, the Government in pursuance of the said order dated 4.8.1999 communicated the decision to the Director that Grant-in-Aid would be released as and when funds would be made available for the purpose. The State Government by its letter dated 1.11.2000 rejected the claim for sanction of Grant-in-Aid to the College on the ground of financial constraint.

The petitioners against the said order of rejection again approached this Court in W.P.(C) No.7574/2000, which was disposed of on 1.11.2002 in terms of the judgment rendered **Prafulla Kumar Sahoo vrs. State of Orissa & Others,** 2003 (I) OLR-91, quashing the impugned notification dated 9.8.2000 issued by the Department of Higher Education with a direction to re-consider the case of the petitioners for release of Grant-in-Aid strictly in accordance with the Grant-in-Aid Order, 1994. As the order of this Court dated 1.11.2002 was not implemented, this Court directed personal appearance of the Secretary to Government, Higher Education. But a plea was taken that the State Government has filed an application to review the decision rendered by this Court in the case of Prafulla Kumar Sahoo (supra).

2. Thereafter, the State Government moved the apex Court in a Special Leave Petition, which was converted to Civil Appeal No.4389/2006, challenging the judgment in Prafulla Kumar Sahoo so also several judgments and orders passed by this Court in terms of the decision in the case of Prafulla Kumar Sahoo (supra).

3. It is pertinent to mention here that when the matter was thus pending, the State Government in the Department of Higher Education came up with a Notification dated 5th February, 2004, Annexure-9, notifying "Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-Aid Order, 2004 to regulate the payment of Grant-in-Aid to private educational institutions being non-Government Colleges, Jr. Colleges or Higher Secondary Schools. The aforesaid Order, 2004 is an amendment to the earlier Grant-in-Aid Order, 1994. Sub-Clause (2) of Clause-3 of the said Grant-in-Aid Order, 2004 being relevant is quoted hereunder :-

> "3(2)- The block grant payable to the private educational institutions under sub-para (1) shall be a fixed sum of grant-in-aid, which shall be determined by taking into account the salaries and allowances, as on the 1st day of January, 2004, of the teaching and non-teaching employees of the educational institution which has become eligible to receive grant-in-aid by the 1st day of June, 1994 in accordance with the Grant-in-Aid Order, 1994, but the determination of the quantum of such block grant shall be within the limits of economic capacity of Government as mentioned in sub-section (1) of section 7-C of the Act and shall have no linkage with the salary and

allowance payable to any such employee by the Governing Body from time to time."

The vires of Grant-in-Aid Order, 2004 has been challenged in this case on the ground that it has been purposefully enacted to take away the effect of the judgment in Prafulla Kumar Sahoo (supra). When the State Government had decided earlier that 39 Colleges were eligible to get Grant-in-Aid in terms of the Grant-in-Aid Order, 1994, such colleges cannot be deprived of to get the benefits of Grant-in-Aid in terms of the Grant-in-Aid Order, 2004.

4. But at this juncture, we have to look at the judgment of Prafulla Kumar Sahoo. Paragraphs-10,11,12, 15 & 16 of the said judgment are quoted hereunder :-

"10. Clause (2) of the Grant-in-Aid Order, 1994 defines the various expressions used In the Grant-in-Aid Order, 1994. The expression "Director" and "Government" as defined in Clauses-2(e) and 2(g) of the Grant-In-Aid Order, 1994, are quoted herein below :-

"2.(l) In this order, unless the context otherwise requires-

(a) to (d) xx xx xx

(e) "Director" means the Director, Higher Education, Orissa and includes any officer not below the rank of Deputy Director who may be Authorised by the State Government in that behalf from time to time by a general or a special order to perform all or any of the functions and exercise all or any of the powers of the Director under this order :

(f) xx xx xx

(g) "Government" means the Government in the Department of Higher Education:

(h) to (i) xx xx xx"

In the Grant-in-Aid Order, 1994 wherever the expression "Director" occurs, it would mean the Director, Higher Education, Orissa or any officer not below the rank of Deputy Director, who may be authorised by the Stale Government in that behalf from time to time by a general or a special order to perform all or any of the

functions and exercise all or any of the powers of the Director under the Order and the expression "Government" where ever occurs in the Grant-in-Aid Order, 1994 would mean Government in the Department of Higher Education. Thus, it is only the authorities of the department of the Higher Education who have been vested with the statutory powers and functions with regard to claims to eligibility or admissibility to grant-in-aid. The authorities of the Finance Department, Government of Orissa, have not been vested with any statutory power or function under the Grant-in-Aid Order, 1994 to take any decision with regard to the claims to e1gibi1ity or admissibility to grant-in-aid.

11. Yet, by a circular dated 2.2.2000 annexed to the writ petition as Annexure-7, the Government of Orissa in the Finance Department has imposed some restrictions on the claims to eligibility or admissibility to grant-in-aid. The relevant portion of the said circular dated 2.2.2000 of the Finance Department, Government of Orissa, is quoted herein below

"xx xx xx

2. As a medium term fiscal reform, steps have already been taken to abolish 50% of the existing vacancies at the base level posts under State Government establishments. Restrictions have also been imposed not to fill up any vacant post without prior concurrence of Finance Department. But it has been noticed that in most of the aided institutions the vacancies are being filled up and there is increase in demand for grant-in-aid.

3. It has, therefore, been decided that the restrictions as indicated below should be made applicable to the aided institutions under your administrative control.

(i) All the base level vacancies in the non-teaching posts as on 1.1.2000 shall stand abolished immediately and Government shall not pay grant -in-aid hence forward in respect of those posts stand abolished:

(ii) The non-teaching posts in the aided institutions that may fall vacant with effect from 1.2.2000 onwards due to retirement/resignation/death or any other reason, shall not be filled up and those posts falling vacant would stand automatically

abolished. State Government shall not pay any grant-in-aid in respect of those vacant posts thus abolished.

(iii) The existing vacancies and also future vacancies in the teaching posts shall not be filled up without specific approval of Government with due concurrence of Finance Department."

The aforesaid circular of the Finance Department is the basis of the decision in the impugned order dated 9.8.2000 of the Government of Orissa, Department of Higher Education rejecting the case of the petitioner for removal and grant-in-aid as would be clear from the very language of the impugned order dated 9.8.2000 quoted above. As the Finance Department, Government of Orissa had no jurisdiction to impose restrictions by an executive order on the claim of any educational institution or any member of its teaching or non-teaching staff to grant-in-aid, the impugned order dated 9.8.2000 of the Government of Orissa, Higher Education Department, which is based on such executive order of the Finance Department, Government of Orissa is *ultra vires* Sub-section (4) of Section 7-C of the Orissa Education Act and the Grant-in-Aid Order, 1994 and is also without jurisdiction and is liable to be quashed.

12. In Sub-section (4) of Section 7-C of the Orissa Education Act, however, it is clearly stated that grant-in-aid where admissible under the rule or order, as the case may be. "shall be payable from such date as may be specified in that rule or order or from such date as may be determined by the State Government". We have perused the provisions of the Grant-in-Aid Order, 1994 and we do not find therein any mention as to the date from which grant-in-aid would be payable. Clause-16 of the Grant-in-Aid Order, 1994 on which great reliance was placed by Mr. Swain in support of his submission that grant-in-aid would become payable as soon as the eligibility to grant-in-aid is decided by the Director, is quoted herein below :

"16.(1) On receipt of a proposal from the Governing Body under para- 15, the Director shall examine each case and if he is satisfied that the person proposed by the Governing Body is eligible to receive grant-in-aid against an approved post he shall make an order to that effect. Where the Director is satisfied that a person proposed by the Governing Body is not eligible to receive grant-in-aid his decision shall be communicated to the Governing Body.

For the purpose of satisfying himself as to eligibility of a person to receive grant-in-aid, the Director may call for any information, clarification or document that he considers necessary for the purpose.

(2) No person shall be eligible to receive grant-in-aid against an aided post unless :

(i) he has been lawfully and validly appointed to that post by the competent authority in accordance with the law, rules and instructions in force at the time of his appointment and has been continuing to hold that post on and beyond the date of eligibility of the post to receive grant-in-aid, and

(ii) he possessed educational qualifications and experience required holding that post at the time of his recruitment or on the date of post was admissible to grant-in-aid, whichever is later".

The aforesaid Clause-16 does not specify the date from which grant-in-aid would become payable, but only provides that the Director will communicate his decision on the claim to eligibility to grant-in-aid. After the claim to eligibility to grant-in-aid is decided by the Director, the State Government has to decide the date from which the grant-in-aid would be paid after finding the resources for making such payment. If funds are available under the budget for making payment of the grant-In-aid, the State Government can forthwith issue the order specifying the date from which the payment of grant-in-aid would be made. But if budgetary allocations for grant-in-aid have been exhausted, the State Government will have to wait till such budgetary allocations are made, Thus until the State Government issues an order determining the date from which grant-in-aid is payable to an educational institution or to a member of the teaching or non-teaching staff of the educational institution after finding the resources for the same, grant-in-aid cannot be claimed as a matter of right and no direction can be issued by the Court for payment. But once the State Government issues an order determining the date from which grant-in-aid is payable, a direction can be given by the Court to make payment of grant-in-aid, both current and arrear. This conclusion is in accord with the decision of the Supreme Court in **State of Orissa and another v. Pratap Kumar Nayak and another** *(supra)* that case of each employee for grant-in-aid has to be

considered as per the Grant-in-Aid Order and Section 7-C of the Orissa Education Act, 1969 and it is for the State Government to examine each and every case in accordance with the prescribed procedure for such grant-in-aid. This conclusion is also consistent with the view taken by the Full Bench of this Court in **Laxmidhar Pati and others v. State of Orissa and others** *(supra)* that mere eligibility to grant-in-aid *ipso facto* does not confer a right or entitlement on the educational institution or its teaching or non-teaching staff to claim and receive grant-in-aid.

15. Orissa is a State with large sections of people including Scheduled Castes and Scheduled Tribes who are illiterate and backward consistent with the Directive Principles of the State Policy in Articles 41 and 46 of the Constitution, the legislature has imposed a mandate on the State Government under Sub-section (1) of Section 7-C of the Orissa Education Act to set apart a sum of money annually for being given as grant-in-aid to private educational institutions in the State subject to the limits of its economic capacity. The State Government has also made the Grant-in-Aid Order, 1994 under Sub-section (4) of Section 7-C of the Orissa Education Act clearly indicating the relevant factors to be taken into consideration for deciding the eligibility of an educational institution or a member of leaching or non-teaching staff of such educational institution keeping in mind the educational needs of the State. The State Government cannot ignore such legislative mandate as we1l as the Directive Principles of State Policy the statutory provisions of the Grant-in-Aid Order, 1994. Unless, therefore, there are other more pressing needs than education, the State Government must set apart sufficient money for making payment of grant-in-aid to educational institutions or their teaching or non-teaching staff in accordance with the Grant-in-Aid Order 1994.

16. For the aforesaid reasons, the impugned order dated 9.8.2000 is quashed and the Director, Higher Education, Orissa and the Secretary, Department of Higher Education, Government of Orissa are directed to reconsider the case of the petitioner for approval in the post of Junior Librarian and eligibility or admissibility to grant-in-aid in the said post strictly in accordance with the Grant-in-Aid Order, 1994 and the observations in this judgment within a period of four months from today. If such approval is granted and the petitioner is declared to be eligible to grant-in-aid, the State Government will issue an order specifying the date for payment of such grant-in-aid after arranging the resources for the same in the budget for the next financial years. With the aforesaid

directions the writ petition is allowed. But considering the facts and circumstances of the case, the parties shall bear their own costs."

5. On 18.10.2010, the Hon'ble apex Court did not interfere with the impugned judgment and dismissed Civil Appeal No.4389/2006 (State of Orissa & Others vrs. Prafulla Kumar Sahoo & Another) with certain direction. The relevant part of the order is extracted hereunder :-

> "……We have carefully gone through the impugned judgment passed by the Division Bench of the High Court of Orissa. In our considered view, no interference is called for. These appeals are devoid of any merit.
>
> We, however, direct the appellant to decide the case of the respondents as expeditiously as possible and, in any event, within four months from the date of communication of this order.
>
> This appeal, is accordingly, dismissed leaving the parties to bear their own costs."

6. Coming back to the facts of this case, we refer to the office order dated 29th November, 2003 passed by the Commissioner-cum-Secretary to Government, Department of Higher Education, relevant portion of which reads thus :-

> "The petitioner Shri Chittaranjan Mohapatra and others are at present working as teaching and non-teaching staff of Prahallad Mohavidyalaya, Padmabati, District-Nayagarh. The Director, Higher Education has submitted a proposal to government vide his letter No.2195 GH dt.13.3.97 to notify the +2 Wing of Prahallad Mohavidyalaya, Padmabati, district-Nayagarh as an Aided College under Section 3(b) of the Orissa Education Act, 1969 and to sanction grant-in-aid in favour of the eligible employees of the College. At present, proposals in respect of 39 (+2) unaided Colleges are pending at Government level for consideration due to resource crunch faced by the State Government."

From the aforesaid, it is crystal clear that the proposal for consideration of Grant-in-Aid Order, 1994 for the college of the petitioners as well as other 38 nos. of +2 unaided colleges was pending before the Government and no decision was taken solely on the ground of financial crunch, for which this Court decided the same in Prafulla Kumar Sahoo (supra) negativing the plea taken by the Government. So, after the judgment of the Hon'ble apex Court passed in Civil Appeal No.4389/2006, nothing survived for decision in the present case.

However, so far as it relates to vires of the Notification dated 5th February, 2004 (Gran t-in-Aid Order, 2004) under Annexure-9, learned

counsel for the State furnishes the list of 39 nos. of +2 Colleges, as indicated below :-

1. Balasore Colleges, Balasore.

2. Anchilaka M.V., Ajodhya, Dist: Balasore

3. Maa Sarada Devi M.V. Kothar, Dist: Bhadrak

4. S.C. College Kukudakhandi, Dist: Ganjam

5. P.S. College, Polsara, Dist:Boudh.

6. C.T. Women's College, Thoriasahi.

7. Ansupa College of Education & Tech., Banki, Dist: CTC.

8.Ancha1ika M.V. Pragnya Bihar, Odapada, Dist: Dhenkanal

9. Parimal College, Pandua,Dist: Dhenkanal.

10. Jhadeswarpur Telkoi College, Dist: Jajpur.

11. A.S.Women's College, Alakunda, Dist: Jajpur.

12. Kadambari Pal Women's College1, Bari, Dist: Jajpur

13. Dasarathapur H.S.S., Dist: Jajpur.

14. P.A.M.B. Kumarbandha, Dist: Jharsuguda

15. S.M. Panchayat College, Dist: Jharsuguda.

16. P.S. College, Dist:Jharsuguda.

17. Radgaor H.S.S., Dist: Kalahandi

18. J.K.M.V. Kosala, Dist: Kalahandi

19. Charigarh M.V. Telkoi, Dist:Keonjhar

20 Usha Devi Women's Co11ege.

21. G.B. Women's College, Athagarh

22. P.B.M. M.V. Mahabirod Dist: Dhenkanal

23. M.S.R. Mahila M.V. Dist: Kendrapara

24. Chitrotpala Women's College, Dist: Kendrapara

25. B.P.College, Dist: Khurda

26. Murga Sasan Co1lege, Nua Diha, Dist: Mayurbhanj.

27. Kaptipada College, Kaptipada, Dist: Mayurbhanj.

28. R.N. College, Dist: Mayurbhanj

29. I.G. Mahila College, Dist: Mayurbhanj.

30. Anla M.V., Dist: Mayurbhanj

31. Prahallad M.V. Padmabati. Dist:Nayagarh.

32. N.S.W. College, Kakatpur, Dist:Puri

33. I.G.M M.V. Nimapara, Dist: Puri

34. Panchayat College, Satpara, Dist: Puri.

35. P.S. College, Dist: Sundergarh

36. P.S. College, Sonepur.

37. Similian College, Dist: Kalahandi

38. Kusum Devi Women's College, Cuttack

39 A.S College, Balia, Dist: Jajpur

whose cases were considered and found to be eligible for release of Grant-in-Aid in terms of the Grant-in-Aid Order, 1994 but the Grant-in-Aid could not be given due to the reason for financial crunch, as ascribed by the State

Authorities, the dispute over which has already been set at rest by the Hon'ble apex Court.

8. In view of such, we dispose of this writ petition in terms of the decisions in **Prafulla Kumar Sahoo vrs. State of Orissa & Others** reported in 2003(I) OLR-91 and **Chittaranjan Mohapatra & Others vrs. State of Orissa & Others** (O.J.C. No.7574/2000 disposed of on 1.11.2002) and direct the State Government to examine the eligibility of each of the petitioners and release Grant-in-Aid in their favour strictly in accordance with the Grant-in-Aid Order, 1994. The differential salary as well as arrear, if any, shall also be paid to them. The entire exercise shall be completed within a period four months from the date of communication of this order. No cost.

Writ petition disposed of.

2011 (I) ILR – CUT- 521

L.MOHAPATRA. J & ARUNA SURESH.J

O.J.C. No.1872 of 2001(Decided on 23.11.2010)

LOKANATH KUANR ……. Petitioner**.**

.Vrs.

LIFE INSURANCE CORPORATION OF INDIA & ANR. ……. Opp.Parties**.**

Service law – Petitioner produced Transfer Certificate in proof of his date of birth – Certificate found to be forged – On inquiry petitioner found guilty and removed from service – Hence the writ petition.

This Court in a similar case set aside the punishment of removal from service and directed the opp.parties to reconsider the question of punishment. Held, employees standing on the same footing and charged on the same allegation should be dealt with similarly - Hence this Court quashed the order of punishment as well as the order of the appellate authority and remitted the matter back to the opp.parties for reconsideration of the punishment and further directed that the petitioner in the present case shall not be entitled to back wages for the period he remains out of service.

(Para 4,5)

Case law Relied on:-

2007(8) SC 713 : (Akhilesh Kumar Singh -V- State of Jharkhand & Ors.)

Case laws Referred to:-

1.(2008) 13 SCC 170 : (Regional Manager, Central Bank of India-V- Madhulika Guruprasad Dahir & Ors.)

2.AIR 2008 SC 2481 : (Man Singh-V-State of Harayana & Ors.)

For Petitioner - M/s B. Routray, A.K.Baral, D.K. Mohapatra & P.K.Dash

For Opp. Parties - M/s Sanjit Mohanty, N.C. Sahoo, S.P. Panda, S.N. Mohanty, R.R. Swain,M.Banarjee & S.C.Samantray.

L.MOHAPATRA, J. The petitioner, who was working as a Sub-Staff in the Life Insurance Corporation of India, having been removed from service vide order dated 29th January, 1996 in Annexure-6 and the appeal filed against

the said order of removal having also been rejected in Annexure-10, this writ application has been filed challenging the aforesaid two orders.

2. Coming to know about existence of certain vacancies of Sub-Staff in the Life Insurance Corporation of India, the petitioner submitted an application for being appointed. An interview was conducted and the petitioner was selected and appointed as a Sub-Staff in the Cuttack Divisional Office of Life Insurance Corporation of India in February,1993. While working as such, he was served with a notice in Annexure-1 dated 24.9.1993 asking him to submit a reply in relation to the charges made therein. As it appears, the petitioner at the time of submitting the application for appointment had produced a Transfer Certificate in proof of his date of birth and educational qualification. Subsequently the said certificate was found to be a forged one and, accordingly, the aforesaid charge was framed against him for having entered into service of the Corporation as a Sub-Staff on production of fake and forged Transfer Certificate. The petitioner submitted his reply and an inquiry was conducted. Upon conclusion of the inquiry, the order of removal was passed by the Senior Divisional Manager, who is the Disciplinary Authority. The appeal preferred by the petitioner was also rejected in Annexure-10.

3. Learned counsel appearing for the petitioner in stead of making any submission on veracity of the charges framed against the petitioner, drew attention of the Court to a decision of this Court in the case of ***Deepak Kumar Bohidar Vrs. Divisional Manager, Life Insurance Corporation of India and others*** vide O.J.C. No.8643 of 1994 disposed of on 13.8.2008. With reference to the aforesaid judgment, it was contended by the learned counsel that the petitioner stands exactly on the same footing as that of the petitioner in the aforesaid case and the order of termination in the aforesaid case having been set aside, the said decision be made applicable to the case of the present petitioner.

Shri Samantray, learned counsel appearing for the Life Insurance Corporation of India relied on some decisions of the Hon'ble Supreme Court and submitted that a person, who has entered into the service by producing a forged document, does not deserve any sympathy and, therefore, the order of removal from service can only be the order that could be passed under the circumstances. Shri Samantray, learned counsel also relied on a decision of the Supreme Court in the case of Regional Manager, Central Bank of India Vrs. Madhulika Guruprasad Dahir and others reported in (2008) 13 Supreme Court Cases 170. In the samd case, appointment had been made on the basis of a false Caste Certificate and the employee was terminated from service. The Hon'ble Supreme Court held that where an employee obtains an appointment on production of false Caste Certificate, equity, sympathy and generosity have no place in such a situation. The

decision relied upon by the learned counsel for the petitioner is more or less same as the face of the present case. The petitioner-Deepak Kumar Bohidar in the aforesaid case was initially engaged as a Badli worker under Life Insurance Corporation of India. A decision was taken by the National Industrial Tribunal that those who were working as Badli workers would be regularized. The petitioner-Deepak Kumar Bohidar accordingly applied for regularization and after facing an examination, he was selected and was appointed as a Sub-Staff in Class-IV under Life Insurance Corporation of India. While working as such, it was found that he had given a certificate showing him to have passed Class-X from CSB Zilla School, Sambalpur and his death of birth as 15.7.1961 and the said certificate having been found to be forged one, he was removed from service. In the said writ application, the petitioner-Deepak Kumar Bohidar admitted to have produced a forged certificate indicating his death of birth and the educational qualification but submitted that under similar circumstances in respect of some other employees namely, Ramnath Lakra and Stephen Khalko, a lenient view had been taken by the Life Insurance Corporation Authorities and they were not removed from service. One of them namely, Ramanath Lakra was punished with reduction of pay by one stage permanently and other employee namely, Stephen Khalko was punished with reduction of his pay by two stages. This Court relying on a decision of the Hon'ble Supreme Court in the case of Akhilesh Kumar Singh Vrs. State of Jharkhand & others, reported in 2007(8) Supreme Court 713 came to hold that the employees standing on the same footing and charged on the same allegations should be dealt with similarly and, accordingly, this Court set aside the punishment of removal from service imposed on the said petitioner-Deepak Kumar Bohidar and directed the opposite parties to reconsider the question of punishment.

4. Here is a case where the petitioner did not admit to have produced a forged certificate but upon inquiry it was found that the certificate produced by the petitioner was forged one. Except this difference there is no other difference in the facts of the present case and in the case of Deepak Kumar Bohidar. In this connection, learned counsel Shri Samantray referred to a decision of the Hon'ble Supreme Court in the case of Man Singh Vrs. State of Harayana and others reported in AIR 2008 Supreme Court 2481. On perusal of the facts involved in the said case, we find that it is completely different and distinguishable from the present case. There is no denial of the fact that Ramnath Lakra and Stephen Khalko, who were also appointed as Sub-Staff under the Life Insurance Corporation of India, were found to have produced forged certificates for obtaining appointment, but they were not visited with an order of removal from service whereas the petitioner in the present case and Deepak Kumar Bohidar, the petitioner in O.J.C.No.8643 of 1994 on the very same allegation were removed from service. Therefore the

ratio laid down by the Hon'ble Supreme Court in the case of Akhilesh Kumar Singh Vrs. State of Jharkhand & others was relied upon by this Court in the case of Deepak Kumar Bohidar and the order of removal was set aside and the opposite parties were directed to reconsider the question of punishment. Having not found differences in the case of Deepak Kumar Bohidar and in the present case, we have no hesitation to rely on the said judgment.

5. Accordingly, we quash the order of punishment in Annexure-6 as well as the order of appellate authority in Annexure-10 and remit the matter back to the opposite parties for reconsideration of the punishment specially considering the punishment imposed on the aforesaid two employees namely, Ramnath Lakra and Stephen Khalko. Since in the case of Deepak Kumar Bohidar, the Court did not grant any back wages for the period he was out of service, it is also directed that the petitioner in the present case shall not be entitled to back wages for the period he remains out of service.

The writ application is disposed of.

2011 (I) ILR – CUT- 525

L.MOHAPATRA, J & S.PANDA, J.

W.P.(C) NO.1301 OF 2005 (Decided on 26.10.2010)

COMMISSIONER, K.V.S. & ANR. ……. ….. Petitioners.

.Vrs.

GAYATRI MISHRA & ANR. …… Opp.Parties.

KENDRIYA VIDYALAYA EDUCATION CODE– ART.81 (D).

Voluntary abandonment of service – Article 81(D) was inserted to the Education Code of Kendriya Vidyalaya on 04.09.2000 – Opp.Party was transferred to Kalaikunda Kendriya Vidyalaya West Bengal on 05.08.1996 – Prior to such transfer O.P. made representation for a posting at K.V. Bhubaneswar and for permitting her to go to U.S.A for treatment – Although her representation was rejected all along she was given an impression that her case would be considered for a posting at Bhubaneswar till her last representation was rejected on 19.01.2000 – Moreover while allowing the similar representation of one Mrs. Sanjurani Mishra her representation was rejected and by that process she was discriminated – Held, Opp.Party had no intention of abandoning the service and as such Article 81 (D) has no application to the facts and circumstances of the case and the Tribunal has rightly set aside the action taken under the said Article.

(Para 5,6)

Case Laws Referred to :-

1.AIR 1964 SC 1272 : (Buckingham & Carnatic Co.Ltd.-V-Venkatiah & Anr.)

2.AIR 1979 SC 582 : (g.t. Lad & Ors. -V-Chemicals & Fibres India Ltd.).

For Petitioners - M/s. Asok Mohanty, J.Sahu, H.K.Tripathy, S.P.Nayak & J.P.Patra.

For Opp.Parties - M/s. Aswini Kumar Mishra, G.Rout, D.K.Panda, G.Sinha & A.Mishra.

L.MOHAPATRA, J. Kendriya Vidyalaya Sangathan and its officers are the petitioners before this Court assailing the judgment and order of the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.143 of 2001, disposed of on 4.11.2004. The opposite party was the applicant before the Tribunal.

2. The case of the opposite party before the Tribunal was that she joined the Kendriya Vidyalaya Sangathan on 17.7.1981 as a Primary Teacher and was posted at Kendriya Vidyalaya, FCI at Talcher. She was subsequently transferred to Kendriya Vidyalaya, Cuttack on 8.12.1982. She being an unmarried lady having heart problem and she being also the only member in the family to look after her ailing mother at Bhubaneswar, approached the authorities by way of representation for a transfer to K.V., Bhubaneswar where some posts were available and she could be adjusted as P.R.T. From 1990 to 1994 none of the representations submitted by her was considered and she was transferred by order dated 27.7.1996 as a surplus teacher to Kendriya Vidyalaya No.1 at Kalaikunda, in the State of West Bengal. Challenging the said transfer, she approached this Court initially but the same was transferred to the Central Administrative Tribunal after coming into force of the Administrative Tribunals Act and it was re-registered initially as a Transfer Application and subsequently as O.A. No.146 of 2000. The said Original Application having been dismissed by the Tribunal on 5.10.2000, a writ application was filed before this Court by her vide O.J.C. No.1454 of 2001. The further case of the opposite party is that in January, 1994, one Mrs. Sanjurani Misra joined as P.R.T. at K.V., Cuttack and she was transferred on her representation even though she had been posted to K.V., Saintala, in the district of Bolangir only in December, 1993. In May 1994, in K.V., Cuttack, one Primary Section was deleted and one Headmaster post was sanctioned. Thus the sanctioned posts became 12 P.R.Ts. and one Headmaster while the existing strength was 14 P.R.Ts. and no Headmaster. Accordingly, she was treated as a surplus teacher in July, 1994 and was transferred to Kalaikunda. From the date of transfer, she made several representations to the Assistant Commissioner indicating about adjustment of Mrs. Sanjurani Misra but instead of considering her grievance, by order dated 5.8.1996 she was given fifteen days extension for joining at the new place of posting. Because of her health condition, she applied for five days Earned Leave from 13.8.1996 to 17.8.1996. However, she was relieved from the post held by her at K.V., Cuttack on 27.8.1996 in her absence. She not only made a representation again to consider her case for posting at Bhubaneswar, she also applied for issuance of No Objection Certificate in order to go to U.S.A. for treatment where her sisters were staying. While the matter stood thus, she was communicated from the Head Office that her representation dated 11.11.1997 with regard to her transfer to Bhubaneswar shall be considered when annual transfer takes place in the year 1998-99. On 29.6.1998 also she was communicated by the authorities that during regional transfers if a clear vacancy arises at K.V., Bhubaneswar or at K.V., Cuttack, her case would be considered. On 6.8.1998, she was informed that her repeated representations for a posting

at Bhubaneswar could not be acceded to and she was asked to resume duties at Kalaikunda by 14.8.1998. In November, 1998, her mother passed away and she was left alone. Only on 1.12.1998, an office order was passed to the effect that leave applied for by her is sanctioned and permission is also given to leave for U.S.A. subject to certain conditions. She was also informed that the grant of No Objection is without prejudice to the disciplinary proceedings contemplated against her due to her unauthorized absence since 1996. The Tribunal disposed of the Original Application on 19.11.1999 filed by her challenging the order of transfer with an observation to consider her representation for a posting at Bhubaneswar. But the same was not complied with and she was directed to again join at Kalaikunda on 19.1.2000. On 18.8.2000, she again wrote a letter for issuance of No Objection Certificate to go to U.S.A. for treatment and to her utter surprise, a notification was issued on 4.9.2000 indicating therein that under Article 81 (D) she has voluntarily abandoned her service. Challenging the said order/notification, she approached the Tribunal in the aforesaid Original Application and the said Original Application having been allowed by the Tribunal, the Kendriya Vidyalaya Sangathan has filed this writ petition.

3. Shri Asok Mohanty, the learned Senior Counsel appearing for the petitioners assailed the impugned judgment of the Tribunal on the ground that due to long absence of the opposite party from service, the Sangathan took a decision to apply Article 81 (D) which had been newly inserted instead of going for a regular disciplinary proceeding for unauthorized absence and accordingly, she was treated to have abandoned the service because of her long unauthorized absence.

Shri A.K. Mishra, the learned Senior Counsel appearing for the opposite party submitted that having taken a decision at one point of time to initiate a departmental proceeding for the so called unauthorized absence, there was no necessity on the part of the K.V. Sangathan to take recourse to Article 81 (D) and treat the opposite party to have abandoned the service.

4. Undisputedly while working at Kendriya Vidyalaya, Cuttack, the opposite party was transferred to Kendriya Vidyalaya at Kalaikunda, in the district of West Bengal on 27.7.1996. She was transferred from Cuttack as the second surplus teacher. Prior to her transfer, she had made representations to the authorities for a posting at Bhubaneswar on the ground that she was unmarried and she was required to look after her ailing mother as all her brothers and sisters were staying away. Therefore, on the date the order of transfer was passed, the authorities were aware of her difficulties and her representations for a posting at Bhubaneswar were

pending. Even after the order of transfer was passed in July, 1996, she repeatedly submitted representations for a posting at Bhubaneswar and all along she was kept under an impression that her representations would be considered. Even in Annexure-14 to the Original Application by memo dated 29.6.1998 the opposite party was informed that her case for transfer to Bhubaneswar or Cuttack would be considered during regional transfers provided there will be any clear vacancy. On 6.8.1998 in Annexure-15 to the Original Application, the opposite party was informed that there being no post of PRT in any of the Kendriya Vidyalaya either at Bhubaneswar or Cuttack, her representation for such a posting could not be acceded to and she was directed to report for duty at Kalaikunda by 14.8.1998 On 22.3.1999 in Annexure-17 to the Original Application she was informed by Deputy Commissioner (Admn.) that the Assistant Commissioner, KVS, Bhubaneswar has already been requested to consider her request within the framework of the existing guidelines and she was asked to contact the Assistant Commissioner. After disposal of the Transfer Application, filed by the opposite party challenging the order of transfer, by the Tribunal, in compliance of the Tribunal's order, the representation of the said opposite party was considered and rejected on 19.1.2000 and she was asked to join within fifteen days at the place of posting. Article 81 (D) was inserted to the Education Code of the Kendriya Vidyalaya on 4.9.2000 and by way of a memorandum dated 13.3.2001, she was informed that she has voluntarily abandoned the services of the Sangathan in terms of Article 81 (D) of the Education Code of the Sangathan.

The question raised before this Court is as to whether Article 81 (D) has any application to the case of the opposite party or not and as to whether recourse to Article 81 (D) can be taken in the facts and circumstances of the present case avoiding the normal procedure laid down under the Education Code for initiation of a departmental proceeding for unauthorized absence. Article 81 (D) of the Education Code is quoted below:

"(D) **VOLUNTARY ABANDONMENT OF SERVICE**

1. If an employee has been absent/remains absent without sanctioned leave or beyond the period of leave originally granted or subsequently extended, he shall provisionally lose his lien on his post unless :-

a)he returns within fifteen calendar days of the commencement of the absence or the expiry of leave originally granted or subsequently extended, as the case may be; and

b)satisfies the Appointing Authority that his absence or his inability to return on the expiry of the leave, as the case may be, was for reasons beyond his control. The employee not reporting for duty within fifteen calendar days and satisfactorily explaining the reasons for such absence as aforesaid, shall be deemed to have voluntarily abandoned his service and would, thereby, provisionally lose lien on his post.

2. An employee, who has provisionally lost lien on his post in terms of the aforesaid provisions, shall not be entitled to the pay and allowances or any other benefit after he has provisionally lost lien on his post.-

The payment of such pay and allowances will be regulated by such directions as the Appointing Authority may issue while ordering re-instatement of the employee in terms of sub-clause (6) of this Article.

3. In cases falling under sub-clause (1) of this Article, an order recording the factum of voluntary abandonment of service by the employee and provisional loss of his lien on the post, shall be made and communicated to the employee concerned at the address recorded in his service book and/or his last known address, to show cause why the provisional order above mentioned may not be confirmed (***Appendix – XIII***).

4. The employee may make a written representation to the Appointing Authority, within ten days of the receipt of the order made under sub-clause (3).

5. The Appointing Authority may, on receipt of the representation, if any, and on perusal of materials available on record as also those submitted by the employee, grant, at his discretion, an oral hearing to the employee concerned to represent his case.

6. If the Appointing Authority is satisfied after such hearing that the employee concerned has voluntarily abandoned his service in terms of the provisions of sub-clause (1) of this Article, he shall pass an order confirming the loss of employee's lien on his post, and in

that event, the employee concerned shall be deemed to have been removed from the service of the Kendriya Vidyalaya Sangathan with effect from the date of his remaining absent. In case, the Appointing Authority is satisfied that the provisions of sub-clause (1) of clause (d) of this Article are not attracted in the facts and circumstances of the case, he may order re-instatement of employee to the post last held by him, subject to such directions as he may give regarding the pay and allowances for the period of absence.

5. The circumstances under which an employee can be said to have abandoned the services came for consideration by the Hon'ble Supreme Court in the case of ***Buckingham and Carnatic Co. Ltd. v. Venkatiah & another, reported in AIR 1964 SC 1272***. The Hon'ble Supreme Court in the said judgment observed that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. A similar view was also expressed by the Hon'ble Supreme Court in the case of ***G.T. Lad & others v. Chemicals and Fibres India Ltd., reported in AIR 1979 SC 582***. In the present case, undisputedly the opposite party was transferred to Kalaikunda in the State of West Bengal on 5.8.1996 and Article 81 (D) was inserted to the Education Code of Kendriya Vidyalaya on 4.9.2000. Till 4.9.2000 the opposite party having not joined at Kalaikunda Kendriya Vidyalaya No.1, even if the contention of Shri Asok Mohanty, the learned Senior Counsel appearing for the petitioner is accepted to the extent that Article 81 (D) introduced on 4.9.2000 is applicable to the case of the opposite party, the circumstances must satisfy such action as indicated in the aforesaid two judgments. On a reading of the aforesaid two decisions, it is clear that absence from service has to be intentional. Undisputed facts involved in this case are that the opposite party is an unmarried lady and prior to her transfer to Kalaikunda on 5.8.1996, she made representations for a posting at the Kendriya Vidyalaya, Bhubaneswar. Her representations in this regard were ignored and she was transferred to Kalaikunda. The instance given by her that one Mrs. Sanjurani Mishra on her representation had been adjusted in Cuttack Kendriya Vidyalaya is not disputed anywhere and therefore, her allegation that she has been discriminated is not without any basis. Apart from the above, there is also no dispute that immediately after she was transferred to Kalaikunda, she not only made several representations to reconsider her case for a posting at Bhubaneswar but also made representations for permitting her to

go to U.S.A. for treatment. As stated earlier in paragraph-4 of the judgment, on 29.6.1998 the opposite party was informed that her case for transfer to Bhubaneswar or Cuttack would considered during regional transfer provided there is a clear vacancy. On 6.9.1998 she was also informed that there being no post of P.R.T. in any of the Kendriya Vidyalayas either at Bhubaneswar or Cuttack, her representation for such a posting could not be acceded to and she was directed to report for duty at Kalaikunda. On 22.3.1999 in Annexure-17 to the Original Application she was informed to contact the Assistant Commissioner, KVS, Bhubaneswar to consider her request for a posting at Bhubaneswar. Even after disposal of the Original Application filed by the opposite party challenging her transfer to Kalaikunda, on 19.1.2000 the representation of the opposite party for a posting at Bhubaneswar was rejected and she was asked to join at Kalaikunda. Therefore, as is evident from the aforesaid communications made by the petitioners at different times, though the opposite party had been transferred on 27.7.1996, all along she was given an impression that her case would be considered for a posting at Bhubaneswar till the last representation was rejected by the petitioners on 19.1.2000 in pursuance of the order of the Central Administrative Tribunal. It is, therefore, clear that not only from the representations made by the opposite party but also from the replies given by the petitioners at different times that she had no intention to abandon the service but only wanted a posting at Bhubaneswar on the ground that she is an unmarried lady and was also having heart problems. There is also no dispute so far as her ailment is concerned and the prayer made by her to visit U.S.A. for treatment had been allowed by the petitioners. Under these circumstances, we are of the view that the opposite party had no intention of abandoning the service but wanted a posting at Bhubaneswar not only before she was transferred to Kalaikunda but also after such transfer and all along she had been intimated till January 2000 that her prayer would be considered for a posting at Bhubaneswar.

6. Under these facts and circumstances, we are of the view that Article 81 (D) has no application to the facts and circumstances of the present case. Consequently the action taken under Article 81 (D) is bad in law and has been rightly set aside by the Tribunal.

7. For the reasons stated above, we find no justification to interfere with the impugned judgment and accordingly dismiss the writ application.

Writ petition dismissed.

2011 (I) ILR – CUT- 532

L.MOHPATRA, J & C.R.DASH, J.

W.P.(C) NO.6214 OF 2002 (Decided on 08.7.2010).

DR. REBATIKANTA DAS ……. Petitioner.

.Vrs.

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

Lease – Allotment of space by Cuttack Development Authority (CDA) to start Nursing Home - Subsequent allotment of additional space for setting up of C.T. Scan – Allotment Confirmed by CDA – Notice for cancellation of lease – Order challenged.

Lease deed executed between the petitioner and the State Government specifically provides that the land shall be utilized for commercial purpose namely Buxibazar Market-cum-office complex but no where it prohibits running of a Nursing Home or a C.T. Scan Centre – Moreover the petitioner had never defaulted in payment of lease premiums – CDA had also given permission to the petitioner to mortgage the said land in order to obtain the loan from the financial institutions – Held, it is not open for CDA to cancel the allotment of lease granted in favour of the petitioner on the ground of contravention of condition of lease between State Government and CDA.

(Para 4,5)

For Petitioner - M/s. R.K.Mohanty, P.K.Routray, S.N.Biswal, A.K.Das & A.P.Bose.

For Opp.Parties - M/s. S.K.Nayak(1), Mrs.D.Nayak, Miss. M.Bhanja, M.S.Sahoo & B.K.Sahoo (for O.P.3).

L. MOHAPATRA, J. The petitioner, who is a Medical Practitioner by profession, has filed this writ application assailing the legality of notice in Annexure-1 issued by the Cuttack Development Authority directing the petitioner to show cause as to why allotment of land measuring 4178 Sqft. at Jajatikendra Market Complex, Buxibazar, Cuttack made in his favour vide office letter no.9310 dated 17.7.1997 shall not be cancelled, the same having been made in contravention of the original lease condition of the Government.

2. As it appears from Annexure-2, a decision was taken by the Cuttack Development Authority to allot a space measuring 1500 Sqft. at Jajatikendra

Market Complex, Buxibazar, Cuttack in favour of the petitioner on long term lease basis for a period of ninety years from the date of taking over possession for the purpose of Scanning Centre and also for allied purposes relating to the said centre. Possession of the aforesaid space was handed over to the petitioner in Annexure-3 on 25.4.1994. In the year 1996, the then Vice-Chairman of Cuttack Development Authority allotted an additional area of 2678 Sqft. at Jajatikendra, Buxibazar, Cuttack for setting up of the C.T. Scan in the premises subject to payment of certain amount. Possession of the said additional land was handed over to the petitioner in Annexure-3/a on 17.7.1997. Under Annexure-4, the petitioner was given post facto permission for construction of a three storied building to be exclusively used as a Nursing Home (Health Unit) on 6.1.2000. After taking possession of the land and a part of the space initially allotted, the petitioner completed construction of the Nursing Home and started running a Nursing Home in the name and style of "Ideal Nursing Home". The Cuttack Development Authority also permitted the petitioner to avail loan from financial institutions by mortgaging the said property during lease. While the Nursing Home was running smoothly and the Cuttack Development Authority had no grievance regarding payment of the dues, notice in Annexure-1 was issued by the Secretary of the Cuttack Development Authority to show cause as to why such allotment shall not be cancelled having been made in contravention of the original lease condition of the Government.

3. Shri R.K.Mohanty, learned counsel appearing for the petitioner assailed the impugned notice on the ground that the Cuttack Development Authority was conscious of the fact that the petitioner not only intended to a start a Scanning centre but also a Nursing Home for which initially 1500 Sqft. of space was granted in the Market Complex and subsequently land was also allotted for construction of the Nursing Home. Constructions were completed with due approval of the Cuttack Development Authority for the purpose of running a Nursing Home and there is no allegation of any outstanding due against the petitioner. Having allowed the petitioner to construct a Nursing Home and run it for several years and also having allowed the petitioner to take loan from the financial institutions by mortgaging the said property, there was no reason for issuing such a notice.

A counter affidavit has been filed by the Cuttack Development Authority. In paragraph-8 of the counter affidavit, it is stated that on 8.12.1993, the petitioner applied for 1000 Sqft. of space in the Ground Floor of CDA Market Complex at Buxibazar for installation of City Scan. The then Minister of Health recommended such allotment and, accordingly, on 18.3.1994, 1260 Sqft. Of land was allotted in favour of the petitioner for

installation of C.T. Scan and Imaging Centre. On 19.4.1994, the petitioner intimated that for a full phase scanning centre, it requires 1500 Sqft. of land and, accordingly, he was allotted 1500 Sqft. of land adjoining to petrol pump in the said Market Complex. He was handed over possession of the said land on 25.4.1994. The petitioner was again allotted with an additional land of 2678 Sqft. on 31.7.1996 for setting up of a C.T. Scan and Imaging Centre and the said allotment was confirmed by the Cuttack Development Authority on 49th meeting held on 19.3.1997 and possession was handed over to the petitioner on 29.7.1997. In respect of all the three allotments, required amount had been deposited by the petitioner. The lease-deed was executed in favour of the petitioner on 24.2.2000 on long term lease basis for a period of thirty years. However, the Authority in its 71st meeting held on 1.10.2002 resolved to cancel the allotment of land in favour of the petitioner on the ground that the lease was granted contravening the original lease conditions of Government. In terms of the said resolution, notice in Annexure-1 was issued. The relevant part of the lease-deed executed by the Government in favour of Cuttack Development Authority dated 15.9.1979 prescribes that such land shall be utilised for commercial purpose namely for Buxibazar Market-cum-Office Complex and, therefore, the same could not have been used for any other purpose, such as, Nursing Home.

4. Upon hearing the learned counsel for the parties and on perusal of the documents attached to the writ application as well as the counter affidavit, we find that from the very beginning, the petitioner had applied for allotment of space/land for the purpose of establishing a Scanning and Imaging Centre with allied facilities and also later for running a Nursing Home. The Cuttack Development Authority was aware of the conditions on which lease had been granted by the State Government and being aware of the conditions, it allowed the petitioner to run a Scanning Centre and Nursing Home. There is no allegation whatsoever that the petitioner had defaulted in payment of lease premiums. The Cuttack Development Authority had also given permission to the petitioner to mortgage the said land in order to obtain the loan from the financial institutions. Under these circumstances, is it open for the Cuttack Development Authority to cancel the allotment of the lease granted in favour of the petitioner on ground of contravention of condition of lease between State Government and Cuttack Development Authority?

5. It is true that the lease-deed executed between the petitioner and the State Government specifically provides that the land shall be utilised for commercial purpose namely, Buxibazar Market-cum-Office Complex but it no where prohibits running of a Nursing Home or a C.T. Scan Centre. It is

also submitted by Shri S.K.Nayak-1, the learned counsel appearing for the Cuttack Development Authority that for last nine years nobody has also applied for allotment of space in the said Market Complex affecting the lease granted in favour of the petitioner. It is evident from Annexure-8 to the rejoinder filed by the petitioner that a conscious decision was taken by the Cuttack Development Authority to allot additional lands in favour of the petitioner for running a Nursing Home and the Minutes of the discussions held on 18.12.1990 show that for more than nine years no one has come forward to take this part of building on rent. Besides, the Nursing Home provides medical services to the local people and people from outside the State. It also appears from the letter dated 22.3.1990 written by the Vice-Chairman to the petitioner that the Cuttack Development Authority has been provided with two beds in the said Nursing Home for its employees on concessional basis i.e. concession of 50% for the beds in dormitory and concession of 25% for the cabins. This request of the petitioner for setting up a Nursing Home has been accepted by the Cuttack Development Authority.

6. In view of the above circumstances, we find no reason on the part of the Cuttack Development Authority to issue notice in Annexure-1 for cancellation of allotment on a ground which is otherwise not tenable under the law. We accordingly quash the said notice in Annexure-1.

The writ application is accordingly allowed.

Writ petition allowed.

2011 (I) ILR – CUT- 536

L.MOHAPATRA, J & S.K.MISHRA, J.

W.P.(C) NOS.11852/2009 & 18929/2010 (Decided on 18.02.2011).

A.B. MINERALS & EXPORTS & ANR. ……. Petitioners.

.Vrs.

PARADEEP PORT TRUST (PPT) & ORS. ……. Opp.Parties.

Tender – Paradeep Port Trust (PPT) floated tender for purchase of spillage Iron Ore – No off set price in the tender call notice – Petitioner and four others applied – Price quoted by the petitioner was highest – Opp.Parties cancelled such tender and issued fresh tender notice Dt.03.08.2009 – Hence the writ petition.

In this case prior to floating of the tender Authorities of PPT fixed the off set price at Rs.2000/- per M.T. but the petitioner offered a price of Rs.1537/- which is much below the off set price – There is no wrong in not disclosing the reserve price fixed prior to the auction or at the time of the auction, because it may result in the formation of cartels and may result in underbidding, which shall in ultimate analysis effect the revenue of the exchequer – Moreover the price offered by the successful bidder in the second tender is much higher than the off set price and the price offered by the present petitioner – Held, the decision of PPT in canceling the tender floated on 26.06.2009 and Dt.25.08.2009 is not tainted, arbitrary rather it was in the larger public interest hence not liable to be interfered with.

(Para 18)

Case laws Relied on ;

1.(2008) 16 SCC 405 : (Haryana State Agricultural Marketing Board & Ors.-V- Sadhu Ram).
2.(1996) 4 SCC 208 : (Laxmikant -V- Satyawan)

Case laws Referred to:-

1.(2007) 8 SCC 1 : (Reliance Energy Ltd. & Anr.-V-Maharashtra State Road Development Corporation Ltd. & Ors.)
2.(1997) 1 SCC 53 : (Dutta Associates Pvt. Ltd.-V- Indo Merchantiles Pvt.Ltd. &Ors.)
3.(2007) 1 SCC 477 : (Rajasthan Housing Board & Anr.-V-G.S.Investments & Anr.)
4.(1994) 6 SCC 651 : (Tata Cellular -V- Union of India).

For Petitioner - M/s. S.P.Mishra, A.K.Dash, S.K.Sahoo, J.Rout, S.K.Samtnaray, B.S.Panigrahi & B.P.Sarangi.
For Opp.Parties - M/s. S.P.Sarangi, B.C.Mohanty, P.P.Mohanty, D.K.Das, S.Pattnaik.
M/s. R.K.Rath, Sr.Advocate, D.Mishra.
M/s. S.K.Padhy, P.K.Patra, P.B.C.Singh.
For Petitioner - M/s. Jayadeep pal, B.K.Parhi & Ritanjali Sahoo.
For Opp.Parties - M/s. P.K.Parhi & S.Mohanty.
M/s. S.K.Parhi, B.Chhualsingh & P.Patra (for intervener)

S.K.MISHRA, J. The pivotal question, which arises in these writ applications, is whether the authorities of Paradeep Port Trust (hereinafter referred as the "PPT") has the option of canceling the tender because of the fact that the price offered by the petitioner to purchase the Spillage Iron Ore from it was below the off set price fixed by the opposite party no.1.

2. The petitioner is a Proprietorship concern having its branch office at Bhubaneswar. It carries on business of Export of minerals. The petitioner pleads that it has a very good track record.

On 11.06.2009, the P.P.T. floated a tender call notice vide Notification No. MM/SCRAP/09/2008/1795 inviting sealed tenders from the intending bidders in two bid system i.e. (i) E.M.D. and (ii) Price bid from interested bidders for purchase of spillage Iron Ore of about 14000 MTs on 'as is where is' basis. The petitioner was required to pay a non-refundable fees of Rs.4,000/- in the shape of Bank Draft along with the tender papers and E.M.D. of Rs.1,00,000/- in shape of demand draft. The tender papers were to be submitted through Regd. Post, Speed Post or by Courier only.

3. The petitioner being aware of the notice inviting tender, obtained the application form and other relevant documents from the website, applied for the tender quoting rate of Rs.1537/- only per M.T. for 14000 MTs as per the stipulation. The petitioner deposited two cheques dated 23.06.2009 for an amount of Rs.4,000/- and Rs.1,00,000/- towards the cost of the tender documents and E.M.D. respectively drawn in favour of the F.A. and C.A.O., P.P.T. i.e. the opp.party no.3.

Besides the petitioner, four other bidders also quoted the bid price but their prices were lower to the price quoted by the petitioner. It is further pleaded that, therefore, the opposite parties, after going through the bid documents of all the bidders, selected the petitioner as the successful bidder

for execution of the work contract at a bid price of Rs.1,537/- per M.T. (total cost of Rs.2.15 crores).

The petitioner pleaded that the Slippage Iron Ore was stored inside the prohibited area but some officials, criminals and contractors were selling out the spillage ore and share the cost among them. After opening of the tender, they became more activated to discharge the open tender call through the co-operation of some Port officials internally by disobeying the decision of the selection board. This matter was brought to the notice of the opposite party authorities by the Utkal Port and Dock Workers Union by its letter dated 02.07.2009 while expressing their pleasure towards allotment of the tender work in favour of the petitioner.

After applying for the tender, the petitioner also received threatening calls probably from Syndicate Groups of participants. Even the petitioner was suggested to be part of their arrangement so that calling price will be less and profit will be distributed among all. But the petitioner refused to be part of such an arrangement and quoted price taking a financial risk. The petitioner also came to know from reliable source that for the intervention of some groups, who have connived with the port officials, opposite party no.1 has taken a decision for re-auctioning the Spillage Irion Ore. The petitioner, apprehending cancellation of the tender in their favour by the opposite parties, requested not to cancel the tender by his letter dated 17.07.2009.

4. The petitioner further pleads that without giving any notice of show cause or without giving any opportunity of hearing to the petitioner, vide letter No.MM/SCRAP/09/2009/2258 dated 22.07.2009 discharged the tender call notice dated 11.06.2009 without any financial liability to the Port Trust stating therein to have enclosed the EMD in original deposited by the petitioner. It is further pleaded that in the meantime, the opposite parties have already quoted the tender call notice for the same work in Oriya daily newspaper 'Dharitri' on 03.08.2009 for fresh auction. The petitioner pleads that such action of the opposite parties is in order to do favour to some other group and deprive the petitioner of the tender awarded in its favour. That apart, the opposite parties have also not returned the original Demand Draft of Rs.1,00,000/- deposited by the petitioner.

The petitioner further pleads that the tender notice issued on 03.08.2009 is illegal and highly arbitrary, in as much as, the colourable exercise of the administrative power of the opposite parties vitiates the selection process and warrants judicial review by the Court under Article 226 of the Constitution of India. It is pleaded that the cancellation of the tender

without giving him an opportunity of hearing is violative of principles of natural justice and not sustainable in law. It is further pleaded that the opposite parties have the right to cancel or rescind the tender at any time before finalization of the same, but such cancellation or recession can only be in public interest and not at the cost of the party, who have already undergone the process of tender and accepted to be successful bidder among the participants. So the expectation of the petitioner to execute the work after being found to be a highest bidder is the legitimate expectation, which requires enforcement through court. Therefore, the petitioner prayed that the notice of cancellation and fresh tender, Annexures 6 and 7 be quashed and the petitioner be permitted to carry out the tender.

5. The opposite parties-Paradeep Port Trust filed its counter affidavit pleading, *inter alia*, that since the quoted price of all the bidders including the petitioner were below the set off price fixed, the P.P.T. was constrained to cancel the tender. The tender was never awarded in favour of anybody. It is further pleaded that since the bid was cancelled, the P.P.T. had no other option than to issue another tender call notice on 30.08.2009 inviting fresh bids for the selfsame work. As per the counter affidavit, the P.P.T. has committed no wrong in canceling the earlier tender notice and issuing a fresh tender notice.

In the counter affidavit, the opposite parties have denied the averments made in the writ application. They further plead that during processing of the tender, considering the price obtained in the tender was not beneficial to the Port Trust, a decision was taken by the P.P.T. for cancellation of the tender. Hence, the version of the petitioner is not correct. The opposite parties further plead that the petitioner was found to be a H1 bidder, but the price offered by the petitioner did not match with the off set price fixed by the P.P.T. @ Rs.2000 per M.T. Thus, the P.P.T. did not take a decision for selecting anybody for award of the work. It is further pleaded that the letter of the employees of Utkal Port and Dock Workers Union was issued at the behest of the petitioner and P.P.T. has nothing to do with the said letter. The averments made in the writ application regarding the connivance of some persons with the Port officials are also denied. It is specifically pleaded that the off set price was fixed at Rs.2000/- per M.T. earlier.

6. It is further pleaded that the Port Trust has not placed any work order in favour of the petitioner. The discharge letter was issued returning the E.M.D. amount deposited by the petitioner. However, by over sight, the original draft submitted by it could not be enclosed with the said letter and

hence once again it was submitted to the petitioner by letter no.2286 dated 25.07.2009 by Regd. Post with A.D. and the same was confirmed by letter No. MM/Scrap/9/2008/2500 dated 17.08.2009. It is further pleaded that at no point of time, a decision was taken to offer the tender to the petitioner. On such pleading the opposite parties prayed to dismiss the writ application.

7. The petitioner has filed a rejoinder on 22.12.2010 pleading, *inter alia,* that there was no off set price in the tender call notice. Among the bidders, the petitioner offered the highest price. The opposite parties, though found the petitioner to be the highest bidder, but cancelled the whole process on the unfounded ground that the amount quoted by the petitioner was below the off set price fixed by the P.P.T. per M.T.

8. Such a plea, it is pleaded by the petitioner, is an after thought, just to hide the illegality and irregularities committed by the opposite parties in the selection process. The terms and conditions of sale or disposal of Spillage Irion Ore as the tender document did not contain any stipulation regarding the minimum off set price at Rs.2000/- per M.T. It was open to the participants to quote the off set price as per the quotations made by the five participants. The petitioner quoted the highest price. Hence, there is no justifiable reason for the opposite parties to cancel the tender on that ground.

9. Furthermore, the petitioner pleads that the opposite parties should have given an opportunity to the petitioner, if they can match any subsequent stipulation or not but no such steps have been taken nor any correspondence having been made, the tender call notice has been cancelled unilaterally, arbitrarily and in a whimsical manner, which vitiates the decision making process requiring interference of the Court.

10. In W.P.(C) No. 18929 of 2010, Orissa Steel Trading Corporation prayed that appropriate directions may be given to the opposite parties to finalize the tender dated 30.07.2009 and to direct the opposite parties to issue work order in favour of the petitioner. Since the fate of this application depends largely on the result of the W.P.(C) No. 11852 of 2009, it is not necessary to reiterate the pleadings of the Orissa Steel Trading corporation at this stage.

11. In course of hearing of the writ application, Sri S.P.Mishra, learned Senior Counsel appearing for the petitioner-A.B. Minerals and Exports in W.P.(C) No.11852 of 2009 contended that the tender notice and the terms and conditions of the letter did not specify about any off set price and for that reason, the Paradeep Port Trust cannot as an after-thought take a plea that the quoted price was less than the off set price and cancel the tender. It is

submitted that unless the off set price is made known to the petitioner in the tender notice, it will not allow them a level playing field. It is alternatively submitted that as the petitioners were not aware of the minimum off set price, they could not have given a higher price than the minimum off set price to be accepted by the P.P.T. He, therefore, submits that the writ application be allowed and the fresh auction notice may be cancelled.

12. Sri Parija, learned Senior Counsel appearing for the opposite parties, on the other hand, submitted that a stipulation or a notification of the off set price would have resulted in curtailing the quoted price taking advantage of the same and there was nothing wrong in not mentioning the off set price. In course of argument, he also produced the documents from which it became evident that prior to the floating of the tender at first instance, the off set price was fixed at Rs.3500/- per M.T. But later same was re-fixed at Rs.2000/- per M.T. thereafter, the tender was floated. This fact has not been disputed by the learned counsel appearing for the petitioner.

13. Thus, the only question which remains to be decided in this case is whether the action of the opposite parties i.e. P.P.T. in canceling the tender call notice issued at the first instance, in which the petitioner was found to be the highest bidder on the ground that the price quoted by him was much less than the off set price fixed by the authorities is correct or the petitioner has a right of being informed about such off set price prior to or at the time of floating of the tender.

14. Learned counsel for the petitioner has relied on several decisions. It is appropriate on our part to take note of each of the cases cited by the learned counsel for the petitioner. In ***Reliance Energy Ltd and another v. Maharashtra State Road Development Corporation Ltd. and others***, (2007) 8 SCC 1, the Supreme Court had examined a similar question, wherein the tender offered by the Reliance Energy Ltd. and Hyundai Engineering and Construction Company Ltd. to construct a bridge connecting Navi Mumbai with Dadar was cancelled because as per certain accounting standard, the companies were found not to be compatible with the terms and conditions regarding net profits and net worth of the consortium. While disposing of the appeal filed by Reliance Energy Ltd. and another, the Hon'ble Supreme Court has taken note of the fact that "level playing field" is an important concept while considering Article 19(1)(g) of the Constitution. It was held in that case that in the world of globalization, competition is an important factor to be kept in mind. The "level playing field" is an important doctrine, which is embodied in Article 19(1)(g) of the Constitution. This is

because of the said doctrine provides space within which equally placed competitions are allowed to bid so as to subserve the larger public interest.

After taking into consideration the facts of the case, the Hon'ble Supreme Court held that when tenders were invited, the terms and conditions should be with a legal certainty. It is further held that this legal certainty is an important aspect of the rule of law. If there is vagueness or subjectivity in the norms specified in the said norms, it may result in unequal and discriminatory treatment and violate the doctrine of "level playing field". The Hon'ble Supreme Court held that since the tender floated by the opposite parties had not indicated with a legal certainty about the accounting procedure to be adopted for assessing financial criteria and the operating flow cash, the decision to cancel the tender was held to be erroneous and, therefore, was set aside.

In ***Dutta Associates Pvt. Ltd. v. Indo Merchantiles Pvt. Ltd. and others***, (1997) 1 S.C.C. 53, the Hon'ble Supreme Court held that the conduct of the Commissioner of Excise and the Government in fixing a viability range after receipt of the tenders from various parties is not legal. The Supreme Court has held that the tender notice did not specify the viability range nor did it state that only the tenders coming with the viability range will be considered. Thus, the action of the Commissioner of Excise in rejecting the lowest bidder on the ground that such bidding was not within the viability range was struck down by the Supreme Court.

15. On the other hand, the learned counsel for the opposite parties relied primarily on the case of ***Haryana State Agricultural Marketing Board and others v. Sadhu Ram,*** (2008) 16 S.C.C. 405. In that case, a public notice was issued by the office of the Marketing Committee, Panchkula, Haryana inviting traders and general public to purchase commercial sites in an open auction to be held on 8th July, 2004. Such notice did not specify the reserved price for holding the auction of the plot in question nor it was informed to the respondent. The auction of the plots were rejected and direction was given to refund the amount to the respondent, the reason being the price offered was much below to the reserved price. The matter was taken to the High Court and the writ application filed by the parties was allowed mainly on the ground that in view of the non-disclosure of the reserved price to the auction purchasers. The auction proceeds in their favour can neither be cancelled nor approval be denied on the ground that the bid price offered by them was lower than the reserved price. It is further observed by the Hon'ble Supreme Court that the non-disclosure of the reserved price would not amount to an unfair practice. It is further held that

the auction in favour of the highest bidder was subject to the approval of the Chief Administrator and the approval can be declined only for reasons which were relevant and could justify the non-acceptance of highest bids of the auction-purchasers but the same could not be arbitrary or absolute. Haryana State Agricultural Marketing Board preferred an S.L.P. before the Hon'ble Supreme Court. In allowing the appeal, the Hon'ble Supreme Court has observed as follows:-

> "14. Keeping the principles laid down in the aforesaid decisions of this Court in mind, let us, therefore, consider whether non-disclosure of the reserve price in the public notice is a ground on which the High Court could direct the authorities to allot alternative plots in favour of the respondents in exercise of its powers under Article 226 of the Constitution. At the risk of repetition, we may note that one of the conditions in the public notice was that the final authority to approve or disapprove the best offer in the auction was that of the Chief Administer of the Board. It is true that the Chief Administrator of the Board rejected the offers without assigning any reason but Condition 10 of the Guidelines clearly provides that such rejection could be made without assigning any reason."

In addition, the Hon'ble Supreme Court has held that as per Section 18 of the Punjab Agriculture Produce Market Act, the Chief Administrator could reject any tender without assigning any reason. However, the Supreme Court further held that such cancellation of tenders cannot be arbitrary and unfair. Only when there are good grounds, the same can be cancelled. On the question of not notifying the reserve price, the Hon'ble court held that such a practice is not unfair. It further went on to hold that it is common knowledge that when reserve price is disclosed, the bidders often form cartels and bid at or ground the disclosed price, though the market price is much higher. Therefore, the Supreme Court rejected the contention that the appellants had acted in an unfair manner in not disclosing the reserve price at the time of inviting tenders or even at the time of holding the auction. This principle is squarely applicable in the case at hand. It is seen that even prior to floating of the tender, the Authorities of Paradeep Port Trust have decided that the off set price for the said tender should be fixed at Rs. 2000/- per M.T. and it is also admitted that the petitioner has offered a price of 1537/- which is much below the off set price. It is not also disputed that the re-tender of the petitioner in the connected writ application has offered a price, which is more than the off set price.

16. In ***Rajasthan Housing Board and another v. G.S. Investments and another,*** (2007) 1 SCC 477 at page 482, the Supreme Court has laid down by referring to an earlier decision, viz. ***Laxmikant v. Satyawan*** (1996) 4 SCC 208; that even if a party is the highest bidder no right accrues to him till the confirmation letter issued to him. The respondents do not require any right to claim that the auction be concluded in its favour and any direction by the court to conclude the same in favour of the highest bidder is improper.

In the said case, the Supreme Court further held that the sale of plots by the Rajasthan Housing Board by means of an auction is essentially a commercial transaction. Even if some defect was found in the ultimate decision resulting in cancellation of the auction, the court should exercise its discretionary power under Article 226 of the Constitution with great care and caution and should exercise it only in furtherance of public interest. The Court should always keep the larger public interest in mind in order to decide whether it should interfere with the decision of the authority.

In ***Tata Cellular v Union of India*** (1994) 6 SCC 651, the Supreme Court has laid down that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There is no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. After discussing a large number of decisions in that case, the Supreme Court laid down the principles which are summarized as follows:-

(i) The modern trend points to judicial restraint in administrative action.

(ii) The court does not sit as a court of appeal but merely review the manner in which the decision was made.

(iii) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(iv) The terms of the *invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of

contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(v) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application or Wednesbury principle of reasonableness (including its other facts point out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

17. In ***Reliance Airport Developers (P) Ltd. Airports authority of India and others***, (2006) 10 SCC 1; the Supreme Court has laid down that in the matters of judicial review, the basic task is to see whether there is any infirmity in the decision making process and not in the decision itself. This means that the decision maker must understand correctly the law that regulates his decision making power and it must give effect to it, otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in the contractual matters or matters if the Government exercise its contractual powers. But the judicial review is intended to prevent arbitrariness but it must be exercised in larger public interest.

18. On applying the aforesaid principles to the cases in hand it is argued that at Clause 3 of the terms and conditions of the tender, it has been specifically mentioned that the authorities had right to withdraw any item at any stage from the sale lot without assigning any reason thereof. Thus, the authorities have the jurisdiction to cancel the tender at any stage without assigning any reason thereof. However, in this case, it is to be seen whether the decision of the P.P.T. was tainted with arbitrariness or it can be said in the larger public interest. There is no dispute of the fact that the authorities had fixed the off set price at Rs.2000/- per MT even prior to the opening of the tender but the said fact cannot be communicated to the tenderers at the time of floating the tender. As observed in the case of ***Laxmikant*** *(supra),* there is no wrong in not disclosing the reserve price fixed prior to the auction or at the time of the auction, because it may result in the formation of cartels and may result in underbidding, which shall in ultimate analysis effect the

revenues of the exchequer. The P.P.T. is a Government instrumentality. Any decision taken by it in this aspect can be adjudged as arbitrary, if it is shown that the decision making process was itself tainted with ulterior motive or arbitrariness. Though the petitioner has pleaded that some cartel is operating for steeling the iron spillage from the Port Trust, no material could have been placed by it before the court to come to a conclusion that such allegations are true. On the contrary, it is seen that the price offered by the successful bidder in the second tender is much higher than the price offered by the present petitioner. The second bidder's price is also above the off set price. So in the larger public interest, this Court comes to the conclusion that the action of the opposite parties in canceling the tender floated on 26.06.2009 and 25.08.2009 is not arbitrary and therefore, it is not liable to be interfered with. Since there is no merit in the writ application, we dismiss the same.

In so far as the writ application No.18929 of 2010 is concerned, the Orissa Steel Trading Corporation, which was the successful bidder in the second tender has prayed to finalize the tender in his favour. Since this Court comes to a conclusion that cancellation of earlier tender is not illegal, the second tender cannot be faulted with and if there is no other impediment, the Paradeep Port Trust Authorities should proceed with concluding the tender in favour of the petitioner in that writ application.

Both the writ applications are accordingly disposed of. No cost.

Writ petition disposed of.

2011 (I) ILR – CUT- 547

L.MOHAPATRA, J & C.R.DASH, J.

CRLA. NO.121 OF 1999 (Decided on 09.03.2011)

LOKANATH PUJAPANDA & ANR. …… …. Appellants.

.Vrs.

STATE OF ORISSA ……. Respondent.

A. EVIDENCE ACT, 1872 (ACT NO. 1 OF 1872) – S.32 (1)

Deceased himself lodged F.I.R. vide Ext.6 – In course of treatment his statement was recorded U/s. 161 Cr. p.c. and such statement has been proved vide Ext.10 – Statements of the deceased under Ext.6 & 10 relates to the circumstances of the transaction which resulted in his death.

Held, Exts. 6 & 10 are admissible in evidence as dying declarations of the deceased.

(Para 8)

B. PENAL CODE, 1860 (ACT NO. 45 OF 1860) – 300, 304-PART-II.

Except inquiry No. (iv) which is not a grievous injury and which has not affected the deceased totally, all other injuries are either on legs or palm or knee – In view of such fact, it can not be held that the appellants had the intention to cause death of the deceased – Held, appellants have committed offence of culpable homicide not amounting to murder punishable U/s.304, Part-II I.P.C.

(Para-16)

Case law Referred to:-

.AIR 1983 SC 680 : (Rana Pratap-V-State of Haryana).

For Appellants - M/s. D.Nayak, R.K.Pradhan, M.Mohanty, S.K,.Das, P.K.Mohanty, N.K.Mohanty, B.Rout & B.Das.

For Respondent - Additional Government Advocate

C.R.DASH,J. Both the appellants along with six others stood trial for offence punishable under Section 302/34, I.P.C. Learned Trial Court found the present appellants guilty under Section 302/34, I.P.C. and sentenced each of them to suffer imprisonment for life. The aforesaid judgment and order of sentence dated 26.03.1999 passed in S.T.Case No.22/64 of 1997 and S.T. Case No.48/327 of 1997 by learned Second Addl. Sessions Judge, Puri are impugned in this appeal.

2. A compendium of the prosecution case, as found from the record, is as follows :-

The occurrence happened at about 7.30 a.m. The occurrence happened at about 7.30 a.m. on 27.09.1996 at Gudia Sahi, Puri in front of the house of deceased Laxmidhar Rout. Deceased Laxmidhar Rout was brining water from the front courtyard of his house at that time. Both the appellants being armed with swords came there and dealt blows on the head of the deceased from his backside, abusing him in filthy language. They were also declaring simultaneously to take away his life. Receiving the blow when the deceased Laxmidhar Rout entered inside his house, both the appellants chased him and dealt further blows to his head by the swords held by them. The deceased raised his right hand to ward off the sword blow and received cut injuries on his little finger and another finger. Owing to assault by the appellants, deceased Laxmidhar Rout sustained multiple cut and bleeding injuries on his head, shoulder, hands and legs. 'Basti' people rushed to the spit hearing shout of the deceased, and seeing them the appellants decamped from the spot. The deceased was first taken to Puri Town P.S. in a rickshaw and thereafter he was taken to District Headquarter Hospital, Puri for necessary treatment. While undergoing treatment, the deceased succumbed to the injuries on 01.10.1996. F.I.R. was lodged in Puri Town P.S. On completion of the investigation, the Investigation Officer (P.W.10) filed charge-sheet implicating the present appellants and others in the offence punishable under Section 302/34, I.P.C.

The defence plea is one of complete denial.

3. Prosecution has examined eleven witnesses to prove the charge. P.Ws. 4, 6 and 9 are the eye-witnesses to the occurrence. P.Ws.7 and 8 are post-occurrence witnesses. P.Ws.2 and 3 are the witnesses to the inquest held over the dead body of the deceased by the I.O. (P.W.10). P.W.1 is a witness to the seizure. P.W.5 is the Medical Officer, who examined the injured Laxmidhar Rout (deceased) on police requisition and held post-mortem over his dead body on his death. P.W.10 is the Investigating Officer, who had conducted the substantive part of the investigation and P.W.11 is the I.O. who received the report, treated the same as F.I.R., registered a case and directed P.W.10 to take up investigation.

Defence has examined none.

4. Learned Trial Court, on consideration of the materials on record, held the appellants guilty under Section 302/34, I.P.C. and convicted them there under, while acquitting the others implicated in the offence.

5. Learned counsel for the appellants submits that there being discrepancies in the ocular testimony of P.Ws.4, 6 and 9, and P.W.4 being a

chance witness, conviction of the appellants on the basis of their evidence is not sustainable in the eyes of law; motive on the part of the appellants having not been proved, conviction of the appellants under Section 302, I.P.C. is bad in law; the cause of death of the deceased having been opined to be cerebral embolism which may occur even in case of a hypertensive patent, cause of death of the deceased is not proximate to the act of the appellants and it is too remote so as to hold the appellants guilty under Section 302, I.P.C. In the alternative, it is submitted by learned counsel for the appellants that regard being had to the nature of injuries sustained by the deceased and cause of his death, appellants could have only been convicted either under Section 324, I.P.C. or at best under Section 326, I.P.C.

6. P.W.4 is criticized and assailed by learned counsel for the appellants on the ground of his being a chance witness. P.W.4 is a co-basti man of both appellants and the deceased. At the relevant time of occurrence he (P.W.4) was passing across the house of the deceased on his way to nearby Laxmi Bazar to bring vegetables. He saw the occurrence standing in front of the house of the deceased and he has described in detail the conduct of the appellants, manner of assault on the deceased by each of the appellants, his part in taking the deceased Laxmidhar Rout in a rickshaw to Puri Town P.S. and there from, on and advice of the police, to the District Headquarter Hospital. Learned Trial Court has eschewed the defence contention on this point through detail discussion in paragraph-8 of the impugned judgment, by referring to various authorities on the point. The relevant facts, which, according to learned trial court, rescues P.W.4 from being a chance witness is the fact that he is a co-basti man of both the parties and he has explained his presence at the spot at the relevant time of the alleged occurrence. Taking into consideration the evidence of P.W.4 in its entirely, we do not find justification to take a different view, but we feel persuaded to reinforce the findings of the learned trial court by referring to Rana Pratap vrs. State of Haryana, A.I.R. 1983 S.C. 680, wherein Hon'ble the Supreme Court has held thus-

> "….. We do not understand the expression "chance witnesses". Murder are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence can not be brushed aside or viewed with suspicion on the ground that they are mere "Chance Witness" is borrowed from countries where every man's home is considered his castle and every and must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression

> in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street Vendors on the ground that they are "Chance witnesses" even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence.

In the case in hand, presence of P.W.4 at the spot having been found to be probable, he being a resident of the locality and he (P.W.4) having given reasons or having explained his presence at the spot, his evidence can not be brushed aside or viewed with suspicion on the ground that he is a chance witness.

7. P.Ws. 6 & 9 are daughter and wife respectively of the deceased. They are eye witnesses to the occurrence. They came from inside the house to see the occurrence on being attracted by the shout of the deceased. They have also described in detail the conduct of the appellants, manner in which each of the appellants mounted the assault and the injuries sustained by the deceased. Their evidence is criticized on the ground of their relationship with the deceased. Learned trial court by referring to various case laws on the point, has negatived such a contention by holding that relationship can not be a ground to discard the sworn testimony of a witness. There is no infirmity in the findings of the trial court on this point and learned trial court having appreciated the evidence of P.Ws.6 and 9 carefully and cautiously before believing them as they were criticized on the ground of their relationship, we also do not find any infirmity in the decision making process by the learned trial court so far as the evidence of P.Ws.6 and 9 are concerned.

8. In the present case, the deceased himself has lodged the F.I.R. vide Ext.6, which was scribed by P.W.8. In course of treatment, his statement under Section 161 Cr.P.C. was recorded and such statement has been proved as dying declarations of the deceased. The statement given by the deceased in Ext.6 and 10 relates to the circumstances of the transaction, which resulted in his death. It is well settled in law that any statement made by the deceased, which are directly connected with or related to his death and which reveal a tell tale, is admissible in evidence under Section 32(1) of the Evidence Act. No authority is required to be referred to justify our findings on the point to the effect that Exts.6 and 10 in the present case are admissible under Section 32(1) of the Evidence Act. We, therefore, hold that learned trial court has taken the right view on admissibility of Exts. 6 and 10 under Section 32(1) of Evidence Act as dying declarations of the deceased.

9. Learned counsel for the appellants submits that cause of death of the deceased to cerebral embolism and the medical officer P.W.5 has specifically opined that cerebral embolism can also happen in case of a

hypertensive patient without any injury being caused to such a patient. It is further submitted that in view of such fact, it can not be said that there is proximate relationship between the act of the appellants and death of the deceased. On such premises, it is contended that when death of the deceased can not be held to be homicidal, Exts.6 and 10 can not be held to be relevant and admissible under Section 32(1) of the Act, inasmuch as both the Exhibits do not contain statement of the deceased, which relates to the circumstances of the transaction that resulted in his death.

10. Evidence of P.W.5 shows that during the post-mortem examination he (P.W.5) found the following external injuries on the dead body of the deceased :-

" (i) Incised wound 2"x1"x cutting muscles and fascie posterior part of the left leg 3" above the knee obliquely placed.

(ii) Abrasion with bleeding over anterior part of left knee and right ankle.

(iii) Incised wound 4"x1"x bone deep bleeding present on anterior part of right knee just below the patella semi-circular with curved upwards,

(iv) Incised injury 2"x1" cutting outer cortes of the skull below the injury bleeding present anterior posteriorly placed over left eye brow.

(v) Amputation of the little finger of the right hand from the base bleeding present.

(vi) Ring finger of the right hand cut vertically separating nail from the pulp up to second wrist laterally and up to base media.

(vii) Incised wound 2"x3" cutting deep muscle transversely placed bleeding present on the lateral part of the left palm 2" above the acromia process.

(viii) Incised wound 3"x1/2"x skin deep bleeding present over supra scapular region left side anterior posteriorly placed."

It is opined by him (P.W.5) that all the injuries except injury no.(ii) were stitched. The internal injuries found by P.W.5 are punctured haemorrhage over both the hemisphere of the brain, fracture of upper fibula of the left side, fracture and upper tibia on the right side, and cutting of outer cortes of front parietal bone of the left side. Cause of death, according to P.W.5, is multiple injuries leading to cerebral embolism and shock. It is further opined by P.W.5 that all the injuries except injury no.(ii) above were caused by sharp cutting weapon.

In cross-examination (at Para-13), P.W.5 has testified thus :-

"13. Without any Injury cerebral embolism may occur if there is hypertension."

11. Learned counsel for the appellants capitalized much on the aforesaid opinion of P.W.5 and submits that there being nothing on record to show that the deceased was not suffering from hypertension, cerebral embolism caused to the deceased can not be attributed to the injuries sustained by him.

12. 'Cerebral Embolism' medically refers to a condition of blockage of blood flow through vessel in the brain by a blood clot that formed elsewhere in the body and travelled to the brain.

P.W.5 is specific in his opinion that multiple injuries caused to the deceased have led to cerebral embolism in the present case. He having conducted the post-mortem on the dead body of the deceased, is the right person to form the opinion as aforesaid. His opinion in paragraph-13 of his cross-examination is an answer to a general question as to whether cerebral embolism may occur without any injury. Such a general opinion can not, however, supersede the specific opinion given by him in his examination-in-chief. We are, therefore, constrained to hold that the injuries sustained by the deceased in the present case have led to cerebral embolism resulting in the death of the deceased.

13. It is well settled in law that in order to hold the death of a person to be homicidal, the injuries inflicted must be the proximate cause of death and not a remote cause connected with the death by a chain of intervening events. In other words, the 'death' should be connected with the act of violence or other primary cause not merely by a chain of causes and effects but by such direct influence as is calculated to produce its effect without intervention of any considerable change of circumstances. The death of a person must be at least a likely consequence of the injury received. In view of such position of law when any disease, which actually causes death, is natural and probable result of the injury which has been caused, the person who has inflicted injury is to be held responsible for the disease arising from the injury. Therefore, when the disease, which actually causes death is disease like meningitis, peritonitis, tetanus, pneumonia, gangrene or a condition like cerebral embolism, as in the present case and it is natural of a condition like probable result of the injury which the accused has caused, the accused is to be held to be responsible for the disease or condition arising from the injury, and the death in such cases is to be held to be homicidal.

In the premises as aforesaid, it is to be held that death of the deceased Laxmidhar Rout was a homicidal death.

14. Learned counsel for the appellants has raised some other points regarding absence of motive, etc., but all those points being in the fringe and

having been discussed and negatived by learned trial court in the impugned judgment, we do not find any justification to burden this judgment by reiterating the same in detail.

15. Coming to the alternative contention raised by learned counsel for the appellants, there is no dispute on the point of law that in a charge under Section 302, I.P.C. an accused can be convicted suitably either under Section 324, 325 or 326, I.P.C. in such a case where death of the deceased was not the direct result of the injuries caused to the deceased during the occurrence. But in case the injuries caused to the deceased are held to be the cause of death of the deceased, there is no scope to convert or to modify the conviction under Section 302, I.P.C. to one under any of the sections relating to hurt. In the present case we have already held that death of the deceased is a homicidal death and injury received by the deceased is the cause of his death. In the premises as aforesaid, contention of learned counsel for the appellants to convert the conviction of the appellants to one under Section 324, I.P.C. merits no consideration.

16. Except injury no. (iv) extracted supra, all other injuries are on non-vital parts of the body of the deceased. Injury no. (iv) is an incised injury of size 2" x 1" cutting outer cortes of the skull below the injury present anterior and posteriorly placed over left eye-brow. The aforesaid injury or other injuries received by the deceased can not be brought under Clause Thirdly of Section 300, I.P.C. in as much as there is nothing on record to come to a finding that the injuries were sufficient in ordinary course of nature to cause death and the appellants had intended to cause those particular injuries shown to have been sustained by the deceased. Except injury no. (iv), which is not a grievous injury and which has not affected fatally the deceased, all other injury are either on legs or palm or knee. In view of such fact, it can not be held that the appellants had the intention to cause death of the deceased. The blood clot resulting in cerebral embolism might have been caused by fracture of left fibula or right tibia. In view of such fact knowledge may be attributed to both the appellants to the effect that by their act they are likely to cause death of the deceased. We are inclined to take such a view taking into consideration the indiscriminate assault on the deceased by sharp cutting weapons like sword. Accordingly the appellants are held to have committed offence of culpable homicide not amounting to murder punishable under Section 304, Part-II, I.P.C.

17. In view of our discussion supra, conviction of the appellants is modified to one under Section 304, Part-II, I.P.C. read with Section 34 thereof. Conviction of the appellants under Section 302/34, I.P.C. is accordingly set aside.

It is submitted by learned counsel for the appellants that both the appellants have already suffered imprisonment for 10 years as Under Trial Prisoners, as they were in custody since 29.09.1996 until their release on bail in mind 2007. Regard being had to such submission, the sentence in respect of both the appellants is modified to the period already undergone by each of them.

The Criminal Appeal is accordingly allowed in part. The appellants be discharged of the bail bonds executed in the present case.

Appeal allowed in part.

2011 (I) ILR – CUT- 555

PRADIP MOHANTY, J & B.K.NAYAK, J.

JCRLA. NO.100 OF 2000 (Decided on 02.02.2011)

RABI KHARA …….. Appellant.

.Vrs.

STATE OF ORISSA ……... Respondent.

CRIMINAL TRIAL – Appreciation of evidence – P.W.1 is the son of the deceased – He vividly described the role played by the present appellant – He also proved the enmity between his deceased father and the appellant – Discrepancies appearing in the evidence of P.W.1 and P.W.3 are minor in nature and bound to occur in case of truthful witnesses due to efflux of time – The appellant while in police custody admitted his guilt, led the police and the witnesses to the place of concealment and gave recovery of the weapon of offence – The Medical Officer specifically opined that the seized weapon of offence can cause the injuries sustained by the deceased – Chemical report reveals that the seized Kati and Tangi were stained with blood – Held, evidence of P.W.1 can not be discarded on the ground of relationship with the deceased – There is no illegality committed by the trial Court in convicting the appellant – Conviction and sentence passed by the learned trial Court is confirmed.

(Para 8)

For Appellant - Mr. G.S.Pani, Advocate
For Respondent - Addl. Standing Counsel

PRADIP MOHANTY, J. This appeal is directed against the judgment and order dated 29.01.2000 passed by the learned Additional Sessions Judge, Jeypore convicting the appellant under Section 302 of the Indian Penal Code and sentencing him to undergo imprisonment for life in Sessions Case No.05 of 1998.

2. The case of the prosecution, in short, is that on 03.06.1997 evening P.W.1-Abhi Suna and his father (deceased) had been to village Landiguda to settle a dispute with the appellant. At that time, the appellant was not present in his house. It is alleged that the appellant lodged a report against the deceased on that day alleging that the deceased has committed theft of Bhalia for which the Police came to the house of the deceased for apprehending him. Both P.W.1 and deceased waited for the appellant sitting on the verandah of Jhilibandhu Paraja. At about 8 P.M. the appellant,

Laikhan Khara, Saheb Kuna, Moti Khara, Somari Khara and Hari Suna came near the house of that Paraja and picked up a quarrel with the deceased. All the accused persons caught hold of the hands and legs of the deceased and the appellant caught hold of the hair of the deceased, twisted his head backwards and cut his throat by means of kati, as a result of which the deceased fell on the ground facing downwards. Then the appellant gave another blow by means of an axe on his back. P.W.1, the son of the deceased protested against their action for which Sadheb Suna chased him to assault by means of stone. P.W.1 concealed himself behind a big stone and spent the entire night there. On the next morning, he came and narrated the entire incident to his mother (P.W.8), who in turn reported the same to P.W.7. Thereafter, P.W.7 lodged an information before the O.I.C., Koraput P.S., who on receipt of the same registered the case, and took up investigation and ultimately submitted charge sheet against the present appellant along with five others under section 302/34 of the Indian Penal Code.

3. The plea of the accused persons was complete denial of the allegation. In order to prove its case, the prosecution examined 10 witnesses and the defence has examined none.

4. The learned Additional Sessions Judge, tried the case and after assessing the evidence adduced by the prosecution convicted the present appellant under section 302 of the Indian Penal Code and acquitted the other five accused persons of the charges under section 302/34 of the Indian Penal Code.

5. The learned counsel for the appellant assails the impugned judgment on the following grounds:

i) The ocular witnesses are interested and they have not seen the occurrence since it took place in a dark night.

ii) There are major contradictions in the evidence of the witnesses and they have tried to develop the prosecution story in the Court while adducing evidence.

iii) Ingredients of Section 27 of the Evidence Act have not been proved, and;

iv) The weapons of offence (M.Os.1 and II) seized under section 27 of the Evidence Act were not produced by the appellant.

6. Mr. Rath, learned Additional Standing Counsel vehemently argues that the evidence of P.Ws. 1 and 3 is clear and cogent. They have also admitted the enmity between the parties. There is no discrepancy in the evidence of P.Ws.1 and 3 with regard to the involvement of the present appellant in the said crime. P.Ws.2 and 4 have specifically stated about the presence of the deceased at the occurrence place before the incident.

Therefore, there is no infirmity or illegality in the impugned judgment warranting interference by this Court.

7. Perused the L.C.R. P.Ws. 1 and 3 are witnesses to the occurrence. P.W.1 who is the son of the deceased, deposed that accused Saheba Suna caught hold of the two hands of his father from his backside. The other accused persons also caught hold of the hands and legs of his father. The appellant caught hold of the tuft of the hair of his father and by twisting his neck upwards, cut his neck by means of a kati as a result of which his father (deceased) sustained severe cut and bleeding injury on his neck and fell down on the ground facing downwards. Thereafter the appellant gave a tangia blow on the back of his father as a result of which his father sustained cut and bleeding injuries. He also deposed that he concealed his presence behind a big stone for the entire night. On the next morning he went to his house and informed the incident to his mother. In cross-examination, P.W.1 admitted that when the occurrence took place it was not dark. Nothing has been elicited in cross-examination to demolish his evidence. P.W.3 is another occurrence witness. His house is very close to the house of Paraja Jhilibandhu (P.W.4). Hearing hullah he came out of his house and saw that the appellant cut the throat of the deceased Arjuna by means of a kati and also gave a blow by means of a tangia on the backside of the deceased. At that time,other accused persons were also present. Out of fear he closed the door of his house and remained inside. In cross-examination, he has stated that the occurrence took place in a dark night. His Pindah was at a distance of about 15 to 20 feet from the pindah of Jhilibandhu Paraja, where the occurrence took place. He admitted that due to darkness he could not identity the other accused persons except Rabi, the present appellant. P.W.2 has been turned hostile. But he has stated in his examination-in-chief that he found the deceased Arjuna sitting on the pindha of Paraja at about 7 to 8 P.M.. On the next day morning he came to know that the appellant committed murder of the deceased by cutting his throat. Thereafter, he went to the spot and found the dead body of the deceased lying at the end of the village. P.W.4 has stated that on the occurrence day he saw the deceased and P.W.1 were sitting on his verandh. All the accused persons came to his pindah where the deceased was sitting. Out of fear he did not come to the spot and on the next day morning he saw the dead body of the deceased was lying on the ground. P.W.5 is a witness to the inquest and proved the Inquest report. Ext.2. He is also a witness to seizure of blood stained earth and sample earth and also proved Ext.3. P.W.5 has stated in his evidence that the appellant while in police custody gave his statement before the Police admitting the murder of the deceased and led him, the police and other witnesses to the place of concealment of kati and tangia and gave recovery of those weapons of offence which were seized under Ext.5. He

also proved the statement of the accused marked as Ext.6. Nothing has been elicited from his mouth byway of cross-examination to support the defence.

P.W.6 is the Doctor, who conducted autopsy over the dead body of the deceased and found the following injuries.

i) Cut would on the nect of size 2" x 1" x 2" involving total evolution of trachea and large vessels on both sides of the neck.

ii) Incised would on the back over left scapula of size 2 ½ " x ½" x ½

He opined that the cause of death was due to cutting of large vessels of the neck causisng severe haemorrhage and bleeding. He proved the Post Mortem report (Ext.7). He also opined that the taniga (M.O.II) can cause the would on the back over the left scapula and Kati (M.O.I) can cause the would on the neck.

P.W.7 is the informant. He has specifically stated that after hearing the entire incident from the wife (P.W.8) and son (P.W.1) of the deceased Arjun, he lodged F.I.R. at Koraput P.S. He jproved the F.I.R. (Ext.9). Nothing has been elicited in his cross-examination to discredit his testimony. P.W.8 is the widow of the deceased, who specifically deposed that she heard the incident from P.W.1. Thereafter, they went to P.W.7 and P.W.1, the son of the deceased, narrated the incident before P.W.7. Nothing has been elicited in her cross-examination. P.W.9 is the Constable, who was commanded by the I.O. to take the dead body for post mortem examination. He proved Ext.10 the Command Certificate and Ext.11 the dead body challan as well as Ext.12 the seizure list in respect of wearing apparels of the deceased. P.W.10 is the I.O., who registered the case, seized the incriminating materials, conducted inquest over the dead body, sent the dead body for autopsy and after completion of investigation submitted charge sheet.

8. It is the settled principle of law that on the ground of relationship the evidence of a witness can not be discarded. P.W.1 is the son of the deceased. He vividly described the role played by the present appellant. He also proved the enmity between his deceased father and the appellant. Discrepancies appearing in the evidence of P.Ws.1 and 3 are minor in nature and bound to occur in case of truthful witnesses due to efflux of time. It is in the evidence of P.W.4 that just before the occurrence the deceased Arjun and his son 9P.W.1) were sitting on the verandah of P.W.4 and the evidence of P.W.4 gets corroboration from the evidence of P.W.2. It is evident from the evidence of P.W.5 (the seizure witness) and P.W.10 the I.O. and also from Ext.5 that the appellant while in police custody admitted his guilt, led the Police and the witnesses to the place of concealment and gave recovery of the weapons of offence (M.Os.1 & II). The Medical Officer (P.W.6) specifically opined that the seized weapons of offence can cause the

injuries sustained by the deceased. The Chemical report also reveals that the seized kati and tangi were stained with blood. On a careful scrutiny of the evidence of record we are of the view that there is no infirmity or illegality committed by the trial Court in convicting the appellant.

9. For all the above reasons, there is no scope for this Court to interfere with the impugned judgment and order of conviction and sentence passed by the trial Court and the same is accordingly confirmed.

The Jail Criminal Appeal is accordingly dismissed.

Appeal dismissed.

2011 (I) ILR – CUT- 560

PRADIP MOHANTY, J & B.K.NAYAK, J.

W.P.(C) NO.66 OF 2010 (Decided on 25.01.2011)

STATE OF ORISSA & ORS. ……. Petitioners.

.Vrs

SUBRAT KUMAR TRIPATHY …….. Opp.Party.

CONSTITUTION OF INDIA, 1950 – ART.16 (1) & (4).

Service – Advertisement for the post of Sub-Inspector of Police – Physical requirement for general/unreserved Candidates is 168 cm in height and 55 kg in weight and in case of SC/ST Candidates minimum height should be 163 cm – O.P. belongs to general category and his height is 165 cm and weight 50 kg and he seeks appointment against sports quota – Government Resolution Dt.18.11.1985 – Refusal for relaxation of requirement in minimum physical standard – O.P. filed O.A – Tribunal compared the O.P. with reserved Candidates and directed the Government to consider his appointment in the post reserved for sports person – Hence this writ petition.

Tribunal has no jurisdiction to relax the height and weight of the O.P. – Reservation for a sports man in the service is a horizontal reservation and not vertical – Tribunal is not justified by making a comparison of the O.P. with SC/ST Candidates for whom relaxation of height by 5 cm has been granted which can not be said to be the minimum standard of height required for the post – Since the required physical standard for sports person has not been dispensed with by the State Government, the State has not granted relaxation in respect of physical standard in favour of the O.P. – Held, Order passed by the Tribunal is illegal hence set aside.

(Para 11,12,13)

Case laws Referred to:-

1.(2010) 3 SCC 119 : (Jitendra Ku.Singh & Anr.-V-State of Uttar Pradesh & Ors.)
2.1992 Supp (3) SCC 217 : (Indra Sawhney -V- Union of India).
3.(2008) 10 SCC 382 : (Shiv Prasad -V- Government of India & Ors.).

For the Petitioners - Addl. Standing Counsel.
For Opp.Party - M/s. Kali Prasanna Mishra, T.P.Tripathy, L.P.Dwivedy

B.K.NAYAK, J. The State of Orissa and the Staff Selection Commission as petitioners have filed this writ application challenging the order dated 05.08.2009 passed by the Orissa Administrative Tribunal in O.A.No.269 of 2008 vide Annexure-5.

2. The facts of the case are that pursuant to the advertisement dated 27.08.2002 issued by the Orissa Staff Selection Commission, the opposite party applied for appointment to the post of Sub-Inspector of Police. The opposite party, who is a general candidate claimed appointment as a sports person against the sports quota. He came out successful in the written examination and was called to appear in the psychological test, physical test and viva voce test. He came out successful in psychological test, but fell short of the physical requirement as applicable to unreserved/general candidates. The physical requirement for unreserved candidate was that the candidate must be 168 cm in height and 55kg in weight. The requirement of minimum height for SC/ST candidate was however 163 cm. The opposite party is 165 cm in height and 50 kg in weight and therefore in the physical test he fell short of 3 cm in height and 5 kg. in weight. The opposite party initially filed O.A.No.1515(C) of 2004 before the Orissa Administrative Tribunal, Cuttack Bench, Cuttack for a direction to the petitioners to allow him to face the viva voce test and to give him appointment against the sports quota. The Tribunal disposed of the original application on 16.08.2004 directing petitioner No.3, the Secretary of the Staff Selection Commission to examine the averments made in the original application and to pass appropriate orders regarding the prayer of the opposite party within two months from the date of receipt of the copy of the order. The further direction was to communicate the decision of petitioner No.3 to the opposite party. In pursuance of such order, the Staff Selection Commission rejected the prayer of the opposite party for relaxation of requirement of minimum physical standard and the physical test and the said decision was communicated to the opposite party vide Commission letter No.1271 dated 07.04.2004 (Annexure-2). Thereafter the opposite party filed the present O.A.No.2208(C) of 2004 before the Administrative Tribunal, Cuttack Bench, Cuttack, which was transferred to the Principal Bench at Bhubaneswar and renumbered as O.A.No.269 of 2008 with a prayer to direct the present petitioners to allow the opposite party to face the viva voce test and to appoint him as S.I. of Police against the post reserved for sports persons in view of the Government of Orissa in G.A. Department Resolution No.24808-Gen dated 18.11.1985.

3. In the O.A., the present petitioners, who were respondents therein, filed a Counter Affidavit stating that there was no scope for relaxation of any of the conditions specified in the advertisement in respect of Sports persons.

In other words, the candidates claiming appointment against sports quota have to be governed by the criteria laid down in respect of the relevant caste category to which they belong. The further stand of the petitioners in the counter affidavit was that the present opposite party had filed a representation seeking relaxation and the said representation was not considered as it was not possible to bring any relaxation in individual cases unsupported by any guidelines which will be applicable to all candidates.

4. The learned Tribunal disposed of the original application by order dated 05.08.2009 (Annexure-5) and directed that the opposite party be put through the remaining tests i.e., the Physical Test and Viva Vove Test and be considered for appointment against a vacant post if found suitable and that age would be no bar for such appointment. It was further directed that the entire exercise be completed within a period of three months from the date of receipt of the copy of the order of the Tribunal. For giving such direction the Tribunal compared the opposite party with reserved candidates of S.C./S.T. category for whom the requirement of minimum height is 163 cm and reasoned that in case for S.C./S.T. candidates the minimum height required for the post of S.I. of Police is 163 cm, the opposite party being a sports person, who is more efficient physically, cannot be discriminated merely because he belongs to the general caste, i.e., unreserved category. The Tribunal also relied upon the Government Resolution No.24808-Gen dated 18.11.1985 and held that since the Resolution provides only for requirement of minimum educational qualification as the qualifying standard, the opposite party , who is a sports person is required to qualify such minimum standard set for selection in all respect. In relation to the deficiency of the opposite party to conform to the minimum weight of 55 kg, the Tribunal has not made any consideration.

This order of the Tribunal is under challenge.

5. Mr.Rath, the learned Additional Standing Counsel contends that without there being any specific guideline or Rules to that effect, the Administrative Tribunal has no jurisdiction to relax the height and weight of the opposite party. It is also his submission that observation of the Tribunal that minimum height requirement for the post is 163 cm which is fixed for the S.C./S.T. category candidates is wholly misconceived as because the reserved category of S.C./S.T. candidates were only given a relaxation with regard to height which is less than the minimum required standard. In other words, the relaxation or concession given to a particular type of candidate cannot be equated with reservation and cannot be treated to be the minimum requirement for the post concerned. He also submits that the reservation for sports person, like that of women and physically handicapped being horizontal reservation, the candidates claiming such

reservation must conform to the minimum eligibility criteria fixed for the category to which they belong. The learned counsel for the opposite party strongly relies on the Government Resolution dated 18.11.1985 and vehemently urges that the only requirement is the minimum educational qualification and even if the opposite party fell short of the height and weight required for general/unreserved candidates, he cannot be denied appointment in the post reserved for sports persons.

6. Before going to consider the legality and propriety of the Tribunal's order and the contentions raised by the learned counsel for both the parties, it is necessary to see the Government in the G.A. Department Resolution No.24808-Gen dated 18.11.1985 which is reproduced below :

> " In their Resolution No.1099 S.C., dated the 16th February, 1985, the Tourism, Sports & Culture (Sports & Culture) Department have decided to adopt a Sports Policy, broadly in keeping with the National Policy guidelines for ensuring systematic and concerted efforts for development of sports and games in the State. Besides certain other facilities provided for the sportsmen under the Sports Policy, a decision has also been taken that one percent of the jobs in the Government and public Sector Organizations will be kept reserved for deserving sportsmen representing the State subject to their meeting the minimum educational requirement.
>
> 2. In order to implement this decision in a systematic manner, it has now been decided by Government that one percent of vacancies arising in a year in each of the categories of Class II and Class III services/posts and in Class-IV posts filled by direct recruitment should be reserved for the sportsmen. Further, it has been decided that the 8th vacancy in cycle of 100 vacancies should be reserved for sportsmen.
>
> 3. A cell shall be constituted in the Directorate of Sports to register the names of the sportsmen and one of the Assistant Directors will remain in charge of this cell. The Assistant Director in charge shall receive applications from the sportsmen for registration. Applications for registration shall be accompanied with certificates relating to educational qualification and training, etc. and also with a certificate to the effect that the candidate is a sportsman and participates and represents the State in regular open national Events and Championships.
>
> 4. Recognized Associations/ Federations/ Organizing bodies may issue the sports certificates to the candidates who participated or represented in the Open National Events and Championships.

The Director, Sports shall issue identity cards to the deserving sportsmen on the basis of the above certificates.

5. The sportsmen shall produce the identity card issued in their favour by the Director, Sports at the time of their appointment against the posts reserved for them.

6. The above instructions may be followed by different Departments and Heads of Departments and the relevant recruitment rules framed by the Departments of Government may be amended accordingly."

7. On the direction of the Court, the learned Additional Standing Counsel produced the copy of the advertisement dated 27.08.2002 which reveals that a total of 254 number of posts of S.I. of Police was advertised with the following break up for different categories.

S.C.	– 41	(13 reserved for women candidates)
S.T.	– 57	(19 reserved for women candidates)
SEBC	- 71	(23 reserved for women candidates)
Unreserved	- 85	(28 reserved for women candidates)

Just below the above break up a Note has been appended and Sl. No.(2) of the Note states that the above category wise vacancy position is inclusive of reservation for Ex-servicemen and Sportsmen as per Rules in force.

8. It is quite clear from the Government Resolution dated 18.11.1985 and the Note given in the advertisement as seen above, that the reservation for a sportsman in the service is a horizontal reservation and not vertical one which is available to be made in public services by the State in exercise of its enabling power under Clause(4) of Article-16 of the Constitution of India. There is no dispute that the opposite party is a general caste candidate and therefore, he will be entitled to claim reservation as a sportsman to a post from amongst those meant only for the general caste/unreserved candidates. The Tribunal has fallen to error by making a comparison of the opposite party with candidates of S.C./S.T. category for whom a relaxation of height by 5 cm has been granted. Such relaxation or concession given to the reserved category of S.C./S.T. candidate cannot be said to be the minimum standard of height required for appointment to the post of S.I. of police. In fact the requirement of a minimum standard of height is 168 cm.

9. Explaining the nature of reservation for sports person, physically disabled and women etc. in public services, the Apex Court in the case of ***Jitendra Ku.Singh and another-v.State of Uttar Pradesh and others : (2010) 3, SCC 119,*** took note of the observations made l n the case

of ***Indra Sawhney v.Union of India : 1992 Supp (3) SCC 217*** and held as follows :

> "812. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes [under Article 16(4)] may be called vertical reservations, whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations-what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains-and should remain-the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure."

10. In the case of ***Shiv Prasad –v.-Government of India and others (2008) 10 Supreme Court Cases 382*** the aforesaid observation made in the case of Indra Sawhney (supra) was also followed in the matter of horizontal reservation for women by the Apex Court which upheld the appointment of a woman candidate in the unreserved category as Assistant professor to the exclusion of a more meritorious male candidate of such unreserved category.

11. We are therefore of the view that the Tribunal was not justified in saying that since a S.C./S.T. candidate of 163 cm height was eligible to be considered for appointment, the opposite party should have also been considered in the sports quota though he belonged to general/unreserved category.

12. The reasons given by the Tribunal that under the Government resolution dated 11.08.1985 the only requirement for sports person is to attain the minimum educational qualification and nothing else is required is

wholly fallacious. There being no specific rule for reservation of posts and services for sports persons, it is not disputed that the Government Resolution is governing the field which provides for reservation of 1% of jobs for sports persons as per the Government policy. However, the physical requirement and other eligibility criteria for recruitment to the post of S.I. of Police has not been given a go bye in the Government Resolution. The resolution does not mean that having the minimum requisite educational qualification, a sports person should be appointed without passing the required tests those are necessary to be passed by candidates of all categories in order to qualify for the service. The reservation for a sports person being horizontal in nature, it means that fulfilling the minimum eligibility criteria and obtaining the minimum qualifying marks in all the tests a sports person may be preferred to other more meritorious and qualified candidates of his category. Since the required physical standard for sports person has not been dispensed with by the State Government, rightly the State has not granted relaxation in respect of requirement of physical standard in favour of the opposite party.

13. In the light of the aforesaid discussions, we are of the view that the Tribunal's order under Annexure-5 is illegal and unsustainable. We, therefore, set aside the said order of the Tribunal.

The writ application is accordingly allowed. No costs.

Writ petition allowed.

2011 (I) ILR – CUT- 567

M.M.DAS, J.

W.P.(C) NO.14563 OF 2007 (Decided on 20.01.2011)

P. AREYA REDDY …….. Petitioner.

.Vrs.

P.O., LABOUR COURT,BBSR & ANR. ….. ……. Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.311 (2).

Disciplinary Proceeding – Enquiry Officer found the petitioner furnishing wrong information at the time of entry into Govt. service and involved in bigamous marriage – Disciplinary Authority imposed punishment of compulsory retirement from service – Appeal Committee confirmed the penalty – hence the writ petition.

Petitioner declared the name of his wife P. Arnapurna Reddy at the time of entering into the service was based on bonafide belief that his marital status with his first wife P. Sharma has come to an end as per their Caste-Custom and thereafter he got married to P. Arnapurna Reddy and disclosed her name as his legally married wife so question of committing bigamy after entering in to Government service did not arise and the charge framed against him for giving wrong information at the time of entering into service and under going bigamous marriage can not be sustained – Held, punishment imposed leading termination of service by way of compulsory retirement shocks the conscience of this Court and the punishment imposed is clearly disproportionate and it does not commensurate with the alleged misconduct – Held, termination of service of the petitioner by way of compulsory retirement, which has been confirmed in the award, is set aside and the petitioner is imposed with a minor penalty of stoppage of three increments with cumulative effect and he shall be reinstated in service and in lieu of back wages he shall be paid a consolidated amount of Rs.50,000/- as Compensation .

(Para-12,13,14)

Case laws Referred to:-

1.2010 (2) OJR 124 : (Dibakar Moharana-V-State of Orissa & Ors.)
2.AIR 1996 SC 484 : (B.C.Chaturvedi-V-Union of India & Ors.).
3.AIR 1983 SC 454 : (Bhagat Ram-V-State of H.P. & Ors.)
4.AIR1987 SC 2386 : (Ranjit Thakur-V-Union of India & Ors.)

5.1995 Suppl.(3)SCC 519 : (S.K.Giri-V-Home Secretary,Ministry of Home Affairs & Ors.).
6.(2005) 7 SCC 338 : (V.Ramana-V- A.P.S.R.T.C. & Ors.).

For Petitioner - M/s. Braja Kishore Sahoo & K.C.Sahoo.
For Opp.parties - None

M.M. DAS, J. The petitioner in this writ petition calls in question the award dated 29.6.2007 passed by the Presiding Officer, Labour Court, Bhubaneswar in I.D. Case No. 3 of 2003.

2. The facts, which are relevant , are as follows:-

The petitioner was an employee under the opp. party no. 1. He was employed as a helper on 8.2.1979. He declared his marital status as married and disclosed the name of his wife as P. Arnapurna Reddy at the time of joining in the service which has been duly entered in the Service Book as well as in the Group Insurance. Later, a complaint was filed by one P. Sharma alleging herself to be the married wife of the petitioner-workman. The opposite party-management by letter dated 09.10.1990 charge-sheeted the workman framing various charges against him, which are as follows:-

(i) furnishing wrong information at the time of entry into Govt. service.

(ii) involving yourself in Bigamous marriage as a Govt. servant.

(iii) violation of Govt. servant conduct rules.

3. The petitioner was called upon to explain within 15 days from the date of receipt of the said charges as to why disciplinary action shall not be taken against him. The petitioner submitted an explanation stating that the statements given by him in his joining report as well as in the Group Insurance Scheme Nomination Form are not inconsistent. He denied the charges levelled against him and stated that he is an illiterate person for which, he preferred to serve as an attendant in the office. He also asserted that P. Arnapurna is his married wife, whose name has been reflected in the official correspondence and denied the claim of the complainant P. Sharma further submitting that said P. Sharma is trying to take revenge against him, as said P. Sharma stays with one P. Purushottam, a mechanic, in the said office. Subsequently, an Enquiring Officer was appointed, who enquired the disciplinary proceeding. In his report, it is reflected that the petitioner by his letter dated 20.08.1990 intimated the office that Smt. P. Sharma left her before the year 1975 and as per the decision of the “Caste Committee” held on 13.07.1975 in his village, he had given a cultivable land of Ac 1.00 along

with some house-hold land to her and thereafter he married Smt. P. Arnapurna. The Enquiring Officer came to the conclusion that there was a Misc. Case relating to demand of interim maintenance filed by said P. Sharma in which, the interim maintenance was awarded, which was confirmed by this Court in a Civil Revision. However, the main case for maintenance is still pending. The Enquiring Officer therefore, concluded that although at the time of joining in the Govt. service, the petitioner was not living with P. Sharma and their relationship as husband and wife did cease on the basis of the decision of the "Caste Committee" on 13.07.1975, but in the eye of law, they are to be treated as husband and wife and in fact, it is clear that the petitioner involved himself in bigamous marriage and furnished wrong information at the time of his entering into the Govt. service. Therefore, both the charges are held to be proved against him.

4. The disciplinary authority basing on the enquiry report, gave his finding as follows: -

> "Went through the report of the E.O. The charges against Sri Reddy have been duly established. He has served employment by furnishing wrong information to this office. In view of this, he is compulsorily retired from service".

Accordingly, a letter was issued to the petitioner retiring him compulsorily from service from the date of issuance of the letter, i.e., 07.03.1992. Against the said order of the compulsory retirement, the petitioner initiated the industrial dispute, which was ultimately referred to the Labour Court, the reference being, (i) "whether the action of the management of the Director of Text Book Production & Marketing, Bhubaneswar leading to termination of services of Sri P. Areya Reddy by way of compulsory retirement, as punitive measure w.e.f. 07.03.1992 is legal and/or justified ? and, (ii) If not, to what relief Sri Reddy is entitled to ?"

5. Learned Labour Court after hearing the dispute, on analyzing the materials available on record, came to the conclusion that it can never be said that the enquiry conducted by the Enquiring Officer was in any way unfair or violative of principles of natural justice. Considering the facts on record, the learned Labour Court held that there is no force in the evidence of the workman that the enquiry into the charges against him was improper or unfair in any way. He, therefore, answered the reference by holding that the action of the management of the Director, Text Book Production & Marketing, Bhubaneswar leading to termination of service of Sri P. Areya Reddy by way of compulsory retirement with effect from 07.03.1992 is legal and justified and the workman is not entitled to any relief whatsoever.

6. Mr. Sahoo, learned counsel for the petitioner submits that since the petitioner joined in service in the year 1979 by which time, as per his caste custom, he was separated from Smt. P. Sharma and as per the decision of the community, he gave Smt. Sharma Ac. 1.00 of land with some homestead property, he on a bona fide belief that his marriage with P. Sharma should dissolve and he can get married again, he got married to P. Arnapurna. This being a prior act, the action of the petitioner in disclosing the name of P. Arnapurna as his legally married wife cannot be held to be a wrong information. He secondly submitted that even assuming that under law, there was no separation between the petitioner and Smt. P. Sharma, it cannot be said that the petitioner after entering into Government service was involved in a bigamous marriage. Therefore, technically, it can only be said that the petitioner gave a wrong information at the time of joining in service. In view of such facts, Mr. Sahoo submits that the punishment imposed, i.e., termination by way of compulsory retirement is disproportionate to the charges levelled against the petitioner. He relied upon the decision in the case of ***Dibakar Moharana v. State of Orissa and others***, 2010 (2) OJR 124 in support of his contention. In the said case, a Division bench of this Court was considering the punishment imposed on the writ petitioner by the learned District Judge , Cuttack in a disciplinary proceeding initiated against him, who was a 4th grade employee, i.e., a Peon and was appointed on 29.7.1976 in the court of the learned S.D.J.M., Cuttack. Being satisfied that his conduct, sincerity and obedience with regard to discharge of his duties, he was promoted and worked as Library Attendant in the court of the learned District Judge, Cuttack with effect from 3.11.1984 up to 30.9.2004. There were no adverse entries against the petitioner in the said case. When the matter stood thus on 30.9.2004, as per Rule 12 of the O.C.S. (CCA) Rules, 1962, the learned District Judge passed the order of suspension and initiated a departmental proceeding against the petitioner in the said writ petition. Charges were framed against him that (1) while posted as Library Attendant, he incurred a housing loan under the Flood loan scheme from the Union Bank of India , Main Branch, Cuttack without prior sanction of the authority and made unauthorized borrowing (ii) he forged the signature and seal of his drawing and Disbursing Officer, i.e., the Registrar, Civil Courts, Cuttack in the loan application form, salary certificate and forwarding letter and mis-represented the Union Bank of India regarding salary and wrongfully and fraudulently obtained the loan, amounting to gross misconduct on the part of a Government Servant (iii) he furnished a fake salary certificate for the month of July, 2004 with the loan application to the Bank which was not his actual salary and thereby he cheated the bank with false representation and thus acted against the interest and reputation of the authority. He acted immorally and dishonestly and cannot be trusted by the employer.

7. While enquiry was being conducted, he was reinstated with effect from 15.7.2005 after revocation of the order of suspension and he was posted as Duftary in the court of the learned Civil Judge (Sr. Division), Jajpur. The E.O. in his report held that the petitioner was guilty of the offences charged and recommended minor penalty of withholding of three periodical increments with cumulative effect and not to assign him with any responsible post in future. Upon such enquiry report, notice was issued to the petitioner to show cause as to why a major penalty like dismissal or removal from service should not be imposed on him for his misconduct. Ultimately, he was served with an order of dismissal from service by the learned District Judge.

8. The petitioner filed an appeal before the Appeal Committee of this Court and the appeal Committee confirmed the penalty imposed by the Disciplinary Authority against which the said writ petition was filed.

9. This Court in the said case, taking into consideration the nature of dereliction in duty and the charges and on scrutinizing the materials on record found that since two views are possible, the view which is in favour of the delinquent –petitioner should have been taken and a minor penalty instead of major penalty like dismissal from service should have been imposed by the Disciplinary Authority. Taking such a view and further noting the nature of penalties provided in the rules and referring to the case of ***B.C. Chaturvedi v. Union of India and others,*** AIR 1996 SC. 484 wherein the Supreme Court laid down that the disciplinary authority as well as the appellate authority are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct and the High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty, unless the punishment imposed shocks to conscience of the High Court/Tribunal, in which event, it can appropriately mould the relief either directing the disciplinary/appellate authority to consider the penalty imposed or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof or otherwise sent back the matter to the disciplinary authority to reconsider the matter land award some lesser punishment as per law.

10. The question of interference with the quantum of punishment has been considered by the Supreme Court in a number of judgments and it has been held that, if the punishment awarded, is disproportionate to the gravity of the misconduct, it would be arbitrary and violative of the mandate of Article – 14 of the Constitution.

(See ***Bhagat Ram V. State of H.P. & Ors.,*** AIR 1983 SC 454, ***Ranjit Thakur V. Union of India & Ors***., AIR 1987 SC 2386 and ***S.K. Giri V.***

Home Secretary, Ministry of Home Affairs & Ors., 1995 Suppl. (3) SCC 519).

11. In the case of ***V. Ramana V. A.P.S.R.T.C. & Ors***. (2005) 7 SCC 338, the Supreme Court, with regard to the above question compared the Indian Law with the English Law on judicial review and placing reliance on several previous judgments concluded that every administrative order should be rational and reasonable and the orders should not suffer from any arbitrariness. The scope of judicial review, as to the quantum of punishment, is permissible only, if it is found that it does not commensurate with the gravity of charges and, if, the Court comes to the conclusion that the quantum of punishment is shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. Thus, therefore, in the normal course, if the punishment imposed is shockingly disproportionate, it is open to the Court to direct the disciplinary authority to reconsider the penalty imposed or to shorten the litigation in exceptional cases, the Court itself can impose appropriate punishment by recording cogent reasons.

12. Considering the facts of the present case in the light of the above cited judgments, it would be clear that the action of the petitioner in declaring the name of his wife P. Arnapurna Reddy at the time of entering into service was based on bona fide belief that his marital status with his first wife P. Sharma has come to an end as per their caste-custom and thereafter, as he got married to P. Arnapurna Reddy, he disclosed her name, as his legally married wife. Question of committing bigamy after entering into the Government service did not arise at all in the facts of the present case. At best applying the provisions of the Hindu Marriage Act as the parties are Hindus, it can be said that without dissolution of the first marriage of the petitioner as per law, his second marriage with P. Arnapurna Reddy is invalid. But the finding of the Enquiring Officer, upon which, the disciplinary authority dismissed the petitioner that the charges framed with regard to giving wrong information at the time of entering into service and undergoing bigamous marriage, cannot be sustained. The information, as given by the petitioner, appears to be on a bona fide belief. Therefore, the only charge, which can be said to have been proved, was with regard to violation of Government Servant Conduct Rules on a technical ground that the petitioner's first marriage was not legally dissolved but he mentioned the name of his second wife as his legally married wife at the time of joining the service**.** Hence, the punishment imposed leading to termination of service of the petitioner by way of compulsory retirement with effect from 07.03.1992 shocks the conscience of this Court. The said punishment is clearly disproportionate and it does not commensurate with the alleged misconduct.

13.This Court, therefore, in order to shorten the litigation, without sending the matter back to the disciplinary authority, directs that the award passed by the

Labour Court be modified to the extent that the order of termination of service of the petitioner by way of compulsory retirement, which has been confirmed in the award, is set-aside and the petitioner is imposed with a minor penalty of stoppage of three increments with cumulative effect.

14. The petitioner, who was a fourth grade employee, being out of service with effect from 07.03.1992, shall be reinstated in service with immediate effect. However, the petitioner in lieu of back wages, shall be paid a consolidated amount of Rs.50,000/- (Rupees fifty thousand) as compensation. The above order shall be complied with immediately on communication of the same to the opposite party no.2.

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15. With the aforesaid modification in the award, the writ application stands partly allowed. No costs.

Writ petition partly allowed.

2011 (I) ILR – CUT- 574

M.M.DAS, J.

R.S.A. NO. 135 OF 2009 (Decided on 07.01.2011)

JITENDRA CHOUDHURY ……. … Appellant.

.Vrs.

SANGEETA MOHAPATRA & ANR. ……. Respondents.

HINDU MARRIAGE ACT, 1955 (ACT NO.25 OF 1995) – S.13 (1) (iii).

Dissolution of Marriage – Husband alleged that the wife suffers from schizophrenia which was suppressed during marriage – Both the Courts below held she was not suffering from schizophrenia Mental disorder prior to her marriage – Hence this appeal.
"Mental disorder" can be treated as a ground of divorce where it is of such a kind and degree that one party can not reasonably be expected to live with the other and if parties are young procreation of children is also not possible.

In the present case there is no evidence on record that the alleged mental disorder on the part of the defendant No.1 (wife) is of such a type that she can not enter into sexual act for procreation of children – Held, learned Courts below rightly refused the prayer for dissolution of marriage and grant of decree of divorce by the appellant.
(Para 9 & 10)

Case laws Referred to:-

1.1988 SC 2260 : (Ram Narayan Gupta-V-Smt. Rameswari Gupta).
2.AIR 1982 (Calcutta) 547 : (Smritikana Bag-V- Dillip Kumar Bag).
3.2006 (3) SCC 778 : (Vinita Saxena-V-Pankaj Pandit).

For Appellant - M/s. S.Das, P.Chuli, A.Mishra & S.Soren.
For Respondents- M/s. N.Pattnaik, A.K.Das
(for respondent no.1)
Mrs. N.Patnaik
(for respondent no.2)

M.M.DAS, J. This second appeal arises out of Matrimonial Suit No.59 of 2003 filed by the appellant (husband) for declaring the marriage between the appellant and the respondent no.1 invalid on the ground that the same was solemnized perpetrating fraud and mis-representation on the appellant and in the alternative for dissolution of the marriage by a decree of divorce. The

learned Civil Judge (Senior Division), Puri after trying the said matrimonial dispute by judgment dated 7.7.2006 dismissed the said suit on contest against both the defendants-respondents, the defendant-respondent no.2 being the father of the defendant-respondent no.1. The appellant – husband carried an appeal against the said judgment and decree registered as R.F.A. No.75 of 2006. The learned appellate Court, i.e. the learned District Judge, Puri by his judgment dated 13.3.2009 dismissed the appeal being devoid of merit by confirming the judgment of the learned trial court. Hence, this Second Appeal.

2. The vital issue which arose in the suit was that the defendant-respondent No.1 – Wife was suffering from Schizophrenia disease which was suppressed during the marriage. The learned lower appellate court which is the final court of fact arrived at a finding that it has not been brought to record that the behavior of the respondent no.1-wife was abnormal to such an extent that looking at her one can say her to be Schizophrenic and it can not be accepted that it was known to her parents prior to the marriage that she was suffering from Schizophrenia. As a matter of fact, it has been found that the respondent no.1- wife prosecuted her studies normally.

3. This Second Appeal has been admitted on the following substantial question of law:-

> "Whether the learned courts below have committed an error holding that the respondent no.1-wife was not suffering from Schizophrenia mental disorder prior to her marriage in view of the evidence adduced by the P.W.1 on behalf of the appellant ?

4. A marriage solemnized between two hindus can be dissolved and a decree for divorce can be passed if the conditions specified in section 13 of the Hindu Marriage Act, 1955 (for short, 'the Act;) are satisfied. Section 13 of the said Act prescribes that any marriage solemnized, whether before or after the commencement of the said Act can, no a petition presented by either the husband or the wife, be dissolved by a decree of divorce on any of the grounds stated in clauses (i) to (vii) of the said sub-section. Clause (iii) of the said sub-section provides that the marriage can be dissolved and a decree of divorce can be passed if the other party has <u>been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner can not reasonably be expected to live with the respondent.</u> Mental disorder has been explained in the said clause to mean mental illness arrested or incomplete development of mind, psychopathic disorder or any order disorder or disability of mind and includes Schizophrenia. "Psychopathic

disorder" has been defined as persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment.

(emphasis supplied)

5. The only relevant material, which the appellant has produced before the Court is the evidence of the doctor-P.W.1.

I find that on perusal of the said deposition, the learned trial court arrived at a finding that there is no iota of evidence on record available in the case at hand that the alleged mental disorder on part of the defendant no.1 (wife) is of such a type that she can not enter into sexual act for procreation of children and, therefore, after analyzing the evidence of the doctor P.W.1, came to the conclusion that the marriage can not be declared as void and the decree for divorce as sought for by the appellant, can not be granted.

6. The learned lower appellate court on considering the materials available on record along with the evidence of P.W.1 held that it can not be said that the fact that the respondent-wife was suffering from schizophrenia prior to her marriage, was known to her father, who himself is a doctor. Hence, it is not sufficient to declare the marriage a nullity unless it is categorically shown that such fact was within the knowledge of the parents of the respondent no.1-wife, which they suppressed from the plaintiff at the time of marriage of respondent no.1 with the appellant. The lower appellate court further relying upon the decision in the case of *Ram Narayan Gupta v. Smt. Rameswari Gupta,* 1988 SC 2260 and another decision in the case of *Smritikana Bag v. Dillip Kumar Bag,* A.I.R. 1982 (Calcutta) 547, came to the conclusion that it can not be said that the plaintiff-appellant has discharged the burden by proving the fact that the respondent-wife though a chronic schizophrenic, which is also a mental disorder, was suffering from mental disorder to such an extent and to such a degree that it was not expected on the part of the plaintiff to lead a normal conjugal life with her.

7. On perusal of the evidence of P.W.1, the doctor, it is seen that he examined the respondent-wife as an outdoor patient on 16.12.2002. He collected the history from the mother of the respondent no.1 that the respondent no.1 had appetite loss, laughing and crying to self at times remaining quite and withdrawn and talking much repeatedly. He again examined respondent no.1 at his residence, when both the mother of the respondent no.1 as well as the father-in-law, who accompanied her, disclosed that there was no improvement. He has also stated that the respondent no.1 was a graduate.

8. It further appears from the evidence of P.W.1, the doctor, that the father-in-law of respondent no.1 is a doctor P.W.1 has nowhere stated that the behaviour of the respondent wife was abnormal to such extend, which can be termed as mental disorder.

9. In the case of *Vinita Saxena v. Pankaj Pandit*, 2006 (3) SCC 778. the Supreme Court interpreting Section 13 (1) (iii) of the Hindu Marriage Act held that "mental disorder as a ground of divorce, can only be attracted, where it is of such a kind and degree that the husband can not reasonably be expected to live with the wife." It further held that where the parties are young and the mental disorder is of such type for which procreation of child is not possible, it may furnish a good ground for nullifying the marriage because to beget children from Hindu wedlock is one of the principal aim of Hindu marriage where sanskar of marriage is advised for progeny and offspring. The case relied upon by the learned lower appellate court, i.e. the case of Ram Narayan Gupta (supra) is also an authority where the Supreme Court laid down as follows:-

> "The context in which the ideas of unsoundness "mind" and "mental disorder" occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of the "mental disorder". Its degree must be such as that the spouse seeking relief can not reasonably be expected to live with the other. All mental abnormalities are not recognized as grounds for grant of decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage few marriages would, indeed, survive in law. "Schizophrenia" it is true, is said to be difficult mental-affliction. It is said to be insidious in its onset and has hereditary predisposing factor. It is characterized by the shallowness of emotions and is marked by a detachment from reality. In paranoid-states, the victim responds even to fleeting expressions of disapproval from others by disproportionate reactions generated by hallucinations of persecution. Even well meant acts of kindness and of expression of sympathy appear to the victim as insidious traps. In its worst manifestation, this illness produces a crude wrench from reality and brings about a lowering of the higher mental functions. But the personality-disintegration that characterizes this illness may be of varying degrees. Not all schizophrenics are characterized by the same intensity of the deceased. The mere branding of a person at schizophrenic therefore will be sufficient. For purpose of S.13 (1) (iii) "schizophrenia" is what schizophrenia does."

10. On analysis of the materials, this Court finds that the learned courts below have rightly, refused the prayer for dissolution of marriage and grant of decree of divorce by the appellant.

11. In the result I find no merit in the Second Appeal, which is accordingly dismissed, but in the circumstances without cost.

Appeal dismissed.

2011 (I) ILR – CUT- 579

M.M.DAS, J.

W.P.(C) NO.9782 OF 2008 (Decided on 08.10.2010)

PRIYA RANJAN MOHANTY ……. Petitioner.

.Vrs.

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

Education – Admission to MBBS Course, 2008 – Petitioner applied for admission as a physically handicapped Candidate – Clause 2.1.4 of the Information brochure prescribes 3% of the seats reserved in Govt. Colleges for persons with disabilities – For eligibility percentage of disability required between 50% to 70% - Medical Board Cuttack district found the petitioner 50% disable – However Medical Board constituted by JEE Committee found him not suffering from the required locomotory disability – Petitioner could not be selected – Hence the writ petition.

District Medical Boards Constituted under the persons with Disabilities (Equal opportunities, protection of Rights and full-participation) Act, 1995 – Policy Planning Body had no authority to include a clause in the information Brochure with regard to Constitution of a separate Medical Board by the JEE Committee, 2008 – Held, JEE 2008 should have accepted the certificate produced by the petitioner as granted by the Medical Board Constituted under the Act - Direction issued to the JEE Committee to give admission to the petitioner to the MBBS course meant for physically handicapped Candidates in the seat which was previously directed to be kept vacant by an interim order passed by this Court on 30.7.2010.

(Para 10 & 11)

Case laws Referred to:-

1. 97(2004)CLT 264 :(D.S Rashmi Ranjan -V- Chairman ,Joint Entrance Examination 2003 & Ors.
2. AIR 2003 SC 355 : (T.MA. Foundation & Ors -V- State of Karnataka & Ors.)

For Petitioner – M/S B. M. Patnaik ,B.R.Behera, P.R,Patnail & B.K.Tripathy

Far Opp.Parties – Addl. Standing Councel (for O.P.1)

M/s. R.C.Mohanty & K.C Swain(For.O.P.4)

M. M. DAS, J. Deprivation of the petitioner from being given admission to M.B.B.S. Course in the year 2008 is the cause of action for which the present writ petition has been filed.

2. The petitioner is a physically handicapped candidate, who made application for appearing in the Joint Entrance Examination, 2008 and appeared in the said examination in the category of physically handicapped candidate. The petitioner's rank in the said category was 61, but the Medical Board constituted by the Joint Entrance Examination Committee on examining him found that he does not suffer from locomotory disability up to the percentage required by the Joint Entrance Examination Committee, 2008. The petitioner, however, produced a disability certificate, which was granted by the Medical Board, Cuttack district, disclosing that the percentage of disability was 50%. The question, which is raised in the present writ petition to be determined is, as to whether the Joint Entrance Examination Committee is bound to accept the percentage of disability as mentioned in the disability certificate granted by the Medical Board of Cuttack district or can ignore the same and rely on the findings of the Medical Board constituted by the Joint Entrance Examination Committee.

3. The facts relevant to the issue are as follows:

The information brochure of Joint Entrance Examination, 2008 prescribed in Clause – 2.1.4 that 3% of the total M.B.B.S. seats of the three Government Medical Colleges of the State and B.D.A. stream in the S.C.B. Medical College, Cuttack are reserved for persons with disabilities and they have to meet the medical standard of locomotory disability of lower limbs between 50% to 70% (percentage of disability may vary subject to the decision of the Hon'ble apex Court). The medical standard of physically handicapped category candidates will be decided by a Medical Board specifically constituted with senior Professors of the Premier Medical College and Hospital; S.C.B. Medical College, Cuttack and Chairman, J.E.E., 2008 or his representative under the Chairmanship of Principal, S.C.B. Medical College, Cuttack..

4. It has been averred in the counter affidavit filed by the J.E.E. Committee, 2008 that the decision of the said Medical Board constituted by the J.E.E. shall be final and binding and the candidates should not submit along with the application forms any Medical Certificate to the effect that they are physically handicapped. Under section 4 (6) of the Orissa Professional Educational Institutions (Regulation of Admission and Fixation

of Fee) Act, 2007, the Policy Planning Body is to perform certain functions which are as follows:

"4. (1) to (5) xx xx xx

(6) The Policy Planning Body shall perform the following functions, namely:-

(a) regulate the admission;
(b) formulate policy guidelines for holding JEE;
(c) constitute one or more sub-committee for efficient discharge of its functions in the matter of examination and admission;
(d) formulate and recommend the reservation policy to Government for approval, which shall be with regard reservation of seats in favour of Scheduled Castes, Scheduled Tribes, SEBC, green card holders, Ex-servicemen, sports persons and physically handicapped persons:
(e) determine the eligibility criteria and qualifying examination required for admission; and
(f) perform such other functions as may be prescribed.

5. Though the petitioner was placed at serial no. 61 in the rank list meant for physically handicapped candidates, but was found by the Medical Board constituted by the J.E.E. Committee that he is not suffering from locomotory disorder of 50% or more for which he was found ineligible to be given admission to the M.B.B.S. Course of that year. The disability certificate granted to the petitioner by the Medical Board of Cuttack district which has been annexed as Annexure-1 to the writ petition and stated to have been produced before the J.E.E. Committee, 2008 shows that the said district Medical Board certified that the petitioner comes under the category of Orthopedic disability and the percentage of disability is 50%. The Policy Planning Body constituted under the Act is empowered to fix the modalities for holding a Joint Entrance Examination to give admission to the candidates to the M.B.B. S. Course and other technical courses as per the provisions of the Act as quoted above. No where in the said Act, it is provided that the Joint Entrance Committee holding the examination should constitute a Medical Board to examine the percentage of locomotory disability of any candidate, who has appeared under the reserved category of physically handicapped candidates. For the above purpose, the Parliament has legislated the Special Act, i.e., Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, 'the Disabilities Act'). The body which is to give effect to the reservation policy for the physically handicapped, is legally authorized to insist for a disability certificate by the Medical Board constituted under the Persons with Disabilities (Equal Opportunities, Protection of Rights and

Full Participation) Rules, 1996 (For short, "the Rules"). Rule 3 of the said Disabilities Rules in Chapter-II empowers the Government of India, Ministry of Welfare to publish general guidelines for evaluation and assessment of various disabilities specified in section 2 of the Disabilities Act. Section 2 (i) of the Disabilities Act defines "disability" to mean, (a) blindness, (b) low vision, (c) leprosy-cured, (d) hearing impairment, (e) locomotor disability, (f) mental retardation, and (g) mental illness.

6. Rule 4 of the Disabilities Rules reads as under:-

"4. Authority to give Disability Certificate.-(1) A Disability Certificate shall be issued by a Medical Board duly constituted by the Central and the State Government.

(2) The State Government may constitute a Medical Board consisting of at lease three members out of which at least one shall be a specialist in the particular field for assessing locomotor/Visual including low vision/hearing and speech disability, mental retardation and leprosy cured, as the case may be".

7. The Supreme Court in the case of ***Parul Jhunjhunwalla v. University of Delhi*** (Civil Writ No. 4345 of 2003 and C.M. No. 7440 of 2003) held that on a conjoint reading of section 58 of the Disabilities Act and Rule 4 of the Disabilities Rules, it is crystal clear that individual Universities, institutions or establishments have no alternative but to accept a certificate issued by the Medical Boards constituted by the Central Government or State Government as the case may be. Any other interpretation would render Rule 4 totally otiose. Since the said Rule has not been challenged, it must be given effect to. In the facts of the said case, taking note of the contention made by the University, the Supreme Court held that even though there may be some substance in the stand of the Universities that it is quite possible that some Medical Board may be lenient in the manner and the extent of their certification when compared with others, examining the status of the Members of the Board, who gave the certificate in the said case and finding that such Board includes not just a "Specialist" in locomotory disabilities, but the Professor of Orthopedics himself, came to the conclusion that the Delhi University does not have power to insist that persons, who have produced physically handicapped certificate from any of the nine Hospitals mentioned in the order dated 8.8.2002 should nevertheless appear before the Medical Board constituted by the University. In the instant case, a reference was made to the decision of a Division Bench of this Court in the case of ***D.S. Rashmi Ranjan v. Chairman, Joint Entrance Examination, 2003 and others***, 97 (2004) CLT

264 by Mr. R.K. Dash, learned counsel for the J.E.E. in support of his contention that this Court has held that there is no illegality with the J.E.E. Committee constituting a Medical Board to examine the percentage of the disabilities of the candidates under physically handicapped category.

8. A bare reading of the said decision goes to show that the aforesaid question was not directly involved in the said case. Further, as pointed by Mr. R.C. Mohanty from the counter affidavit filed by the Medical Council of India that the decision in the case of D.S. Rashmi Ranjan (supra) has been challenged by the Medical Council of India before the Hon'ble Supreme Court of India in S.L.P. (C) No. 7952 – 53 of 2005 with regard to the fixation of percentage of disability to be considered for the physically handicapped candidates, as a reserved category. The Supreme Court by its order dated 8.8.2006 modified its stay order passed on 25.4.2005 staying operation of the order of this Court to the extent that the said order of stay does not prevent the admission of physically handicapped candidates having locomotory disability of lower limbs between 50 – 70%. The said Special Leave Petition is still subjudice.

9. It would be pertinent to mention that in a connected writ petition, being W.P. (C) No. 10892 of 2009, the State was directed to file counter affidavit as to whether the District Medical Boards, who have granted disability certificates are constituted under the Disabilities Act. It has been stated in the counter affidavit filed therein by the State, that the District Boards have been constituted under the Disabilities Act. In view of such position and the ratio of the decision in the case of Parul Jhunjhunwalla (supra), the contention raised by Mr. Patnaik, learned senior counsel appearing for the petitioner that the J.E.E. 2008 should have accepted the certificate produced by the petitioner granted by the Medical Board constituted under the Disabilities Act is bound to be accepted as it is also found that the Policy Planning Body had no authority to include a clause in the Information Brochure with regard to constitution of a separate Medical Board by the J.E.E. Committee, 2008.

10. On a direction issued by this Court, Mr. R.K. Dash, learned counsel appearing for the Chairman, J.E.E. 2008 has produced a copy of the letter dated 18.9.2010 issued by the said Chairman instructing him that in the year 2008, who were placed below the petitioner at serial nos. 65 and 67 have been given admission to M.B.B. S. Course. This Court, therefore, finds that as the J.E.E. Committee, 2008 could not have ignored the certificate granted by the Medical Board constituted under the Disabilities Act produced by the petitioner which disclosed that he was orthopedically handicapped up to 50% and the petitioner should have been given

admission to M.B.B.S. Course in the said year. The above conclusion of this Court is based on the interpretation that the definition of disability as given in the Disabilities Act with regard to orthopedic disability includes only "locomotory disability".
Therefore, the certificate issued to the petitioner can only mean locomotory disability.

11. It is well settled in law that due to pendency of a case, a petitioner, who has been deprived from being admitted to a course on a particular year can be directed to be given admission in a subsequent year. As the last date for admission to M.B.B.S. Course has been fixed as 30th September of each year by the Government of India following the decision of the Constitution Bench judgment of the Supreme Court in the case of ***T.M.A. Pai Foundation and others v. State of Karnataka and others***, AIR 2003 SC 355 and the final judgment could not be delivered on 28.9.2010, i.e., the date when the matter was finally heard, orders were passed on the same day directing the J.E.E. Committee to give admission to the petitioner to the M.B.B.S. Course meant for physically handicapped candidates in the seat which was previously directed to be kept vacant by an interim order passed by this Court on 30.7.2010. In view of such order having been passed on 28.9.2010 keeping the last date of admission in view, no further directions are issued in this judgment.

12. The writ petition is accordingly allowed.

Writ petition allowed.

2011 (I) ILR – CUT- 585

R.N.BISWAL, J.

W.P.(C) NOS.19822/2009 & 1577/2010 (Decided on 14.12.2010)

EXECUTIVE ENGINEER,CDD-II,CESU,CTC. ….. ….. Petitioner.

.Vrs.

GRIEVANCE REDRESSAL FORUM, & ANR. .. ……. Opp.Parties.

Electricity – 4th amendment to Regulation 80(5) of OERC Distribution (Conditions of Supply) Code, 2004 – Introduction of Agro Industrial Consumers – It became effective from 1.4.2008 – OERC allowed the Agro Industrial Consumers the same tariff as applicable to irrigation, pumping and agriculture – Clarification sought by Distribution Companies – In the meantime OERC vide notification dt.19.10.2009 made 5th amendment to Regulation 80(5) of OERC Distribution (Conditions of Supply) Code 2004 – Petitioner challenged the amendment dt. 19.10.2009 and claimed reduced rate of tariff – Held, Amendment vide notification dt.19.10.2009 is held to be valid and the consumer can not get the benefit of reduced rate of tariff after the aforesaid Notification was made effective.

(Para 9,11)

Case laws Referred to :-

1.AIR 1989 SC 611 : (The Member-Secretary,Andhra Pradesh State Board for Prevention & Control of Water Polution-V-A.P. Rayons Ltd. & Ors.)

2.AIR 1991 SC 218 : (Sutleg Cotton Mills Ltd.-V-Commissioner of Income-tax, West Bengal III, Calcutta).

3.AIR 1992 SC 224 : (M/s. Saraswati Sugar Mills-V-Haryana State Board & Ors.).

For Petitioner - M/s. Ashok Mohanty, B.K.Nayak & D.K. Mohanty.
For Opp.Parties- M/s. S.K.Padhi, G.N.Mishra, S.C.Sahoo, P.K.Sahoo & B.Priyadarshi.

R.N.BISWAL,J. The facts and points of law involved in the aforesaid two writ petitions being interlinked, they were heard analogously and the following common order is passed thereon.

2. M/s. Pasupati Feeds, the petitioner in W.P.(c) no.1577 of 2010 is a partnership firm. It is engaged in production of cattle and poultry feeds. On 4.12.2003 M/s. Pasupati Feeds (here-in-after called 'the consumer') took

power supply for a contract demand of 200 KVA by executing an agreement. It was categorized under Large Industrial Tariff. Bills were raised by the Executive Engineer/Asst. General Manager CDD No.II, CESU, Badambadi, Cuttack, opp.party no.2 in W.P.(c) No.1577 of 2010 and petitioner in W.P.(c) No.19822 of 2009 and the consumer went on paying the same.

3. A new category of consumer namely, Agro Industrial Consumer was introduced vide OERC Distribution (Conditions of Supply) (4th Amendment) Code, 2007. The newly introduced Regulation 80(5)(I) reads as follows:

> "Reg. 80 (5) (1) – Agro Industrial Consumers:
>
> This category relates to supply of power for Pisciculture, Horticulture, Floriculture, Sericulture and other allied agricultural activities including animal husbandry, poultry and cold storage(i.e. a temperature controlled storage where flowers, fruits, vegetables meat, fish and food etc can be kept fresh or frozen until it is needed."

4. It became effective from 1.4.2008. The OERC allowed the Agro Industrial consumers the same tariff as applicable to irrigation, pumping and agriculture. The CESU Badambadi, Cuttack billed the consumer for the month of May,2008 with energy charges @ Rs.1/- per KWH. Subsequently, CESU Badambadi, Cuttack in its letter no.7934 dated 23.6.2008 issued a revised bill for May,2008 demanding energy charges @ Rs.3/- per KWH. Again in the month of June,2008 bill was issued demanding energy charges amounting to Rs.1,19,862/. However, the consumer paid an amount of Rs.21,717/- on the basis of the tariff approved by the OERC for Agro Industrial Consumers. CESU issued a notice to the consumer on 16.7.2008 for disconnection electricity supply to its firm. So the consumer filed a complaint vide CC No.75 of 2008 before the Grievance Redressal Forum, Badambadi, Cuttack with prayer to direct the Respondents therein to classify cattle and Poultry processing unit of the consumer as Agro Industrial consumer and to revise the bills with effect from 1.4.2008. After hearing the parties, the Grievance Redressal Forum held that Poultry and Cattle Feeds being directly for benefit of Poultry i.e. an agri-product, it would come within the purview of other allied agriculture activities including animal husbandry and poultry and accordingly allowed the complaint and directed CESU, Badambadi to revise the bills of the consumer from 1.4.2008 as per Agro-Industrial tariff U/R 80(5)(i) and to prepare the bill under the said category. It was further ordered that the consumer shall execute a fresh agreement subject to compliance of conditions laid down in OERC (Conditions of Supply) Code 2004. The said order which was passed on 15.9.2008 has been challenged by the Executive Engineer, CESU,CDD No.II, Badambadi, Cuttack in W.P.(c) No.19822 of 2009.

5. In the meantime, OERC vide Notification dated 19th October, 2009 notified 5th amendment of the OERC Distribution (Conditions of Supply) Code,2004. As per this amendment, Regulation 80(5)was substituted as follows:

> "80(5)(1):Irrigation, Pumping and Agriculture: This category relates to supply of power for pumping of water in lift irrigation, flow irrigation and for lifting of water from wells/bore-wells, dug-wells, nallahs, streams, rivulets, rivers, exclusively for agricultural purposes.
>
> 80(5)(ii):Allied Agricultural Activities: This category relates to supply of power for Aquaculture (which includes Pisciculture/ prawn culture), Horticulture, Floriculture, Sericulture, Animal Husbandry and Poultry. Activities such as ice factories, chilling plants, cold storages, and cattle/poultry/fish feed units and food/ agri products processing units are excluded.
>
> 80(5)(iii):Allied Agro-industrial Activities: This category relates to supply of power to Cold Storages(i.e. a temperature controlled storage where flowers, fruits, vegetables, meat and fish can be kept fresh or frozen until it is needed)and includes chilling plant for milk and only the cold storages attached to processing units for meat, fish, prawns, flowers, fruits and vegetables."

Accordingly, public notice was issued on 30th October,2009 by OERC in fixing electricity tariff for different types of consumers as classified vide Notification dated 19.10.2009. Electricity tariff for the consumer was fixed at the rate fixed for Large Industrial Tariff and on 19.1.2010 it was asked to clear up the outstanding dues from 1.4.2008 to 31.12.2009 amounting to Rs.34,29,826/- on or before 2.2.2010. So, it challenged the public notifications dated 19.10.2009, 30.10.2009 and the demand notice dated 19.1.2010 in writ petition bearing W.P.(C)No.1577 of 2010 inter-alia on the ground that the same are in violation of the provision of Section 64 of the Electricity Act,2003 and Regulation 53 of the OERC (Conduct of Business) Code,2004 and Clause 5 of the OERC (terms and conditions for Determination of tariff) Regulation,2004.

6. With reference to W.P.(c) No.19822 of 2009,learned counsel appearing on behalf of the petitioner(Executive Engineer, CESU) submitted that the word 'Poultry' introduced in the definition of Agro Industrial Consumer category has not been defined in the Regulation. The dictionary meaning of it is hen, rooster, pullet, capon, chick all of which are living birds. So poultry is quite different from production of cattle and poultry feeds. But,

the GRF in CC case No.75 of 2008 wrongly held that Pasupati feed unit is covered under allied agricultural activities including animal husbandry and poultry. He further submitted that since cattle and poultry feed units were not there in the newly introduced regulation 80(5)(1), it could not be included therein. In support of his submission, he relied on the decisions, **The Member-Secretary, Andhra Pradesh State Board for Prevention and Control of Water Polution** Vs.**Andhra Pradesh Rayons Limited and others,**AIR 1989 Supreme Court 611,**Sutleg Cotton Mills Ltd** vs. **Commissioner of Income-tax, West Bengal III, Calcutta** AIR 1991 Supreme Court 218 and **M/s Saraswati Sugar Mills Vs. Haryana State Board and others** AIR 1992 Supreme Court 224.

7. Learned counsel for the consumer while supporting the impugned order contended that the consumer use to process feeds for fowls of its poultry firms situated at different places, which were insured in its name and drew the attention of the Court to Annexure-5 in W.P.(c) No.1577 of 2010, which shows that the consumer has insured the birds. So, according to him there is no element of commercial or business activity in it. Moreover, he contended that O.E.R.C. vide notification dated 19th October,2009 notified 5th Amendment of the OERC Distribution(Conditions of supply)Code 2004, where activities like ice factories, chilling plants, cold storages, cattle/poultry, fish feed units and food/agri products proceeding units are excluded from Allied Agricultural Activities. Had those units not been included in the 4th amendment of OERC Distribution (Condition of Supply) Code, then there was no occasion of excluding the same. Furthermore, he contended that as found from Annexture-6 series in W.P. © No. 1577 of 2010, in response to the quires of the Commissioner, CESU in its affidavit dated 11.1.2010 stated the consumer comes under Allied Agro Industrial Categories. So, he prayed to dismiss W.P.(c) No.19822 of 2009.

At the risk of repetition, it would be apposite to quote Regulation 80 (5) (1) of O.E.R.C. Distribution (Condition of Supply) (4th amendment) Code 2007. It reads as follows:-

> "Reg. 80 (5) (1) – Agro Industrial Consumers:
>
> This category relates to supply of power for Pisciculture, Horticulture, Floriculture, Sericulture and other allied agricultural activities including animal husbandry, poultry and cold storage(i.e. a temperature controlled storage where flowers, fruits, vegetables meat, fish and food etc can be kept fresh or frozen until it is needed)."

The term 'including' is generally used to enlarge the meaning of preceding words. In the Regulation 80(5) (1) quoted just above, the preceding words of

'including' are 'allied agricultural activities'. So, the meaning of these words can be enlarged. The same cannot be limited to animal husbandry, poultry and cold storage(i.e. a temperature controlled storage where flowers, fruits vegetables meat fish and food etc. can be kept fresh or frozen until it is needed)only. Moreover, the title of Regulation 80(5)(1)quoted above itself is 'agro industrial consumers'. So, the meaning of 'Allied Agricultural Activities' can be enlarged to agro industries, which include cattle and poultry feeding units as rightly held by the Grievance Redressal Forum. In the decision cited on behalf of CESU in the case of **The Member-Secretary, Andhra Pradesh State Board for Prevention and Control of Water Pollution** ,**Sutleg Cotton Mills Ltd** and M/s.**Sarswati Sugar Mills** (supra) it is held that there is no room that presumption and intendment in tax. Nothing is to be read in and nothing is to be implied. One has to look fairly at the language used. All the decisions relate to fiscal statute. In view of the discussion as made above these decisions are not applicable to the present case. Furthermore, in Regulation 80(5)(1)as per the 5th amendment of OERC Distribution)Conditions of supply)Code 2004 it has been specifically stated that activities such as ice factories, chilling plants cold storages and cattle/poultry/fish feed units and food and agro-products processing units are excluded which shows that cattle, poultry feed units were impliedly there in the 80(5)(1)of O.E.R.C. Distribution (Conditions of Supply)(4th amendment)Code,2004.

8. Learned counsel appearing for the CESU submitted that the said provision was explanatory, as found from the Notification dated 19th October,2009 of the O.E.R.C. The said Notification shows that the Distribution Companies requested the Commission to issue clarification on the scope and extent October,2009 it is found that the Distribution Companies requested the Commission to issue Clarification Companies requested the Commission to issue Clarification on the scope and extent of agro-industrial consumer category. So, the scope and extent of it was clarified in the said notification. Only because it has been so mentioned, it cannot be said that it is clarificatory in nature, rather it introduced a new concept. In the decision **Union of India and others** (supra) which also relates to fiscal statute, the apex Court held that the explanation given to Section 65(19)(II)of the Finance Act 2008 cannot be explanatory. The explanation reads as follows:

> "**Explanation;**-For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, 'service in relation to promotion or marketing of service provided by the client' includes any service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client, in

whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;"

Even though the explanation begins with "For the removal of doubts', still then, the apex Court held that it is not explanatory in nature. In para 52 of the said decision it has been held as follows:

> "52.As stated hereinbefore, for the aforementioned purpose, the expressions like "for the removal of doubts" are not conclusive. The said expressions appear to have been used under assumption that organizing games of chance would be rendition of service. We are herein not concerned as to whether it was constitutionally permissible for Parliament to do so as we are not called upon to determine the said question but for our purpose, it would be suffice to hold that the Explanation is not clarificatory or declaratory in nature."

8. Learned counsel for the CESU submitted that the Notification dated 19th October, 2009 would have retrospective effect. There is nothing in that provision that it would have such effect. It is an established law that there is presumption that the statutes are not intended to have retrospective effect unless they merely change the legal procedure.

In view of the discussions made above, it is held that cattle/poultry feed units would come under allied agricultural activities and the same were excluded by the Amendment vide Notification dated 19th October,2009 to the OERC Distribution(Conditions of Supply)Code,2004 which would have prospective effect. So the order as passed by learned Grievance Redressal Forum cannot be defaulted.

10. With reference to W.P.(c) No.1577 of 2010, learned counsel appearing for the consumer submitted that the Notification dated 19th October,2009 was made without following the provisions contained under Section 64 of the Electricity Act,2003,Clause 53 of the O.E.R.C.(Conduct of Business)Code,2004 and Clause 5 of the O.E.R.C.(Terms and Conditions for Determination of Tariff)Regulation,2004.It transpires from the aforesaid Notification dated 19th October,2009 that the Commissioner clarified Agro Industrial Consumers pursuant to the demand of such consumers and the CESU. Consumers engaged in prawn processing ice factories, chilling plants for milk and other agricultural products pleaded to include them in the category of Agro Industrial Consumers. Furthermore, this court vide order dated 26.8.2009 passed in W.P.(c) No.6516 of 2009 **M/s.Prithwiraj Dairy Products Vs. State of Orissa and others** while setting aside para 255 and 258 of Commission's Retail Supply Tariff Order for FY 2009-10 directed the Commission to consider the feasibility of creating an additional tariff

category for agro-based Industries applicable to non-agriculturist consumers and fix appropriate tariff for the said category. Accordingly the aforesaid Notification was made. Under such circumstance even though it is presumed that the Tariff Transmission and Distribution licensees did not apply in proper format to the Commission containing calculation of the expected aggregate revenue from charges under its currently approved tariff and the expected cost of providing services for the ensuing financial year, it cannot be said that Section 64 of the Electricity Act,2003 and Regulation 5 of O.E.R.C.(Terms and Conditions for Determination of Tariff) Regulation, 2004 and Regulation 53 of the Orissa Electricity Regulatory Commission (Conduct of Business) Regulation, 2004 were violated.

11. In the 19th October,2009 Notification, Regulation 80(5) was substituted and the said Regulation was divided into three categories as quoted earlier. In the 2nd category it has been specifically mentioned that activities such as ice factories, chilling plants, cold storages, cattle/poultry/fish feed units and food/agri-products processing units are excluded. So the consumer cannot get the benefit of reduced rate of tariff after the aforesaid Notification was made effective. In such view of the matter, the Notifications dated 19.10.2009 and 30.10.2009 cannot be quashed as prayed for in W.P.(c) No.1577 of 2010.So far the demand notice dated 19.1.2010 is concerned, it stands quashed.

12. Accordingly, W.P.(c) No.19822 of 2009 is dismissed and the order dated 15.9.2008 passed by the Grievance Redressal Forum, Cuttack in CC case No.75 of 2008 is hereby confirmed and W.P.(c)No.1577 of 2010 is allowed in part. No cost.

WP (C) No. 19822/09 dismissed.
WP (C) No. 1577/10 partly allowed.

2011 (I) ILR – CUT- 592

INDRAJIT MAHANTY, J.

CRLREV NO.1264 OF 2010 (Decided on 04.01.2011)

SATRUGHAN PATRA …… Petitioner.

.Vrs.

BAIKUNTHA NATH MOHAPATRA ……. .. Opp.Party.

NEGOTIABLE INSTRUMENT ACT, 1881 (ACT NO.26 OF 1881) – S.147.

Section 147 N.I. Act does not bar the parties from compounding an office U/s.138 of the N.I. Act even at the appellate stage of the proceeding.

In the present case the complainant-Opp.Party has filed an affidavit indicating his satisfaction in settlement of the disputes and receipt of defaulted amount and supported the prayer of the accused-petitioner for allowing the revision and setting aside the order of conviction passed against him – Once a matter has been compromised between the parties and payment has been made in full and final settlement of their dues the order of conviction and sentence recorded by the Courts can be permitted to be set aside and the appellant ought to be acquitted of the charges leveled against him – Held, conviction of the petitioner U/s.138 N.I. Act by the trial Court and confirmed by the appellate Court are set aside.

(Para 4,5,6)

Case law Referred to:-

(2010) 1 SCC 798 : (K.M.Ibrahim -V-K.P.Mohammed & Anr.).

For Petitioner - M/s. Nisith Nisank & B.Pattnaik.
For Opp.Party - M/s. S.K.Das, B.R.Sahoo, A.Das & P.S.Nayak.

I. MAHANTY, J. In this application under Section 401 Cr.P.C., the accused-petitioner has sought to challenge the judgment dated 2.9.2009 passed by the learned J.M.F.C., Bhubaneswar in I.C.C. Case No.4174 of 2008 convicting him of an offence under Section 138 of the Negotiable Instrument Act, 1881 and sentencing him to undergo S.I. for three months and to pay compensation of Rs.23,000/- to the complainant within two months from the date of the judgment. Challenge has been further made to dismissal of the petitioner's Criminal Appeal No.11/75 of 2010/2009 by the

learned Ad hoc Addl. Sessions Judge (F.T.C.), Bhubaneswar by his judgment dated 13.8.2010 thereby confirming the order passed against the accused-petitioner in I.C.C. Case No.4174 of 2008.

2. Two affidavits have been filed, one by the petitioner-Satrughan Patra and another, by the complainant-Baikuntha Nath Mohapatra, wherein it is stated that the dispute inter se the parties have been resolved and the petitioner has paid a sum of Rs.23,000/- to the opposite party-complainant. The opposite party-complainant in his affidavit has accepted the aforesaid fact and has noted the fact that he does not want to proceed with the matter any further.

In this regard, reference is made to a judgment of the Hon'ble Supreme Court in the case of **K.M. Ibrahim vs. K.P. Mohammed and Another,** (2010) 1 Supreme Court Cases 798, wherein a Division Bench of the Hon'ble Supreme Court headed by Hon'ble Justice Altamas Kabir came to hold that, an application for compounding the offence under Section 147 of the Negotiable Instrument Act can be made even at the appellate stage and even in a proceeding under Article 136 of the Constitution.

3. The Hon'ble Supreme Court took into account the scope and ambit of Section 147 of the N.I. Act and held that once a matter has been compromised between the parties and payment has been made in full and final settlement of their dues, the appeal deserved to be allowed and the appellant is entitled to an acquittal and as a consequence thereof, the order of conviction and sentences recorded by all the courts can be permitted to be set aside and the appellant ought to be acquitted of the charges leveled against him. It is further held in paragraph-14 of the aforesaid judgment that Section 147 of the N.I. Act does not bar the parties from compounding an offence under Section 138 of N.I. Act even at the appellate stage of proceeding. For better appreciation, Section 147 of the N.I. Act is quoted herein below:

> "**147.Offences to be compoundable-**Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable.

4. In the facts of the present case, it appears that the accused-petitioner had issued a cheque value of Rs.23,000/- which was the subject matter of dispute in the present proceeding. While the petitioner was convicted by the learned J.M.F.C., Bhubaneswar in I.C.C. Case No.4174 of 2008, the accused-petitioner also filed an appeal being Crl. Appeal No.11/75 of 2010/2009 in the court of the learned Ad hoc Addl. Sessions Judge (F.T.C.), Bhubaneswar, which has been dismissed by judgment dated

13.08.2010. In the present revision the complainant-opposite party has filed an affidavit indicating his satisfaction in settlement of the disputes and receipt of the defaulted amount. In the said affidavit he has also supported the prayer of the accused-petitioner for allowing the revision and setting aside the order of conviction passed against him.

5. On consideration of the facts as noted hereinabove, and the power of this Court to compound the offences arising out of the N.I. Act by virtue of Section 147 thereof, I am of the considered view that this is a fit case where the prayer of the parties to this litigation to compound the offence as provided under Section 147 of the N.I. Act ought to be allowed and that the conviction of the petitioner under Section 138 of the N.I. Act ought to be set aside.

6. Accordingly, the revision is allowed and consequently the order of conviction dated 2.9.2009 passed in I.C.C. Case No.4174 of 2008 and dismissal of Crl. Appeal No.11/75 of 2010/2009 vide judgment dated 13.08.2010 are set aside and the conviction of the petitioner under Section 138 of the said Act is also set aside.

Revision allowed.

2011 (I) ILR – CUT- 595

INDRAJIT MAHANTY, J.

CRLMC. NO. 2067 OF 2010 (Decided on 25.01.2011)

PRATIMA NAYAK ….. …… Petitioner.

.Vrs.

STATE OF ORISSA …… …..Opp.Parties.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.167 (2) (a) (i).

Offence U/s. 302, 309 & 364 I.P.C. – Charge sheet not filed in spite of lapse of 123 days – Application for bail moved before the learned Magistrate U/s. 167 (2) Cr. P.C. – Bail granted on 28.05.2010 on the condition to furnish bail bond of Rs.30,000/- with one solvent surety for the like amount – On the same day at 5 P.M. prosecution submitted charge sheet – Thereafter advocate for the accused filed bail bond and affidavit of the surety for the accused – Learned Magistrate refused to accept the bail bond – Hence this application.

In the present case since bail bond was furnished after submission of charge sheet the "indefeasible right" claimed by the accused-petitioner stood "extinguished" – Held, impugned order needs no interference.

(Para 10,11,12)

Case law Relied on:-

2001(II) OLR (SC) 290 : (Uday Mohanlal Acharya-V-State of Maharashtra).

Case law Referred to:-

(2009) 44 OCR 721 : (Gorel Venkat Ratnam @ G.V.Ratnam-V-State of Orissa).

For Petitioner - M/s. H.N.Mohapatra, A.Samantaray.
For Opp.Party - Mr. K.K.Mishra
Additional Govt. Advocate.

I. MAHANTY, J. The petitioner herein Pratima Nayak seeks to challenge the order dated 28.5.2010 passed by the learned JMFC, Nimapara in G.R. Case No.55 of 2010 by which the learned Magistrate, after granting bail to the petitioner under Section 167(2)(a)(i) of the Cr.P.C., later on refused to accept the bail bond and affidavit of the surety after taking note of the fact that, on the same day charge sheet was submitted

against the accused-petitioner at 5.00 P.M., prior to furnishing of the bail bond.

2. The petitioner is an accused in Ramchandi P.S. Case No. 4 of 2010 for commission of offences under Sections 302,309 and 364, I.P.C. corresponding to G.R. Case No. 55 of 2010.

3. Mr. Mohapatra, learned counsel for the petitioner submitted that since the prosecution had failed to submit the charge sheet in the case, in spite of lapse of 123 days since remand of the accused, an application was filed seeking bail under Section 167(2)(a)(i) of the Cr. P.C. and by order dated 28.5.2010, the said application seeking bail came to be allowed and direction was given for release of the petitioner on bail on furnishing bail bond of Rs.30,000/- with one solvent surety for the like amount. But by a later order, on the same day i.e. 28.5.2010, the learned JMFC noted that the bail bond had not been filed and direction was issued to put up the record on the date fixed. But on the self-same day i.e. 28.5.2010 the order sheet reveals that at 5.00 P.M. the case record was put up before the learned Magistrate in his residential office, on receipt of charge sheet bearing No. 10 dated 22.5.2010 against the accused for commission of the offences under Sections 302, 309 and 364 I.P.C. and after the charge sheet was submitted on the same day i.e. on 28.5.2010, advocate for the petitioner filed the bail bond and affidavit of the surety, but the same was not accepted on the ground that the charge sheet had been filed in the meanwhile by the prosecution, the bail application of the accused-petitioner had become infructuous accordingly and the bail bond was not accepted.

4. Mr. Mohapatra further placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Uday Mohanlal Acharya vrs. State of Maharashtra**, reported in 2001(II) OLR (SC) 290 and in particular conclusion No.4 in paragraph 13, which is quoted hereiunder:-

> "Conclusion No. 4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/Court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part

> of the investigating agency in completing the investigation within the period stipulated."

Relying upon the aforesaid conclusion No.4, learned counsel for the petitioner strenuously urged that since prosecution had not filed charge sheet within the mandatory period of 120 days in the case against the accused-petitioner involving an offence under Section 302 of the I.P.C., an indefeasible right had accrued in favour of the accused-petitioner on account of default on the part of the investigating agency in completing the investigation within the statutory period and further order of bail had also been passed in favour of the accused-petitioner, requiring the petitioner only to furnish bail bond in question. He further submitted that in order to deprive the accused-petitioner of her "indefeasible right" the prosecution submitted charge sheet on the same day i.e. on 28.5.2010 before the trial court, but filing of the charge sheet after an order of bail has been granted could not be a ground to deny the release of the petitioner on bail and the learned Magistrate ought to have accepted the bail bond and affidavit of the surety as submitted by the accused-petitioner through her counsel on the self-same day.

5. Mr.Mohapatra further placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Gorel Venkat Ratnam @ G.V.Ratnam vrs. State of Orissa**, reported in (2009) 44 OCR 721 and submitted that since the petitioner had been directed to furnish bail bond of Rs. 30,000/- with one solvent surety for the like amount and in fact had furnished such bail bond, rejection of the bail bond on a technical ground that the condition of the bail had not been written in the bail bond and refusal to accept the same should not have been done.

6. Mr. K.K.Mishra, learned Additional Government Advocate for the State on the other hand also placed reliance on the judgment of the Hon'ble Supreme Court in the case of Udaya Mohanlal Acharya (supra) in particular on conclusion No.-5 in Paragraph-13 of the said judgment, which is quoted below:

> "Conclusion No. 5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to Sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorized and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished."

Mr. Mishra, learned Additional Government Advocate submitted that in view of Explanation 1 an the Proviso to Sub-section 2 of Section 167, since the

accused continued to be in custody, even beyond the specified period (120 days) the said custody could not be deemed to be unauthorized and therefore, if during the said period the investigation was completed and charge sheet was filed, then the so called "indefeasible right of the accused" would stand "extinguished".

6.1 Mr. Mishra further submitted that in the fact of the present case although on 28.5.2010 the bail application of the accused-petitioner had been allowed, the necessary bail bond had not been submitted by the accused and at 5.00P.M. on the said date the investigating agency submitted the charge sheet. He accordingly submits that once charge sheet is submitted prior to the bail bond being furnished by an accused, the so called indefeasible right of the accused would stand extinguished and hence learned Magistrate was correct in refusing to accept the bail bond, since the same was furnished after filing of the charge sheet and holding that the bail petition had become infructuous.

6.2 In so far as the judgment in the case of Gorel Venkat Ratnam (supra) is concerned, learned Additional Government Advocate for the State submitted that, the facts of the said case are clearly distinguishable from the facts of the case at hand. In the aforementioned case the accused-petitioner had furnished the bail bond and affidavit of the surety prior to the submission of charge sheet, but the same had been rejected on a technical ground, which was held to be illegal as observed by the Hon'ble High Court. But in the present case, from the certified copy of the entire order sheet appended as Annexure-1 to the present application, it would be clear that, the charge sheet in the present case had been submitted by the investigating agency prior to accused furnishing the bail bond and therefore, the said case being clearly distinguishable from the facts of the case at hand has no application to the present case.

7. Mr. Mohapatra, learned counsel for the petitioner on the other hand placed further reliance on para-32 in the case of Uday Mohanlal Acharya' (supra) in which Hon'ble Justice B.N.Agrawal noted his dissenting view from the majority view held in the facts of the said case that the right of the accused to be enlarged on bail under the Proviso to Section 167(2) of the Code "cannot be said to have been availed".

7.1 While placing reliance on the aforesaid paragraph of the dissenting view expressed therein, Mr. Mohapatra, learned counsel for the petitioner submitted that in the case at hand since the accused-petitioner had already "availed of" of her "indefeasible right" under Proviso to Section167 (2) of the Code, such right could not be frustrated or defeated by the mere factum of

filing of the charge sheet after an order of bail was passed and prior to acceptance of the bail bond/surety being furnished.

8. In the light of facts as well as contentions advanced by the learned counsel for both parties as noted herein above, the short point that arises for consideration in the present case is, whether the claim of the accused-petitioner of an "indefeasible right" under Section 167(2) of the Code, could be said to have been extinguished or not in the facts of the present case?

9. In view of the judgment rendered by the Hon'ble Supreme Court in the case of of Udaya Mohanlal Acharya(supra), this issue is no longer res integra and the conclusions arrived at by the majority view in the aforesaid case contained in para-13 thereof is fully binding.

10. While the petitioner placed reliance on conclusion No.4, the State has placed reliance on conclusion No.5. In my earnest view conclusion No.5 is squarely applicable to the facts of the present case. On a perusal of the impugned order, it is clear that on 28.5.2010 the learned Magistrate had in fact granted bail to the accused petitioner under Section 167(2)(a)(i) of the Cr.P.C. on the condition of furnishing bail bond of Rs. 30,000/- with one solvent surety for the like amount. The order sheet further reveals that till the learned Magistrate rose from his dais on the said date and left for his residence, bail bond had not been furnished. Further the order indicates that at 5.00 P.M. of the same day, i.e., 28.5.2010 the prosecution submitted charge sheet under Section 302,309 and 364 I.P.C. and by a later order on the same date i.e. 28.5.2010 the learned Magistrate noted, "at this juncture advocate Sri B.K.Mohapatra files bail bond and affidavit of the surety for the accused". This clearly shows that the bail bond that was furnished on behalf of the petitioner was furnished after the charge sheet was submitted by the prosecution. Therefore, in terms of conclusion No.5 in the case of Udaya Mohanlal Acharya (supra) the "indefeasible right" claimed by the accused stood "extinguished".

11. So far as Gorel Venkat Ratnam's case is concerned, the said case is clearly distinguishable on facts, inasmuch as, in the said case while the order passed therein under Section 167(2) proviso granting bail to the petitioner had been passed on 7.1.2009 and bail bond was also furnished on behalf of the accused, on a technical defect that the bail bond was incomplete and therefore refused to accept the same and directed that the matter be put up with the case record with the rectified bail bond. Thereafter, on the same day at 4.30 P.M. the charge sheet was received by the learned court below. This act on the part of the learned Magistrate in the aforesaid case was held by the High Court as a technical ground, but on factual basis in the aforesaid case the Court had granted bail to the accused-petitioner

therein and accused-petitioner had also furnished the bail bond as well as surety prior to the charge sheet being filed.

12. In the present case, the facts are clearly distinguishable and the bail bond was furnished only after the charge sheet was submitted by the prosecution and therefore, the "indefeasible right" claimed by the accused petitioner stood "extinguished" in view of the judgment of the Hon'ble Supreme Court, in the case of Udaya Mohanlal Acharya (supra) and in particular conclusion No.5 as contained in para-13 of the said judgment.

13. In view of the foresaid conclusion, this Court is left with no other alternative but to reject the present application and affirm the order passed by the learned Magistrate.

Application dismissed.

2011 (I) ILR – CUT- 601

H.S. BHALLA, J.

W.P.(C) NO.22190 OF 2010 (Decided on 15.02.2011)

M.CHABINDRA PATRO …… Petitioner.

.Vrs.

COLLECTOR & DIST. MAGISTRATE, GANJAM & ORS. …… Opp.Parties.

ESSENTIAL COMMODITIES ACT, 1955 (ACT NO.10 OF 1955) – Ss.3 & 6-A.

Seizure of P.D.S. Kerosene oil and the Tanker by a police officer – Confiscation proceeding – Legality – As per Clause 23 of the Orissa public Distribution System (Control Order, 2008) the Licencing authority or any other officer authorized by the Govt. in that behalf can only make search and seizure of any essential commodity.

The Govt. in its Food supplies and consumer welfare department vide notification Dt.29.03.2008 specified the officers who can exercise the power of entry, search and seizure but no police officer has been so specified.

In the present case seizure is made by an S.I. of police who was not authorized to make seizure of P.D.S. Kerosene – Held, the seizure being illegal the confiscation proceeding U/s.6 (A) of the E.C. Act can not sustain – E.M.C. case No.60/2010 before the Collector is quashed.

(Para 7 & 10)

Case laws Referred to:-

1.(2007) 37 OCR (SC) 586 : (Kailash Prasad Yadav & Anr.-V-State of Jharkhand)

2.Patna H.C.Crimes Vol-VIII : (Nanda Kishore Singh-V- State of Bihar) 1990(2) 744

3.2004(2) ALD(Crl.)314(AP) : (Sankar Lalmaniyar & Anr.-V-State of Andhra Pradesh)

4.Patna H.C.Crimes Vol-VIII : (Ram Chandra Pansari-V-State of Bihar) 1988(2) 963

For Petitioner - M/s. K.Panigrahi & S.R.Debata.
For Opp.Parties- Addl. Govt. Advocate.

H.S.BHALLA, J. Heard counsel for the petitioner and learned Addl. Government Advocate for the State.

2. The petitioner has knocked at the door of this Court by filing the present writ petition, by virtue of which he is praying to quash the proceeding initiated by the Collector, Ganjam in EMC Case No.60 of 2010. The petition was contested by the opposite parties.

3. The facts of the case in nutshell are that the petitioner is an Agent Wholesaler of Kerosene Oil and proprietor of Gurumurty Oil Co., Surada in the district of Ganjam. He is a registered owner of a tanker bearing Regd. No.OR-02-AG-7373. On 28.7.2010 the petitioner had purchased 12,000 liters of Kerosene Oil from O.I.C.L., Bhubaneswar Depot vide TIN No.21661903091 and was transporting 8000 Liters of Kerosene of sub-wholesaler E.Bangali patro of Badagada in his aforesaid tanker. On the way from Surada to Badagada the said vehicle met with an accident and some cattle died and a case under Section 279/429, IPC was registered bearing Badagada P.S. Case No.72 of 2010. During the course of investigation, the S.I. of Police, Badagada Police Station registered a case under Section 7 of the E.C.Act vide Badagada P.S.Case No.74(10) of 2010 corresponding to G.R.Case No.105 of 2010 of the court of learned J.M.F.C., Surada. The S.I. of Police also seized 8000 liters of kerosene oil as wellas the said tanker and released the kerosene on zimanama to the Marketing Inspector, Surada for distribution in public distribution system. The petitioner thereafter moved the learned J.M.F.C., Surada by filing a petition under Section 457, Cr.P.c. to release the tanker. During the course of hearing of the said petition before the learned J.M.F.C., Surada, it has come to the notice of the learned J.M.F.C. that a confiscation proceeding under Section 6-A of the E.C.Act has been initiated before the Collector, Ganjam for the self-same offence. Accordingly, learned J.M.F.C., Sorada rejected the petition filed by the petitioner under Section 457, Cr.P.C. The Collector in the said confiscation proceeding after perusing the F.I.R. and other documents by order dated 4.10.2010 directed the Investigating Officer to dispose of the seized kerosene under Public Distribution System and deposit the sale proceeds in treasury and also directed the I.O. to file final form and prosecution report. The present writ petition has been filed to quash the proceeding in E.M.C. Case No.60 of 2010.

4. Learned counsel appearing for the petitioner submitted that as per Clause 23 of the Orissa Public Distribution System (Control) Order, 2008 (hereinafter referred as “P.D.S. (Control) Order, 2008)’ the Licensing authority or any other officer authorized by the Government in that behalf can only search and seize any essential commodity in consonance with the provisions contained under Section 102, Cr.P.C. The Government in Food Supplies and Consumer Welfare Department Notification No.7450-FS.IC.2/2008 dated 29th March, 2008 specified the officers authorized to exercise the power conferred under Section 23 of the P.D.S. (Control) Order,

2008. No police personnel is so specified. So, according to the learned counsel for the petitioner, the so-called P.D.S. kerosene along with the truck having not been seized by any of the officers authorized to seize the same, the seizure was illegal and, as such, the proceeding initiated under Section 6(A) of the E.C. Act could not stand and consequently, the impugned order passed by the Collector, Ganjam would also fail. In support of his submission, he relied on the decisions in the Case of **Kailash Prasad Yadav and another v. State of Jharkhand,** (2007) 37 OCR (SC), 586, **Nanda Kishore Singh v. State of Bihar,** Patna High Court, Crimes Vol. VIII, 1990 (2), 744, **Sankar Lalmaniyar and another v. State of Andhra Pradesh,** 2004 (2) ALD (Crl.), 314 (A.P.) and **Ram Chandra Pansari v. State of Bihar**, Patna High Court Crimes Volume-VIII, 1988 (2), 963.

5. On the other hand, learned Addl. Govt. Advocate contended that as per Section 102 (1) of Cr.P.C. any police officer can seize any property which may be alleged or suspected to have been stolen or which may be found under circumstances, which creates a suspicion of commission of any offence. No notification under Clause 23 of P.D.S. (Control) Order, 2008 vesting power to a police officer to make search and seizure is required. It is further submitted that since the conduct of the driver created suspicion of commission of an offence under Section 6 of the E.C.Act, the police officer rightly seized the kerosene along with the tanker. Learned Addl. Govt. Advocate further submitted that P.D.S. (Control) Order, 2008 came into force with effect from 19.3.2008 and the notification under clause 23 of the said Order was issued on 29.3.2008. The said notification can not over ride the E.C. act.

6. Now the only points to be considered are whether a police officer is competent to seize P.D.S. kerosene along with the truck on suspicion that the said kerosene was to be sold in black market and whether on the basis of that seizure, confiscation proceeding under Section 6(A) can be initiated.

7. In exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 (10 of 1955), read with Paragraph 5 of the Annexure to the Public Distribution System (Control) Order, 2001, published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (i), No.434, dated the 31st August, 2001 and the notification of Government of India, in the Ministry of Agriculture and Irrigation (Department of Food), GSR 800, dated the 9th June, 1978, published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (i), dated 17th June, 1978 and the notifications in the Ministry of Industry and Civil Supplies (Department of Civil Supplies and Co-operation) No.S.O.681 (E) and S.O. 682 (E) both dated the 30th November, 1974, published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (i), dated the 30th November, 1974, the State

Government made the O.P.D.S. (Control) Order, 2008, Clause 23 of the said order reads as follows:-

> **"23. Power of entry, search and seizure etc.** (a) – The Licensing authority or any other officer authorized by Government in this behalf, may, with such assistance, if any, as he thinks fit.
>
> (i) require the owner, occupier or any person in charge of the place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order or of the conditions of any license issued there under has been, is being or is about to be committed, to produce any books, accounts or other documents showing transactions relating such contravention :
>
> (ii) enter, inspect or break open any place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order or of the conditions of any licence issued there under has been, is being or is about to be committed;
>
> (iii) take or cause to be taken extracts from or copies of any documents showing transactions relating to such contravention which are produced before him/her;
>
> (iv) test or cause to be tested the weight of all or any of the essential commodities found in any such premises'
> Provided that in entering upon and inspecting any premises the persons so authorized shall have due regard to the social and religious customs or the persons occupying the premises.
>
> (v) search, seizure and remove the stocks of the essential commodities and the packages, coverings, animals vehicles, vessels or other conveyance used in carrying the said essential commodities in contravention of the provisions of this order or of the conditions in any licence issued there under and thereafter take or authorize the taking of all measures necessary for securing the production of the essential commodities and the packages, coverings, animals, vehicles, vessels or any other conveyances so seized in a Court and for their safe custody pending such production.
>
> (b) The provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974) relating to search and seizure shall so far as may be, apply to searches and seizures under this clause."

Pursuant to the above provision, the State Government in their Food Supplies and Consumer Welfare Department vide notification dated 29.3.2008 specified the officers who can exercise the power of entry, search and seizure etc., but no police officer has been so specified. This notification

having been issued in exercise of the powers conferred by sub-clause 9a) of Clause 23 of the P.D.S. (Control) Order, 2008 as stated earlier it can not be said that it is only an executive instruction. Accordingly, the submission of learned counsel for the petitioner in this regard can not be sustained.

8. In the decision Kailash Prasad Yadav (supra), the apex court in reference to a case under Section 6 (A) of the E.C. Act, held that valid seizure is a sine qua non for passing an order of confiscation of property. In the case of Nanda Kishore Singh (supra) it was held that where the seizure was made by a person not competent to seize the essential commodities, such seizure being illegal, the proceeding under Section 6(A) of the E.C. Act can not stand. As per Rule 12 of Bihar Kerosene Oil Dealers Licensing Order, any Licensing Authority or any Executive Magistrate, Special Officer in Charge Rationing and an officer not below the rank of sub-Inspector etc. can make search and seizure, but in the aforesaid case since an A.S.I. made the search and seizure it was held to be illegal. In the case of Shankar Lalmaniyar and another it was held that the authorities, mentioned in the control order are competent to search and seize the goods transported in violation of the control order and not the vigilance officers mentioned under the Act and in that view of the matter Section 6(A) of the Act can not be invoked and search and seizure appears to be not valid for want of jurisdiction, so also the view taken by Patna High Court in the case of Rama Chandra Ansari (supra).

9. In the case at hand since an S.I. of Police who was not authorized to make seizure, seized the so called P.D.S., kerosene, the seizure itself being illegal, the proceeding under Section 6(A) of the E.C.Act can not sustain.

10. Accordingly, the E.M.C. Case No.60 of 2010 of the file of learned Collector, Ganjam is hereby quashed. Since the PDS Kerosene has been sold in Public Distribution System, the proportionate amount be paid to the petitioner. Consequentially, the interim order passed by the Collector also stands quashed.

11. The writ petition is disposed of. No cost.

Writ petition disposed of.

2011 (I) ILR – CUT- 606

SANJU PANDA, J.

W.P.(C) NO.17561 OF 2006 (Decided on 04.02.2011)

JAGANNATH BARIK ……. Petitioner.

.Vrs.

SECRETARY, DEPARTMENT OF SCHOOL & MASS EDUCATION,BBSR & ORS. ……. Opp.Parties.

Service – Petitioner was serving as a Primary School Teacher from 24.07.1965 to 13.01.1986 – Petitioner was selected in OAS and he relieved from school on 13.01.1986 – He joined as Transport Manager (Admn.) Jatani on 14.01.1986 and retired on 30.04.2007 – As per Rule 4(5) of the Orissa Aided Educational Institution Employees Retirement Benefit Rules 1981 entitles a non-Govt. Primary School Teacher to pension on closure of the College or School as the Case may be due to withdrawal of recognition of the said College or school or other causes – The expression "other causes" was clarified under 1998 amendment Rules – As per the above amendment a person absorbed in other service is also entitled to get pensionary benefits – In the meantime Orissa Aided Educational Institution (Non-Govt. Fully Aided Primary School Teachers) Retirement Benefit Rules 1986 came into force w.e.f. 01.04.1985 and the said Rule is applicable to the petitioner – Held, the petitioner is entitled to get the pensionary benefits for the service rendered by him from Dt.24.07.1965 to 30.04.2007. (Para 3 & 5)

For Petitioner - M/s. Asim Amitav Das, S.Mohanty,

B.R Swain, T.K.Praharaj.

For Opp.Parties – Addl. Standing Counsel for O.P.No.1,2 & 4)

M/s. Ashok Mohanty ,Hrusikesh Tripathy ,

P.Sahu & P.K.Mohanty (For Op.No.3)

S. PANDA, J. In this writ petition, the petitioner has prayed for a direction to the opposite parties to give pensionary benefits for the services

rendered by him as a Primary School Teacher as well as under the State Government.

2. The facts, as narrated in the writ petition, are as follows:

The petitioner was appointed and joined as a Primary School Teacher in a Non-Government Fully Aided Primary School on 24.7.1965. He was transferred from one school to another during his service period. While continuing as a teacher in Non-Government Fully Aided School, he was selected by the Orissa Public Service Commission for recruitment to the post of Orissa Administrative Service (O.A.S.) in the year 1970. However, by virtue of Government Notification dated 20.8.1982, the Government appointed about 100 surplus candidates of 1978 O.A.S. recruits after amending the relevant portions of the Service Rules with retrospective effect from 6.6.1980 and as the petitioner could not get the opportunity of getting the job for the post of O.A.S. after approaching the authorities, he filed OJC No.1819 of 1983 before this Court which was disposed of on 8.2.1984 with an observation that the State Government may consider the case of the petitioner for absorption in a suitable post. On 6th November, 1985, the Deputy Secretary to Government in the Department of Planning and Coordination issued a letter to the Chairman, Orissa State Electricity Board, Managing Director, all Public Undertakings, for absorption of the petitioner in service under Public Sector Undertakings. In pursuance of the said letter, the petitioner received an appointment order as Asst. Transport Manager (Admn.) at Jatni on trial and ad hoc basis fixing the scale of pay with usual D.A. and A.D.A. as sanctioned from time to time. Accordingly, the petitioner who was a Primary School Teacher was relieved from the School on 13th January, 1986 and joined as the Asst. Transport Manager (Admn.), Jatni on 14th January, 1986. He retired from the service on 30th April, 2007. The petitioner has not received any pension till date. He rendered service as a Primary School Teacher from 24th July, 1965 to 13th January, 1986.

3. Learned counsel for the petitioner submitted that the Orissa Aided Educational Institutions (Non-Govt. Fully Aided Primary School Teachers) Retirement Benefit Rules, 1986 (in short, “1986 Rules”) came into force with effect from 1.4.1985. Rule 8 of 1986 Rules provides that an employee under Non-Govt. Fully Aided Educational Institutions shall be eligible for pension or gratuity and death-cum-retirement gratuity at the rates admissible to his counterpart in the State Government. He submitted that prior to the said Rules the employees of Non-Govt. Fully Aided Educational Institutions were also eligible for pension under the Orissa Aided Educational Institutions Employees Retirement Benefit Rules, 1981. He further submitted that Sub-Rule (5) of Rule 4 of 1981 Rules entitles a Non-Government Primary School Teacher to pension on closure of the College or School, as the case may be,

due to withdrawal of recognition of the said College or School or other causes (emphasis supplied). The expression "or other causes" was clarified vide 1998 Amendment Rules. In Rule 4 of the Orissa Aided Educational Institutions' 'Employees' Retirement Benefit Rules, 1981, in sub-rule (5) after Note-4, the following Note has been inserted, namely :-

> "Note-5- The period of qualifying service rendered by an employee under any Non-Government Aided Educational Institution affiliated to any University of the State shall count for the purpose of pension and gratuity in the event of his/her absorption in any of the Universities of the State or in any organization under the control and management of the State Government and the State Government shall bear liability only for the period of service of the employee rendered against any approved post in such Institution."

In view of the above amendment, as the petitioner was absorbed in the service being selected as OAS by the Orissa Public Service Commission, he is entitled to the pensionary benefits for the years from 1965 to 2007.

4. Opposite party no.4 has filed counter affidavit taking a stand that the petitioner is not entitled to any pensionary benefit as his case is not covered under 1986 Rules. A Primary School Teacher is entitled to pension if his service has ended on or after 1.4.1985 on the following grounds:

> "(a) On retirement by reason of his attaining the age of superannuation; or
> (b) On voluntary retirement or retirement by the appointing authority after completion of thirty years of qualifying service or the age of fifty years; or
> (c) On retirement before superannuation on medical certificate of permanent in capacity for further service; or
> (d) On termination of service due to abolition of the post; or
> (e) On closure of the School due to withdrawal of recognition of the said School or other causes"

5. This Court heard the rival submissions of the parties and went through the relevant rules. It appears that the 1986 Rules ended in the year 1998 and the note to Sub-Rule (5) of Rule 4 of 1981 Rules was clarified as stated in the above paragraphs which clearly shows that a person absorbed in other service is also entitled to get the pensionary benefits. It is not in dispute that the petitioner was duly relieved by the authorities and absorbed in the Public Sector Undertakings on the request of the Deputy Secretary to the Government in the Department of Planning and Coordination. Therefore, the petitioner is entitled to the benefits of pension for the service he has rendered as a Primary School Teacher from 24.7.1965 till he was relieved

from the said post. Admittedly, the petitioner was relieved from the service of Primary School on 13.1.1986. The 1986 Rules came into force from 1.4.1985. Therefore, the said Rule is applicable to the petitioner and he is entitled to get the pensionary benefits for the service rendered by him from 24.07.1965 to 30.04.2007.

6. Accordingly, the writ petition is allowed directing the opposite parties to consider the case of the petitioner for pensionary benefits within a period of three months from the date of communication of this order.

Writ petition allowed.

2011 (I) ILR – CUT- 610

B.N.MAHAPATRA, J.

MACA NO.145 OF 2010 (Decided on 08.12.2010)

D.M., NEW INDIA ASSURANCE CO.LTD. CTC. ……. ….. Appellant.

.Vrs.

BATULAN BIBI & ANR. ……. ….. Respondents.

MOTOR VEHICLE ACT, 1988 (ACT NO.59 OF 1988) – S.163-A.

Motor Vehicle Accident – No evidence about the income of the deceased – Second Schedule was inserted in the M.V. Act, w.e.f. dt.14.11.1994 providing annual income of a non-earning person as Rs.15,000/- per annum – Tribunal passed award in 2009 fixing the annual income of the deceased as Rs.15,000/- P.A. – Award challenged.

Question is whether the Tribunal is justified in making an order in 2009 when the accident occurred in 1992 and the Second Schedule was inserted in the statute in 1994.

Held, time when order passed for compensation is more important – Since compensation amount was determined by the learned Tribunal on 13.10.2009 when Second Schedule to the M.V.Act providing notional annual income of Rs.15,000/- P.A in case of non-earning person was inforce, the Tribunal has not committed any error in determining the compensation as provided in the Second Schedule.

(Para 8,9)

Case law Referred to:-

AIR 2001 SC 1333 : (Rathi Menon -V- Union of India).

For Appellant - M/s. S.A.Ali & S.Kalyan.
For Respondent- M/s. B.N.Samantaray, P.Jena, Anuman Ara & D.Patnaik (for Respondent No.1)
M/s. Antaryami Dash & J.Moharana (for Respondent No.2).

B.N.MAHAPATRA, J. This appeal has been filed by New India Assurance Company Ltd. challenging the correctness of the award dated 13.10.2009 passed by the learned Second Motor Accident Claims Tribunal, Cuttack in Misc. Case No.705 of 1992.

2. This case has a chequerred career. The scenario of facts reveals that one Sk. Alaudin @ Sk. Alarakha died in a motor vehicular accident on 05.6.1992, who is a Muslim by religion and had two wives. Two wives filed two separate claim petitions before the Tribunal claiming compensation. The claim petition filed by Jaybunisa Bibi, one of the wives of the deceased, being Misc. Case No.491 of 1992 was dismissed by the learned Tribunal with the observation that she will be impleaded as party in the other claim petition being Misc. Case No.705 of 1992 filed by Batulan Bibi, the other wife of the deceased. In the claim petition the Tribunal awarded a sum of Rs.69,800/- with a direction that the same shall be distributed equally among the two wives.

3. Challenging the said order three appeals were filed before this Court. The Insurance Company filed an appeal challenging its liability and involvement of the particular vehicle whereas claimant-two wives filed two appeals for enhancement of the award amount. The matters were remanded by this Court to the Tribunal for fresh consideration in accordance with law.

4. On remand, the learned Tribunal after taking into consideration the oral and documentary evidence, came to the conclusion that the truck bearing registration No.WB-03-4002 was involved in the accident and awarded compensation of Rs.1,25,000/- with interest @ 7 % per annum from the date of filing of the claim petition till the date of payment. The Insurance Company was directed to pay the said amount of compensation within one month from the date of order. It was further directed that the said compensation amount shall be distributed equally among the two wives.

5. Challenging the said order this appeal has been filed by the Insurance Company on the following three grounds:-

i) The finding of the Tribunal that the truck bearing registration No.WB-03-4002 was involved in the accident is not correct.
ii) The claimants have not proved the income of the deceased, but the Tribunal has taken it as Rs.15,000/- per annum.
iii) The offending vehicle was not insured with the Insurance Company.

6. So far as the first question is concerned, learned counsel for the Insurance Company submits that in the F.I.R, the name of the owner of the offending vehicle was not disclosed. The police filed a final report with an observation that though the accident was true, there was no clue. It is further submitted that one of the eyewitnesses could not say the registration number of the offending vehicle. The Tribunal has erred in law in holding that the truck bearing registration No.WB-03-4002 was involved in the accident.

Learned counsel for the claimants submits that all the eyewitnesses in their evidence stated that the vehicle bearing registration No.WB-03-4002 was involved in the accident. It is further submitted that in the F.I.R. itself the registration number of the offending vehicle has been mentioned.

The Tribunal, which is a fact finding authority, after analyzing and taking into consideration the evidence on record has come to the conclusion that the Truck bearing registration No.WB-03-4002 was involved in the accident. The learned counsel for the appellant-Insurance Company has not brought any material to the notice of this Court in support of his contention that the vehicle in question was not involved in the accident. In view of the same, this Court is of the considered view that the aforesaid vehicle was involved in the accident.

7. The second contention of learned counsel for the Insurance Company is that in absence of any proof in support of income of the deceased, the Tribunal has committed wrong in taking the income of the deceased as Rs.15,000/- per annum. It is further submitted that while disposing of the earlier claim petition the Tribunal awarded Rs.69,800/- towards compensation and in absence of any new fresh material on record, the Tribunal has committed wrong in enhancing the compensation amount from Rs.69,800/- to Rs.1,25,000/-.

Learned counsel for the claimants submits that Second Schedule to the Motor Vehicle Act provides that in case of death of a person who has no income, the notional income should be taken as Rs.15,000/- per annum.

According to learned counsel for the Insurance Company, the notional income provided in schedule-2 was inserted in the year 1994; whereas the accident occurred in 1992. Therefore, the notional annual income of Rs.15,000/- should not be applied in the case at hand.

8. Now the question that falls for consideration is whether the Tribunal is justified to adopt the notional income of Rs.15,000/- per annum as provided in the Second Schedule attached to the M.V. Act which came into force in the year 1994 while making an order of payment of compensation in the year 2009 in respect of the accident occurred in the year 1992.

At this juncture, it would be profitable to refer the decision of the apex Court in ***Rathi Menon Vs. Union of India***; AIR 2001 SC 1333, wherein it is held that the statute did not fix the amount of compensation, but left it to be determined by the Central Government from time to time by means of rules. Hence, the time of ordering payment is more important to determine as to what is the extent of the compensation which is prescribed by the rules to be disbursed to the claimant. Though the word 'compensation' is not defined in the Act or in the Rules, it is the giving of an equivalent or substitute of equivalent value. It means when you pay the compensation in terms of money it must represent, on the date of ordering

such payment, the equivalent value. The provisions are not intended to give a gain to the Railway Administration but they are meant to afford just and reasonable compensation to the victims in a speedier measure. If a person files a suit the amount of compensation will depend upon what the Court considers just and reasonable on the date of determination. Hence, when he goes before the Claims Tribunal claiming compensation the determination of the amount should be as on the date of such determination.

9. Needless to say that the M.V. Act is a social benevolent statute. Section 163A provides that notwithstanding anything contained in the M.V. Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of use of the motor vehicle, compensation, as indicated in the Second Schedule to the legal heirs or the victim, as the case may be. Pursuant to such provision, the second Schedule to the M.V. Act was inserted with effect from 14.11.1994 which provides that for the purpose of computing compensation, the annual income of a non-earning person shall be taken as Rs.15,000/- per annum. In the present case, the amount of compensation was determined by the Tribunal on 13.10.2009 when the second Schedule to M.V. Act providing notional annual income of Rs.15,000/- per annum in case of non-earning person was in force. Therefore, the Tribunal has committed no error by taking into consideration of notional income as provided in the second Schedule while determining the just compensation.

10. Learned counsel for the insurance Company submits that the learned Tribunal has erred in holding that the offending vehicle was covered by valid insurance policy and it's driver had valid driving licence at the time of accident on the basis of letter of the owner of the offending vehicle and Xerox copy of the Insurance Company. Learned counsel appearing for the claimant-respondents submits that though the two documents, relying upon which the learned Tribunal held that the offending vehicle was covered by valid insurance policy and it's driver had valid driving licence at the time of accident were within the knowledge of the Insurance Company, no step was taken by the Insurance Company to dispute such documents. It is further submitted that the Insurance Company has not led any evidence in support of its contention that the offending vehicle was not insured with the Insurance Company and the driver of the said vehicle did not have valid driving licence at the time of accident.

The finding of the Tribunal with regard to the insurance Company and the driving licence of the offending vehicle is reproduced hereunder.

> "In the present case, the claimant/petitioner has proved vide Ext.3 that the offending truck was insured under O.P.2 company and the insurance was valid by the date of accident. The said fact also gets

support from the Xerox copy of the policy filed by the owner of the offending truck (O.P.1). No evidence has been led from the side of O.P.No.2 regarding the breach of any policy condition. O.P.W.1 stated that no notice was received regarding the Insurance policy and the D.L. of the driver for which the records of the office of the company could not be verified regarding the aforesaid documents. Since the accident took place during the period of validity of the Insurance Policy issued by O.P.No.2 company and no evidence has been led regarding the breach of policy condition, the Insurance Company, O.P. No.2 cannot exonerate its liability to pay compensation to the petitioner."

In view of the above categorical finding of the learned Tribunal and in absence of any evidence adduced by the Appellant-Insurance Company in support of its contention, this Court is not inclined to interfere with the finding of the learned Tribunal.

11. In view of the above, the Insurance Company is directed to deposit the total amount of compensation of Rs.1.25 lakhs along with interest @ 7% per annum from the date of filing of claim petition dated 11.08.1992 till the date of actual payment within eight weeks from today before the Tribunal. On deposit of the said amount, the Tribunal shall disburse the same to the claimants in the manner it has directed in its order.

12. On production of evidence in support of payment of the awarded amount along with interest before the Registrar (Judicial) of this Court, the statutory deposit of Rs.25,000/- along with interest shall be refunded to the Insurance Company.

In the result, the appeal is dismissed with the above observation.

Appeal dismissed.

2011 (I) ILR – CUT- 615

S.C.PARIJA, J.

MACA. NO.772 OF 2004 (Decided on 04.03.2011)

M/S. M.K.BHAUMIK …….. Appellant.

.Vrs.

SUKURA SINGH & ORS. ……..... Respondents.

MOTOR VEHICLES ACT, 1988 (ACT NO. 59 OF 1988) – S.2 (34).

"Public place" – All places where the members of public have an access for whatever reasons, whether as of right or controlled in any manner whatsoever would be covered by the definition of "Public place" in Section 2(34) of the Act.

In the present case the accident took place on a private land for which the learned Tribunal held that the accident did not take place in a public place and as such the insurer is not liable to pay compensation but the owner is liable to pay the same – Hence this appeal.

This Court on perusal of the evidence on record found that the land in question was a "Nayanjori" abutting the public road to which the public had free and easy access and the same does not cease to be a public place mearly because the land stood recorded in the name of a private individual and as such the land in question on which the accident took place was a public place within the definition of Section 2 (34) of the Act and the insurer is liable to pay the compensation as awarded – Held, the impugned order directing the owner to pay the compensation amount is set aside and the insurer is held liable to pay the same. (Para 16,17)

Case laws Referred to:-

1.1991 ACJ 673 : (Nagarathinam-V- Murugesan & Ors.)
2.AIR 1988 Bom.248 : (Pandurang Chimaji Agale & Anr-V-New India Life Insurance Co.Ltd., Pune & Ors.)
3.AIR 1991 Orissa 17 : (Oriental Fire & General Insurance Co.Ltd. -V- Raghunath Muduli & Ors.).
4.1999 ACJ 1520(Madras) : (United India Insurace Co.Ltd.-V-Parvathi Devi & Ors.)

For Appellant - M/s. S.K.Nayak-2, B.Giri, B.K.Rout & S.K.Dash.
For Respondent - M/s. D.Mishra, K.M.panda & N.N.Mishra

S.C. PARIJA, J. This appeal by the owner of the vehicle (truck) no.OSM-997, is directed against the judgment/award dated 8.10.2004 passed by the 1st Motor Accident Claims Tribunal, Baripada, in MACT Misc.Case No.82 of 2003, awarding an amount of Rs.91,400/- as compensation along with interest @ 9% per annum, from the date of filing of the claim application, i.e. 24.3.2003 and directing the present appellant, as the owner of the offending vehicle, to pay the same.

2. The sole contention raised by the learned counsel for the owner-appellant is that as the accident took place on a land, which was adjacent to the public road and was recorded as a "Nayanjori", to which, the public had easy access, learned Tribunal erred in holding that the accident took place on the private land of one Lalmohan Singh and therefore the insurer is not liable to pay the compensation amount. In this regard, it is submitted that the evidence on record clearly revealed that the deceased Bira Singh was at the work site on 9.3.2003 at about 4.30 P.M. near village Kamalasole, where digging and lifting of earth work was going on for construction of a road under "Pradhanmantri Gramya Sadak Jojana", when the offending truck no.OSM-997, which was engaged to remove the earth to the road side suddenly reversed and dashed against the deceased and thereafter the rear wheel of the offending truck ran over him, as a result of which deceased Bira Singh died at the spot. It is submitted that as the land on which the accident took place was just adjacent to the public road having been recorded as a "Nayanjori", learned Tribunal erred in ignoring the same and proceeding to hold that as the said land stood recorded in the name of one Lalmohan Singh and inquest over the dead body of the deceased was done by the police over the said land, the accident did not take place in a 'public place' and therefore, the insurer is not liable to pay the compensation amount.

3. Learned counsel appearing for the Insurance Company-respondent no.3, while supporting the impugned award, submits that as there are specific findings of the learned Tribunal that the accident took place on a private land belonging to one Lalmohan Singh and not on a public road or a 'public place', no liability can be fastened on the insurer to pay the compensation amount. In this regard, it is submitted that as the accident took place on a private land, to which the public have no access, which is evident from the materials on record, the impugned award cannot be faulted.

4. On a perusal of the impugned award, it is seen that in the claim application, it was pleaded that on 9.3.2003 at about 4.30 P.M. while the deceased Bira Singh was at the work site near village Kamalasole, where digging and lifting of earth work was going on for construction of road under

"Pradhanmantri Gramya Sadak Jojana", the offending truck no.OSM-997 belonging to the present appellant, which was engaged to remove the earth to the road side, suddenly came in reverse motion, being driven by the driver in a rash and negligent manner and dashed against the deceased Bira Singh and thereafter the rear wheel of the offending truck ran over him, resulting in his death at the spot. The claimants led oral evidence through P.Ws 1 and 2 and filed documentary evidence, like police papers (Exts.1 to 6), in support of their case. The Final Form (Ext.2) revealed that the police after investigation filed charge sheet against the driver of the offending truck no.OSM-997 for rash and negligent driving. The Seizure List (Ext.3 series) revealed that the police during investigation seized the offending truck and its documents and also the driving licence of the accused driver. Learned Tribunal on the basis of the evidence on record, both oral and documentary, came to hold that the driver of the offending truck was rash and negligent in causing the accident, which resulted in the death of the deceased.

5. As regard the liability to pay the compensation, the insurer took a stand before the learned Tribunal that as the accident took place on a private land belonging to one Lalmohan Singh as per the certified copy of ROR (Ext.A) and not on a public road or a 'public place', the insurer is not liable to pay the compensation amount. In support of its contention, the insurer relied upon a decision of the Madras High Court in the case of **Nagarathinam Vs. Murugesan and others**, 1991 ACJ 673, wherein the learned Single Judge while interpreting Section 2(24) of the Motor Vehicles Act,1939 (for short '1939 Act'), came to hold that the precincts of a petrol bunk, where the accident took place, was not a 'public place' and therefore the insurer cannot be fastened with the liability to pay the compensation.

6. Learned Tribunal on the basis of the materials on record has come to find that as the ROR (Ext.A) reveals that one Lalmohan Singh is the recorded tenant of the land and the evidence of P.W.2 clearly shows that the accident took place on the private land of said Lalmohan Singh and the inquest over the dead body of the deceased was done by the police over the said land, the insurer cannot be made liable to pay the compensation amount. Accordingly, learned Tribunal has proceeded to saddle the entire liability on the present appellant, as the owner of the offending truck.

7. The sole question which falls for consideration in the present appeal is as to whether the land in question, which stood recorded in the name of one Lalmohan Singh can be said to be a 'public place' within the meaning of Section 2(34) of the Motor Vehicles Act, 1988 (for short "M.V.Act"), which reads as under:-

> "2(34) "Public place" means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access, and includes any place or stand at which passengers are picked up or set down by a stage carriage."

8. The definition of 'public place' under the M.V.Act is, therefore, wide enough to include any place which members of public use and to which they have a right of access. The right of access may be permissive, limited, restricted or regulated by oral or written permission, by tickets, passes or badges or on payment of fee. The use may be restricted generally or to particular purpose or purposes. What is necessary is that the place must be accessible to the members of public and be available for their use, enjoyment, avocation or other purpose.

9. It is also necessary to bear in mind the distinction between the expression "right of access" and "access as of right". The latter expression denotes a place where the members of public have a right of its use as members of public and as a matter of right, whether regulated, restricted or not. They cannot, however, be denied the said right except on legal grounds. On the other hand, where there is only a right of access, the owner of the place, if he happens to be a private owner, may deny the access to any members of the public on any ground which he chooses. In other words in the former case the right of the members of the public to use the place is restricted compared to their right to use in the latter case. The definition under the M.V.Act uses the expression "right of access" as pointed out earlier. What is, therefore, significant to note is that under the present definition even a place the right to use of which is restricted is a public place. Once this is borne in mind much of the controversy raised in this appeal around the correct meaning of the expression "public place" loses its edge.

10. If we further bear in mind the overall object of the provisions of Chapter XI of the M.V.Act which deals with compulsory insurance of the vehicle to cover risks to third parties and their property, with claims to be filed for recovering compensation, no fault liabilities and liabilities arising out of hit and run accidents, etc., the intention of the legislature is clear. It is to secure compensation to the persons and property which are exposed to the accidents caused by the vehicles. The very nature of the motor vehicle and its use mandate these provisions. The motor vehicle in this respect can be likened to a wild animal. Whoever keeps it does so at his risk. As pointed out earlier, some of the restrictions on the use of the vehicle contained in the Act are irrespective of the nature of the place where it is used and irrespective of

whether it is plied or kept stationary. The legislature was concerned not so much with the nature of the place where the vehicle causes the accident as where it was likely to do so. Hence all places where the members of public and/or their property are likely to come in contact with the vehicles can legitimately be said to be in its view when the legislature made the relevant provisions for compulsory insurance. It will have, therefore, to be held that all places where the members of public have an access, for whatever reasons, whether as of right or controlled in any manner whatsoever, would be covered by the definition of 'public place' in Section 2(34) of the M.V.Act. To hold otherwise would frustrate the very object of the said Chapter and the Act.

11. This question came up for consideration before the Full Bench of Bombay High Court in **Pandurang Chimaji Agale and another Vs. New India Life Insurance Co.Ltd., Pune and others**, AIR 1988 Bom. 248, wherein the Hon'ble Court after taking note of the divergent views of different High Courts with regard to the meaning and import of the term 'public place', as defined under Section 2(24) of the 1939 Act (corresponding to Section 2(34) of the M.V.Act), proceeded to hold that for the purpose of Chapter VIII of the said Act, the expression 'public place' will cover all places including those of private ownership where members of the public have an access whether free or controlled in any manner whatsoever.

12. The aforesaid view expressed by the Full Bench of Bombay High Court has been affirmed and reiterated by a decision of this Court in the case of **Oriental Fire and General Insurance Co.Ltd. Vs. Raghunath Muduli and others**, AIR 1991 Orissa, 173, wherein the learned Single Judge while interpreting the term 'public place', as defined in Section 2(24) of the 1939 Act, has come to hold as under:-

> "Bearing in mind the fact that the provisions of Section 95 of the Act are beneficial provisions for making the insurer liable to pay compensation in a case where death or bodily injury to any person or damage to any property of a third party is caused by or arising out of the use of the vehicle in a public place, there cannot be any manner of doubt that the expression 'public place' should be given a wide interpretation. In this view of the matter, the road inside the Orissa Secretariat compound must be held to be public place and if any death or injury occurs inside that compound on account of any use of vehicle, then the insurer must be held to be liable to pay the compensation. xxx"

13. In a subsequent decision of the Bombay High Court in **Forbes Cambel & Co. Ltd. Vs. Vilasrao Deshmukh**, AIR 1994 Bombay 346, the ratio of earlier Full Bench decision in Pandurang Chimaji Agale (supra) has been affirmed and applied to the Bombay Dock area and it has been held to be a 'public place' within the meaning of Section 2(24) of the 1939 Act.

14. Relying on the Full Bench decision of the Bombay High Court (cited supra), a Full Bench of Madras High Court in the case of **United India Insurance Co.Ltd. Vs. Parvathi Devi and others**, 1999 ACJ 1520 (Madras) has held as follows:-

> "16. The definition of 'public place' is very wide. A perusal of the same reveals that the public at large has a right to access though that right is regulated or restricted. It is also seen that this Act is beneficial legislation, so also the law of interpretation has to be construed in the benefit of public. In the overall legal position and the fact that if the language is simple and unambiguous, it has to be construed in the benefit of the public, we are of the view that the word 'public place' wherever used as a right or controlled in any manner whatsoever, would attract section 2(24) of the Act. In view of this, as stated, the private place used with permission or without permission would amount to be a 'public place'.
>
> 17. In view of what we have discussed above, we hold that the expression 'public place' for the purpose of Chapter VIII of the Motor Vehicles Act, 1939 will cover all places including those of private ownership where members of the public have an access whether free or controlled in any manner whatsoever."

15. In a near recent Division Bench decision of the Kerala High Court in the case of **Rajan Vs. John,** 2009 (2) TAC 260 (Ker.), the Hon'ble Court while considering the definition of 'public place' for the purpose of Section 2(34) of the M.V.Act, proceeded to hold that the term 'public place' cannot be given a restricted meaning in asmuch as, it is not to be taken as a place where public have uncontrolled access at all times. 'Public place' for the purpose of the Act has to be understood with reference to the places to which a vehicle has access. Accordingly, the Hon'ble Court proceeded to hold that the private premises of a house where goods vehicle is allowed entry, is a 'public place' for the purpose of Section 2(34) of the M.V.Act and therefore the insurer is liable to pay the compensation.

16. In the present case as the evidence on record shows that the land in question was a 'Nayanjori', abutting the public road, to which the public had free and easy access, the same does not cease to be a public place, merely because the land stood recorded in the name of a private individual.

17. Applying the principles of law, as discussed above, to the facts of the present case, the conclusion is irresistible that the land in question, on which the accident took place, was a 'public place' within the definition of Section 2(34) of the M.V.Act and therefore, the insurer is held liable to pay the compensation amount awarded. Accordingly, the impugned findings of the learned Tribunal, directing the owner-appellant to pay the compensation amount is set aside and the insurer-respondent no.3 is directed to pay the same. However, the award of interest @ 9% per annum is modified and reduced to 6% per annum. Accordingly, the claimants are entitled to the awarded compensation amount of Rs.91,400/- along with interest @ 6% per annum from the date of filing of the claim application, which is payable by the insurer-respondent no.3. The impugned award is accordingly modified.

18. The Insurance Company-respondent no.3 is directed to deposit the awarded compensation amount of Rs.91,400/- along with interest @ 6% per annum with the learned Tribunal within six weeks hence.

MACA is accordingly allowed.

Appeal allowed.

2011 (I) ILR – CUT- 622

B.K.PATEL, J.

W.P.(C) NO.18033 OF 2010 (Decided on 4.3.2011)

VISHAL RETAIL LTD. & ANR. …… Petitioners.

.Vrs.

ACHHAR SINGH BHUMBER & ORS. ……. Opp.Parties.

ARBITRATION & CONCILIATION ACT, 1996 (ACT NO.26 OF 1996) – S.8(1) (2).

Power to refer Parties to arbitration – Suit for realization of arrear rent – Memorandum of understanding (MOU) between the parties – Under Clause 18 of the MOU parties have agreed upon that either the dispute shall be referred to arbitration or Courts at Jaypore shall have the sole and exclusive jurisdiction to try such dispute – Defendants-petitioners filed application U/s.8 (1) of the Act before filing of written statement – Without pursuing such application they submitted and acquiesced to the jurisdiction of the Court not only by filing written statement but also by participating in the trial by Cross-examining P.W.1 – Conduct of the petitioners show that they have waived their right to invoke the arbitration Clause since both the parties have participated in the trial and the Civil Court is equally efficacious in resolving the dispute between the parties – Held, it would not be proper to refer the parties to arbitration solely on the ground that public policy encourages out of Court settlement of disputes.

(Para 22,25,26)

Case laws Referred to:-

1.AIR 2000 SC 1379 : (Wellington Associates Ltd. -V- Kirit Mehta).
2.AIR 2008 SC 1016 : (Atul Singh-V- Sunit Kumar Singh).
3.AIR 1973 SC 2071 : (The State of Uttar Pradesh & Anr-V-Janki Saran Kailash Chandra & Anr.)
4.AIR 2008 Gujarat 148 : (Saurashtra Chemicals Ltd.-V-Union of India)
5.AIR 2004 Gauhati 70 : (W.B.S.E. Board-V- Shanti Conductors Pvt. Ltd.).
6.AIR 2006 SC 2800 : (Rashtriya Ispat Nigam Ltd.-V-Verma Transport Company)
7.AIR 2000 SC 1886 : (P. Anand Gajapathi Raju-V-P.V.G. Raju).
8.AIR 2006 Rajasthan 70: (Ranwa Construction Co.-V-Administrator,Pant Krishi Bhawan).
9.AIR 2008 (NOC) 593 (M.P.) : M.P.Housing Board & Anr-V-Sohanlal Choursia & Anr)

For Petitioners - M/s. Basudev Mishra & B.L.Tripathy.
For Opp.Parties - M/s. G.Mukherjee, A.C.Panda, S.Patra, S.Laxmi, S.Das & S.Mishra.

B.K.PATEL, J. In this writ application, petitioners have assailed legality of order dated 8.1.2009 passed by learned Civil Judge, (Senior Division), Jeypore in I.A. No. 24 of 2009, arising out of C.S. No.53 of 2009, by which their application under Section 8 (1) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') was rejected.

2. Petitioners are defendants and opposite parties are plaintiffs in the suit. The suit has been filed for realization of security deposit and arrear rent alongwith interest and cost. Plaintiffs' case is that in terms of agreement in the Memorandum of Understanding dated 2.7.2008 (for short 'the MOU') defendants took on lease the suit property for a period of ten years in order to run a retail show room on payment of rent at the rate of Rs.18/- per sq. feet per month. Show room over the suit land was constructed by the plaintiffs as per the specification of defendants. Defendants occupied and used the building without payment of security deposit and monthly rent. Plaintiffs wrote letters to the defendants in response to which defendants issued letter dated 13.6.2009 stating that agreement has been terminated.

3. On their appearance defendants filed application under Section 8 (1) of the Act on 28.10.2008. Thereafter, written statement was filed on 14.12.2009. Defendants' prayer for amendment of written statement was allowed by order dated 3.5.2010. P.W.1, examined on behalf of plaintiffs on 22.9.2010, was partially cross-examined by defendants on 24.9.2010.

4. Prayer in the application under Section 8 (1) of the Act in I.A. No.24 of 2009 reads:

> "It is, therefore, respectfully prayed that keeping in view the clause of Arbitration between the parties to the present suit, the suit of the plaintiff may kindly be returned to the plaintiff and the period of filing of the written statement as stipulated in the CPC may kindly be kept in abeyance till the decision of the present application. This prayer is made as an abandoned *(sic)* precaution."

Defendants filed objection resisting the application on the ground that Clause-18 of the MOU relied upon by the plaintiffs to be an arbitration clause provided for option to the parties either to resort to arbitration or to approach Civil Court. Considering the rival contentions, learned Civil Judge (Senior Division), Jeypore passed the impugned order upholding plaintiffs'

stand that Clause-18 of the MOU provided for such option for which Civil Court has jurisdiction to entertain the suit.

5. Opposite parties-plaintiffs have filed counter affidavit and petitioners-defendants have filed rejoinder to the counter affidavit.

6. It was contended on behalf of the petitioners that there is no dispute between the parties to have entered into the MOU on 2.7.2008. Clause-18 of the MOU specifically provides for resolution of dispute between the parties by arbitration. Defendants filed application under Section 8 (1) of the Act before filing of the written statement. However, learned court below proceeded with the trial instead of relegating the parties to arbitration. It was strenuously contended that the learned court below committed gross illegality in holding that Clause-18 of the MOU provided for option to the parties to approach the Civil Court also.

7. In reply, it was submitted by the learned counsel for the opposite parties that a plain reading of Clause-18 shows that the agreement provided for an option to the parties for resolution of dispute by either resorting to arbitration or by approaching Civil Court. In such circumstance, plaintiffs were not obliged to approach the defendants for appointment of sole arbitrator for redressal of their grievance. In this connection, learned counsel for the opposite parties relied upon the decision in **Wellington Associates Ltd. –vrs.- Kirit Mehta**: AIR 2000 SC 1379.

8. It was next contended on behalf of the opposite parties that on the face of it application stated to have been filed under Section 8 (1) of the Act by the defendants was not maintainable due to non-compliance of mandatory provision under sub-section (2) of Section 8 of the Act to the effect that application under Section 8 (1) of the Act is to be accompanied by the original arbitration agreement or a duly certified copy thereof. Decision of the Hon'ble Supreme Court in **Atul Singh –vrs.- Sunil Kumar Singh** : AIR 2008 SC 1016 was relied upon in support of the contention.

In this context, it was not disputed by the learned counsel for the opposite parties that neither original arbitration agreement nor any certified copy thereof was filed alongwith the application under Section 8 (1) of the Act. However, placing reliance on two decisions of Rajastan High Court it was contended that the provision under Section 8(2) of the Act is not mandatory. It was also argued that as a copy of the MOU filed by the plaintiffs was already on record, non-filing of the same along with the application under Section 8 (1) of the Act is not material.

9. Learned counsel for the opposite parties would also contend that defendants not only filed written statement but also participated in the trial by cross-examining P.W.1. Therefore, they acquiesced in and submitted to the jurisdiction of the Civil Court without pursuing the application to refer the parties to arbitration. Therefore, there being substantial progress in the suit, defendants are estopped from seeking shelter of the provision under the Act at a belated stage. In this connection, reliance was placed by the learned counsel for the opposite parties on **The State of Uttar Pradesh and Anr. –vrs.- Janki Saran Kailash Chandra and Anr.** : AIR 1973 SC 2071, **Saurashtra Chemicals Ltd. –vrs.- Union of India** : AIR 2008 Gujarat 148 and **W.B.S.E. Board –vrs.- Shanti Conductors Pvt. Ltd.** : AIR 2004 Gauhati 70. repel

Repelling the objection, it was argued by the learned counsel for the petitioners that, admittedly, defendants had filed application under Section 8 (1) before filing of written statement. They were not responsible for keeping the application pending till examination of P.W.1. Therefore, even if the defendants subsequently filed the written statement and cross-examined P.W.1, such conduct would not prevent them from claiming arbitration in terms of the MOU. Learned counsel for the petitioners relied upon decision in **Rashtriya Ispat Nigam Ltd. –vrs.- Verma Transport Company** : AIR 2006 SC 2800 in support of such contention. Also, relying upon decision in **P. Anand Gajapathi Raju –vrs.- P.V.G. Raju** : AIR 2000 SC 1886 it was submitted by the learned counsel for the petitioners that public policy being encouragement of out of court settlement of dispute by resorting to arbitration, conciliation and mediation etc. learned Civil Judge ought to have directed the parties to arbitration.

10. In order to appreciate the controversy between the parties, it is necessary to reproduce Clause-18 of the MOU. It reads:

> "**ARBITRATION & CONCILIATION**
>
> In case of any difference or dispute arising between the parities herein on any of the terms and conditions contained herein, such difference or dispute shall be referred to sole arbitrator appointed by the LESSEE and the LESSOR shall have no objection to it. The provision of the Arbitration and Conciliation Act, 1996 and any modification thereof shall be applicable for settlement of disputes, thus referred. The Venue for holding all such proceeding shall be at New Delhi. The Courts at Jeypur shall have the sole and exclusive jurisdiction to try any such dispute that may arise out of this instant agreement."

11. A cursory reading only makes it evident that the clause does not provide for arbitration as the only mode of resolution of difference or dispute arising out of the agreement between the parties. Though first part of clause provides for resolution of dispute in New Delhi by the sole arbitrator appointed by the petitioners, in the last sentence parties have agreed that Courts at Jeypore shall have the sole and exclusive jurisdiction to try any such dispute that may arise out of the MOU. It is not disputed that in the suit opposite parties have alleged breach of agreement as the basis of their claim. Clause-18 of the MOU does not prescribe arbitration to be the only mode of settlement of such dispute by the parties to the agreement. It does not appear that the intention of the parties was that arbitration would be the sole remedy. Clause-18 is not an unequivocal and firm arbitration clause.

12. Under similar circumstances, the Hon'ble Supreme Court in **Wellington Associates Ltd. –vrs.- Kirit Mehta** (supra) pointed out:

> "……. Section 7 defines 'arbitration agreement' as follows :
>
> 'S.7. Arbitration agreement :- (1) In this part "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> xx xx xx xx
> xx xx xx xx'.
>
> The words in sub-clause (1) of S.7, "means an agreement by the parties to submit to arbitration," in my opinion, postulate an agreement which necessarily or rather mandatorily requires the appointment of an arbitrator/ arbitrators. Section 7 does not cover a case where the parties agree that they "may" go to a suit or that they 'may' also go to arbitration."

13. In the present case, though the word "may" has not been used by the parties in the arbitration clause, it has been agreed upon by the parties that either the dispute shall be referred to arbitrator or Courts at Jeypore shall have the sole and exclusive jurisdiction to try any such dispute. Both the options having been agreed upon by the parties and one of the parties having approached the Civil Court at Jeypore by filing the suit, there appears no infirmity in the impugned order. Where both the arbitration clause and clause for deciding dispute by Civil Court of particular jurisdiction is available the parties may choose any one out of the two to decide the dispute.

14. It is not disputed that defendants did not file a copy of the MOU or Clause-18 thereof alongwith their application under Section 8(1) of the Act. Prayer in the application under Section 8(1) of the Act extracted above is not a prayer for referring the parties to arbitration. Defendants made prayer simply to return the plaint and to keep in abeyance period stipulated for filing of written statement till decision on the application.

15. Section 8 of the Act reads as follows:

> "**Power to refer parties to arbitration where there is an arbitration agreement**.- (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
>
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

16. In view of nature of prayer made in the application and in view of non-filing of arbitration agreement or copy thereof alongwith the application, the petitioners are found to have complied with neither sub-section (1) nor sub-section (2) of Section 8 of the Act. In the absence of specific prayer to refer the parties to arbitration, petitioners cannot claim to have applied to refer the parties to the suit to arbitration under Section 8(1) of the Act.

17. That apart, language in sub-section (2) of Section 8 of the Act is in negative terms providing for the consequence of filing an application under Section 8(1) of the Act without being accompanied by the original arbitration agreement or duly certified copy thereof. Court cannot entertain such an application. In other words in the absence of the original arbitration agreement or copy thereof, there is no application in the eye of law.

18. In **Atul Singh –vrs.- Sunil Kumar Singh** (supra), dealing with a case in which application under Section 8(1) of the Act was filed without agreement, it was observed and held by Hon'ble Supreme Court as follows:

> "There is no whisper in the petition dated 28.2.2005 that the original arbitration agreement or a duly certified copy thereof is being filed along with the application. Therefore, there was a clear

non-compliance of sub-section (2) of Section 8 of 1996 Act which is a mandatory provision and the dispute could not have been referred to arbitration. Learned counsel for the respondent has submitted that a copy of the partnership deed was on the record of the case. However, in order to satisfy the requirement of sub-section (2) of Section 8 of the Act, defendant No.3 should have filed the original arbitration agreement or a duly certified copy thereof along with the petition filed by him on 28.2.2005, which he did not do. Therefore, no order for referring the dispute to arbitration could have been passed in the suit."

19. Thus, availability of copy of the MOU, filed by the plaintiffs, in the record is inconsequential. Mandatory provision under Section 8(2) of the Act having not been complied with by the defendants seeking referral of the dispute to arbitration, learned Civil Judge could not have referred the dispute to arbitration. In view of such settled principle of law, decisions in **Ranwa Construction Co. –vrs.- Administrator, Pant Krishi Bhawan** : AIR 2006 Rajasthan 70 and **M.P. Housing Board & Anr. –vrs.- Sohanlal Chourasia & Anr**. : AIR 2008 (NOC) 593 (M.P.) are of no assistance to the petitioners.

20. Nature of prayer made by the petitioners in their application under Section 8(1) of the Act has already been referred to. In spite of the only prayer to return the "suit" to the plaintiffs and to keep in abeyance period stipulated for filing of written statement, petitioners chose not only to file written statement but also to participate in the trial by cross-examining P.W.1. Such conduct of the petitioners amounts to not only submission and acquiescence to the jurisdiction of the Civil Court but also explicit waiver of the right to claim arbitration. Also, such conduct is in consonance with Clause-18 of the MOU which provided for redressal of remedy by sole arbitrator or by adjudication in the Courts at Jeypore. Plaintiffs and defendants having right to opt for adjudication of dispute arising out of the MOU in Civil Court also, the right cannot be taken away. Even in the absence of such option, a party seeking to deprive the adversary of the general right to seek remedy in a Civil Court under Section 9 of the C.P.C. has to make out a very strong case.

21. In **The State of Uttar Pradesh and Anr. –vrs.- Janki Saran Kailash Chandra and Anr.** (supra), it has been held:

> ".....When a party to an arbitration agreement commences any legal proceedings against any other party to the said agreement with respect to the subject-matter thereof, then the other party is entitled to ask for such proceedings to be stayed so as to enable the

> arbitration agreement to be carried out. It is, however, to be clearly understood that the mere existence of arbitration clause in an agreement does not by itself operate as a bar to a suit in the Court. It does not by itself impose any obligation on the Court to stay the suit or to give any opportunity to the defendant to consider the question of enforcing the arbitration agreement. The right to institute a suit in some court is conferred, on a person having a grievance of a civil nature under the general law. It is a fundamental principle of law that where there is a right there is a remedy. Section 9 of the CPC confers this general right of suit on aggrieved person except where the cognizance of the suit is barred either expressly or impliedly. A party seeking to curtail this general right of suit has to discharge the onus of establishing his right to do so and the law curtailing such general right has to be strictly complied with……..”

22. No doubt, petitioners filed the application purported to be under Section 8(1) of the Act before filing of written statement. However, without pursuing the application they submitted and acquiesced to the jurisdiction of the Court not only by filing of written statement but also by participating in the trial and thereby waived any objection to the Court’s jurisdiction. In view of such conduct of the petitioners it may be unhesitatingly held that they waived their right to invoke the arbitration clause.

23. In **Rashtriya Ispat Nigam Ltd. –vrs.- Verma Transport Company** (supra), relied upon by the petitioners, it has been held:

> “34. The expression ‘first statement on the substance of the dispute’ contained in Section 8(1) of the 1996 Act must be contra-distinguished with the expression ‘written statement’. It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, needed is a finding on the part of the judicial authority that the party has waived his right to invoke the arbitration clause.”

24. It has been held by Gauhati High Court in **W.B.S.E. Board –vrs.- Shanti Conductors Pvt. Ltd.** (*supra*):

> “If despite existence of arbitration clause, the parties choose to contest the suit, the powers under Section 8 cannot be invoked.”

25. Thus, it is evident that not only Clause-18 of the MOU provided for option to approach Civil Court but also the petitioners’ application under Section 8 (1) of the Act is not an application for arbitration in the eye of law.

Opposite parties chose to invoke the jurisdiction of Civil Court. Petitioners, waiving their right, if any, to claim arbitration, submitted and acquiesced to the jurisdiction of the Court. Therefore, there is absolutely no scope to hold that opposite parties have not acted in accordance with terms of the Clause-18 of the MOU. Under the facts and circumstances of the case, petitioners have not made out any case to prevent the opposite parties to seek remedy in Court both in view of nature of the provision under said Clause and in exercise of general right conferred under Section 9 of the C.P.C.

26. Moreover, it is to be borne in mind that trial in the suit has already commenced. Both the parties have participated in the trial. Civil Court is equally efficacious in resolving dispute between the parties. At this stage, it would not be just and proper to refer the parties to arbitration solely on the ground that the public policy encourages out of Court settlement of disputes.

27. In view of the above, there is no merit in any of the contentions raised on behalf of the petitioners. The impugned order is immune for interference.

Accordingly, the writ petition is dismissed.

Writ petition dismissed.

2011 (I) ILR – CUT- 631

S.K.MISHRA, J.

CRL.REVN.NO.102 OF 2007 (Decided on 27.01.2011)

M/S. S.G.S. INDIA PVT. LTD. ……. … Petitioner.

.Vrs.

FRIMEX FOODS PVT. LTD. & ORS. …….. Opp.Parties.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.249.

Absence of complainant – Complaint case dismissed – Order challenged – Magistrate can dismiss a complaint for absence of the complainant, before framing of the charges, if the following conditions are satisfied;

(1) A proceeding must have been instituted upon a complaint.
(2) The complainant has failed to appear on the date fixed and
(3) That the offence to which the complainant alleged can be ordinarily compounded or is not cognizable by police.

In the present case Magistrate has taken cognizance of the offences U/ss.420, 468 and 471 I.P.C. out of which offence U/s.420 is compoundable with the leave of the Court and all other offences are cognizable offences – In this case since the first two requirements are fulfilled but the third requirement is not satisfied the Magistrate could not have dismissed the complaint petition – Held, impugned order dismissing the complaint petition is set aside.

(Para 5 & 6)

For Petitioner - M/s. C.Choudhury, D.Chotray, B.Mohanty, S.Mohanty, B.Moharana & D.R.Das.
For Opp.Parties - M/s. B.Biswal, B.N.Mishra, D.K.Biswal, S.Samal, B.R.Biswal, S.Baral & R.Pradhan.

S.K.MISHRA, J. The petitioner assails the order dated 06.12.2006 passed by the learned J.M.F.C., Bhubaneswar in I C.C. No.85 of 2005 dismissing the case for default of the complainant.

2. The facts leading to filing of the Revision can be succinctly stated as follows:-

The complainant M/s. S.G.S. India Pvt. Ltd., hereinafter referred as the "complainant company", is a Company, incorporated under the Companies Act, 1956. Accused no.1, Frimex Foods Pvt. Ltd. carries on business in import and export of food materials. Accused Nos. 2 and 3 are its Director and Managing Director respectively and are directly responsible for carrying on day-to-day business and the affairs of the accused-company. On or about 17.10.2000, the accused exported raw cashew nut to Florida, United States of America to an overseas entity i.e. Ambrosia International. In connection with the said shipment made by the accused-company to the overseas entity, the accused persons provided a forged certificate purported to have been issued by the complainant company bearing no. ADRIDIV/SGS/CH 203 dated 17.10.2002.

3. The complainant received information that when the containers sent by the accused-Company was opened by Ambrosia International inc., Florida, U.S.A., the importer, the quality of the goods was neither as per the order nor having the weight as per the order. Because for the certificate of inspection, purported to have been issued by the complainant company, the said Importer- Ambrosia International inc., Florida, U.S.A. complained before the complainant company about such certificate relating to the quality and weight of the goods exported by the accused. On discharge of the cargo at the Port, the deception could be revealed. Thereafter, the complainant-company enquired into the matter and came to know that the accused dishonestly and fraudulently prepared and made false documents of certificate of inspection purported to have been issued by the complainant company with the intention of causing it to be believed that such document/certificate of inspection was made, signed, executed and transmitted to the authority by the complainant knowing fully well that such document had never been signed, executed, made or transmitted under the authority of the complainant company. Therefore, it initiated a complaint case before the learned S.D.J.M., Bhubaneswar, which was numbered as I C.C. Case No. 89 of 2005. The learned S.D.J.M. took cognizance of the offences on 08.08.2005 and the case was made over to the J.M.F.C., Bhubaneswar. The case was then posted to 5.12.2006. On that day, the case was again adjourned to 6.12.2006. On that date the complainant was absent and, therefore, the learned J.M.F.C., Bhubaneswar dismissed the complaint case for default of the complainant. At this stage, it is undisputed that the learned Magistrate had taken cognizance of the offence under Sections 420, 468 and 471 of the Indian Penal Code, 1860, hereinafter referred as the "Penal Code" for brevity.

4. In course of hearing of the criminal revision, the learned counsel for the petitioner raised two points; firstly it was contended that the case was

not posted to 06.12.2006 and there has been manipulation in the order-sheet; secondly it is contended that under section 249 of the Code of Criminal Procedure, 1973, hereinafter referred as the "Code" for brevity, the learned Magistrate is not justified to dismiss the complaint for non-prosecution as the offence alleged are all cognizable and only section 420 of the Penal Code is compoundable with the leave of the court.

5. Since the offences under sections 420, 468 and 471 of the Penal Code are punishable with the imprisonment for more than two years, the offences are to be tried as warrant trial cases. Clause (x) of Section 2 of the Code defines "warrant-case" as a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years". Thus, all the offences are warrant trial offences and the trial of the case has to be conducted under Chapter XIX of the Code, which prescribes the procedure for trial of warrant case by Magistrates. Section 249 of the Code provides for the consequence of absence of the complainant. It is profitable to re-produce the provision, which reads as follows:

> *"249.* ***Absence of complainant.-*** When the proceedings have been instituted upon complaint, and on any day fixed for hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

So, a Magistrate can dismiss a complaint for absence of the complainant, before framing of the charges, if the following conditions are satisfied *viz.*

(1) A proceeding must have been instituted upon a complaint;
(2) The complainant has failed to appear on the date fixed; and
(3) That the offence to which the complainant alleged can be ordinarily compounded or is not cognizable by police.

6. It is seen that in this case, the first two requirements are fulfilled in the sense that the case has been instituted upon a private complaint and the complainant has failed to appear on the date fixed. The court could have dismissed the complaint for non-prosecution and discharge the accused if the offences can be lawfully compounded and is not cognizable by police. However, it is seen that out of the offences, for which cognizance has been taken by the learned Magistrate, only the offence under section 420 of the Penal Code is compoundable with the leave of the court and all the offences under Sections 420, 468 and 471 of the Penal Code are cognizable offences. It is clear from the bare reading of the provision that a case instituted under a private complaint can be dismissed for non-prosecution, if the offences are compoundable and not cognizable. Since the third

requirement is not satisfied in this case, the order passed by the learned Magistrate is held without jurisdiction and illegal, and, therefore, required to be set aside.

7. In view of the aforesaid settled legal principle, it is not necessary in this case to consider the other points canvassed regarding the alleged manipulation of the date. In the result, the revision application is allowed. The order dated 06.12.2006 is hereby set aside. The complaint case be taken up for hearing by the learned Magistrate. The petitioners and the opposite parties are directed to appear before the learned J.M.F.C., Bhubaneswar on 28.2.2011. The learned Magistrate shall provide adequate and reasonable opportunity to the complainant to produce its witnesses and, thereafter, dispose of the complaint case on merit.

The Criminal Revision is accordingly disposed of.

Revision disposed of.

2011 (I) ILR – CUT- 635

S.K.MISHRA, J.

RPFAM NO.37 OF 2010 (Decided on 09.02.2011)

KASINATH SETHY ……. Petitioner.

.Vrs.

SANJUKTA SETHI & ORS. ……. Opp.Parties.

(A) CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S. 125 (3)

Maintenance allowed exparte – Non-payment of such maintenance without sufficient cause – Sentencing a person to jail is a mode of enforcement – Purpose of sending him jail is not to wipe out the liability but to obey the order and to make payment – Held, a sentence of jail will not absolve the petitioner-husband from payment of maintenance amount to his wife. (Para 6)

(B)CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.125 (3)

Order of maintenance passed exparte in favour of the wife and children on 27.10.1995 – Non payment of such maintenance – Application should have been filed on or before 26.10.1996 for the breach of the order – However they filed 1st application on 30.04.2004 and next on 30.10.2008 for recovery of the total amount from 31.08.1994 till end of Sept.2008.

Under the first proviso to Sub-Section (3) of Section 125 Cr.P.C. no warrant shall be issued for the recovery of any amount due under this Section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due – Held, the applications which have been filed in April 2004 and Oct.2008 can be entertained only for recovery of the preceding twelve months maintenance allowance – So the order impugned requires modification and the learned Judge Family Court is directed to recalculate the arrear maintenance and issue fresh N.B.W/ D.W.

(Para 8)

Case laws Referred to:-

1.1999 AIR SCW 4880 : (Shahada Khatoon & Ors.-V- Amjad Ali & Ors.)

2.AIR 1989 SC 232 : (Smt. Kuldip Kaur -V- Surinder Singh & Anr.).

For Petitioner - M/s. S.K.Mandal & Mamata Mohapatra.

For Opp.Parties- M/s. P.K.Lenka, Pradipta Ku.Routray,

R.P.Singh & Manoj Kumar Parida.

S.K.MISHRA,J. The short question which arises for determination in this revision is whether the imprisonment of the petitioner-husband in pursuant to the order passed by the learned Judge, Family Court, Cuttack, for default of non-payment of the maintenance shall absolve him from payment of maintenance to his wife.

2. The petitioner challenged the order dated 09.10.2009 passed by learned Judge, Family Court, Cuttack, in Crl. Proceeding No.677 of 1995. Initially a proceeding under Section 125 of the Code of Criminal Procedure(hereinafter referred to as "the Code") was instituted by the opposite parties before the Court for maintenance and it was registered as CRP No.451 of 1994. The said proceeding was disposed of as exparte on 27.10.1995 by the learned Judge, Family Court, Cuttack. Learned Judge, Family Court allowed the maintenance @ Rs.300/- per month to opposite party no.1, who happens to be the wife, and Rs.100/- each to the opposite parties 2 and 3, minor sons of the present petitioner.

Opposite parties thereafter filed an application under Section 125(3) of the Code for arrear maintenance from 31.8.1994 to 30.4.2004 amounting to Rs.52,000/-. The petitioner, in spite of notice, did not appear before the learned Judge, Family Court, Cuttack. Therefore, learned Judge, Family Court issued warrant of arrest against him. He was arrested and produced before the learned Judge, Family Court, Cuttack, on 16.12.2004 and was remanded to jail. Thereafter on completion of one month incarceration the petitioner was released by learned Judge, Family Court on 08.2.2005. The opposite parties thereafter filed an application on 30.10.2008 before the learned Judge, Family Court, Cuttack, claiming arrear maintenance from 31.8.1994 to the end of September, 2008 amounting to Rs.74,000/- from the petitioner. The petitioner filed an objection to such application on the ground that the application is not maintainable. It was contended that the petitioner has already been punished for non-payment of arrear for the period from 31.8.1994 to 28.2.2004 and as such he is not liable to pay Rs.52,000/- out of the claim of Rs.74,000/-. It is further contended that after

serving punishment, learned Judge, Family Court should have dropped the aforesaid execution proceeding.

3. On the face of such contentions, learned Judge, Family Court, Cuttack, held that the period undergone is for a month thereon, the petitioner is liable to pay Rs.82,500/- and issued N.B.W. against him. Such order has been assailed in this revision. Alleviate

4. Section 125 of the Code is a benevolent provision aimed at eliminating vagrancy and for providing speedy remedy to persons, who do not have the means to maintain themselves, against persons who are under legal obligation to maintain them, but who without any just cause refuses to maintain them. Section 125 of the Code provides for an order for maintenance to wives, children and parents. A Magistrate upon being satisfied about the proof of negligence or refusal on the part of the person from whom monthly allowance for the maintenance of his wife, child, father or mother, as the case may be, is due, upon being satisfied about the fact that the person has sufficient means, may pass an order for monthly maintenance under sub-sections (1) and (2) of Section 125 of the Code. The mode of enforcement of such an order has been provided under Section 128 of the Code, which reads as follows:

> "128. Enforcement of order of maintenance - A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due."

5. Sub-section (3) of Section 125 of the Code provides punishment for non-compliance of the order of maintenance allowance passed by the learned Magistrate. It is apposite to quote the same:-

> "Sub-section (3) of Section 125 – If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's(allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be) remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made."

Interpreting sub-section (3) of Section 125 of the Code, Hon'ble Supreme Curt in the case of ***Shahada Khatoon and others v. Amjad Ali and others,*** 1999 AIR SCW 4880, has held that the anguage of sub-section (3) of Section 125 is quite clear and it circumscribes the power of the Magistrate to impose imprisonment for a term which may extend to one month or until the payment, if sooner made. This power of the Magistrate cannot be enlarged and therefore, the only remedy would be after expiry of one month, for breach of non-compliance of the order of the Magistrate the wife can approach again to the Magistrate for similar relief. By no stretch of imagination, the Magistrate can be permitted to impose sentence for more than one month.

6. Thus, it is clear for every breach of the order by husband in a case filed by the wife, the only course open to the wife is to file an application for imprisonment for one month. The course adopted by the learned Judge, Family Court in reducing the amount of maintenance by Rs.500/- is erroneous. This is because in the case of ***Smt. Kuldip Kaur v. Surinder Singh and another***, AIR 1989 SUPREME COURT 232, the Hon'ble Supreme Court interpreting the provision has held that the distinction has to be made between a mode of enforcing recovery of maintenance allowance on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to Jail is a 'mode of enforcement'. The Apex Court has in clear terms laid down that it is not a 'mode of satisfaction' of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending the defaulter to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. The Apex Court further ruled that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance 'without sufficient cause' to comply with the order. It cannot be said that a person who 'without reasonable cause' refuses to comply with the order of the court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail. A sentence of jail is no substitute for recovery of the monthly allowance, which has fallen in arrears. It is not a mode of discharging liability. The Section does not say so.

7. Thus, it is clear that the contentions raised by the learned counsel for the petitioner that once the petitioner has suffered incarceration for default of payment of the maintenance allowance shall absolve from making payment of the said arrear amount is fallacious and is not acceptable in

view of the rulings given by the Hon'ble Supreme Court in the case of Smt. *Kuldip Kaur* (supra).

8. However, while examining records it is found that the ex parte order of maintenance was made on 27.10.1995. They should have filed an application on or before 26.10.1996. However, they filed an application on 30.4.2004. Thereafter, the opposite parties did not file an application till 30.10.2008. On 30.10.2008 they have filed an application for recovery of the amount for the period from 31.8.1994 to the end of September, 2008 and the total amount was calculated to be Rs.74,000/-. However, in the first proviso to sub-section (3) of Section 125 of the Code, it is provided that no warrant shall be issued for the recovery of any amount due under this Section unless application be made to the court to levy such amount within a period of one year from the date on which it became due. Therefore, the applications, which have been filed in April 2004 and October, 2008 can be entertained only for recovery of the preceding twelve month's of maintenance allowance. Thus, the order impugned requires for modification to that extent. The learned Judge, Family Court, Cuttack, is directed to recalculate the arrear maintenance and issue fresh NBW/DW.

With the aforesaid observation, the RPFAM is disposed of.

The interim order passed earlier is vacated and the Misc. Case No.62 of 2010 is disposed of being infructuous.

Application disposed of.

2011 (I) ILR – CUT- 640

B.K.MISRA, J.

CRLA. NO.56 OF 2008 (Decided on 11.03.2011)

NIRANJAN PANDA ..…… Appellant.

.Vrs.

STATE OF ORISSA …… … Respondent.

PENAL CODE, 1860 (ACT NO. 45 OF 1860) – S.376 (2) (f).

Rape – The victim (P.W.7) in her evidence specifically deposed that one person caught hold of her and established illicit relation by doing unfair work with her and due to darkness she could not know who dragged her – She has also not breathed a word that the appellant who was in the dock was that man who had ravished her – Other prosecution witnesses have also not implicated the appellant – Held, there is no grain of evidence against the appellant to fasten him with the liabilities of ravishing a minor girl – Order of conviction and sentence imposed by the learned trial Court is set aside.

Case laws Referred to:-

1.(2009) 43 OCR (SC) 338 : (State of Rajasthan -V- Mohan Lal)
2.(2008) 40 OCR 9SC) 584 : (Harendra Sarkar -V- State of Assam)
3.(2004) 10 SCC 699 : (Narendra Singh & Anr -V- State of Madhya Pradesh)
4.(2005) 5 SCC 294 : (Ranjitsingh Brahmajeetsingh Sharma-V- State of Maharashtra & Anr.)

For Appellant - Mr. G.N.mohapatra & Miss Tejasmita Mohapatra.
For Respondent - Mr. J.Patnaik
Addl.Govt. Advocate.

B.K.MISRA, J. The appellant, who is suffering incarceration since 3.10.2006 being aggrieved with the order of conviction and sentence imposed on him by the learned Adhoc Additional Sessions Judge, (Fast Track), Jajpur in S.T. Case no.30 of 2007 has preferred this appeal. The learned Adhoc Additional Sessions Judge, (Fast Track), Jajpur convicted the appellant under Section 376 (2) (f) of the Indian Penal Code (in short, "I.P.C.") and sentenced him to undergo rigorous imprisonment for ten years.

2. The case of the prosecution is that the victim girl who happens to be the "BHANIJI" (sister's daughter) of the informant Sarat Chandra Panda (P.W.6) was prosecuting her studies when the occurrence took place by remaining with P.W.6. It is alleged that on the evening of 24.5.2005 around 7 P.M. the victim along with her friends proceeded to witness "SAPTA" (worshipping of the village deity) where the appellant seeing the victim playing alone dragged her to the nearby "Ankura Badi" and there undressed the victim by removing her frock and panties and gagged her mouth with a towel when the victim cried aloud and after making her to lie on the ground ravished her. It is alleged that the appellant also threatened the victim not to disclose the matter before anybody or else she would be done to death. After the incident, the victim reported the matter to her aunt (MAAIN). The informant Sarat Chandra Panda (P.W.6), who is the uncle of the victim reported the matter to the father of the victim, Santosh Panda (P.W.5) in his village and thereafter, the father of the victim as well as the informant (P.W.6) complained before the father of the appellant, but when the father of the appellant did not take any action, information was lodged before the O.I.C., Binjharpur Police Station in writing vide Ext.2. Police on receipt of the said information took up investigation of the case and on completion of the investigation placed the charge-sheet against the appellant to stand his trial.

3. The plea of the appellant was of complete denial of the occurrence.

4. The prosecution in order to establish its case against the appellant examined as many as ten witnesses in all and of them, P.W.7 is the victim, P.W.6 is the informant, P.W.5 is the father of the victim, P.Ws. 3 and 10 are the two aunts (MAAIN) of the victim, P.Ws.2 and 4 are the two friends of the victim, P.W.1 is the doctor who examined the victim. P.Ws.8 & 9 are the two I.Os.

The appellant declined to examine any witness in his defence.

5. The learned trial Court formulated two points for determination, namely:-

"I) Whether the accused Niranjan committed rape on the victim Sunita Panda who was under the age of 12 years ?

ii) Whether on the same date, time and place of occurrence the accused committed criminal intimidation by threatening to kill the victim?"

6. The learned trial Court on examining the evidence on record believing the evidence of P.Ws.6 and 7 and the medical evidence arrived at the conclusion that the prosecution could establish its case against the appellant under Section 376 (2) (f) of the Indian Penal Code and passed the impugned sentence. But the appellant was acquitted of the charge under Section 506 of the Indian Penal Code.

7. Miss. Tejasmita Mohapatra, learned counsel appearing for the appellant while taking me through the evidence on record argued with vehemence that no court of prudence could have recorded an order of conviction especially when the victim herself did not support her case and the manner in which the learned Adhoc Additional Sessions Judge, (Fast Track), Jajpur dealt with the matter that speaks that something has gone wrong in our criminal justice system for which people's faith in our adversarial system is being eroded. Accordingly, it was urged that the impugned order of conviction and sentence be set aside and the appellant be acquitted

8. Learned counsel appearing for the State also very fairly conceded that in view of the evidence of P.W.7 the victim as well as the informant and when there is no evidence worth the name to support the case with the prosecution, the appellant could not have been convicted and he can not support the order of the conviction and sentence imposed on the appellant.

9. After hearing the learned counsel for the appellant and the Additional Government Advocate, I scanned the entire evidence on record. P.W.7, the victim in her evidence has not breathed a word against the appellant that the appellant dragged her to a nearby "Ankura Bari" and ravished her on 24.05.2005 around 7.00 P.M. On the other hand, it is the victim, who has specifically deposed that "one person caught hold her and established illicit relation with her by doing unfair work with her". It is also her evidence that, that man opened her pant and after opening his pant also, raped her. In her cross-examination, P.W.7 has specifically stated that it was a dark night when the occurrence took place and because of that darkness, she could not know who dragged her towards the "Ankura Bari". Thus, P.W.7, the victim did not implicate the appellant at all in the alleged rape. P.W.7 also has not breathed a word if the appellant who was in dock when she was deposing in Court was that man who dragged her to the Ankura Bari" on 24.05.2005 evening and ravished her. P.W.3 who is the aunt (MAAIN) of the victim before whom the prosecution alleges that the victim narrated the incident immediately after the occurrence deposed that she does not know anything regarding the incident. Similarly, P.W.10, who is another aunt (MAAIN) of the victim also deposed on oath that she does not know anything about the incident. Both P.Ws. 3 and 10 were declared hostile by the prosecution as they did not support the case of the prosecution. But those were futile attempts on the part of the prosecution, as nothing could be elicited from their mouth to throw any light on the point of occurrence. The two friends of the victim, namely, P.Ws.2 and 4 in whose company the victim had gone to witness "SAPTA" on the alleged date and time they have also not supported the case of the prosecution. P.W.2, only deposed that

two years back in the evening hours she along with Tapaswini, Sunita and others were playing near one “Saptaghara” and except that she did not breath a single word about the alleged rape on P.W.7. Similarly P.W.4 another friend of P.W.7 simply deposed that she does not know anything regarding the occurrence. She simply deposed that she heard from villagers that the accused had ravished Sunita. Thus this shows that P.W.4, who is another star witness for the prosecution, did not support the F.I.R. story of rape. It is the established position of law that hearsay evidence is no evidence. Thus when P.Ws.2 & 4 did not support the case of the prosecution they were declared hostile, but those were vain attempts on the part of the prosecution. P.W.5 is the father of the victim and he deposed that while he was in his village in the month of April, 2005 Sarat (P.W.6) came and reported that the son of Nilamani Panda to have raped his daughter for which he proceeded to the police station and Sarat Chandra Panda presented the F.I.R.. The informant Sarat Chandra Panda, who has been examined as P.W.6, deposed that he heard from his sister-in-law (Bhauja) that the appellant had raped the victim. P.W.6 deposed that he lodged the F.I.R. 9Ext.2). P.W.6 in his cross-examination deposed that he himself did not write the F.I.R., but it was scribed by a person as per his version. P.W.6 also deposed that he did not ask the victim nor her friends about the occurrence. Thus, the evidence of P.W.6, the informant is also of no help to the case of the prosecution.

10. The evidence of P.W.1 the Medical Officer that there was sign and symptoms of partial penetration to the genital of the victim and the medical examination report Ext.1 can not by itself probablises the case of the prosecution case as the victim herself has not supported the case of the prosecution. P.Ws. 8 & 9 are the two Investigation Officers who are admittedly post occurrence witnesses and therefore their evidence is also of no assistance to the case of the prosecution.

11. Very unfortunately, in the instant case the learned Adhoc Addl. Sessions Judge (Fast Track), Jajpur observed in the body of the judgment in para-13 that by placing reliance on the evidence of victim P.W.7, P.W.6 the informant and the medical evidence i.e. of P.W.1, it can safely be concluded that the offence under Section 376 (2) (f) of I.P.C. has been well established by the prosecution against the appellant. I have no hesitation in my mind that the finding of guilt of the appellant can not at all be sustained in the eye of law. The evidence on record do not at all establish the charge of rape against the appellant. It is the settled position of law that “the paramount consideration of the court should be to avoid miscarriage of justice. Law can not afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. The concepts of probability,

and the degrees of its, can not obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uniformed legitimization of trivialities would make a mockery of administration of criminal justice".(2009) 43 OCR (SC) 338 State of Rajasthan-vrs- Mohan Lal.

12. It should be borne in mind that in a criminal trial the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent until contrary is proved and criminality is never to be presumed subject to statutory exception.

13 Article 21 of the Constitution of India provides for a right to a fair trial. Marshalling and appreciation of evidence must be done strictly in accordance with law. Appreciation of evidence must be on the basis of materials on record and not on the basis of some reports and each accused person has his human right and he should be tried in accordance with law. In a criminal proceeding, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man beyond all reasonable doubt. Presumption of innocence is a human right. Such a legal principle can not be thrown aside under any situation. (2008) 40 OCR (SC) 584 – Harendra Sarkar –vrs- State of Assam, (2004) 10 SCC 699 – Narendra Singh & Anr. –vrs. State of Madhya Pradesh & (2005) 5 SCC 294 – Ranjitsingh Brahmajeetsing Sharma-vrs- State of Maharasthra & anr.

14. Keeping in mind the aforesaid well established cannons of law and evidence on record as evaluated in this case the only irresistible conclusion emanates is that by convicting the appellant in the instant case there has been a miscarriage of justice as there is no grain of evidence against the appellant to fasten him with the liability of ravishing a minor girl. It is an established position of law that courts should not be swayed away with emotions and courts can not act on surmises or suppositions. The Court always looks for legal evidence to establish the culpability of the perpetrator of the crime.

15. In the aforesaid view of the matter, the order of conviction of the appellant under Section 376 (2) (f) of the I,P.C. and sentencing him to undergo R.I. for ten years for the said offence can not be sustained in the eye of law for a moment. Accordingly, while allowing the appeal, the order of

conviction and sentence is hereby set aside and the appellant is set at liberty forthwith.

Resultantly, the appeal stands allowed.

Appeal allowed.