S.H. KAPADIA, CJ, K.S.RADHAKRISHNAN,J & SWATANTER KUMAR, J.

CIVIL APPEAL NO.8859 OF 2011(Dt.20.10.2011)

(Arising out of SLP (C) NO.36166 of 2010)

THE EXECUTIVE ENGINEER & ANR. …….. Appellants.

.Vrs.

M/S. SRI SEETARAM RICE MILL ……Respondent.

(A) ELECTRICITY ACT, 2003 (ACT NO. 36 OF2003) – SE.126.

Un authorized use of electricity – Provisional assessment order U/s.126 (1) of the Act passed by the appellant – Instead of filing objection, respondent challenged the same in writ petition – High Court did not commit any error of jurisdiction in entertaining the writ petition against provisional assessment order but has transgressed its jurisdictional, limitations, while travelling into the exclusive domain of the Assessing officer relating to passing of an order of assessment and determining factual controversy of the case – In the above context the appropriate course of action for the High Court would have been to remand the matter to the assessing authority by directing the consumer to file his objections, if any, as contemplated U/s.126(3) and require the authority to pass a final order of assessment as contemplated U/s.126(5) of the 2003 Act.

Held, the impugned judgment of the High Court is set aside and the matter is remanded to the Assessing Officer to pass a final order of assessment after providing opportunity to the responded to file objections, if any, to the provisional assessment order as provided U/s.126 (3) of the 2003 Act. (Para 58, 59)

(B) **ELECTRICITY ACT, 2003 (ACT NO. 36 OF 2003) – Ss. 126, 127.**

Provisional order of assessment and final order of assessment – Only a final order of assessment passed U/s.126(3) is an order appealable U/s.127 but a notice-cum-provisional assessment made U/s.126(2) is not appealable – Thus the High Court should normally decline to interfere in a final order of assessment passed by the assessing officer in terms of Section 126 (3) of the 2003 Act in exercise of its jurisdiction under Article 226 of the Constitution of India.

(Para 58)

C. **ELECTRICITY ACT, 2003 (ACT NO.36 OF 2003) – S.126,**

r/w Regulations 82 and 106 of the OERC (Conditions of supply) Code, 2004.

Unauthorized use of electricity – The expression "un authorized use of electricity" means as appearing in Section 126 of the 2003 Act is an expression of wider connotation and has to be construed purposively in contrast to contextual interpretation while keeping in mind the object and purpose of the Act – The Cases of excess load consumption than the connected load inter alia would fall under Explanation (b) (iv) to Section 126 of the 2003 Act, besides it being in violation of Regulations 82 and 106 of the Regulations and terms of the Agreement. (Para 58)

D. **ELECTRICITY ACT, 2003 (ACT NO.36 OF 2003) – S.126.**

Wherever the consumer commits the breach of the terms of the Agreement, Regulations and the provisions of the Act by consuming electricity in excess of the sanctioned and connected load, such consumer would be "in blame and under liability" within the ambit and scope of Section 126 of the 2003 Act. (Para 58)

Case laws Referred to:-

1.(2003) 7 SCC 628 : (Balram Kumawat-V- Union of India & Ors.)
2.(1964)1 SCR 371 : (State of West Bengal-V- Union of India)
3.AIR 1992 SC 81 : (R.S.Raghunath-V- State of Karnataka & Anr.)
4.AIR 1990 SC 123 : (Tinsukhia Electric Supply Co.Ltd.-V-State of Assam)
5.(1900)2 Ch 352 : (Manchester Ship Canal Co.-V-Manchester Racecourse Co.)
6.1928 AC 37 : (Whitney -V- Inland Revenue Commissioners)
7.(1886)11 AC 827 : (Salman-V-Duncombe)
8.(1990) 2 All ER 118 : (BBC Enterprises -V- Hi-Tech Xtravision Ltd.)
9.(1979) 4 SCC 85 : (Superintendent & Remembrancer of Legal Affairs to Govt. Of West Bengal-V-Abani Maity).
10.AIR 1966 SC 523 : (Dr. S.Dutt-V- State of U.P.)
11.(2006)3 SCC 391 : (M.C.Mehta-V- Union of India)
12.(1997) 2 SCC 53 : (K.V. Muthu-V- Angamuthu Ammal)
13.(2008)9 SCC 527 : (Union of India-V-Prabhakaran Vijaya Kumar & Ors.)
14.(2003)4 SCC 524-P.9 : (Kunal Singh-V-Union of India)
15.(2002)1 SCC 193-p-12 : (B.D. Shetty-V-Ceat Ltd.)
16.(2000)1 SCC 332 : (Transport Corpn.of India-V-ESI Corpn.)
17.(2010)6 SCC 193 : (Eureka Forbes Ltd.-V-Allahabad Bank)

18.(2003)7 SCC 185 : (Bhilai Rerollers & Ors.-V-M.P.Electricity Board & Ors.)

19.(1995)4 SCC 328 : (Orissa State Electricity Board & Anr.-V- IPI Steel Ltd. & Ors.)

20.(1998)4 SCC 471 : (Hyderabad Vanaspathi Lts.-V-A.P.State Electricity Board &Anr)

21.(2002)3 SCC 711 : (Association of Industrial Electricity Unsers-V-State of A.P.&Ors.)

22.(2010)4 SCC539 : (Punjab State Electricity Board-V-Vishwa Caliber Builders Pvt.Ltd.)

23.(1998)8 SCC 1 : (Whirlpool Corporation-V-Registrar of Trade Marks, Mumbai).

24.(1961)41 ITR 191(SC) : (Calcutta Discount Co.Ltd.-V-ITO Companies Distt.)

25.(2000) 10 SCC 482 : (Union of India-V- State of Haryana)

SWATANTER KUMAR, J.

1. Leave granted.

2. Over a period of time, it was felt that the performance of the State Electricity Boards had deteriorated on account of various factors. Amongst others, the inability on the part of the State Electricity Boards to take decisions on tariffs in a professional and independent manner was one of the main drawbacks in their functioning. Cross-subsidies had reached unsustainable levels. To address this issue and to provide for distancing of governments from determination of tariffs, the Electricity Regulatory Commissions Act, 1998 (hereinafter, the 1998 Act') was enacted in addition to the existing statutes like Indian Electricity Act, 1910 (hereinafter, the 1910 Act') and the Electricity (Supply) Act, 1948 (hereinafter, the 1948 Act'). For a considerable time, these three legislations remained in force, governing the electricity supply industry in India. The Boards created by the 1948 Act and the bodies created under the 1998 Act, as well as the State Governments, were provided distinct roles under these statutes. There was still overlapping of duties and some uncertainly with regard to exercise of power under these Acts. To address the issues like deterioration in performance of the Boards and the difficulties in achieving efficient discharge of functions, a better, professional and regulatory regime was introduced under the Electricity Bill, 2001, with the policy of encouraging private sector participation in generation, transmission and distribution of electricity and with the objective

of distancing regulatory responsibilities from the Government by transferring the same to the Regulatory Commissions. The need for harmonizing and rationalizing the provisions of the earlier statutes was met by creating a new, self-contained and comprehensive legislation. Another object was to bring unity in legislation and eliminate the need for the respective State Governments to pass any reform Act of their own. This Bill had progressive features and strived to strike the right balance between the economic profitability and public purpose given the current realities of the power sector in India. This Bill was put to great discussion and then emerged the Electricity Act, 2003 (for short, the 2003 Act'). The 2003 Act had notably provided for private sector participation, private transmission, licences for rural and remote areas, stand alone systems for generation and distribution, the constitution of an Appellate Tribunal, more regulatory powers for the State Electricity Regulation Commission and provisions relating to theft of electricity. The additional provisions were introduced in the 2003 Act in relation to misuse of power and punishment of malpractices such as over-consumption of sanctioned electric load which are not covered by the provisions relating to theft; all of which had significant bearing upon the revenue focus intended by the Legislature. This is the legislative history and objects and reasons for enacting the 2003 Act.

3. To ensure better regulatory, supervisory and revenue recovery system, as expressed in the objects and reasons of the 2003 Act, there was definite concerted effort in preventing unauthorized use of electricity on the one hand and theft of electricity on the other. The present case falls in the former. According to the appellant, there was breach of the terms and conditions of the Standard Agreement Form for supply of Electrical Energy by the Grid Corporation of Orissa Ltd.(hereinafter, 'the Agreement') as the consumer (respondent herein) had consumed electricity in excess of the contracted load.

FACTS

4. We may briefly refer to the facts giving rise to the present appeal. Respondent herein, a partnership firm, claims to be a small scale industrial unit engaged in the production of rice. For carrying on the said business, it had obtained electric supply under the Agreement. Between the present appellant No.1 and the respondent the Agreement dated 9th December, 1997 was executed for supply of power to the respondent. Keeping in view the contracted load, the respondent was classified as 'medium industry category'. This category deals with the contract demand of 99 KVA and above but below 110 KVA. According to the respondent, since the day of

connection of power supply, the meter and all other associated equipments had been inspected by the appellants. On 10th June, 2009, the Executive Engineer, Jeypore Electrical Division and SDO, Electrical MRT Division, Jeypore inspected the business premises of the respondent's unit and dump was conducted. These officers issued a dump report by noticing as follows :

> "Dump of the Meter taken. Calibration of meter done and error found within limit. If any abnormality detected in Dump, it will be intimated later on."

5. It is the case of the respondent that no intimation was given to it as to finding of defects if any, in dump. On 25th July, 2009, provisional assessment order bearing No.854 was issued by the appellants to the respondent. Intimation bearing No.853 had also been issued on the same day which informed the respondent that there was unauthorized use of electricity falling squarely within the ambit of provisions of Section 126 of the 2003 Act. In the dump report dated 10th June, 2009, it was stated that there was unauthorized use of electricity and Maximum Demand (hereinafter MD) had been consumed up to 142 KVA. On this basis, the appellant passed the order of provisional assessment by taking the contracted demand as that applicable to large industry. The demand was raised, assessing the consumer for the period from June 2008 to August 2009 for a sum of Rs.7,77,300/-. This was computed for 15 months at the rate of Rs.200 per KVA (i.e., tariff for large industry) multiplied by two times, aggregating to the claimed amount. Vide the provisional assessment order dated 25th July, 2009, assessment was made under Section 126(1) of the 2003 Act for unauthorized use of electricity, the respondent was required to file objections, if any, and to also pay the amount. The relevant part of the said provisional assessment order reads as under :

> " And Whereas you are entitled to file objections against the aforesaid provisional assessment order under Section 126(3) of Electricity Act, 2003, within 30 days from receipt hereof and further entitled to appear before the undersigned for an opportunity of being heard on 25.08.2009 during working hours from 11.00 AM to 5.00 PM.
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> And Whereas you are further entitled u/s. 126 (4) to deposit the aforesaid amount within 7 days and upon such deposit being made within 7 days, you shall not be subject to any further liability or any action by any authority whatsoever.
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> And Whereas if you fail to file the objection within 30 days from receipt hereof, the undersigned shall presume that you have no

objection to the provisional assessment and the undersigned shall proceed to pass final order u/s. 126 (3) on assessment of electricity charges payable by you.

And Whereas, if you fail to appear before the undersigned at the aforesaid date and time after filing objections, if any, the undersigned shall proceed to pass the final order under section 126 (3), based on the objection filed by you and evidence available on record."

6. The respondent did not file its objections/reply but challenged the said provisional assessment order and the intimation of unauthorized use before the High Court of Orissa, Cuttack by filing writ petition No.W.P.(C) No.12175 of 2009 on the grounds of lack of authority and jurisdiction on the part of the Executive Engineer to frame the provisional assessment by alleging unauthorized use of electricity since 4th June, 2008. It was also contended that no inspection had been conducted in the business premises till date of dump, i.e., 10th June, 2009 when unauthorized use of electricity was found. The respondent also challenged the maintainability and sustainability of the order of provisional assessment in calculating the dump charges for a period of 15 months from June 2008 to August 2009 on the basis of dump charges relating to large industry while the respondent was classified as medium scale industry. It was also the contention raised by the respondent before the High Court that the provisions of Section 126 of the 2003 Act were not attracted in the present case at all. This claim of the respondent was contested by the appellants, as according to them, unauthorized use of electricity as defined under Section 126 will come into play as per clause (b) of the Explanation appended to Section 126 of the 2003 Act. The dump report dated 10th June, 2009 and the intimation dated 25th July, 2009 had been sent showing overdrawal of MD where, according to the appellants, the respondent had consumed electricity by means unauthorized by the licencee (overdrawal of maximum demand); and thereby breached the Agreement and, therefore, the provisional assessment order and the intimation were fully justified.

7. The High Court, vide impugned judgment, accepted the case of the respondent and held that the words 'unauthorized use of electricity' and 'means' as provided in Explanation to Section 126 of the 2003 Act were exhaustive. Overdrawal of MD would not fall under the scope of 'unauthorized use of electricity' as defined under the 2003 Act, and the appellants had no jurisdiction to issue the intimation in question and pass the assessment order in terms of Section 126 of the 2003 Act. Aggrieved by the

judgment of the High Court, the appellants have filed the present appeal by way of a special leave petition before this Court.

Questions for Determination :

1. Wherever the consumer consumes electricity in excess of the maximum of the contracted load, would the provisions of Section 126 of the 2003 Act be attracted in its true scope and interpretation?

2. Whether the High Court, in the facts and circumstances of the case, was justified in interfering with the provisional order of assessment/show cause notice dated 25th July, 2009, in exercise of its jurisdiction under Article 226 of the Constitution of India?

3. Was the writ petition before the High Court under Article 226 of the Constitution of India not maintainable because of a statutory alternative remedy being available under Section 127 of the 2003 Act ?

Discussion on Merits

1. **Wherever the consumer consumes electricity in excess of the maximum of the connected load, would the provisions of Section 126 of the 2003 Act be attracted on its true scope and interpretation?**

8. On the simple analysis of the facts as pleaded by the parties, it is contended on behalf of the respondent that the provisions of Section 126 of the 2003 Act are not attracted and no liability could be imposed upon them by the authorities in exercise of their power under that provision. Even if the case advanced by the appellants against the respondent without prejudice and for the sake of argument is admitted, even then, at best, the demand could be raised under Regulation 82 of the Orissa Electricity Regulatory Commission Distribution (Condition of Supply) Regulations, 2004 (for short, the Regulations'). But recourse to the provisions of Section 126 was impermissible in law. The contention is that the case of a consumer consuming the electricity in excess of maximum and the installed load does not fall within the mischief covered under Section 126 of the 2003 Act. To put it plainly, the argument is that the appellants lack inherent authority to raise such demand with reference to the present case on facts and law both.

9. On the contra, submission on behalf of the appellants is that the case of excessive consumption of power beyond and sanctioned load would be a case falling within the ambit of Section 126 of the 2003 Act. Section 126 of

the 2003 Act is incapable of an interpretation which would render the said provision otiose in cases which do not specifically fall under Section 135 of the 2003 Act. In order to answer these contentions more precisely, we find it appropriate to examine the question framed above, under the following sub-headings:

(a) Interpretation;

(b) Distinction between Sections 126 and 135 of the **2003** Act;

(c) The ambit and scope of Section 126 with reference to the construction of the words 'unauthorized use' and 'means'; and

(d) Effect and impact of change in applicability of tariff upon the power of assessment in accordance with the provisions of the 2003 Act and the relevant Regulations in the facts of the case.

1(a) Interpretation

10. First and foremost, we have to examine how provisions like Section 126 of the 2003 Act should be construed. From the objects and reasons stated by us in the beginning of this judgment, it is clear that 'revenue focus' was one of the principal considerations that weighed with the Legislature while enacting this law. The regulatory regime under the 2003 Act empowers the Commission to frame the tariff, which shall be the very basis for raising a demand upon a consumer, depending upon the category to which such consumer belongs and the purpose for which the power is sanctioned to such consumer. We are not prepared to accept the contention on behalf of the respondent that the provisions of Section 126 of the 2003 Act have to be given a strict and textual construction to the extent that they have to be read exhaustively in absolute terms. This is a legislation which establishes a regulatory regime for the generation and distribution of power, as well as deals with serious fiscal repercussions of this entire regime. In our considered view the two maxims which should be applied for interpretation of such statutes are ex visceribus actus (construction of the act as a whole) and ut res magis valeat quam pereat (it is better to validate a thing than to invalidate it). It is a settled cannon of interpretative jurisprudence that the statute should be read as a whole. In other words, its different provisions may have to be construed together to make consistent construction of the whole statute relating to the subject matter. A construction which will improve the workability of the statute, to be more effective and purposive, should be preferred to any other interpretation which may lead to undesirable results.

11. It is true that fiscal and penal laws are normally construed strictly but this rule is not free of exceptions. In given situations, this Court may, even in relation to penal statutes, decide that any narrow and pedantic, literal and lexical construction may not be given effect to, as the law would have to be interpreted having regard to the subject matter of the offence and the object that the law seeks to achieve. The provisions of Section 126, read with Section 127 of the 2003 Act in fact, becomes a code in itself. Right from the initiation of the proceedings by conducting an inspection, to the right to file an appeal before the appellate authority, all matters are squarely covered under these provisions. It specifically provides the method of computation of the amount that a consumer would be liable to pay for excessive consumption of the electricity and for the manner of conducting assessment proceedings. In other words, Section 126 of the 2003 Act has a purpose to achieve, i.e. to put an implied restriction on such unauthorized consumption of electricity. The provisions of the 2003 Act, applicable regulations and the agreement executed between the parties at the time of sanction of the load prohibit consumption of electricity in excess of maximum sanctioned/installed load. In the event of default, it also provides for the consequences that a consumer is likely to face. It embodies complete process for assessment, determination and passing of a demand order. This defined legislative purpose cannot be permitted to be frustrated by interpreting a provision in a manner not intended in law. This Court would have to apply the principle of purposive interpretation in preference to textual interpretation of the provisions of Section 126 of the 2003 Act. We shall shortly discuss the meaning and scope of the expressions used by the Legislature under these provisions. At this stage, suffice it to note that this Court would prefer to adopt purposive interpretation so as to ensure attainment of the object and purpose of the 2003 Act, particularly, of the provisions of Section 126 in question. We may usefully refer to the judgement of this Court in the case of Balram Kumawat v. Union of India & Ors. ((2003) 7 SCC 628) wherein this Court discussed various tenders of interpretation and unambiguously held that these principles could be applied even to the interpretation of a fiscal or a penal statute. This Court held as under :

> "20. Contextual reading is a well-known proposition of interpretation of statute. The Clauses of a statute should be construed with reference to the context vis-à-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject-matter. The rule of 'ex visceribus actus' should be resorted to in a situation of this nature.
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> 21. In State of West Bengal v. Union of India (1964) 1 SCR 371, the learned Chief Justice stated the law this :

"The Court must ascertain the intention of the Legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."

22. The said principle has been reiterated in R.S. Reghunath v. State of Karnataka and Anr. (AIR 1992 SC 81).

23. Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal Jurisprudence does not say so.

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25. A statute must be construed as a workable instrument. Ut res magis valeat quam pereat is a well-known principle of law. In Tinsukhia Electric Supply Co. Ltd. V. State of Assam (AIR 1990 SC 123), this Court stated the law thus :

"118. The Courts strongly lean against any construction, which tends to reduce a statute to a futility. The provision of a statute must be so construed as to a make it effective and operative, on the principle "ut res magis valeat quam pereat". It is, no doubt, true that if a statute is absolutely vague and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness. This is not in judicial review by testing the law for arbitrariness or unreasonableness under Article 14; but what a court of construction, dealing with the language of a statute, does in order to ascertain from, and accord to, the statute the meaning and purpose which the legislature intended for it. In Manchester Ship Canal Co. v. Manchester Racecourse Co. (1900) 2 Ch 352, Farwell J. said : (pp. 360-61).

" Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning and not to declare them void for uncertainly."

In Fawcett Properties Ltd. V. Buckingham County Council ((1960) 3 All ER 503) Lord Denning approving the dictum of Farwell, J. Said :

"But when a Statute has some meaning, even though it is obscure, or several meanings, even though it is little to choose between them, the courts have to say what meaning the statute to bear rather than reject it as a nullity."

It is, therefore, the court's duty to make what it can of the statute, knowing that the statutes are meant to be operative and not inept and that nothing short of impossibility should allow a court to declare a statute unworkable. In Whitney v. Inland Revenue Commissioners (1928 AC 37) Lord Dunedin said :

"A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

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27. The Courts will therefore reject that construction which will defeat the plain intention of the Legislature even though there may be some inexactitude in the language used. (See Salmon v. Duncombe (1886) 11 AC 827). Reducing the legislation futility shall be avoided and in a case where the intention of the Legislature cannot be given effect to, the Courts would accept the bolder construction for the purpose of bringing about an effective result. The Courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that the Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve. (See BBC Enterprises v. Hi-Tech Xtravision Ltd., (1990) 2 All ER 118)."

12. Further, in the case of *Superintendent and Remembrancer of Legal Affairs to Government of West Bengal v. Abani Maity* ((1979) 4 SCC 85), this Court held as under :

" Exposition ex visceribus actus is a long recognized rule of construction. Words in a statute often take their meaning from the context of the statute as a whole. They are therefore, not to be construed in isolation. For instance, the use of the word "may" would normally indicate that the provision was not mandatory. But in the context of a particular statute, this word may connote a legislative imperative, particularly when its construction in a permissive sense would relegate it to the unenviable position, as it were, "of an ineffectual angel beating its wings in a luminous void in

vain". If the choice is between two interpretations", said Viscount Simon L.C. in Nokes v. Doncaster Amalgamated Collieries, Ltd. ((1940) A.C. 1014) :

> "the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

13. The relevancy of objects and reasons for enacting an Act is a relevant consideration for the court while applying various principles of interpretation of statutes. Normally, the court would not go behind these objects and reasons of the Act. The discussion of a Standing Committee to a Bill may not be a very appropriate precept for tracing the legislative intent but in given circumstances, it may be of some use to notice some discussion on the legislative intent that is reflected in the substantive provisions of the Act itself. The Standing Committee on Energy, 2001, in its discussion said, 'the Committee feel that there is a need to provide safeguards to check the misuse of these powers by unscrupulous elements'. The provisions of Section 126 of the 2003 Act are self-explanatory, they are intended to cover situations other than the situations specifically covered under Section 135 of the 2003 Act. This would further be a reason for this Court to adopt an interpretation which would help in attaining the legislative intent.

14. By applying these principles to the provisions of this case requiring judicial interpretation, we find no difficulty in stating that the provisions of Section 126 of the 2003 Act should be read with other provisions, the regulations in force and they should be so interpreted as to achieve the aim of workability of the enactment as a whole while giving it a purposive interpretation in preference to textual interpretation.

1(b) Distinction between Sections 126 and 135 of the 2003 Act.

15. Upon their plain reading, the mark differences in the contents of Sections 126 and 135 of the 2003 Act are obvious. They are distinct and different provisions which operate in different fields and have no common premise in law. We have already noticed that Sections 126 and 127 of the 2003 Act read together constitute a complete code in themselves covering all relevant considerations for passing of an order of assessment in cases which do not fall under Section 135 of the 2003 Act. Section 135 of the 2003 Act falls under Part XIV relating to 'offences and penalties' and title of the

Section is 'theft of electricity". The Section opens with the words "whoever, dishonestly' does any or all of the acts specified under clauses (a) to (e) of Sub-section (1) of Section 135 of the 2003 Act so as to abstract or consume or use electricity shall be punishable for imprisonment for a term which may extend to three years or with fine or with both. Besides imposition of punishment as specified under these provisions or the proviso thereto, Sub-section (1A) of Section 135 of the 2003 Act provides that without prejudice to the provisions of the 2003 Act, the licensee or supplier, as the case may be, through officer of rank authorized in this behalf by the appropriate commission, may immediately disconnect the supply of electricity and even take other measures enumerated under Sub-sections (2) to (4) of the said Section. The fine which may be imposed under Section 135 of the 2003 Act is directly proportional to the number of convictions and is also dependent on the extent of load abstracted. In contradistinction to these provisions, Section 126 of the 2003 Act would be applicable to the cases where there is no theft of electricity but the electricity is being consumed in violation of the terms and conditions of supply leading to malpractices which may squarely fall within the expression 'unauthorized use of electricity'.This assessment/proceedings would commence with the inspection of the premises by an assessing officer and recording of a finding that such consumer is indulging in an 'authorized use of electricity'. Then the assessing officer shall provisionally assess, to the best of his judgment, the electricity charges payable by such consumer, as well as pass a provisional assessment order in terms of Section 126(2) of the 2003 Act. The officer is also under obligation to serve a notice in terms of Section 126(3) of the 2003 Act upon any such consumer requiring him to file his objections, if any, against the provisional assessment before a final order of assessment is passed within thirty days from the date of service of such order of provisional assessment. Thereafter, any person served with the order of provisional assessment may accept such assessment and deposit the amount with the licensee within seven days of service of such provisional assessment order upon him or prefer an appeal against the resultant final order under Section 127 of the 2003 Act. The order of assessment under Section 126 and the period for which such order would be passed has to be in terms of Sub-sections (5) and (6) of Section 126 of the 2003 Act. The Explanation to Section 126 is of some significance, which we shall deal with shortly hereinafter. Section 126 of the 2003 Act falls under Chapter XII and relates to investigation and enforcement and empowers the assessing officer to pass an order of assessment.

16. Section 135 of the 2003 Act deals with an offence of theft of electricity and the penalty that can be imposed for such theft. This squarely falls within

the dimensions of Criminal jurisprudence and mens rea is one of the relevant factors for finding a case of theft. On the contrary, Section 126 of the 2003 Act does not speak of any criminal intendment and is primarily an action and remedy available under the Civil law. It does not have features or elements which are traceable to the criminal concept of mens rea.

17. Thus, it would be clear that the expression 'unauthorized use of electricity' under Section 126 of the 2003 Act deals with cases of unauthorized use, even in absence of intention. These cases would certainly be different from cases where there is dishonest abstraction of electricity by any of the methods enlisted under Section 135 of the 2003 Act. A clear example would be, where a consumer has used excessive load as against the installed load simpliciter and there is violation of the terms and conditions of supply, then, the case would fall under Section 126 of the 2003 Act. On the other hand, where a consumer, by any of the means and methods as specified under Sections 135(a) to 135(e) of the 2003 Act, has abstracted energy with dishonest intention and without authorization, like providing for a direct connection by passing the installed meter. Therefore, there is a clear distinction between the cases that would fall under Section 126 of the 2003 Act on the one hand and Section 135 of the 2003 Act on the other. There is no commonality between them in law. They operate in different and distinct fields. The assessing officer has been vested with the powers to pass provisional and final order of assessment in cases of unauthorized use of electricity and cases of consumption of electricity beyond contracted load will squarely fall under such power. The legislative intention is to cover the cases of malpractices and unauthorized use of electricity and then theft which is governed by the provisions of Section 135 of the 2003 Act.

18. Section 135 of the 2003 Act significantly uses the words 'whoever, dishonestly' does any of the listed actions so as to abstract or consume electricity would be punished in accordance with the provisions of the 2003 Act. "Dishonesty' is a state of mind which has to be shown to exist before a person can be punished under the provisions of that Section.

19. The word 'dishonest' in normal parlance means 'wanting in honesty'. A person can be said to have 'dishonest intention' if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of property to which the person so losing is legally entitled. 'Dishonestly' is an expression which has been explained by the Courts in terms of Section 24 of the Indian Penal Code, 1860 as 'whatever does anything with the intention of causing wrongful gain to one person or wrongful loss to another

person is said to do that thing dishonestly.' (The Law Lexicon (2nd Edn. 1997) by P.Ramanatha Aiyar).

20. This Court in the case of Dr. S.Dutt v. State of U.P. (AIR 1966 SC 523) stated that a person who does anything with the intention to cause wrongful gain to one person or wrongful loss to another is said to do that dishonestly.

21. Collins English Dictionary explains the word 'dishonest' as 'not honest or fair; deceiving or fraudulent.' Black's Law Dictionary (Eighth Edition) explains the expression 'dishonest act' as a fraudulent act, 'fraudulent act' being a conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude.

22. All these explanations clearly show that dishonesty is a state of mind where a person does an act with an intent to deceive the other, acts fraudulently and with a deceptive mind, to cause wrongful loss to the other. The act has to be of the type stated under Sub-sections (1) (a) to (1) (e) of Section 135 of the 2003 Act. If these acts are committed and that state of mind, mens rea, exists, the person shall be liable to punishment and payment of penalty as contemplated under the provisions of the 2003 Act. In contradistinction to this, the intention is not the foundation for invoking powers of the competent authority and passing of an order of assessment under Section 126 of the 2003 Act.

1 (c) The ambit and scope of Section 126 with reference to the construction of the words 'unauthorized use' and 'means'.

23. Having dealt with the principle of interpretation of these provisions and the distinction between Sections 126 and 135 of the 2003 Act, we shall now discuss the ambit and scope of Section 126. The provisions of Section 126 contemplate the following steps to be taken:

(i) An assessing officer is to conduct inspection of a place or premises and the equipments, gadgets, machines, devices found connected or used in such place.

(ii) The formation of a conclusion that such person has indulged in unauthorized use of electricity.

(iii) The assessing officer to provisionally assess, to the best of his judgment, the electricity charges payable by such person.

(iv) The order of provisional assessment to be served upon the person concerned in the manner prescribed, giving him an opportunity to file objections, if any, against the provisional assessment.

(v) The assessing officer has to afford a reasonable opportunity of being heard to such person and pass a final order of assessment within 30 days from the date of service of such order of provisional assessment.

(vi) The person, upon whom the provisional order of assessment is served, is at liberty to pay the said amount within seven days of the receipt of such order and where he files such objections, final order of assessment shall be passed, against which such person has a right of appeal under Section 127 of the 2003 Act within the prescribed period of limitation.

Assessment and Computation

24. Wherever the assessing officer arrives at the conclusion that unauthorized use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if such period cannot be ascertained, it shall be limited to a period of 12 months immediately preceding the date of inspection and the assessment shall be made at the rate equal to twice the tariff applicable for the relevant category of service specified under these provisions. This computation has to be taken in terms of Sections 126(5), 126(6), and 127 of the 2003 Act. The complete procedure is provided under these sections. Right from the initiation of the proceedings till preferring of an appeal against the final order of assessment and termination thereof, as such, it is a complete code in itself. We have already indicated that the provisions of Section 126 do not attract the principles of Criminal Jurisprudence including mens rea. These provisions primarily relate to unauthorized use of electricity and the charges which would be payable in terms thereof.

25. To determine the controversy in the present case, it will be essential to examine the implication of the expression ‘unauthorized use of electricity’ as contained in Explanation [b] of Section 126 of the 2003 Act.

26. In order to explain these expressions, it will be necessary for us to refer to certain other provisions and the Regulations as well. These expressions have to be understood and given meaning with reference to their background and are incapable of being fairly understood, if examined in isolation. It is always appropriate to examine the words of a statute in their correct perspective and with reference to relevant statutory provisions.

27. The expression 'unauthorized use of electricity' on its plain reading means use of electricity in a manner not authorized by the licensee of the Board. 'Authorization' refers to the permission of the licensee to use of electricity', subject to the terms and conditions for such use and the law governing the subject. To put it more aptly, the supply of electricity to a consumer is always subject to the provisions of the 2003 Act, State Acts, Regulations framed there under and the terms and conditions of supply in the form of a contract or otherwise. Generally, when electricity is consumed in violation of any or all of these, it would be understood as 'unauthorized use of electricity'. But this general view will have to be examined in the light of the fact that the legislature has opted to explain this term for the purposes of Section 126 of the 2003 Act. The said provision, along with the Explanation, reads as under:-

> **"126. Assessment. –** (1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorized use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.
>
> (2) The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.
>
> (3) The person, on whom an order has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person.
>
> (4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him:
>
> (5) If the assessing officer reaches to the conclusion that unauthorized use of electricity has taken place, the assessment shall

be made for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorized use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection,;

(6) The assessment under this section shall be made at a rate equal to twice the tariff applicable for the relevant category of services specified in sub-section (5).

Explanation : For the purposes of this section,--

(a) "assessing officer' means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;

(b) "unauthorized use of electricity' means the usage of electricity –
(i) by any artificial means; or

(ii) by a means not authorized by the concerned person or authority or licensee; or

(ii) through a tampered meter; or

(iv) for the purpose other than for which the usage of electricity was Authorized; or

(v) for the premises or areas other than those for which the supply of electricity was authorized."

28. The 'unauthorized use of electricity' means the usage of electricity by the means and for the reasons stated in sub-clauses (i) to (v) of clause (b) of Explanation to Section 126 of the 2003 Act. Some of the illustratively stated circumstances of 'unauthorized use' in the section cannot be construed as exhaustive. The 'unauthorized use of electricity' would mean what is stated under that Explanation as well as such other unauthorized user, which is squarely in violation of the above-mentioned statutory or contractual provisions.

29. The *Black's Law Dictionary (Eighth Edition)* defines 'unauthorized as 'done without the authority, made without actual, implied or apparent authority'. 'Unauthorized' is a concept well-recognized under different statutes, for example, under Section 31A of the Delhi Development Act, 1957 (the 'DDA Act') the authority has the power to seal the 'unauthorized' development, if the misuser of the premises would come within the ambit of

unauthorized development. But if such misuse does not come within the ambit of 'unauthorized development', such power is not available to the authority. Simplicitor misuse, therefore, may not fall within the ambit of unauthorized development under the provisions of the DDA Act. In M.C. Mehta v. Union of India ((2006) 3 SCC 391), this Court held that if the misuse was in violation of the permission, approval or sanction or in contravention of any conditions, subject to which the said permission/approval has been granted in terms of Section 30 of the DDA Act, then it will be 'unauthorized use'.

30. We have primarily referred to this case to support the reasoning that 'unauthorized development' is one which is contrary to a master plan or zonal development plan as was the case under the DDA Act. Just as the right to develop a property is controlled by the restrictions of law as well as the terms and conditions of the permission granted for that purpose, the use of electricity is similarly controlled by the statutory provisions and the terms and conditions on which such permission is granted to use the electricity.

31. The unauthorized use of electricity in the manner as is undisputed on record clearly brings the respondent under liability and in blame, within the ambit and scope of Section 126 of the 2003 Act. The blame is in relation to excess load while the liability is to pay on a different tariff for the period prescribed in law and in terms of an order of assessment passed by the assessing officer by the powers vested in him under the provisions of Section 126 of the 2003 Act.

32. The expression 'means' used in the definition clause of Section 126 of the 2003 Act can have different connotations depending on the context in which such expression is used. In terms of Black's Law Dictionary (Eighth Edition) page 1001, 'means' is – ' of or relating to an intermediate point between two points or extremes' and 'meaning' would be 'the sense of anything, but esp. of words; that which is conveyed'. The word ordinarily includes a mistaken but reasonable understanding of a communication. 'Means' by itself is a restrictive term and when used with the word 'includes', it is construed as exhaustive. In those circumstances, a definition using the term' means' is a statement of literal connotation of a term and the courts have interpreted 'means and includes' as an expression defining the section exhaustively. It is to be kept in mind that while determining whether a provision is exhaustive or merely illustrative, this will have to depend upon the language of the Section, scheme of the Act, the object of the Legislature and its intent.

33. 'Purposive construction' is certainly a cardinal principle of interpretation. Equally true is that no rule of interpretation should either be over-stated or over-extended. Without being over-extended or over-stated, this rule of interpretation can be applied to the present case. It points to the conclusion that an interpretation which would attain the object and purpose of the Act has to be given precedence over any other interpretation which may not further the cause of the statute. The development of law is particularly liberated both from literal and blinkered interpretation, though to a limited extent.

34. The precepts of interpretation of contractual documents have also undergone a wide ranged variation in the recent times. The result has been subject to one important exception to assimilate the way in which such documents are interpreted by judges on the common sense principle by which any serious utterance would be interpreted by ordinary life. In other words, the common sense view relating to the implication and impact of provisions is the relevant consideration for interpreting a term of document so as to achieve temporal proximity of the end result.

35. Another similar rule is the rule of practical interpretation. This test can be effectuatedly applied to the provisions of a statute of the present kind. It must be understood that an interpretation which upon application of the provisions at the ground reality, would frustrate the very law should not be accepted against the common sense view which will further such application.

36. Once the court decides that it has to take a purposive construction as opposed to textual construction, then the legislative purpose sought to be achieved by such an interpretation has to be kept in mind. We have already indicated that keeping in view the legislative scheme and the provisions of the 2003 Act, it will be appropriate to adopt the approach of purposive construction on the facts of this case. We have also indicated above that the provisions of Section 126 of the 2003 Act are intended to cover the cases over and above the cases which would be specifically covered under the provisions of Section 135 of the 2003 Act.

37. In other words, the purpose sought to be achieved is to ensure stoppage of misuse/unauthorized use of the electricity as well as to ensure prevention of revenue loss. It is in this background that the scope of the expression 'means' has to be construed. It we hold that the expression 'means' is exhaustive and cases of unauthorized use of electricity are restricted to the ones stated under Explanation (b) of Section 126 alone, then it shall defeat the very purpose of the 2003 Act, in as much as the

different cases of breach of the terms and conditions of the contract of supply, regulations and the provisions of the 2003 Act would escape the liability sought to be imposed upon them by the Legislature under the provisions of Section 126 of the 2003 Act. Thus, it will not be appropriate for the courts to adopt such an approach. The primary object of the expression 'means' is intended to explain the term 'unauthorized use of electricity' which, even from the plain reading of the provisions of the 2003 Act or on a common sense view cannot be restricted to the examples given in the Explanation. The Legislature has intentionally omitted to use the word 'includes' and has only used the word 'means' with an intention to explain inter alia what an unauthorized use of electricity would be. It must be noticed that clause (iv) of Explanation (b) and sub-Section (5) of Section 126 of the 2003 Act were both amended/substituted by the same amending Act 26 of 2007, with a purpose and object of preventing unauthorized use of electricity not amounting to theft of electricity within the meaning of Section 135 of the 2003 Act. This amendment, therefore, has to be given its due meaning which will fit into the scheme of the 2003 Act and would achieve its object and purpose.

38. The expression 'means' would not always be open to such a strict construction that the terms mentioned in a definition clause under such expression would have to be inevitably treated as being exhaustive. There can be a large number of cases and examples where even the expression 'means' can be construed liberally and treated to be inclusive but not completely exhaustive of the scope of the definition, of course, depending upon the facts of a given case and the provisions governing that law. In the case of K.V. Muthu v. Angammuthu Ammal ((1997)2 SCC 53), this Court was dealing with a case under the Tamil Nadu Rent Act and the expression 'member of his family' as defined under Section 2(6-A) of the Act. Section 2(6-A) provides that 'member of his family' in relation to a landlord means his spouse, son, daughter, grand-child or dependent parents. If the principle of construction advanced by the learned counsel appearing for the respondent is to be accepted, then even in that case, the Court could not have expanded the expression 'members of his family' to include any other person than those specifically mentioned under that definition. The definition and the expression 'means', if construed as exhaustive would necessarily imply exclusion of all other terms except those stated in that Section but this Court, which adopting the principle of purposive construction, came to the conclusion that even a foster son, who is obviously not the real son or direct descendant of a person, would be included. This Court, observing that there was consensus in precedent that the word 'family' is a word of great flexibility and is capable of different meanings, held as under :

> "While interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted.
>
> Where the definition or expression, as in the instant case, is preceded by the words "unless the context otherwise requires", the said definition set out in the section is to be applied and given effect to but this rule, which is the normal rule may be departed from if there be something in the context to show that the definition could not be applied."

39. Another comparable example of such interpretation by this Court can be traced out in the case of Union of India v. Prabhakaran Vijaya Kumar & Ors. ((2008) 9 SCC 527) wherein it was dealing with the provisions of Section 123 (c) of the Railways Act, 1989 which read as under :

> "123 (c) "untoward incident" means – (1) (i) the commission of a terrorist act within the meaning of sub- section (1) of section (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ; or
>
> (ii) the making of a violent attack or the commission of robbery or dacoity; or
>
> (iii) the indulging in rioting, shoot- out or arson, by any person in or on any train carrying passengers, or in a waiting hall, cloak room or reservation or booking office or on any platform or in any other place within the precincts of a railway station; or
>
> (2) the accidental falling of any passenger from a train carrying passengers."

40. As is obvious from the bare reading of the above provision, the provision used the expression 'untoward incident means' and under clause (2) of that provision "accidental falling of any passenger from a train carrying passengers' is included. If it was to be understood as an absolute rule of law that the use of the term 'means' unexceptionally would always require an exhaustive interpretation of what is stated in or can be construed to that provision, then a person who was climbing on the train which was carrying passengers and who meets with an accident, would not be covered. However, this Court, while repelling this contention, held that by adopting a

restrictive meaning to the expression 'accidental falling of a passenger from a train carrying passengers' in Section 123 (c) of the Railways Act, 1989, this Court would be depriving a large number of railway passengers from receiving compensation in railway accidents. Treating the statute to be a beneficial piece of legislation, this Court applied purposive interpretation, while observing as under :

> " No doubt, it is possible that two interpretations can be given to the expression "accidental falling of a passenger from a train carrying passengers", the first being that it only applies when a person has actually got inside the train and thereafter falls down from the train, while the second being that it includes a situation where a person is trying to board the train and falls down while trying to do so. Since the provision for compensation in the Railways Act is a beneficial piece of legislation, in our opinion, it should receive a liberal and wider interpretation and not a narrow and technical one. Hence, in our opinion the latter of the abovementioned two interpretations i.e. the one which advances the object of the statute and serves its purpose should be preferred vide Kunal Singh v. Union of India ((2003) 4 SCC 524 para 9), B.D. Shetty v. Ceat Ltd. ((2002) 1 SCC 193 – para 12) and Transport Corpn. Of India v. ESI Corpn. ((2000) 1 SCC 332)".

41. The above judgments clearly support the view that we have taken with reference to the facts and law of the present case. It cannot be stated as an absolute proposition of law that the expression "means" wherever occurring in a provision would inevitably render that provision exhaustive and limited. This rule of interpretation is not without exceptions as there could be statutory provisions whose interpretation demands somewhat liberal construction and require inclusive construction. An approach or an interpretation which will destroy the very purpose and object of the enacted law has to be avoided. The other expressions used by the Legislature in various sub-clauses of Explanation (b) of Section 126 of the 2003 Act are also indicative of its intent to make this provision wider and of greater application. Expressions like 'any artificial means', 'by a means not authorized by the licensee' etc. are terms which cannot be exhaustive even linguistically and are likely to take within their ambit what is not specifically stated. For example, 'any artificial means' is a generic term and so the expression 'means' would have to be construed generally. This Court in the case of Eureka Forbes Ltd. v. Allahabad Bank ((2010) 6 SCC 193), while examining the interpretation and application of the word 'debt', held that it was a generic term and, thus, of wide amplitude :

"50. In this background, let us read the language of Section 2(g) of the Recovery Act. The plain reading of the Section suggests that legislature has used a general expression in contra distinction to specific, restricted or limited expression. This obviously means that, the legislature intended to give wider meaning to the provisions. Larger area of jurisdiction was intended to be covered under this provision so as to ensure attainment of the legislative object, i.e. expeditious recovery and providing provisions for taking such measures which would prevent the wastage of securities available with the banks and financial institutions.

51. We may notice some of the general expressions used by the framers of law in this provision:

a) *any liability* ;

b) claim as due from *any person* ;

c) during the course of any *business activity* undertaken by the Bank;

d) where secured or unsecured;

e) and lastly *legally* recoverable.

52. All the above expressions used in the definition clause clearly suggest that, expression 'debt' has to be given general and wider meaning, just to illustrate, the word 'any liability' as opposed to the word 'determined liability' or 'definite liability' or 'any person' in contrast to 'from the debtor'. The expression 'any person' shows that the framers do not wish to restrict the same in its ambit or application. The legislature has not intended to restrict to the relationship of a creditor or debtor alone. General terms, therefore, have been used by the legislature to give the provision a wider and liberal meaning. These are generic or general terms. Therefore, it will be difficult for the Court even on cumulative reading of the provision, to hold that the expression should be given a narrower or restricted meaning. What will be more in consonance with the purpose and object of the Act is to give this expression a general meaning on its plain language rather than apply unnecessary emphasis or narrow the scope and interpretation of these provisions, as they are likely to frustrate the very object of the Act."

42. The expressions 'means', 'means and includes' and 'does not include' are expressions of different connotation and significance. When the

Legislature has used a particular expression out of these three, it must be given its plain meaning while even keeping in mind that the use of other two expressions has not been favoured by the Legislature. To put it simply, the Legislature has favoured non-use of such expression as opposed to other specific expression. In the present case, the Explanation to Section 126 has used the word 'means' in contradistinction to 'does not include' and/ or 'means and includes'. This would lead to one obvious result that even the Legislature did not intend to completely restrict or limit the scope of this provision.

43. Unauthorized use of electricity cannot be restricted to the stated clauses under the explanation but has to be given a wider meaning so as to cover cases of violation of terms and conditions of supply and the regulations and provisions of the 2003 Act governing such supply. "Unauthorized use of electricity' itself is an expression which would, on its plain reading, take within its scope all the misuse of the electricity or even malpractices adopted while using electricity. It is difficult to restrict this expression and limit its application by the categories stated in the explanation. It is indisputable that the electricity supply to a consumer is restricted and controlled by the terms and conditions of supply, the regulations framed and the provisions of the 2003 Act. The requirement of grant of licence itself suggests that electricity is a controlled commodity and is to be regulated by the regulatory authorities. If a person unauthorisedly consumes electricity, then he can certainly be dealt with in accordance with law and penalties may be imposed upon him as contemplated under the contractual, regulatory and statutory regime. The Orissa Electricity Regulatory Commission, in exercise of its powers under Section 181 (2) (t), (v), (w) and (x) read with Part VI of the 2003 Act, Orissa Electricity Reforms Act, 1995 and all other powers enabling it in that behalf, made the regulations to govern distribution and supply of electricity and procedure thereof such as system of billing, modality or payment, the powers, functions and applications of the distribution licenses form for supply and/or suppliers and the rights and obligations of the consumers. These were called 'Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 (hereinafter referred to as 'Conditions of Supply) vide notification dated 21st May, 2004. The Agreement has been placed on record. This Agreement was undisputedly executed between the parties. Clause (2) of the Agreement deals with Conditions of Supply. It states that consumer had obtained and perused a copy of the Grid Corporation of Orissa Ltd. (General Conditions of Supply) Regulations, 1995, understood its content and undertook to observe and abide by all the terms and conditions stipulated therein to the extent they are applicable to him. The respondent was a

consumer under the 'medium industry category'. Clause (A) of the terms and conditions applicable to medium industry category reads as under :

> "This tariff rate shall be applicable to supply of power at a single point for industrial production purposes with contract demand/connected load of 22 KV and above up to but excluding 110 KVA where power is generally utilized as a motive force."

44. Minimum energy charges are to be levied with reference to 'contract demand' at the rate prescribed under the terms and conditions. These clauses of the Agreement clearly show that the charges for consumption of electricity are directly relatable to the sanctioned/connected load and also the load consumed at a given point of time if it is in excess of the sanctioned/connected load. The respondent could consume electricity up to 110 KVA but if the connected load exceeded that higher limit, the category of the respondent itself could stand changed from 'medium industry' to 'large industry' which will be governed by a higher tariff.

45. Chapter VII of the Conditions of Supply classifies the consumers into various categories and heads. The electricity could be provided for a domestic, LT Industrial, LT/HT Industrial, Large Industry, Heavy Industries and Power Intensive Industries, etc. In terms of Regulation 80, the industry would fall under LT/HT category, if it relates to supply for industrial production with a contract demand of 22 KVA and above but below 110 KVA. However, it will become a 'large industry' under Regulation 80(10) if it relates to supply of power to an industry with a contract demand of 110 KVA and above but below 25,000 KVA. Once the category stands changed because of excessive consumption of electricity, the tariff and other conditions would stand automatically changed. The licensee has a right to reclassify the consumer under Regulation 82 if it is found that a consumer has been classified in a particular category erroneously or the purpose of supply as mentioned in the agreement has changed or the consumption of power has exceeded the limit of that category etc. The Conditions of Supply even places a specific prohibition on consumption of excessive electricity by a consumer. Regulation 106 of the Conditions of Supply reads as under :

> "No consumer shall make use of power in excess of the approved contract demand or use power for a purpose other than the one for which agreement has been executed or shall dishonestly abstract power from the licensee's system."

46. On the cumulative reading of the terms and conditions of supply, the contract executed between the parties and the provisions of the 2003 Act, we have no hesitation in holding that consumption of electricity in excess of the sanctioned/connected load shall be an 'unauthorized use' of electricity in terms of Section 126 of the 2003 Act. This, we also say for the reason that overdrawal of electricity amounts to breach of the terms and conditions of the contract and the statutory conditions, besides such overdrawal being prejudicial to the public at large, as it is likely to throw out of gear the entire supply system,, undermining its efficiency, efficacy and even increasing voltage fluctuations. In somewhat similar circumstances, where the consumer had been found to be drawing electricity in excess of contracted load and the general conditions of supply of electricity energy by the Board and clause 31(f) of the same empowered the Board to disconnect supply and even levy higher charges as per the tariff applicable, this Court held that such higher tariff charges could be recovered. While noticing the prejudice caused, the Court in the case Bhilai Rerollers & Ors. V. M.P. Electricity Board & Ors. ((2003) 7 SCC 185), held as under :

> " 21. The respondent-Board, therefore, is entitled to raise the demand under challenge since such right has been specifically provided for and is part of the conditions for supply and particularly when such drawal of extra load in excess of the contracted load is bound to throw out of gear the entire supply system undermining its efficiency, efficacy not only causing stress on the installations of the Board but considerably affect other consumers who will experience voltage fluctuations. Consequently, we see no merit in the challenge made on behalf of the appellants. The appeals, therefore, fail and shall stand dismissed but with no costs."

47. Similar view was taken by this Court in the case of Orissa State ***Electricity Board & Anr. V. IPI Steel Ltd. & Ors. ((1995) 4 SCC 328).***

48. It will also be useful to notice that certain malpractices adopted by the consumer for consuming electricity in excess of the contracted load could squarely fall within the ambit and scope of Section 126 of the 2003 Act as it is intended to provide safeguards against pilferage of energy and malpractices by the consumer. The Regulations framed in exercise of power of subordinate legislation or terms and conditions imposed in furtherance of statutory provisions have been held to be valid and enforceable. They do not offend the provisions of the 2003 Act. In fact, the power to impose penal charges or disconnected electricity has been held not violative even of Article 14 of the Constitution of India. The expression 'malpractices' does not

find mention in the provisions under the 2003 Act but as a term coined by judicial pronouncements. Thus, the expression 'malpractices' has to be construed in its proper perspective and normally may not amount to theft of electricity as contemplated under Section 135 of the 2003 Act. Such acts/ malpractices would fall within the mischief of unauthorized use of electricity as stipulated under Section 126 of the 2003 Act. Cases of pilferage of electricity by adopting malpractices which patently may not be a theft would be the cases that would fall within the jurisdiction of the Board in furtherance to the terms and conditions of supply. Reference in this regard can be made to the judgment of this Court in the case of Hyderabad Vanaspathi Lts. V. A.P. State Electricity Board & Anr. ((1998) 4 SCC 471).

49. There is another angle from which the present case can be examined and obviously without prejudice to the other contentions raised. It is a case where, upon inspection, the officers of the appellant found that respondent was consuming 142 KVA of electricity which was in excess of the sanctioned load. To the inspection report, the respondent had not filed any objection before the competent authority as contemplated under Section 126(3) and had approached the High Court. Limited for the purposes of these proceedings, excess consumption is not really in dispute. As stated above, the contentions raised by the respondent were to challenge the very jurisdiction of the concerned authorities. Consumption in excess of sanctioned load is violative of the terms and conditions of the agreement as well as of the statutory benefits. Under Explanation (b)(iv), 'unauthorized use of electricity' mans if the electricity was used for a purpose other than for which the usage of electricity was authorized. Explanation (b)(iv), thus, would also cover the cases where electricity is being consumed in excess of sanctioned load, particularly when it amounts to change of category and tariff. As is clear from the agreement deed, the electric connection was given to the respondent on a contractual stipulation that he would consume the electricity in excess of 22 KVA but not more than 110 KVA. The use of the negative language in the condition itself declares the intent of the parties that there was an implied prohibition in consuming electricity in excess of the maximum load as it would per se be also prejudiced. Not only this, the language of Regulations 82 and 106 also prescribe that the consumer is not expected to make use of power in excess of approved contract demand otherwise it would be change of user falling within the ambit of 'unauthorized use of electricity'. Again, there is no occasion for this Court to give a restricted meaning to the language of Explanation (b) (iv) of Section 126. According to the learned counsel appearing for the respondent, it is only the actual change in purpose of use of electricity and not change of category that would attract the provisions of Section 126 of the 2003 Act. The

contention is that where the 'electricity was provided for a domestic purpose and is used for industrial purpose or commercial purpose, then alone it will amount to change of user or purpose. The cases of excess load would not fall in this category. This argument is again without any substance and, in fact, needs to be noticed only to be rejected. We have already discussed in some detail above that the expressions of the Explanation to Section 126 are to be given a wider and amplified meaning so as to ensure the implementation of the provisions in contradistinction to defeating the very object of the 2003 Act. Without being innovative and while predicating, we only state the principles which have been authoritatively pronounced by this Court in different cases. In the case of Association of Industrial Electricity Users v. State of A.P. & Ors. ((2002) 3 SCC 711), this Court, while expressing that fixation of tariff in electricity or allied matters can hardly be a subject matter of judicial review. The courts would not venture to examine the tariff on merit and restrict its power of judicial review only to procedural matters that too where it is ex facie arbitrary. The Court rejecting the contention raised before it that Section 126 of the Andhra Pradesh Electricity Reforms Act does not envisage classification of consumers according to the purpose for which the electricity is used and held that the supply of electricity permits differentiation according to the consumer's load factor or power factor, total consumption of energy during the specified period, the time at which the supply is required and the need for cross-subsidisation or such tariff as is just and reasonable and such as a to promote economic efficiency in the supply and consumption of electricity. The tariff may also be such as to satisfy all other relevant provisions of the 2003 Act and the relevant conditions of the Agreement. Thus, there is a direct relation between the quantum of electricity demanded, supplied and tariff rate. The purpose, therefore, would include by necessary implication, the category under which the electricity supply is being provided by the licensee to the consumer. Still, in another case of Punjab State Electricity Board v. Vishwa Caliber Builders Private Ltd. ((2010) 4 SCC 593), this Court was primarily concerned with the question whether the ombudsman would have the jurisdiction to issue directions for regularization of unauthorized electricity. Answering the same in the negative and dealing with the question of excess load, this Court held as under :

> "The fact that the appellant could not release connection with a load of 2548 KW on account of non-availability of transformer necessary for transfer of 8 MVA load from 66 KV sub station, G.T. Road, Ludhiana had no bearing on the issue of consumption of electricity by the respondent beyond the sanctioned load,. Undisputedly, in terms of the request made by the respondent, the Chief Engineer had sanctioned connection on the existing system

with a load of 1500 KW, but the respondent used excess load to the tune of 481.637 KW and this amounted to unauthorized use of electrical energy."

50. The consistent view of this Court would support the proposition that the cases of excess load of consumption would be squarely covered under Explanation (b)(iv) of Section 126 of the 2003 Act. Once this factor is established, then the assessing officer has to pass the final order of assessment in terms of Sections 126(3) to 126(6) of the 2003 Act.

Discussion of Question No.2 and 3

51. Under the procedure prescribed, the person (the consumer0 has to be served with the notice inviting him to file objections, if any, within the stipulated time in terms of Section 126(3) and the assessing officer is required to pass a final order within 30 days from the date of service of such order of provisional assessment. If the consumer does not pay the provisional assessment amount, as required under Section 126 (4) and file objections under Section 126(3), then after affording opportunity to the consumer, the assessing officer shall assess the amount and pass an order of final assessment, as stated in Section 126(5). Section 126(6) contemplates that the assessment under the Section shall be made at a rate equal to twice the tariff applicable for the relevant category of services specified in Sub-section (5). The reference to the category in Section 126(6) fully substantiate the view that we have taken, that change of category by consumption of excess load will automatically bring the defaulter within the mischief of Explanation to Section 126(6). Once the order of assessment is finally passed and is served upon the consumer, he is expected to pay the said charges unless, being aggrieved from such an order, he prefers an appeal under Section 127 of the 2003 Act. The appeal under Section 127 would lie only against the final order passed under Section 126 that too within 30 days of the said order. The appeal shall be filed, maintained and dealt with in accordance with the procedure specified in Section 127 of the 2003 Act. A bare reading of the provisions of Section 127 shows that it is the final order made under Section 126 which is appealable under Section 127 of the 2003 Act. In other words, issuance of a notice or a provisional order of assessment as may be made by the assessing officer in terms of sub-section (1) to sub-section (3) of Section 126 of the 2003 Act would not be the order against which an appeal would lie.

52. It may be noticed that admittedly the present respondent had not preferred any appeal against the provisional order of assessment dated 25th

July, 2009 and, in fact, had preferred a writ petition against the very issuance of a notice issued in terms of Sub-sections (2) and (3) of Section 126 of the 2003 Act. This brings us to the question as to what is the scope of jurisdiction under Article 226 of the Constitution of India in face of the provisions of Section 127 of the 2003 Act.

53. It is a settled canon of law that the High Court would not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India where statutory alternative remedy is available. It is equally settled that this canon of law is not free of exceptions. The courts, including this Court, have taken the view that the statutory remedy, if provided under a specific law, would impliedly oust the jurisdiction of the Civil Courts. The High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India can entertain writ or appropriate proceedings despite availability of an alternative remedy. This jurisdiction, the High Court would exercise with some circumspection in exceptional cases, particularly, where the cases involve a pure question of law or vires of an Act are challenged. This class of cases we are mentioning by way of illustration and should not be understood to be an exhaustive exposition of law which, in our opinion, is neither practical nor possible to state with precision. The availability of alternative statutory or other remedy by itself may not operate as an absolute bar for exercise of jurisdiction by the Courts. It will normally depend upon the facts and circumstances of a given case. The further question that would inevitably come up for consideration before the Court even in such cases would be as to what extent the jurisdiction has to be exercised.

54. Should the Courts determine on merits of the case or should it preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority ? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where it involves primary questions of jurisdiction or the matters which goes to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act. However, it should only be for the specialized Tribunal or the appellate authorities to examine the merits of assessment or even factual matrix of the case. It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above-stated class of cases. It is a settled principle that the

Courts/Tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, lex nil frustra facit, nor to enforce one which would be frivolous-lex neminem cogit ad vana seu inutilia- the law will not force any one to do a thing vain and fruitless. In other words, if exercise of jurisdiction by the Tribunal ex facie appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction. This issue is no longer res integra and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail. Suffices it to make a reference to the judgment of this Court in the case of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai ((1998) 8 SCC 1) where this Court was concerned with the powers of the Registrar of Trade Marks and the Tribunal under the Trade and Merchandise Marks Act, 1958 and exercise of jurisdiction by the High Court in face of availability of a remedy under the Act. This Court while referring to various judgments of this Court and specifying the cases where the alternative remedy would not bar the exercise of jurisdiction by the Court, held as under :-

> "14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of Habeas Corpus, Mandamus, prohibition, Qua Warranto and Certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".
>
> 15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement or any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.
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> XXX XXX XXX

19. Another Constitution Bench decision in Calcutta Discount Co. Ltd. v. ITO Companies Distt : (1961) 41 ITR 191 (SC) laid down :

> "Though the writ of prohibition or certiorari will not issue against an executive authority the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting without jurisdiction Under Section 34 Income Tax Act.
>
> 20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which command though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, socially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.
>
> 21. That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "Tribunal".

55. Even in the case of Union of India-V- State of Haryana ((2000) 10 SCC 482), this Court took the view that the question raised was a legal one which required determination as to whether provision of telephone connections and instruments amounts to sale and why the Union of India should not be exempted from payment of sales tax under the respective statutes. Holding that the question was fundamental in character and need not even be put through the mill of statutory appeals in hierarchy, this Court remitted the matter to the High Court for determination of the questions of law involved in that case.

56. Applying these principles to the facts of the present case, it is obvious that no statutory appeal lay against a provisional order of assessment and the respondents herein were required to file objections as contemplated under Section 126 (3) of the 2003 Act. It was only when a final order of

assessment was passed that the respondents could prefer a statutory appeal which admittedly was not done in the case in hand.

57. In the present case the High Court did not fall in error of jurisdiction in entertaining the writ petition but certainly failed to finally exercise the jurisdiction within the prescribed limitations of law for exercise of such jurisdiction. Keeping in view the functions and expertise of the specialized body constituted under the Act including the assessing officer, it would have been proper exercise of jurisdiction, if the High Court, upon entertaining the deciding the writ petition on a jurisdictional issue, would have remanded the matter to the competent authority for its, adjudication on merits and in accordance with law. In the facts of the present case, the High Court should have answered the question of law relating to lack of jurisdiction and exercise of jurisdiction in futility without traveling into and determining the validity of the demand which squarely fall within the domain of the specialized authority. The High Court should have remanded the case to the assessing officer with a direction to the respondent to file its objections including non-applicability of the tariff before the assessing authority and for determination in accordance with law.

58. Having, dealt with and answered determinatively the questions framed in the judgment, we consider it necessary to precisely record the conclusions of our judgment which are as follows:-

1. Wherever the consumer commits the breach of the terms of the Agreement, Regulations and the provisions of the Act by consuming electricity in excess of the sanctioned and connected load, such consumer would be 'in blame and under liability' within the ambit and scope of Section 126 of the 2003 Act.

2. The expression 'unauthorized use of electricity means' as appearing in Section 126 of the 2003 Act is an expression of wider connotation and has to be construed purposively in contrast to contextual interpretation while keeping in mind the object and purpose of the Act. The cases of excess load consumption than the connected load inter alia would fall under Explanation (b)(iv) to Section 126 of the 2003 Act, besides it being in violation of Regulations 82 and 106 of the Regulations and terms of the Agreement.

3. In view of the language of Section 127 of the 2003 Act, only a final order of assessment passed under Section 126(3) is an order appealable under Section 127 and a notice-cum-provisional assessment made under Section 126(2) is not appealable.

4. Thus, the High Court should normally decline to interfere in a final order of assessment passed by the assessing officer in terms of Section 126(3) of the 2003 Act in exercise of its jurisdiction under Article 226 of the Constitution of India.

5. The High Court did not commit any error of jurisdiction in entertaining the writ petition against the order raising a jurisdictional challenge to the notice/provisional assessment order dated 25th July, 2009. However, the High Court transgressed its jurisdictional limitations while traveling into the exclusive domain of the Assessing Officer relating to passing of an order of assessment and determining factual controversy of the case.

6. The High Court having dealt with the jurisdictional issue, the appropriate course of action would have been to remand the matter to the Assessing Authority by directing the consumer to file his objections, if any, as contemplated under Section 126(3) and require the Authority to pass a final order of assessment as contemplated under Section 126 (5) of the 2003 Act in accordance with law.

59. For the reasons afore-recorded, the judgment of the High Court is set aside and the matter is remanded to the Assessing Officer to pass a final order of assessment expeditiously, after providing opportunity to the respondent herein to file objections, if any, to the provisional assessment order, as contemplated under Section 126(3) of the 2003 Act.

60. The appeal is allowed in the above terms, while leaving the parties to bear their own costs.

Appeal allowed.

2012 (I) ILR- CUT- 589

V.GOPALA GOWDA, CJ.

MACA NO.513 OF 2003 (Dt.21.10.2011)

K. KALYANI SUBUDHI & ORS. ……..Appellants.

.Vrs.

UNION OF INDIA ……Respondent.

A. **MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – S.168.**

Contributory negligence – Apportionment – Deceased Scooterist coming from the lane to the main road – I.O. who conducted investigation opined negligence on the part of the driver of the offending vehicle.

Held, apportioning of negligence on the part of the deceased scooterist reduced to 40% from 50% as fixed by the Tribunal. (Para 6)

B. **MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) - S. 168.**

Multiplier – Deceased was aged about 45 years at the time of death as borne out from the Post Mortem report – Tribunal applied only 12 multiplier which is contrary to the decision of the apex Court – Held, as per the IInd Schedule of the M.V. Act, 1988, 15 is the appropriate multiplier. (Para 9)

C. **MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – S.168.**

Compensation – Deceased was a scientist aged about 45 years at the time of death – He had another 15 years of service and there would have been three revision of pay scales. His future prospects should be taken in to Consideration while granting Compensation.

As per the law laid down by the Apex Court, addition in income for future prospects would be as follows :

(a) An addition of 50% of actual salary to the actual salary income of deceased towards future prospects where the deceased had a permanent job and was below 40 years.

(b) Addition should be only 30% if the age of the deceased was 40 to 50 years.

In the present case the deceased was aged about 45 years at the time of death and his actual salary was Rs.17,606/- - As per his age 30 % would be added to the actual income towards future prospects which comes to Rs.5281-80 – Held, his monthly income comes to Rs.22,888/-. (Para 7,8)

Case laws Referred to:-

1.AIR 2009 SC 3104 : (Sarla Verma & Ors.-V-Delhi Transport Corporation & Anr.)
2.1993 (1) TAC 402 : (Punjab Rowdways, Hoshiarpur & Ors.-V-Smt.Satya Devi & Ors.).
3.1994(1) TAC. 89 : (Dr.(Mrs.) Sudha Nangia & etc.-V-Ibrahim etc.)
4.1996(2) TAC. 286(SC) : (U.P.S.R.T.C. & Ors.-V-Trilok Chandra & Ors.)
5.AIR 1994 SC 163 : (General Manger, Kerala Road Transport Corporation, Trivandrum-V- Mrs. Susama Thomas & Ors.)

For Appellant - M/s. A.K.Choudhury, K.K.Das.
For Respondent - Mr. S.K.Das, A.S.C. (Central)

V.GOPALA GOWDA, C.J. This appeal is filed by the claimants as they are aggrieved of the finding recorded at paragraph-11 & 12 reducing the compensation by 50%, from ₹ 21,24,336/- to ₹10,62,168/- holding both the driver of the offending vehicle and deceased negligent in answering the contention issue no.3 regarding contributory negligence.

Mr. Choudhury, learned counsel for the appellants contended that the learned M.A.C.T. has not properly appreciated the undisputed fact that the deceased was a scientist and was aged about 45 years at the time of his death. The deceased had another fifteen years of long tenure of service. During that period, he would have got promotion. There would have been revision of pay scale at least for thrice. If he would have been alive, the salary must have been doubled. Therefore, determining the monthly salary of the deceased at ₹17,606/- is wrong.

2. In support of his contention he has placed reliance upon the decision of the apex Court in the case of Sarla Verma and others v. Delhi Transport Corporation and another, AIR 2009 SC 3104. In paragraph-15 thereof principle has been laid down as to what could be the annual income to be taken for determining the just and reasonable compensation in respect of a person who is earning a stable salary out of his public employment. If that principle is applied, according to the learned counsel for the appellant, after

deducting 1/3rd, out of ₹ 17,606/-, it would be ₹ 11,735/- which amount is to be added for the purpose of taking the monthly income to determine the annual income which will be the correct multiplier and it should be applied by the Tribunal. As the M.A.C.T. has applied only 12 as the multipliler, the same is contrary to the decision of Sarla Verma (supra) as well as to the second schedule to the Motor Vehicles Act, 1988. In said judgment a comparative table has been provided at paragraph-19 regarding the multiplier applied in different cases with reference to the second schedule to the Motor Vehicles Act, 1988. Mr. Choudhury submits that the award in so far as finding on the question of contriburoty negligence has been apportioned at 50%. The same being not correct, liable to set aside and the compensation on the correct salary structure is to be awarded on the basis of the multiplier applied in the earlier case. Therefore, the compensation would have been ₹ 40,12,920/-.

3. Mr. Das, learned counsel appearing for the respondent sought to justify the finding on the contentious issue no.3 holding that there is negligence both on the part of the driver of the offending vehicle and the deceased as the deceased was coming from the by-lane to the main road, he ought to have been more careful while taking left hand side curve to the main road. The said finding of the Tribunal is supported by the evidence of P.W.1 driver of the offending vehicle. He has stated that he had applied brake of the bus, for which it skidded for about 5 feet which goes to show that he was driving the bus in a low speed in the crucial juncture, the meeting point of the lane and the main road. He has further deposed that the deceased scooterist did not wear a helmet. If would have wore the helmet, even accident would have occurred, there would not have been severe head injury and the deceased scooterist would not have succumbed to the said injury. Therefore, Mr. Das submitted that the said finding is based on proper appreciation of the evidence on record.

Mr. Das further submitted that the learned Presiding Officer of the Tribunal has accepted the evidence of the interested witness-P.W.1-the driver of the offending vehicle including the evidence of P.W.2 who is an eye witness to the accident though he is not a charge-sheeted witness. Further the Tribunal had not considered the charge-sheet filed by the Investigating Officer after conducting the investigation and had not examined the report of the M.V.I. (Ext.3). He further submitted that there being negligence on the part of the deceased scooterist, apportionment of contributory negligence at 50% is on the higher side and it should be 25% which should be taken by the Tribunal and on that basis, just and reasonable compensation would

have been awarded. In support of his contention he has placed reliance upon the decisions of the Division Bench of Himachal Pradesh High Court in the case of Punjab Roadways, Hoshiarpur and others v. Smt. Satya Devi and others, 1993(1) T.A.C. 402 and Delhi High Court in the case of Dr. (Mrs.) Sudha Nangia and etc. v. Ibrahim etc., 1994(1) T.A.C. 89. Mr. Das has also placed reliance upon the affidavit sworn by one Sri Prafulla Kumar Mohapatra, Scientist 'F', Joint Director in Proof and Experimental Establishment, Chandipur, Balasore (Orissa) who has stated at paragraph-4 as thus :

"That after award dated 13.6.2003 was passed there was a settlement between the appellants and respondent and on 14.7.2003 the respondent paid a sum of ₹12,85,223/- to Smt. K. Kalyani Subudhi, Appellant No.1 towards the awarded amount and in token of full and final settlement of the learned Tribunal's award dated 13.6.2003. That the appellant received the amount in shape of two A/C payee drafts bearing No. 711940 dated 12/07/2003 for ₹ 3,85,223/- and No. 711941 dated 12.7.2003 for ₹ 9,00,000/-. The appellants also filed a Memo-cum-Receipt dated 14.7.2003 before the Ist MACT-cum-District Jude, Berhampur in MAC No. 224/2001 in token of such payment specifically admitting that the above payment is towards the final settlement of all claims arising out of the award dated 13.6.2003 of the learned Tribunal. A copy of the Receipt dated 14.7.2003 is enclosed herewith as Annexure-A."

In view of the above settlement, the respondent respectfully submits that the present appeal is not maintainable.

4. Relying on the contention of the affidavit, Mr. Das prays for dismissal of the appeal contending that the awarding compensation and apportionment of negligence is perfectly based on the facts and legal evidence on record. The same does not call for any interference by this Court in exercise of its appellate jurisdiction.

5. With reference to the above said rival legal contentions the following points would arise for consideration :

(i) whether the finding on the question of negligence and apportioning 50% negligence on the part of the deceased scooterist, is legal and valid ?

(ii) if not legal and valid, what should be apportionment of contributory negligence on the part of the deceased scooterist ?

(iii) whether the compensation determined having regard to the undisputed fact that the deceased was a Scientist in Defence which is a stable employment taking the monthly income at ₹ 17,606/- on the date of death is just and reasonable. If it is not reasonable compensation, what should be the just and reasonable compensation ?

(iv) what award ?

6. The first point is required to be modified partially in favour of the appellants for the following reasons.

It is an undisputed fact that the accident took place on the fatal day of 16.11.2003 while the scooterist was coming from the lane to the main road. The evidence of P.W.2 has not been properly appreciated by the Tribunal for the reason recorded at paragraph-8 of the impugned award that he was not a charge-sheeted witness. To determine the contributory negligence on the part of the driver of the offending vehicle and the deceased scooterist, the Tribunal ought to have taken into consideration the documentary evidence, viz., the charge-sheet (Ext.3) in G.R. Case No. 1268/2000. The I.O. after conducting investigation, seeing the spot of accident and drawing the sketch of the scene of accident, has filed the charge-sheet against the driver of the offending vehicle opining negligence on the part of the driver. Non-consideration of the charge-sheet, the M.V.I. report, evidence of P.Ws.2-the eye witness, accepting the interested testimony of P.W.1-driver of the offending vehicle and apportioning the contributory negligence on the part of the deceased scooterist at 50%, is an erroneous approach on the part of the learned Member of the Tribunal and finding recorded on issue no.3 while apportioning negligence of the deceased at 50% is on the higher side. The same is required to be reduced for the reason that the P.W.1 has deposed that the scooterist was not wearing helmet. Therefore, there is no negligence on the part of the scooterist and the finding recorded on issue no.3 while apportioning negligence of the deceased at 50%, is not correct. Therefore, it would suffice for this Court to reduce the contributory negligence from 50% to 40% on the part of the scooterist. While entering from the lane negotiating towards his left side, he should have taken all possible care as to whether any vehicle is moving in the main road or not and not wearing helmet is one more important fact in this case to justify the finding recorded by the Tribunal that there is contributory negligence on the part of the scooterist deceased but it would suffice to fix the contributory negligence to 40% and not 50%. To that effect, the impugned judgment is modified. The second point is also answered.

7. The point nos. 3and 4 are required to be answered in favour of the appellant for the following reasons. It is an undisputed fact that the deceased was a Scientist and he was drawing ` 17,606/- as indicated in Ext.1-the salary certificate, which is not disputed by the respondent. But the Tribunal was not right in determining the annual income as he had another 15 years of service since he was of 45 years at the time of his death as borne out from the post-mortem report (Ext.4) and in these 15 years there would have been three revision of pay scales. Therefore, reliance is placed upon the decision of the Sarala Verma (supra) for the purpose of determining just and reasonable compensation. As per law laid down therein, addition in income for future prospects would be as follows :

(a) An addition of 50% of actual salary to the actual salary income of deceased towards future prospects where the deceased had a permanent job and was below 40 years.

(b) Addition should be only 30% if the age of the deceased was 40 to 50 years.

8. In the present case the deceased was aged about 45 years and at the time of death his actual salary was ₹17,606/-. As per decision of the Hon'ble Supreme Court 30% would be added to the actual income towards future prospects which comes to ₹ 5281.80. Hence the total comes to ₹ 17606 + ₹ 5281.80 = ₹ 22,888 as monthly income.

9. The Tribunal assessed the contribution to the family on the basis of "Unit system" relying upon the decision of the Supreme Court in the case of U.P.S.R.T.C. and ors. V. Trilok Chandra and others, 1996(2) T.A.C. 286(SC). The Tribunal held the total 11.5 nit including the deceased. On the basis of the monthly income of the deceased at ₹ 22,888 /-, and the share per Unit comes to ₹ 1990/- and monthly dependency/contribution comes to ₹ 1990 x 9.5 = ₹18,905 and annual dependency comes to ₹ 18,905 x 12 = ` 2,26,870/-**.** As the deceased was aged about 45 years, as per the IInd Schedule of the Motor Vehicle Act, 1988, 15 multiplier is to be applied and accordingly the compensation comes to ₹ 2,26,870.00 x 15 = ₹ 34,03,050.

10. Mr. Das submitted that full and final settlement of 12 lakh is received. The said contention cannot be accepted. The payment of the deposit amount cannot be accepted as full and final settlement particularly in view of the stand taken by the first appellant-the wife of the deceased that she has not accepted any receipt stating that she has accepted payment upon

deposit towards full and final settlement of the amount. Therefore, the appellants are entitled to the aforesaid enhanced amount of ` 34,03,050 with interest @ 7% from the date of application till the date of deposit or payment of the same.

11. It is noticed that there are three minor children and at her young age, the first appellant has lost her husband. Therefore, ₹ 30,000/- awarded by the Tribunal towards loss of consortium and other expenses, is on the lower side and it is a fit case for awarding another ₹ 20,000/- in view of the judgment of the apex Court in the **General Manager, Kerala Road Transport Corporation, Trivandrum v. Mrs. Susama Thomas and others**, *AIR 1994 SC 1631*. The said amount is added towards dependency. Therefore, the total amount of compensation would be ₹ 34,03,050 + ₹ 50,000/-, which comes to ₹ 34,53,050/-.

12. Since the contributory negligence is 60%. The appellants are entitled to 60% of the amount of ₹ 34,53,050/-along with interest as directed which shall be deposited before the Tribunal or paid by DD to the appellant no.1 on the same proportion as has been awarded by the Tribunal.

The MACA is disposed of accordingly.

Appeal disposed of.

2012 (I) ILR- CUT- 596

V.GOPALA GOWDA, CJ & ARUNA SURESH, J.

W.P.(C) NO.24906 OF 2011 (Dt.17.02.2012)

DR. DURGA PRASANNA CHOUDHURY … ….Petitioner.

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties.

A. ORISSA SUPERIOR JUDICIAL SERVICE RULES, 1963 – RULE 5,9.

The word "Most suitable" appeared in Rule 9(2) has not been defined under the Rules – From a conjoint reading of the Rules, 1963, it is evident that vacancies in the senior Branch are to be filled up by way of promotion on the basis of the recommendation made by the High Court from amongst the "most suitable" persons and accordingly the Government is to issue appointment orders – Held, if the service record of an officer in the junior Branch of the service is unblemished and he has the due seniority in the cadre and although he has been given his due promotion without any hindrance, such officer can be treated as the "most suitable" person for promotion to the senior Branch of the service – Since the petitioner fulfills such conditions, he ought to have been promoted to the senior Branch of the service as there were 17 vacancies in the said cadre during 2005 when his juniors were promoted. (Para 15)

B. SERVICE LAW– Fairness and transparency in public administration – All entries whether poor, fair, average, good or very good in the Annual Confidential Report (ACR) of the public servant must be communicated to him within a reasonable period so that he can make a representation for its upgradation – In this case adverse entries of the year 1999 ,2000 & 2001 has not been communicated to the petitioner, rather the same were made use against him. – Held, not granting promotion to the petitioner on the basis of the said adverse entries is unjust, unfair, unreasonable and violative of Art. 14 & 16 of the Constitution of India.

(Para 21,22,23)

C. CONSTITUTION OF INDIA, 1950 – ART.226.

Writ petition – Delay – High Court by applying judicial review power can condone such delay.

In this case seniority list of the year 2005 was challenged in 2011 – Petitioner diligently pursued his case by filing representations –

Since this Court has already recorded a finding that denial of promotion to the petitioner is unjust, unfair and unreasonable, it has to exercise its Judicial Review power to undo the injustice caused to him – Held, contention raised to dismiss the writ petition on the ground of delay is rejected. (Para 29)

D. SERVICE LAW – Adverse remark – No reason to make adverse remark as "average" by the Accepting Authority namely the promotion committee which is contrary to the ACR made by the Recommending Authority namely the Port Folio Judge in the absence of any adverse remark about his performance, integrity, honesty and knowledge of law, specifically, when the very same entry has been taken in to consideration for the purpose of giving promotion to the petitioner from the post of Civil Judge (Sr. Divn.) to Chief Judicial Magistrate – Held, remarks made by the Accepting Authority is not sustainable in law. (Para 18)

E. SERVICE LAW – Petitioner seeks promotion to the post of Additional District Judge (District Judge Cadre) and to the post of Selection Grade District Judge – Placement of O.P.3 to 13 in the Gradation list who are juniors to the petitioner – Deviation of the provisions in the Orissa Civil Service (criteria for promotion) Rules, 1992 read with Orissa Superior Judicial Service Rules, 1963 on the part of the committee which has been accepted by the Full Court – Instead of taking in to consideration the service record of the petitioner from the year 2000 to 2004 the service record from 1999 to 2003 has been considered – Accrediting the ratings of marks in the ACR of the officers was neither fallowed earlier to 2005 nor subsequent to that period – Held, procedure followed by the committee is bad in law and denying promotion to the petitioner is a clear case of unfair practice which has not been noticed by the Full Court while accepting the recommendation of the Committee. (para-17)

Case laws Referred to:-

1.AIR 2010 SC 706 : (Shiba Shankar Mohapatra & Ors.-V-State of Orissa)
2.2008(2)SCC 119 : (M.V.Thimmaiah & Ors.-V- Union Public Service Commission & Ors.)
3.1980(49) CLT 442 : (Ramesh Prasad Mohapatra-V-State of Orissa & Ors.)

4.AIR 1964 SC 72 : (S.Pratap Singh-V- State of Punjab)
5.1915 A.C. 372 : (Vatcher-V- Paull)
6.AIR 2008 SC 2513 : (Dev Dutt-V- Union of India)
7.AIR 1996 SC 1661 : (U.P.Jal Nigam & Ors.-V-Prabhat Chandra Jain)
8.(1992)2 SCC 598 : (Dehri Rohtas Light Railway Co.Ltd.-V-District Board, Bhojpur)
9.(2011)10 SCC 608 : (Royal Orchid Hotels Ltd, & Anr.-V-G.Jayarama Reddy & Ors.)

For Petitioner - M/s. J.K.Rath, Sr. Counsel along with Sri D.N.Nath, S.N.Rath & P.K.Rout.
For Opp.Parties - Mr. R.K.Mohapatra, Govt. Advocate(for O.Ps.1,2)
M/s. A.R.Swain, S.B.Mohanty (for O.P.10)
M/s. S.K.Das & Associates (for O.P.4)
M/s. D.Mohapatra & Associates (O.P.7)
M/s. S.K.Pattnaik & Associates (for O.P.8)

V.GOPALA GOWDA, C.J. Petitioner, who is functioning as Director of Orissa Judicial Academy in the cadre of District Judge of the Orissa Superior Judicial Service (Senior Branch), is before this Court seeking for issuance of a writ of mandamus directing the opposite parties 1 and 2 to extend the benefit of promotion to the post of Additional District Judge (District Judge Cadre) and to the post of Selection Grade District Judge with effect from the date the next juniors to him got the benefit of promotion to the said post as well as Selection Grade District Judge urging various facts and legal contentions. Petitioner has further sought for a direction to opp.parties 1 and 2 to place him above the opposite parties 3 to 13 in the Gradation List/ Civil List of the year 2006 prepared and circulated by opposite party no.2.

2. The brief facts, which are relevant for the purpose of appreciating the rival factual and legal contentions urged on behalf of parties to find out as to whether the petitioner is entitled to the relief as sought in this writ petition, are as follows:

3. Petitioner was recruited through a competitive examination conducted by the Orissa Public Service Commission and selected for appointment to the post of erstwhile Munsif, now designated as Civil Judge (Junior Division) on probation vide Law Department Notification No. 16132 dated 10th September, 1982 and this Court's notification No. 615/ H. dated 28th September, 1982 and joined in the said post on 11th October, 1982 forenoon under the judgeship of Cuttack. He had completed the probation period successfully and posted as J.M.F.C., Bhadrak in the erstwhile

judgeship of Balasore vide this Court's notification No. 941-A and 942-A dated 22nd December, 1982. The position of the petitioner as per the gradation list published by the competent authority on the basis of merit assigned to him by the Orissa Public Service Commission was at Sl.No. 170 of the Civil List of 1984. Opposite parties 3 to 13 were also recruited in the same year by the Orissa Public Service Commission and were placed below him in the merit list since their positions in the Civil List/ Gradation list of the year 1984 find place at Sl.Nos.171, 173, 175, 177, 178, 179, 182, 183, 185, 186 and 187. Therefore, opposite parties 3 to 13 were juniors to the petitioner so far as his seniority in service is concerned. Petitioner was promoted to Class-I (Junior) post, i.e., in the post of Sub-Divisional Judicial Magistrate vide notification No. 50 dated 30.01.1989. He was placed senior to the aforesaid opposite parties 3 to 13 in the cadre of Orissa Judicial Service, Class-I (Junior). The same is reflected in the Civil List published in the year 1992. Petitioner along with the opposite parties 3 to 13 were promoted to the post of Subordinate Judge, now designated as Civil Judge (Senior Division) with effect from 14th November, 1994 on the basis of seniority-cum-merit. Opposite parties 3 to 13 were promoted to the post of Subordinate Judge subsequent to that of the petitioner. In the Gradation list/ Civil list prepared by this Court in the year 2002, the name of the petitioner finds place at Sl.No.24 whereas the opposite parties 3 to 13 were placed below the petitioner, i.e., at Sl.Nos.25 to 39.

4. The next promotion from the post of Civil Judge (Senior Division) is Orissa Superior Judicial Service (Junior Branch) i.e., the post of Chief Judicial Magistrate, which is in the cadre of Senior Civil Judges. The Orissa Superior Judicial Service Rule, 1963 (hereinafter to be called as "Rules, 1963") was governing the field. Rule 10 of the said Rules, 1963 prescribes that the recruitment to the Junior Branch of the service shall be made from amongst the Subordinate Judges. Petitioner was promoted to the post of Chief Judicial Magistrate vide this Court's notification No. 517(A) dated 7th September, 2001 whereas the opposite parties 3 to 13 were promoted to the said post subsequent to that of the petitioner. The seniority list of Chief Judicial Magistrate reflected in the Gradation List/ Civil List of 2002 also indicates the placement of the petitioner in the said list at a higher position to that of opposite parties 3 to 13. Therefore, it clearly shows that petitioner was given promotion to the next higher post considering his merit as well as seniority and has been assigned in the Civil List prepared and circulated by this Court and therefore, petitioner was enjoying the promotional benefits without any difficulty.

5. It is also averred in the writ petition that petitioner carries a good service record to his credit and no adverse communication has been conveyed to him by this Court at any point of time. It is further emphasized that with due permission of this Court, petitioner submitted a thesis for acquiring Ph.D qualification and was awarded with a Ph.D degree in Law by Utkal University in the year 1999 and therefore, petitioner was having additional qualification such as LL.M and Ph.D Degree in law to his credit. When the petitioner was continuing in the said post with the same ranking in the Gradation List/ Civil List, i.e. higher ranking to that of opposite parties 3 to 13, the said officers though junior to him in the respective cadres of erstwhile Munsif {Civil Judge (Junior Division)} and in the post of Chief Judicial Magistrate were promoted to the post of Additional District Judge in the cadre of Orissa Superior Judicial Service (Senior Branch) (District Judge Cadre) ignoring the rightful claim of the petitioner without any rhyme or reason. It is his case that he possessed an unblemished career/ service record and without giving due weightage to the seniority and merit, opposite parties 3 to 13, who were juniors to him, have been given benefit of promotion to the next higher post, i.e., in the District Judge cadre Vide Home Department notification dated 29.8.2005. Though the petitioner made a query in the matter, but was not able to know the reason of non-consideration of his case for promotion. However after eleven months of the promotion of his juniors, he was promoted to the post of Additional District Judge (Fast Track Courts) vide Home Department Notification No. 30644 dated 22nd July, 2006 and this Court's notification No. 467/A dated 22nd of August, 2006 and joined in the said post at Nayagarh on 4th September, 2006 forenoon. Further, he has stated that on enquiry he came to know that about 17 nos. of regular posts of Additional District Judges were made available to be filled up by promotion from Orissa Superior Judicial Service (Junior Branch). However, opposite parties 3 to 8 were given the benefit of promotion to regular Additional District Judge post and opposite parties 9 to 11 were given promotion to the post of Ad hoc Additional District Judge and opposite parties 12 and 13 were given promotion to the post of Ad hoc Additional District Judge (Fast Track Courts), but petitioner though was senior to them, was ignored and was not given promotion to the regular post in the cadre of District Judge. Hence, he filed the writ.

6. A detailed statement of counter is filed by opposite party no.2 sworn in by the Special Officer (Admn.) of this Court traversing the petitioner's claim. The recruitment, appointment and seniority list of the erstwhile Munsif {Civil Judge (Junior Division)} and Sub-Judge {(Civil Judge (Senior Division)) and Chief Judicial Magistrate are not in dispute. It is also not in dispute that the opposite parties 3 to 13 have been promoted to the post of Additional

District Judge and Ad hoc Additional District Judge (Fast Track Courts) depriving the said promotional benefits to the petitioner taking into consideration the Annual Confidential Reports for the periods from 1999 to 2003. It is also further stated that the Committee has taken into consideration the grade assigned to the ACR rating of an officer in the following manner.

(a) Outstanding- 5
(b) Very good – 4
(c) Good - 3
(d) Average- 1
(e) Poor- 0

It is also admitted that the said procedure was only adopted for that year, i.e., 2005 and not earlier to that or subsequent to that period and further referred to certain aspects which are not germane to the issue regarding the conduct of the officer as the same do not reflect in the Annual Confidential Report. The said fact is evident from the subsequent action on the part of the High Court in promoting him to the same post in September, 2006 and there is no record that promotion to the post along with opposite parties 3 to 13 has been either denied or has been deferred.

7. Mr.J.K.Rath, learned Senior Counsel by filing a comparative chart showing the names of the officers, their AC.Rs. maintained during the year 1999 to 2004, submits that opposite party no.3 (Smt.V.Jayashree), opp.party no.12 (Shri G.P.Sahoo) and opp.party no.13 (Shri D.Chaulia), whose service record as per the remarks made by the Recommending Authority, namely, the Port Folio Judge and the remarks made by the Accepting Authority in the A.C.Rs. of 2001 is 'average' like that of the petitioner and they have been promoted on the basis of the evaluation of performance by adopting the credit assigned to the A.C.R. rating for five years, i.e., from 1999 to 2003, which was neither provided in the Rules, 1963 nor was followed prior to that period or subsequent thereto but only at the time of considering the case of the petitioner and opposite parties 3 to 13 for promotion to the cadre of District Judge was applied. Therefore, according to the petitioner, the said procedure followed by the Promotion Committee dated 20.07.2005 is not legal and valid and is in violation of Article 14 and 16 of the Constitution of India. Further, it is stated that no departmental proceeding or vigilance case or criminal case was pending against the petitioner at the time of consideration of his case for promotion to the next higher post, i.e, Additional District Judge in the District Judge cadre and besides, no adverse remark

has ever been communicated to him. Therefore, the petitioner was eligible to be considered for promotion to the post of Additional District Judge. It is further stated that the petitioner has been arbitrarily denied promotion by the said Committee by not recommending the case of the petitioner considering the ACR of the year 2001, which was recorded by it contrary to the recommendation made by the recommending authority, viz. Judge in-charge despite the fact that the recommending authority has recommended for promotion of the petitioner (to the post of Additional District Judge). Non-consideration of his claim and denying promotion to him on the basis of the recordings made in the ACR by the Committee contrary to the reporting officer and the recommending authority as 'average', without there being any material by resorting to an alien procedure of grade assigned to the A.C.R. rating of an officer, is bad in law.

8. Further, it is contended by Mr.Rath, learned Senior Counsel that as per Rule 9 of the Rules, 1963, since suitability of an officer of Junior Branch is required to be adjudged for promotion to the Senior Branch Service, the service records/ Annual Confidential Report pertaining to Junior Branch period is only required to be assessed for the purpose of finding out the most suitable candidate to be promoted. The petitioner and opposite parties 3 to 13 were promoted to the post of Chief Judicial Magistrate, i.e., from the cadre of Junior Branch of the service in the year 2001. Thereafter, the service record/ Annual Confidential Report of the petitioner vis-à-vis the aforesaid opposite parties 3 to 13 had to be examined after 2001 and not before that for the purpose of finding out most suitable person for promotion to the Senior Branch of the Service. Therefore, according to the petitioner, the entire process of promotion of the petitioner and others is a deviation to the statutory provisions provided under the Orissa Civil Service (Criteria for Promotion) Rule, 1992 (hereinafter to be referred to as "Rules, 1992") read with Rules, 1963 on the part of the Committee, which has been accepted by the Full Court without considering the relevant aspects and denial of promotion to the petitioner, who stands higher ranking than opposite parties 3 to 13, is bad in law and the procedure followed by the Committee is also bad in law and liable to be interfered with. Further, the petitioner during the course of argument prays to quash the endorsements communicated to him while rejecting his representations dated 9th March, 2007 and 22nd December, 2009 stating that he is not entitled for promotion to the post of Additional District Judge from the date his juniors have been promoted and placing him in the appropriate place in the Gradation List/ Civil List. Though no such prayer has been made, learned counsel for the petitioner further seeks to quash the procedure adopted by the Committee in evaluating the merit of the petitioner without there being any adverse remark against him

and granting the same relief to the juniors and similarly placed persons with that of the petitioner and not following the Rules, 1992 read with Rules, 1963 and following the procedure for evaluating the merit of the petitioner and depriving his legitimate right of promotion, which is in violation of Articles 14 and 16 of the Constitution of India and therefore, the petitioner is entitled for the relief.

9. Mr.R.K.Mohapatra, learned Government Advocate places reliance upon the decision of the Supreme Court in **Shiba Shankar Mohapatra and others v. State of Orissa** AIR 2010 SC 706, wherein the apex Court has held that seniority list which remains in existence for 3 to 4 years unchallenged, should not be disturbed and in case some one agitates the issue of seniority beyond this period, he has to explain the delay and laches in approaching the adjudicatory forum by furnishing satisfactory explanation. He further places reliance upon the decision of the Supreme Court in **M.V.Thimmaiah and others v. Union Public Service Commission and others**, 2008(2) SCC 119, wherein the Supreme Court has held as follows :

> "……Normally, the recommendations of the Selection Committee cannot be challenged except on the ground of mala fides or serious violation of the statutory rules. The courts cannot sit as an Appellate Authority to examine the recommendations of the Selection Committee like the court of appeal. This discretion has been given to the Selection Committee only and courts rarely sit as a court of appeal to examine the selection of the candidates nor is the business of the court to examine each candidate and record its opinion….. "

10. The accepting authority of the Annual Confidential Report, namely, the Promotion Committee has not recommended for his promotion on the basis of the remarks made by it for the years 1999, 2000 and 2001 as 'average' and also accredit the rating marks awarded to the officers whose case fell for consideration on various aspects indicated above.

11. Mr.Mohapatra has also placed reliance to the Full Bench decision of this Court in **Ramesh Prasad Mohapatra v. State of Orissa and others,** 1980(49) CLT 442 regarding the aspects to be taken into consideration for evaluating the Annual Confidential Report for the purpose of promotion. The Full Bench of this Court in paragraph 10 observed thus:

> "…… When the question of promotion arises, the consideration becomes very different. The totality of the service

> record is taken into account for judging comparative merit and for that purpose the total effect of service is taken into account. No reasoning is necessary to support the proposition that between an officer with a clean record throughout and another with a bad record in the beginning for several years and equal record with the other officer for the subsequent period, that officer who has a clean record throughout would stand a better chance of promotion. ……..”

Further, he has vehemently contended that taking note of Rule 9 of the Rules, 1963 read with Rules, 1992, when the Committee has assessed the Annual Confidential Reports of the relevant period of the officers for the purpose of examining the claim for promotion to the post of Additional District Judge, the same need not be interfered with by this Court in exercise of its judicial review power. Therefore, he submitted that no case is made out by the petitioner for grant of reliefs as prayed. Hence, he has prayed for dismissal of the writ petition.

12. Mr.D.Mohapatra, learned counsel appearing for opposite party no.7, Mr.S.K.Patnaik, appearing for opp.party no.8, Mr.S.K.Das for opp.party no.11 and Mr.A.R.Swain for opp.party no.10 while adopting the submissions made by the learned Government Advocate submit that no relief is sought for against the aforesaid opposite parties to quash their appointments by way of promotion.

13. With reference to the aforesaid rival factual and legal contentions, this Court is required to examine

(i) whether the petitioner is entitled for the relief by issuing a direction to opposite party no.2 to extend the benefit of promotion to the post of Additional District Judge (District Judge cadre) and grant of Selection Grade with effect from the date the next juniors to him got promotion to the said cadre and to the Selection Grade District Judge post ?

(ii) whether the petitioner is entitled for the relief of quashing the endorsements issued by the High Court rejecting his representation though no prayer in this regard is made ?

(iii) Whether the writ petition has to be dismissed on the ground of delay and laches ?

(iv) What order?

14. The first point is required to be answered in favour of the petitioner for the following reasons.

15. The Orissa Superior Judicial Service Rules, 1963, (hereinafter to be referred to as "Rules, 1963") framed under Article 309 of the Constitution of India was governing the field for appointment to the post of Additional District Judge. Rule 5 of the said Rules provides that recruitment to the Senior Branch of the service is to be made (a) by way of direct recruitment; and (b) by promotion of officers from Junior Branch of the service. Rule 9(1) of the said Rules prescribes that whenever a vacancy in the Senior Branch of the service is decided to be filled up by way of promotion, the Government shall fill up the same after due recommendation of this Court in accordance with sub-Rule (2). Sub-rule (2) provides that the High Court shall recommend for appointment to such vacancy, an officer of the Junior Branch of the service who in the opinion of the High Court is the most suitable for the purpose of appointment to the post of Additional District Judge by way of promotion, provided that if for any reason, Government is unable to accept the recommendation as aforesaid, they may call for further recommendations from the High Court to fill up the vacancy. From a conjoint reading of the Rules, 1963, it is evident that vacancies in the Senior Branch are to be filled up by way of promotion on the basis of the recommendation made by the High Court from amongst the most suitable persons and accordingly, the Government is to issue appointment orders. If the service record of an officer in the Junior Branch of the service is unblemished and he has the due seniority in the cadre and all through he has been given his due promotion without any hindrance, such officer can be treated as the most suitable person for promotion to the Senior Branch of the Service. Since the petitioner fulfills such conditions, he ought to have been promoted to the Senior Branch of the service as there were 17 vacancies in the said cadre in the year 2005 when his juniors were promoted. The seventeen persons who were promoted to the post of Additional District Judges out of whom two persons were senior to the petitioner and some other persons have retired on attaining the age of superannuation excepting eleven persons (opposite parties 3 to 13), who are arrayed as opposite parties in these proceedings were promoted to the Senior Branch of the Service being juniors to the petitioner ignoring his rightful claim. On perusal of the Rules, 1963, we find that the words "the most suitable" are not defined. The practice and procedure which has been followed by this Court for adjudging an officer most suitable for the purpose of promotion to the Senior Branch of service from the year 1963 till the promotion given to the juniors of the petitioner, i.e., opposite parties 3 to 13, i.e., in the year 2005 had to be followed. The petitioner, who has got periodical promotion from the cadre of erstwhile

Munsif (Civil Judge (Junior Division)) to the Sub-Judge {Civil Judge (Senior Division)} and from the post of Sub-Judge {(Civil Judge (Senior Division)} to the post of Chief Judicial Magistrate, due consideration was given to the seniority as well as merit of the petitioner on the recommendation made by the High Court from time to time and at no point of time his juniors have superseded the petitioner in any promotional post.

16. To appreciate the submissions made on behalf of the respective parties, we called for the file relating to constitution of Transfer Committee and Promotion Committee by the Full Court from the registry. We have gone through the said file and found that the Full Court in its meeting held on 31.7.2004 resolved as follows :

> "It is resolved that henceforth matters relating to promotion and transfer and posting of Judicial Officers belonging to Orissa Superior Judicial Officers (SB) shall be first dealt with by two Committees to be constituted by the Chief Justice of the High Court from time to time and such committees shall make appropriate recommendations which will be placed before the Full Court for consideration."

As per the aforesaid resolution of the Full Court, the then Chief Justice of this Court constituted two Committees (i) relating to promotion of Judicial Officers of the cadre of O.S.J.S.(S.B.) and (ii) relating to transfer and posting of Judicial Officers of the cadre of O.S.J.S.(Sr. Branch) on 13.8.2004 consisting of four Judges and again it was reconstituted on 2.11.2004 and thereafter on 4.3.2005 consisting of five Judges. Rule 4 of the Rules, 1963 deals with 'Cadre', which states as follows:

> "4. (1) The cadre of the service shall consist of two branches, namely:

(i) Superior Judicial Service, Senior Branch; and

(ii) Superior Judicial Service, Junior Branch."

The said Committee considered the case of the petitioner along with opposite parties 3 to 13 for promotion from the cadre of O.S.J.S.(Junior Branch) to the cadre of O.S.J.S. (Senior Branch) on 20.07.2005**.** The Promotion Committee was not authorized to consider the matter relating to promotion of Judicial Officers belonging to Orissa Superior Judicial Service (Junior Branch) to the cadre of Orissa Superior Judicial Service (Senior Branch). The constitution of the Committee pursuant to the said resolution by the Chief Justice was, therefore, not authorized to effect promotion in

respect of officers, i.e., petitioner and opp.parties 3 to 13 belonging to Orissa Superior Judicial Service (Junior Branch). Even construing that it was authorized as per the decision of the Full Court, the recommendation procedure followed by the said Committee accrediting ratings of the Annual Confidential Reports of the officers whose cases were considered for the years from 1999 to 2003 is alien to the well established practice and procedure followed by this Court and the same is contrary to the Rules. The procedure which was adopted by the Committee for assessing the suitability of the officers for promotion taking into consideration the credit assigned to the A.C.R. rating of an officer was as follows:

(f) Outstanding- 5
(g) Very good – 4
(h) Good - 3
(i) Average- 1
(j) Poor- 0

On the basis of the aforesaid rating in the A.C.R. promotion has been given to the petitioner, opp.parties no.3 to 13 and other officers taking into consideration the remarks for the five preceding years.

17. The Rules, 1992 provides that the Annual Confidential Reports of the eligible candidates for the period of five years preceding the year of consideration for promotion has to be taken into consideration. The recruitment was made in the year 2005 and proceeding five years has been explained in the note to Rule 3 of the Rules, 1992, which inter alia, states that the five years preceding the year in which Officer's performance is in accordance with the relevant Recruitment Rules first evaluated. Therefore, the Annual Confidential Report of the petitioner from 2000 to 2004 had to be considered for adjudging his suitability. On perusal of the record we find that instead of taking the service record of the petitioner from the years 2000 to 2004, the service record from the years 1999 to 2003 has been taken into consideration. We also find that accrediting the ratings of marks in the Annual Confidential Reports followed in respect of the officers for the relevant period was never followed earlier to 2005 and subsequent to that period. Thus, the procedure followed by the Committee is bad in law and denying promotion to the petitioner is a clear case of arbitrary, unreasonable, unfair practice which has been adopted by the Committee in recommending the officers to the cadre of O.S.J.S.(Sr. Branch) as Additional District Judges, Adhoc District Judges and Judges of Fast Track Courts. The aforesaid important aspect of the matter was not noticed by the Full Court while accepting the recommendation of the Committee in not recommending

the case of the petitioner for promotion to the post of Additional District Judge in the District Judge cadre though his juniors were considered and promotion has been given to them who were similarly placed.

18. Further, the said Committee was required to take into consideration the Annual Confidential Reports for five years as per the note to Rule 3 of Rules, 1992 on the date of consideration, that means from 2000 to 2004. It is an undisputed fact that as per the record and counter statement, A.C.Rs. for five years, i.e., from 1999 to 2003 had been taken into consideration wherein the said procedure is in contravention of note to Rule 3 of Rules 1992. According to the said note, previous five years period should have been from 2000 to 2004. Further the Annual Confidential Report of the year 1999 was taken into consideration while promoting the petitioner from the post of Sub-Judge to Chief Judicial Magistrate. On the very same A.C.R., the evaluation of marks of the officers whose cases were considered in the manner as aforesaid, was totally impermissible in law for the reason that the Rules do not envisage such procedure. Apart from the said reasoning, the Annual Confidential Report of 2001 has been taken into consideration where the remarks made by the accepting authority, namely, the Promotion Committee is contrary to the remarks made by the recommending authority, namely, the Port Folio Judge, who had the occasion to monitor the functioning of all the Judicial Officers including the petitioner in the Judgeship. The Recommending Authority, namely, the Port Folio Judge while examining the remarks of the Reporting Authority for the year 2001, made an endorsement to the following effect :

> "May be considered for promotion after perusal of judgments (1st part), Good (2nd part)"

In view of the aforesaid remarks made by the Recommending Authority, there is absolutely no reason to make adverse remark by the Accepting Authority as 'average', which is contrary to the Annual Confidential Report made by the Recommending Authority. In the absence of any adverse remark about his performance, integrity, honesty and other relevant factors like knowledge of law etc. and when the very same entry has been taken into consideration for the purpose of giving promotion of the petitioner from the post of Civil Judge (Senior Division) to Chief Judicial Magistrate, the remarks made by the accepting authority is not sustainable in law. Apart from the said reasoning, opposite parties 3, 12 and 13, who were similarly placed as that of the petitioner and who were given the remarks as 'average' by the Recommending Authority, have been given promotion to the post of Additional District Judge (District Judge cadre)

whereas the case of the petitioner without any rhyme or reason, arbitrarily has not been considered on the basis of rating of A.C.R. as indicated above, which is not permissible in law. The Constitution Bench of the Supreme Court in **S.Pratap Singh v. State of Punjab**, AIR 1964 Supreme Court, 72, by referring to the case in **Vatcher v. Paull, 1915 A.C. 372**, at para 6 observed thus :

> "……The courts have, on occasions, resolved the difficulty by finding out the dominant purpose which impelled the action and where the power itself is conditioned by a purpose, have proceeded to invalidate the exercise of the power when any irrelevant purpose is proved to have entered the mind of the authority(See Sadler v. Sheffield Corporation, 1924-1 CH 483 as also Lord Denning observed in Fitzwilliam's (Earl) Wentworth Estate Co. v. Minister of Town and Country Planning, 1951-2 K B 284 at page 307. <u>This is on the principle that if in such a situation the dominant purpose is unlawful then the act itself is unlawful and it is not cured by saying that they had another purpose which was lawful</u>." (emphasis supplied)

19. In view of the aforesaid dictum of the A.C. which is followed by the Supreme Court, we are of the view that consideration of promotion of the petitioner to the post of Additional District Judge (District Judge Cadre) is not in accordance with Rules, 1963 and Rules, 1992. It is an arbitrary action on the part of the Committee in not recommending the case of the petitioner for promotion and granting the benefit to the juniors of the petitioner, namely, opposite parties 3 to 13 and others, which is in clear violation of Articles 14 and 16 of the Constitution of India as rightly urged by Mr.J.K.Rath, learned Senior Counsel, whose submission is well founded and the same must be accepted.

20. It is an undisputed fact that the petitioner was promoted from the cadre of erstwhile Munsif now Civil Judge (Junior Division) to the post of Sub-Divisional Judicial Magistrate and from Sub-Divisional Judicial Magistrate to the cadre of Sub-Judge now Civil Judge (Senior Division) and from the cadre of Sub-Judge to the post of Chief Judicial Magistrate purely on the basis of seniority-cum-merit and his ranking in the Gradation List/ Civil List was above the opposite parties 3 to 13. It is also an undisputed fact that Rule 9(2) of the Rules, 1963 is required to be applied for the purpose of considering the claim of the petitioner and other eligible persons who are below him to fill up the existing vacancies in promotional quota in the posts of Additional District Judge (District Judge cadre).

21. Learned Senior Counsel has also placed reliance upon the decision of the Supreme Court reported in **Dev Dutt v. Union of India** and others, AIR 2008 S.C. 2513 (para-39), wherein the apex Court has clearly laid down as follows :

> "…….. fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the Military) must be communicated to him within a reasonable period so that he can make a representation for its upgradation. ……."

In the instant case, though an adverse entry like 'average' has been made in the Annual Confidential Report of the petitioner during the years 1999, 2000 and 2001, the same has not been communicated and the said entries were made use of by the Committee against the petitioner, which is bad in law. Therefore, the said action is in contravention of the decision of the Supreme Court referred to supra.

22. Learned Senior Counsel in support of the aforesaid proposition of law has also placed reliance upon the decision of the Supreme Court in the case of **U.P.Jal Nigam and others v. Prabhat Chandra Jain** and others, AIR 1996 SC 1661, wherein the apex Court held as follows :

> "…… All what is required by the Authority regarding confidentials in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. ……."

In the present case, the Accepting Authority while recording the Annual Confidential Report as 'average' during the year 1999, 2000 and 2001 has not recorded the reasons for so recording, which has not been communicated to the petitioner at any point of time.

23. Non-consideration of the aforesaid relevant facts by the Full Court at the time of accepting the recommendation of the Committee in denying promotion to the petitioner is bad in law. Further on the basis of the very same Annual Confidential Reports within eleven months, the petitioner has been given promotion to the post of Additional District Judge against the vacancy in the absence of a specific mention that promotion will come into effect prospectively either by the recommendation of the Committee or by

the Full Court resolution. Therefore, the petitioner's rank should have been placed above the opposite parties 3 to 13. The petitioner was, therefore, justified in giving representations to the High Court for rectification of the same in the year 2007 and again in the year 2009. Therefore, though the petitioner's rank is above the opposite parties 3 to 13, and the five years A.C.R. should have been taken into consideration from 2000 to 2004, and the adverse entries having not been communicated to the petitioner, non-grant of promotion to the petitioner on the basis of the said adverse entries is arbitrary, unreasonable, unfair, which is violative of Articles 14 and 16 of the Constitution. Therefore, the petitioner is entitled to the relief as prayed by him.

Point No.(ii)

24. We have already discussed elaborately that the procedure followed by the Promotion Committee in denying promotion to the petitioner is bad in law by recording our reasons on point no.(i) and therefore, we have held that the petitioner is entitled for the relief as prayed for by him. Therefore, we have to grant the relief notwithstanding rejection of the representations of 2007 and 2009 by issuing endorsements in the years 2007 and 2011, which are not challenged in this petition. Since the Full Court has accepted the recommendations of the Committee for giving promotions to opp.parties 3 to 13 and others without proper consideration of the case of the petitioner in the light of Rules, 1992 read with Rules, 1963 and also the ACRs and the alien procedure followed by the Committee in accrediting the rating of the ACR of the officers for the first time and denying promotional benefit to the petitioner and granting benefit to his juniors, is bad in law. The said action is arbitrary and unreasonable. The Committee was not authorized by the Full Court to consider the claim of the officers belonging to Orissa Superior Judicial Service (Junior Branch) to promote to the cadre of Officers of Orissa Superior Judicial Service (Senior Branch). The above aspect of the matter has not been re-examined independently either by the Committee or Full Court when the representations of the petitioner were considered and disposed of. Therefore, rejection of the representations of the petitioner by the Committee and Full Court, is also not legal and valid. Hence, the endorsements issued by the High Court while rejecting the representations is bad in law and we have opined that the prayer sought for by the petitioner is justified, is the finding recorded by us while answering the point no.1 in favour of the petitioner. Therefore, the endorsements issued to the petitioner rejecting the representations are also liable to be quashed and the same are accordingly quashed.

Point Nos. (iii) & (iv)

25. Regarding delay, Mr.Mohapatra, learned Government Advocate while placing reliance on the judgment of the Supreme Court in the case of Shiba Shankar Mohapatra (supra) submitted that since the petitioner has not explained the inordinate delay in approaching this Court for fixation of his seniority, he is not entitled for the relief claimed.

26. The aforesaid submission is refuted by Mr.J.K.Rath, learned Sr. Counsel appearing for the petitioner by referring to the decision of the Supreme Court in **Dehri Rohtas Light Railway Co. Ltd. v. District Board, Bhojpur**, (1992) 2 SCC 598, which has also been followed by the Supreme Court in **Royal Orchid Hotels Limited and another v. G.Jayarama Reddy and others**, (2011) 10 SCC 608, wherein the Supreme Court at para 27 extracted para 13 from the judgment in Dehri Rohtas Light Railway Co. Ltd(supra) and observed thus:

> "13. The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is defined is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. ……."

He has submitted that delay and laches should not come in the way while exercising the power of judicial review by this Court. He has further submitted that when illegalities and irregularities are committed by the Committee in following the procedure, which is not permissible in law at the time of examining the claim of the petitioner and junior officers and denying promotion to the petitioner on irrelevant consideration, delay and laches do not come in the way for this Court for granting the relief to the petitioner. It is further submitted that there is no delay and laches on the part of the petitioner in ventilating his grievance before this Court as the petitioner has made a representation in the year 2007 and when the same was rejected, he again made another representation in 2009, which has also been rejected on 08.08.2011 (Annexure-4) and soon thereafter, he filed this writ. Thus, it is apparent that the petitioner has been diligently pursuing his case

after coming to know that irregularities and illegalities had been committed by the authorities. Hence, it cannot be said that petitioner is not a diligent officer and therefore, delay and laches cannot be attributed to him for denying the relief.

27. Since we have answered point nos.(i) & (ii) against opposite parties 1 and 2 by recording our reasons after coming to the conclusion that not giving promotion to the petitioner along with his juniors and giving promotion to opposite parties 3,12 and 13, who are similarly placed as that of the petitioner to the cadre of Additional District Judge in the year 2005 is in violation of Articles 14 and 16. For the foregoing reasons, it is not necessary for us to direct opposite party no.2 to reconsider the matter afresh as we have already examined the claim of the petitioner and found that the petitioner is fit for promotion and his case has not been recommended by the Full Court to the Government, which action is unreasonable and arbitrary.

28. For the reasons assigned in answer to point no.1, we have held that denying promotion to the petitioner by following an alien procedure in awarding marks to the various aspects of the ACR of the officers, whose claim was considered for promotion, is not permissible in law. As per the Rules, referred to supra and from the record, we found that denial of promotion to the petitioner is bad in law and we are of the view that the petitioner is entitled to promotion and consequential benefits. The ranking of the petitioner and other officers, whose claim was considered, was inter changed on account of accrediting marks awarded to them on the basis of relevant aspects, which is bad in law and, therefore, opp.parties 3 to 13 are also entitled to the relief by placing them in their appropriate place in the gradation list/ civil list.

29. Even assuming that the contentions urged on behalf of the opposite parties that there is delay in approaching this Court from the date of promotion given to opposite parties 3 to 13 while answering the point no.(i) by recording valid reasons, we have recorded a finding that denial of promotion to the petitioner is unjust, unfair and unreasonable. Therefore, this Court has to exercise its judicial review power to undo the injustice caused to him. Hence, the contention raised in this regard by the learned Government Advocate and other contesting opposite parties is wholly untenable and is liable to be rejected.

30. In view of the foregoing reasons, we allow the writ petition and issue Rule directing opposite party no.2 to extend the benefit of promotion to the

petitioner to the post of Additional District Judge (District Judge cadre) as well as promotion to the Selection Grade District Judge at par with his juniors with effect from the date on which his juniors have got the above benefits and his rank be placed at the appropriate place in the Gradation List/ Civil List of 2006 with other consequential service benefits within a period of eight weeks. It is made clear that this order shall not adversely affect the opposite parties 3 to 13, who have already enjoyed the benefit of promotion and some of those who have got the Selection Grade District Judge post. However, the seniority of opp.parties 3 to 13 be re-fixed in the cadre of Orissa Superior Judicial Service (Senior Branch) (District Judge cadre) as per their seniority prevailing in the cadre of Orissa Superior Judicial Service (Junior Branch).

31. In the facts and circumstances of the case, there shall be no order as to cost.

Writ petition allowed.

2012 (I) ILR- CUT- 615

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

W.P.(C) NO.26793 OF 2011 (Dt. 07.02.2012)

SUBASH CHANDRA SAHU ……..Petitioner.

.Vrs.

COLLECTOR, MAYURBHANJ & ANR. ……..Opp.Parties.

SERVICE LAW – Advertisement made for appointment in the post of Attendant-cum-Sweeper on contractual basis – Petitioner was selected and his name finds place at serial No.980 in the merit list – He received information under the RTI Act that persons at serial Nos.982, 983 of the merit list got appointment and he was not selected due to over age – Action challenged.

Advertisement does not disclose any age limit for the post – Mistake of the selection Committee – Violation of selection procedure – Held, Opp.Parties are directed to appoint the petitioner in the post within one month as he stood first in the selection.

(Para 6)

For Petitioner - Mr. K.C.Dash.
For Opp.Parties - Mr. J.P.Pattnaik
Addl. Govt. Advocate.

B.P.DAS, J. The petitioner has come up before this Court with a prayer to direct the opposite parties to appointment him in the post of Attendant-cum-Sweeper on contractual basis in the Mobile Health Unit of Mayurbhanj Zilla Swasthya Samiti in Tiringi Block under the National Rural Health Mission (N.R.H.M.) since he was duly selected in the selection held for the purpose.

2. The case of the petitioner in brief is that pursuant to the advertisement dated 18.7.2007 issued by the Chief District Medical Officer, Mayurbhanj, in Annexure-1 inviting applications from the candidates for filling up vacancies in different posts for operation of Mobile Health Units in Mayurbhanj District, the petitioner applied for the post of Attendant. He was duly selected and his name was found place at Serial No.980 belonging to S.E.B.C.category. When the petitioner was not favoured with an order of appointment, he made a query and came to know that letters of appointment were issued to Rupnarayan Marandi and Jamadar Naik, who were placed below the petitioner in the merit list at Serial Nos.982 & 983 respectively and

were appointed as Attendant in the said Block, i.e., Tiring. Having come to know the aforesaid fact, the petitioner made representations to different authorities including the C.D.M.O., Mayurbhanj, highlighting his grievance. However, on the grievance petition filed before the Collector, the C.D.M.O. on being directed by the Collector intimated the petitioner that due to overage, his application has been rejected. Though in the advertisement, the age limit was not mentioned in the guideline, yet in the information supplied by the A.D.M.O. under the R.T.I.Act under Annexure-4, it is indicated that as per the statutory provision, the age of the candidates for recruitment to Class-IV posts should be under 32 years and over 18 years as on 1.6.2009. Therefore, the age of the petitioner being above 32 years, he was not given appointment. Aggrieved by the action of the O.Ps., the petitioner has filed the present writ application with the prayer indicated herein before.

3. Learned counsel for the petitioner draws our attention to the advertisement in Annexure-1, wherein for the post of Attendant, consolidated salary at Rs.2000/- per month has been fixed and the number of vacancies has been shown as 15.

It is worthwhile to mention here that in the said advertisement, nothing has been indicated about upper age limit and qualification for the post of Attendant. However, the advertisement discloses that the detailed information can be obtained from the Office of the C.D.M.O., Mayurbhanj, Collectorate, Mayurbhanj, Sub-Collector Offices and Block Offices and also from WEBSITE. But according to the petitioner, on verification from the WEBSITE, he also found that nothing has been indicated either about age limit or educational qualification for the post in question.

4. In course of hearing, learned counsel for the petitioner produced before us the document relating to Selection Procedures for Recruitment under Mobile Health Unit. Learned Counsel for the State does not dispute the said document and a copy of the same has also been annexed to the counter affidavit filed by the opposite parties. Clause-3 of the said Selection Procedures in regard to Attendant-cum-Sweeper provides as follows :-

> "3.Attendant-cum-Sweeper
>
> Attendant-cum-Sweeper should be engaged on daily wages or by any other procedures with the approval of collector-cum-chairman, EC, ZSS.
>
> Committee responsible for verification of certificate & necessary processing for engagement of all categories under MHU :

This committee shall be chaired by the Chief District Medical Officer & should comprise of the following members :

i) ADMO(FW)
ii) Representative of Collector
iii) DPM-Member Convener
iv) DHIO

Other Conditions for all categories of posting under MHU.

- Waiting list to be maintained & should be valid for 1 year from the date of approval of the panel of selected candidates. (only if vacancies arises under MHU)
- ORV Act is not applicable.
- The engagement is purely contractual in nature and can be terminated at any point without citing any reasons thereof.
- Candidates once engaged cannot claim for re-engagement under any conditions as a matter of right.
- The contract is initially for a period of 11 months and further extension, if any, will be provided on assessment of the performance of the period in service.
- Candidate appointed on contractual basis will not claim for inter-district transfer.
- These engagements are non-transferable in nature and the candidates have to stay at their place of posting failing which they are liable to be disengaged.

NOTE:

The following documents are to be enclosed along with the application :

a) Residential certificate issued by the competent Authority.
b) Attested photo copies of all mark sheets & certificates in proof of the claim made by the candidate relating to his educational qualification.
c) Valid registration Certificate of Orissa State Homoeopathic Board/Ayurvedic Council)

d) Two copies of passport size coloured attested photograph to be submitted along with the application duly attested.

e) Caste certificate issued by the Competent Authority.

In case of submission of incomplete application including non-attachment of our or more of the above documents, the candidate is liable to be rejected."

In order to know the actual position, we issued notice to the opposite parties on 12.12.2011 and directed the learned counsel for the State to obtain instruction in the matter by the end of December, 2011. Since no instruction was made available to the learned counsel for the State, on 10.1.2012 we directed the C.D.M.O., Mayurbhanj, to remain present in this Court today along with the records relating to selection and appointment of Attendant-cum-Sweeper in the Mobile Health Unit on contractual basis and further not to give any appointment in the post of Attendant-cum-Sweeper in Mobile Health Unit on contractual basis without leave of this Court.

5. In pursuance of the aforesaid order dated 10.1.2012, Dr.Chandan Murmu, C.D.M.O., Mayurbhanj, appears in person and files counter affidavit on behalf of the O.Ps. In paragraph-6 thereof, it is stated that "in case of Attendant-cum-Sweepers as in the present case, there is no specific age criteria, but a clause provides that the procedures should be approved by the Collector-cum-Chairman, Executive Committee, Zilla Swasthya Samiti". In the counter affidavit, reference has also been made to Clause-3 of the selection procedures, which have been quoted in the foregoing paragraph. As the petitioner's age was 43 years as on 1.6.2009, his date of birth being 12.5.1966 as evident from his High School Certificate, he was not given appointment as according to the normal statutory provision of the Government, the age of the candidate should not be more than 32 years and less than 18 years.

No where in the counter affidavit it is indicated that the age limit fixed for the candidates for the post of Attendant-cum-Sweeper by the Government is applicable to the N.R.H.M. candidates. The selection procedures have been consciously formulated by the Government without fixing therein the age limit or qualification for the post of Attendant-cum-Sweeper but leaving it to the approval of the Collector.

Learned counsel for the petitioner submits that the aforesaid procedures have been formulated consciously looking at the nature of duty required to be performed by the appointee. According to him, the petitioner having passed Class 10 was called to the interview and on being selected

was enlisted in the merit list but thereafter his application was rejected on the ground that he was over-aged.

6. We have called for the records relating to selection and no where in the said record, the Collector, Mayurbhanj, has ever fixed the age limit. It is admitted by the C.D.M.O., Mayurbhanj that the Selection Committee during the course of selection thought it proper to fix the age limit. So, in our considered opinion, fixation of age limit in respect of the post of Attendant-cum-Sweeper by the Selection Committee is in violation of the selection procedures, which have been adopted by the opposite parties for various posts including the post of Attendant-cum-Sweeper.

Looking into the records and considering the fact that the selection procedure does not prescribe any age limit, we allow this writ petition and direct the opposite parties to appoint the petitioner in the post within one month from today since he stood first in the selection. Personal appearance of the C.D.M.O. is dispensed with. No cost.

Writ petition allowed.

2012 (I) ILR- CUT- 620

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

W.P.(C) NO.12363 OF 2011 (Dt. 21.02.2012)

UNION OF INDIA .....Petitioner.

.Vrs.

SUSANTA MOHANTY .....Opp.Party.

CONSTITUTION OF INDIA, 1950 – ART.226.

Opp.Party had appeared at the Internal Competative Junior Accounts Officer Examination during 2010 – He secured pass marks in all the papers except paper "V" where he secured 56.5 marks against minimum pass mark of 60 – He made a representation to the petitioner for allowing 3 grace marks in terms of Department of Telecommunication (DOT) circular Dt.20.06.1994 – Representation rejected – He filed O.A. before C.A.T. – Tribunal while directing the BSNL to extend the benefit of grace marks to the Opp.Party in paper "V" further directed the petitioner to extend the benefit of DOT circular Dt.20.06.1994 to all similarly circumstanced candidates like the Opp.Party – Hence the writ petition.

It is not disputed that the examination held under the old syllabus is guided by the DOT circular Dt.20.06.1994 – There is nothing on record that the circular Dt.20.06.1994 has no application to BSNL and it has been superseded by the circular Dt.11.08.2006 and lost its force – Held, circular issued by the DOT Dt.20.06.1994 has application to the case of the petitioner and order to that extent is confirmed – However the direction that the order shall have applicability to all similarly circumstanced candidates having failed in one of the papers and might not have approached the Court of Law or Tribunal is set aside. (Para 5,6,7)

For Petitioner - M/s. S.K.Patnaik, U.C.Mohanty, P.K.Pattnaik, D.Pattnaik, S.Pattnaik & S.P.Das.

For Opp.Party - M/s. Biswajit Mohanty, S.Patra, P.K.Mohapatra, A.Panda, S.J.Mohanty & D.D.Sahoo.

B. P. DAS, J. Bharat Sanchar Nigam Ltd., which is a Government of India Enterprise, has filed this writ application challenging the order dated 28.3.2011 passed by the Central

Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 443 of 2010.

2. The factual matrix of the case is that the opposite party had appeared at the Internal Competitive Junior Accounts Officer Examination against the 40% quota during January, 2010 and secured 56.5 marks in Paper-V against the minimum pass mark of 60. He had secured minimum pass marks in respect of all other papers excluding Paper-V, for which the opposite party made a representation to the petitioner for allowing him 3 grace marks in terms of the DoT (Department of Telecommunications) Circular dated 20.06.1994 and rounding up the marks in Paper-V to 60. Since the said representation of the opposite party was rejected, he filed an Original Application being O.A. No.443 of 2010 before the Central Administrative Tribunal.

3. The Tribunal by its order dated 28.3.2011, while holding that the circular dated 20.6.1994 issued by the DoT has the application to the case of the opposite party, directed the BSNL to extend the benefit of grace marks to the opposite party in Paper-V by rounding up the same to 60 and take consequential action. The Tribunal also directed that since there may be similarly circumstanced candidates as that of the applicant- opposite party having failed in one of the papers in the examination in question, who might have not approached the Court of Law or Tribunal, the BSNL should extend the benefit of DoT Circular dated 20.6.1994 to all similarly situated persons as that of the present opposite party.

4. According to learned counsel for the petitioner, the Tribunal has gone wrong in holding that the DoT Circular dated 20.6.1994 has the application to the case of the opposite party. According to him, after the BSNL came into existence, the circular dated 20.6.1994 issued by DoT has lost its force. He emphatically submitted that when the circular dated 11.8.2006 (Annexure-4) came into force superseding the earlier circular dated 20.6.1994, the provision for grant of grace marks, as has been provided in 1994 circular has not been saved. He drew our attention to the circular under Annexure-4, which is regarding holding Departmental Examination of Junior Accounts Officer (JAO) Part-II under old (DoT) syllabus in the month of March, 2006 and issues relating to grant of grace marks and preparation of Exemption List.

In this regard, he placed reliance to paragraph-1 of the aforesaid circular dated 11.8.2006, which is quoted herein below:-

> "Although the above examination is of descriptive type, it is not a qualifying examination and hence extension of 3 grace marks in this examination is not appropriate."

That apart, it is stated that as the aggregate pass mark in this examination was lowered down to 45% as against the requirement of securing 50% marks in aggregate under the circular dated 20.6.1994, 3 grace marks cannot be awarded to anybody.

5. Though aforesaid was the main stand taken by the petitioner apart from various other grounds, but nothing has been stated in the circular dated 11.8.2006 (Annexure-4) nor was there any document placed before this Court to support the claim of the petitioner that the Circular dated 20.6.1994 issued by the DoT has been superseded and/or lost its force. There is also nothing to show that the said circular dated 20.6.1994 has no application to BSNL.

6. Mr. Mohanty, learned counsel for the opposite party drew our attention drawn to Annexure-3, which shows that the examination conducted, i.e. JAO Part-I and Part-II main examination of the BSNL was for internal candidates under the modified old syllabus and regarding one time relaxation. It is not disputed that the examination held under the old syllabus is guided by the DoT circular dated 20.6.1994.

7. In view of the aforesaid facts and submissions and on perusal of the impugned order, we do not find any infirmity in the impugned order of the Tribunal in coming to the conclusion that the circular issued by the DoT dated 20.6.1994 has the application to the present case. So, the order to that extent is confirmed and the direction to extend the benefit of grace mark rounding up the same to 60 marks is upheld and confirmed.

But So far as the direction of the Tribunal that the order shall have applicability to all similarly circumstanced candidates having failed in one of the papers in question, who might not have approached the Court of law or Tribunal, we set aside the same.

Let the direction of the Tribunal, as confirmed by the present order, be complied with within a period of two months from the date of communication of this order. No cost.

Writ petition partly allowed.

2012 (I) ILR- CUT- 624

L.MOHAPATRA, J & B.K.PATEL,J.

JCRA NO. 188 OF 2000 (Dt.31.10.2011)

HIRAN RANA … …..Appellant.

.*Vrs.*

STATE OF ORISSA ……Respondent.

PENAL CODE, 1860 (ACT NO. 45 OF 1860) – S.84.

Plea of Insanity – Evidence of P.Ws.1,2,3 & 8 shows that some days prior to the occurrence and on the date of occurrence the appellant had developed insanity and his behaviour was abnormal – After the occurrence he did not try to run away from the place or did not make any attempt to conceal the weapon of offence – For the last 15 days he was neither taking food nor taking his sleep – Moreover his father was also suffering from insanity – Held, the appellant is entitled to the benefit U/s.84 IPC. (Para 8)

For Appellant - M/s. Arunendra Mohanty.
For Respondent – Sri Sangram Das,
Addl. Standing Counsel

L.MOHAPATRA, J. The appellant having been convicted for commission of offence under Section 302 of I.P.C. and sentenced to undergo imprisonment for life by the learned Addl. District & Sessions Judge, Nuapada in S.C No.5/9 of 99-2000 has preferred this appeal against the said order of conviction and sentence.

2. The case of the prosecution is that on 07.10.1998 at about 12.00 P.M the informant-P.W.1 was sitting with his relatives-P.Ws.2 and 3 on his verandah when the deceased went inside the room of the appellant carrying some oil in a small pot. Sometimes thereafter all the above three witnesses heard a noise 'MARIGALI A BUA NAHIN BACHENA'. Identifying the said voice to be that of the deceased, all of them went near to the door of the room, which was bolted from inside. Thereafter, the appellant, who is the son of P.W.1, came out of the room holding an axe stained with blood and confessed to have killed his wife. The said axe was snatched away by the above three witnesses and P.W.1 noticed that inside the room his daughter-in-law was lying dead with bleeding injuries. Thereafter they tied the appellant with the help of other relatives and a report was submitted before Dharambandha Out Post by P.W.1, on the basis of which, a case was

registered in Nuapada Police Station for commission of offence under Section 302 of I.P.C. On completion of investigation, charge sheet was submitted for commission of the said offence.

3. The prosecution in order to prove the charge examined nine witnesses. Out of whom P.W.1 is the father of the appellant and the informant in the case. P.Ws.2 and 3 are relatives of P.W.1, who were sitting with P.W.1 on the date of occurrence on the verandah. P.Ws.4 and 6 are the seizure witnesses and P.W.5 is the Doctor, who had conducted the postmortem examination. P.W.7 is a post occurrence witness and P.W.8 is the Investigating Officer.

The plea of the defence was that he was insane at the time of commission of offence.

4. Relying on the evidence of P.Ws.1, 2 and 3 coupled with the evidence of P.Ws.5 and 7, learned Addl. District & Sessions Judge found the appellant guilty of the charge and convicted him thereunder.

5. Mr. Mohanty, learned counsel appearing for the appellant drew attention of the Court to the evidence of P.Ws.1, 2, 3 and the evidence of P.W.8-Investigating Officer to substantiate his argument that the appellant on the date of occurrence was of unsound mind and therefore, he is entitled to the benefit under Section 84 of the I.P.C.

6. Mr. Das, learned Addl. Standing Counsel for the State on the other hand submitted that the question as to whether the appellant was insane on the date of occurrence or not is to be proved by the appellant, who takes such plea and no evidence was adduced on his behalf to prove that he was of unsound mind on the date of occurrence.

7. After carefully scrutinizing the evidence of the witnesses examined on behalf of the prosecution, we find that P.W.1 is the father of the appellant and is also the informant in the case. P.Ws.2 and 3 are related to P.W.1. All the above three witnesses have stated in their deposition that on the date of occurrence when all of them were sitting on the verandah of P.W.1, they saw the deceased going inside the room of the appellant with some oil in a pot. Sometimes thereafter they heard the noise of the deceased and when they went near the door of the room where the appellant was staying, they found the door closed. The appellant thereafter, came out of the room with an axe in his hand and all the three witnesses noticed blood on the said axe. Thereafter they caught hold of the appellant and tied him in a rope. In cross-examination all the three witnesses have stated that 15 days prior to the

date of occurrence as well as on the date of occurrence the appellant had developed insanity. P.W.1 in cross-examination has categorically stated that for the last 15 days from the date of occurrence the appellant had developed insanity as a result of which he was neither taking food nor taking his sleep and was wondering here and there by shouting. Local treatment was given to cure the appellant. He has further stated that in his family, his father had developed insanity and the elder brother of his father had also developed insanity.

P.W.2 in cross-examination also stated that when the appellant came out of the room, he was completely insane by that time. He also stated that the uncle of the appellant, his elder brother, grandfather and elder brother of grandfather were all of unsound mind during their life time.

P.W.3 in cross-examination also stated that he had a discussion with P.W.1 with regard to treatment of the appellant and on the date of occurrence the appellant was completely mad. Though P.W.8, a post occurrence witness has stated that after marriage of the deceased, the appellant was having visiting terms to his house and he was completely a normal man. Such a statement having not been made by him before the Investigating Officer at the time of investigation, no reliance can be placed on the said witness with regard to mental condition of the appellant at the time of occurrence.

8. From the evidence of P.Ws.1, 2, 3 and 8, it is clear that some days prior to the occurrence and on the date of occurrence the appellant had developed insanity and his behaviour was abnormal. From the conduct of the appellant immediately after the occurrence, we also find that he did not resist snatching of the axe from his hand by P.W.1 and also did not try to run away from the place. He also did not make any attempt to conceal the weapon of offence. From all these materials available on record, we are convinced that the appellant some days prior to the occurrence and on the date of occurrence had developed insanity and accordingly even though it is accepted that he committed murder of the deceased by means of the axe, he is entitled to the benefit under Section 84 of the I.P.C.

9. For the reasons stated above, we allow the appeal and set aside the impugned judgment dated 04.5.2000 passed by the learned Addl. District & Sessions Judge, Nuapada in S.C No.5/9 of 99-2000 convicting the appellant for commission of offence under Section 302 of I.P.C. The appellant is acquitted of the charge.

10. It is stated by learned counsel for the appellant that the appellant is in custody till date and has served more than 14 years of imprisonment. We, therefore, direct that the appellant be released forthwith, unless his detention is required in any other case.

11. Before his release the Jail Authority is directed to get the appellant-Hiran Rana examined in a Government Hospital with regard to his mental condition and if certified, he may be allowed to move free. If the insanity of the appellant still continues then he shall be referred to a Mental Asylum for treatment.

Appeal allowed.

2012 (I) ILR- CUT- 628

L.MOHAPATRA, J & B.K.MISRA, J.

W.P.(C) NO. 17514 OF 2006 (Dt. 29.09.2011)

BHASKAR SUBUDHI & ANR. .....Petitioners.

.Vrs.

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

ORISSA LAND REFORMS ACT, 1960 (ACT NO. 16 OF 1960) – S.6-A.

Any transfer by a raiyat of any land which has been settled with him for agricultural purpose under a permanent lease from Government shall if such transfer is made within a period of ten years from the date of such settlement without obtaining previous permission in writing of the Revenue Officer, shall be void.

In this Case Ac.1.000 of land had been settled in favour of one Madhab Naik for the purpose of agriculture on 25.1.1974 – Madhab Naik transferred the land in favour of the petitioner vide R.S.D. Dt. 30.8.1983 – Contention raised by the counsel for the petitioners that an endorsement made in the R.O.R. prohibiting sale of the land by the lessee for a period of five years has no basis – By the time the land in question was sold by Madhab Naik in favour of petitioner No.1, Section 6-A of the OLR Act had already come in to force so the statutory provisions contained in the OLR Act shall prevail – So it was obligatory on the part of Madhab to obtain permission U/s.6-A before effecting transfer in favour of the petitioner - Held, sale made by Madhab in favour of petitioner No.1 is void and petitioner No.1 derives no right over the property in question. (para-6)

For Petitioners - M/s. Sanjay Kumar Samantaray, S.K.Sahoo, S.K.Jena & R.K.Sahoo.
For Opp.Parties - Addl. Govt. Advocate.

L. MOHAPATRA, J. Both the petitioners represented through their power of attorney holder Shri Ashok Kumar Sahoo have filed this writ petition challenging the legality of the order passed by the Additional District Magistrate, Bhubaneswar in Lease Revision Case No.734 of 1987 cancelling the lease granted in favour of the first lessee Madhab Naik on a suo motu proceeding initiated under Section 7-A (3) of the O.G.L.S. Act, 1962 hereinafter called 'the Act'.

2. As it appears from the impugned order in W.L. Lease Case No.1831 of 1973, Ac.1.000 of land was leased out in favour of one Madhab Naik pertaining to Plot No.583 under Khata No.420 in Mouza Pathargadia by the then Tahasildar, Bhubaneswar on 25.1.1974. The suo motu proceeding was initiated in the year 1987 and notice was served on the said Madhab Naik. The said Madhab Naik appeared before the A.D.M. and filed written submission questioning the maintainability of the suo motu revision. The A.D.M. found certain irregularities in the matter of grant of lease and accordingly by the impugned order dated 21.9.1987, cancelled the lease granted in favour of the said Madhab Naik.

3. The petitioner No.1, Bhaskar Subudhi by registered sale deed dated 30.8.1983 had purchased the said land from Madhab Naik, the original lessee. His case in the writ petition is that by the time the proceeding was initiated in the year 1987, the original lessee Madhab Naik had already sold the land to him by registered sale deed dated 30.8.1983. It was, therefore, incumbent on the part of the A.D.M. to issue notice to him before cancelling the lease. The further case of the petitioners is that they having not been given an opportunity of hearing and no notice in the revision case having been served on them, the impugned order is unsustainable in law and should be set aside.

A counter affidavit has been filed by the Additional District Magistrate, Bhubaneswar. Referring to the counter, it was submitted by the learned Additional Government Advocate that the original lessee had been noticed but he never informed the court that the land had been sold by him to the petitioner No.1 in the year 1983 by registered sale deed. Therefore, there was no occasion on the part of the A.D.M. to know that the original lessee had sold the property to the petitioner No.1. It is also stated in the counter affidavit that the lease had been granted by the then Tahasildar in favour of the said Madhab Naik in contravention of Rule 3 (5) of the O.G.L.S. Rules, 1974 and accordingly the lease was cancelled in the impugned order.

4. Though the impugned order was passed in the year 1987, this writ petition has been filed after a long delay in the year 2006. The delay in filing of the writ petition has been explained by the petitioner No.1 stating that he had no knowledge about the said proceeding, he having not been served with a notice and therefore, only after coming to know about such order, he has filed this writ petition. Admittedly from the impugned order, it appears that no notice was served on the petitioner No.1 even though he had purchased the land in the year 1983 from the original lessee Madhab Naik.

It was the duty of the original lessee to bring it to the notice of the A.D.M. that he had sold the land in favour of the petitioner No.1. We are, therefore, inclined to ignore the delay in filing the writ petition.

5. The learned Additional Government Advocate submitted that the original lessee Madhab Naik had no authority to sale the land before completion of ten years from the date of settlement as per Section 6-A of the Orissa Land Reforms Act, 1960 and therefore, such sale prior to expiry of ten years from the date of lease is void. Shri Samantaray, the learned counsel appearing for the petitioners submitted that at the time of granting Records of Right in favour of the original lessee Madhab Naik, a condition had been imposed that he shall not sale the property within five years from the date of grant of lease. Before selling the land in favour of petitioner No.1, after completion of five years, permission had been obtained from the competent authority on 24.12.1983 in Misc. Case No.408 of 1983.

6. Even if we accept the contention of the learned counsel appearing for the petitioners that Madhab Naik, the original lessee could sale the property after completion of five years from the date of settlement, it appears from the sale deed itself that permission was granted by the competent authority for sale of the land in Misc. Case No.408 of 1983 on 24.12.1983. Therefore, no sale deed could be executed in favour of the petitioner No.1 on 30.8.1983, i.e., before obtaining permission from the competent authority and as such, such sale is a void transaction. So far as the submission of the learned counsel for the State is concerned, we find substantial force in it. Section 6-A of the Orissa Land Reforms Act, 1960 specifically provides that notwithstanding anything contained in Sub-section (1) of Section 6, but subject to the provisions of Sub-section (3) thereof any transfer by a raiyat of any land which has been settled with him for agricultural purpose under a permanent lease from Government shall, if such transfer is made within a period of ten years from the date of such settlement without obtaining the previous permission in writing of the Revenue Officer, shall be void. Undisputedly in this case Ac.1.000 of land had been settled in favour of Madhab Naik for the purpose of agriculture. Admittedly also in this case the land was sold in favour of petitioner No.1 by Madhab Naik before expiry of ten years from the date of settlement. Undisputedly also the said Madhab Naik had not obtained any permission for such sale under Section 6-A of the Orissa Land Reforms Act, 1960. The question that arises for consideration is as to whether the endorsement made in the Records of Right that the lessee shall not sale the land within five years from the date of settlement will govern the field or the provision contained in Section 6-A of the Orissa Land Reforms Act shall govern the

field. Nothing has been placed before us by the learned counsel for the petitioners as to under which provision an endorsement has been made in the Records of Right prohibiting sale of the land by the lessee for a period of five years. Even if the contention of the learned counsel is accepted to the above extent, by the time the land in question was sold by Madhab Naik in favour of petitioner No.1, Section 6-A of the OLR Act had already come into force and therefore, the statutory provisions contained in the Orissa Land Reforms Act shall prevail. Therefore, it was obligatory on the part of the lessee Madhab Naik to obtain permission under Section 6-A of the Orissa Land Reforms Act before effecting transfer in favour of petitioner No.1 by a registered sale deed. We are, therefore, of the view that the sale made by Madhab Naik in favour of the petitioner No.1 under the registered sale deed dated 30.8.1983 annexed to the writ petition as Annexure-2 is a void transaction and accordingly the petitioner No.1 derives no right over the property in question. Therefore, the writ petition is also not maintainable at the instance of the petitioners. The writ petition is accordingly dismissed.

Writ petition dismissed.

2012 (I) ILR- CUT- 632

L.MOHAPATRA, J & B.K. MISRA, J.

O.J.C. NO.12217 OF 2001 (Dt.01.12.2011)

MANOJ KUMAR PATI ……..Petitioner.

.Vrs.

STATE BANK OF INDIA & ORS. ……Opp.Parties.

SERVICE LAW – General principle regarding resignation is that in the absence of a legal, contractual or constitutional bar a prospective resignation can be withdrawn at any time before it becomes effective.

In this case the petitioner was promoted to officer's grade on 28.08.1998 w.e.f. 01.08.1997 – He made a representation on 07.10.1998 to forgo promotion – Though on record the Bank might have taken a decision to accept the representation Dt.07.10.1998 it was never communicated to the petitioner although the petitioner joined the promotional post on 18.01.1999 and continued to receive salary in the promotional post till he was reverted to the post of Head Assistant in April 1999.

Held, direction issued to the Bank to permit the petitioner to continue in the promotional post from the date he was reverted to the post of Head Assistant. (Para 8,11)

Case law Referred to:-

AIR 1978 SC 694 : (Union of India-V- Gopal Chandra Misra & Ors.)

For Petitioner - M/s. R.K.Mohanty, D.K.Mohanty, P.K.Rath, A.P.Bose, S.N.Biswal, P.K.Satapathy.

For Opp.Parties - M/s. S.P.Mishra & P.V.Balkrishna

L. MOHAPATRA, J. The petitioner, who was working as Head Assistant in the State Bank of India, Tulasipur Branch, Cuttack, has filed this writ application challenging the communication made to him in Annexure-1 dated 24.8.2000 intimating therein that his representation for promotion to officers cadre has been declined and he has been permanently debarred from promotion to higher cadre.

2. Case of the petitioner is that he was initially appointed as Clerk-cum-Cashier on 5.2.1982 and his post was subsequently re-designated as Clerk

with effect from 12.4.1985. In 1988, he was promoted to the post of Head Assistant and was posted in Tulasipur Branch. He appeared in the departmental examinations in terms of the Bank's guidelines and came out successful. Thereafter, he was promoted to the officer's grade i.e. Junior Management Grade Scale-I on 28.8.1998 with effect from 1.8.1997. Because of several domestic problems, the petitioner was constrained to request the bank that he was prepared to forego promotion and the said representation of the petitioner is dated 7.10.1998 annexed to the writ application as Annexure-3. Without accepting the said representation, the petitioner was posted as Assistant Manager (Cash) at Chhanagiri Branch and was relieved under Annexures-4 and 5. Even after giving promotion to the petitioner and posting him at Chhanagiri Branch in the officers cadre, a decision appears to have been taken on 11.1.1999 to accept the request of the petitioner in Annexure-3 to forgo promotion subject to the condition that the petitioner shall be permanently debarred from getting out of cadre promotion and he should not be permitted to officiate out side the cadre permanently. Before the said decision was communicated to the petitioner, another representation was filed by him on 20.1.1999 praying for withdrawal of the representation in Annexure-3 foregoing promotion and permit him to continue in the promotional post. In the mean time the petitioner was reverted to the post of Head Clerk on 7.4.1999 on the basis of his representation dated 7.10.1998. Thereafter he made another representation to continue in the promotional post. The said representation was rejected in Annexure-1.

3. A counter affidavit has been filed by the Bank but most of the averments made in the writ application are not disputed. It is the stand of the Bank that while working as Head Assistant in Tulasipur Branch, the petitioner by order dated 9.10.1998 was posted as Assistant Manager(Cash) in Junior Management Grade Scale-I at Chhanagiri Branch. The petitioner joined in the promotional post on 18.1.1999 and submitted another representation on 20.1.1999 requesting the Bank to treat his earlier representation dated 7.10.1998 foregoing his promotion to the officers cadre as withdrawn and to permit him to continue as an officer of the Bank. On 11.1.1999, a decision was taken to revert the petitioner to lower cadre on the basis of his representation dated 7.10.1998 and, accordingly by letter dated 16.1.1999 the Zonal Office of the Bank was advised to act accordingly. Therefore, the petitioner was relived from Chhanagiri Branch on 7.4.1999 to continue as Head Assistant at Tulasipur Branch from where he had been promoted to the officer cadre. While accepting his representation dated 7.10.1998 praying for foregoing promotion, it was made clear to the petitioner that he would be debarred from further promotion as per the

Bank's Policy and, accordingly, communication in Annexure-1 was made. Further stand of the Bank is that it acted upon the representation of the petitioner dated 7.10.1998 on the said condition and, therefore, the petitioner cannot have any grievance now in challenging the communication made to him in Annexure-1.

4. There are certain facts, which are not in dispute. Such facts are as follows:-

> "1. While the petitioner was working as Head Assistant at Tulasipur Branch, Cuttack in the year 1988, he appeared in the departmental examinations and succeeded.
>
> 2. By order dated 9.10.1998, the petitioner was given promotion to the post of Assistant Manager (Cash) in the Junior Manager Grade Scale-I, Chhanagiri Branch.
>
> 3. On 7.10.1998, the petitioner had submitted a representation requesting to forego his promotion in view of the domestic problems.
>
> 4. The petitioner joined in the promotional post at Chhanagiri Branch on 18.1.1999.
>
> 5. The petitioner submitted a representation on 20.1.1999 requesting the Bank to treat his earlier representation dated 7.10.1998 as withdrawn but he was relieved from the promotional post in April 1999. His further representation to continue in the promotional post was rejected in Annexure-1".

5. As is evident from the aforesaid admitted facts before the order of promotion was issued on 9.10.1998, the petitioner had already submitted a representation on 7.10.1998 to forego his promotion. This representation was not acted upon and order of promotion was issued. The representation dated 7.10.1998 remained unattended till the petitioner joined on promotion at Chhanagiri Branch in the officer cadre on 18.1.1999. On 20.1.1999, the petitioner by way of representation requested for withdrawal of earlier representation dated 7.10.1998 and in the letter dated 24.8.2000 under Annexure-1, the petitioner was communicated that his further representation dated 5.3.1999 to continue him in the officer cadre has been turned down and he has been debarred from getting further promotion permanently.

6. Learned counsel appearing for the petitioner submitted that the representation dated 7.10.1998 submitted by the petitioner foregoing his

promotion had not been accepted till the petitioner joined in the promotional post on 18.1.1999 and, immediately after joining in the promotional post, on 20.1.1999 the petitioner requested for withdrawal of his earlier representation dated 7.10.1998. According to the learned counsel for the petitioner, the representation dated 20.1.1999 had been submitted by the petitioner for withdrawal of his earlier representation dated 7.10.1998, much before the same was accepted by the bank and, therefore no action could be taken on the basis of the representation dated 7.10.1998 and revert the petitioner to the lower post of Head Assistant and at the same time debar him from further promotion permanently.

Shri S.P. Mishra, learned Senior Counsel appearing for the Bank referring to para-6 of the writ application submitted that the decision to accept the request of the petitioner made in the representation dated 7.10.1998 had been taken on 11.1.1999 and the petitioner was aware of the same. The petitioner's representation for foregoing promotion had been accepted prior to his joining in the promotional post on 18.1.1999. When it was found that in stead of making such representation, the petitioner has joined the promotional post on 18.1.1999, he was reverted. Thereafter, the petitioner submitted a representation again on 5.3.1999 to give him promotion which was declined in the impugned order in Annexure-1.

7. From the facts not in dispute, it is clear that after the petitioner cleared the departmental examinations in the year 1998, he was promoted to the post of Junior Management Grade Scale-I on 28.8.1998 with effect from 1.8.1997. Though such promotion was given, he had not been given any posting. On 7.10.1998 he submitted a representation requesting to forego his promotion to Junior Management Grade Scale-1. The said representation was not acted upon and it appears from the writ application as well as the counter affidavit filed by the Bank that on 11.1.1999 the Bank proposed to accept the said representation dated 7.10.1998 subject to acceptance of two conditions i.e. the petitioner will be permanently debarred from getting out of the cadre promotion and he should not be permitted to officiate out side his cadre permanently. There is nothing on record to show that the said proposal had been communicated to the petitioner before he joined in the promotional post on 18.1.1999. The petitioner submitted a representation again on 20.1.1999 for withdrawal of his earlier representation dated 7.10.1998. Though it is the stand of the Bank that on 11.1.1999 the Bank had already proposed to accept the petitioner's request made in the representation dated 7.10.1998, no official communication had been made to the petitioner till he joined in the promotional post on 18.1.1999 and again he made a representation for withdrawal of his earlier representation dated

7.10.1998 by letter dated 20.1.1999. The petitioner having submitted representation for withdrawal of earlier representation dated 7.10.1998, much prior to its acceptance and communication to the petitioner, the question of reverting him from the promotional post on the basis of a representation dated 7.10.1998 does not arise. Merely because the petitioner was aware of the proposed decision of the Bank dated 11.1.1999 cannot be a ground to reject his representation dated 20.1.1999 withdrawing the earlier representation dated 7.10.1990. Once it is held that the said proposed action had not been communicated to the petitioner before 20.1.1999 when he submitted the second representation withdrawing the earlier representation dated 7.10.1998, the Bank could not have acted upon such proposal before it was communicated to the petitioner officially.

8. In this connection, some decisions were placed by Shri S.P. Mishra, learned Senior Counsel appearing for the bank, but we find that only one out of the said decisions is relevant for the purpose of this case. In the case of ***Union of India Vrs. Gopal Chandra Misra and others*** reported in AIR 1978 Supreme Court 694, it was decided that the general principle regarding resignation is that in the absence of a legal, contractual or constitutional bar, a prospective resignation can be withdrawn at any time before it becomes effective, and it becomes effective when it operates to terminate the employment or the office-tenure of the resignor. This general rule is equally applicable to Government servants and constitutional functionaries. In the case of a Government servant/or functionary who cannot, under the conditions of his service/or office, by his own unilateral act of tendering resignation, give up his service/or office, normally, the tender of resignation becomes effective and his service/or office-tenure terminated, when it is accepted by the competent authority. The decision therefore clearly shows that so long as the unilateral act of an employee seeking for resignation has not been accepted, his service do not stand terminated. In the present case, though on record the Bank might have taken a decision to accept the representation dated 7.10.1998, it was never communicated to the petitioner and the petitioner was permitted to join the promotional post on 18.1.1999 and continued there till he was reverted on the basis of representation dated 7.10.1998 in April 1999.

9. We are, therefore of the view that the order directing reversion of the petitioner to the post of Head Assistant could not have been passed in view of the representation dated 20.10.1999 filed by the petitioner withdrawing his earlier representation dated 7.1.1998 on which the Bank had not acted upon till the petitioner joined in the promotional post.

10. Apart from the above, it also appears that the petitioner was not only allowed to join in the promotional post but also continued in the post for some months before he was reverted to the post of Head Assistant and had been paid salary in the promotional post as stated by the learned counsel for the petitioner. If that be so, promotion of the petitioner to the officer cadre having been accepted by the Bank authorities by permitting him to join in the promotional post and paying him salary for the period he worked in the promotional post, order of reversion cannot be passed without due process of law as the same amounts to punishment.

11. We therefore, for the reasons stated above, allow the writ application and set aside the order in Annexure-1 and direct the Bank to permit the petitioner to continue in the promotional post from the date he was reverted to the post of Head Assistant. However, the petitioner having not worked in the promotional post from the date of his reversion, he shall not be entitled to salary in the promotional post till he again joins in the cadre of Junior Management Grade Scale-I, but the interregnum period shall be counted for other service benefits. The opposite parties are directed to pass necessary orders in this regard promoting the petitioner to the aforesaid officer grade within a period of three months from the date of communication of this order.

Writ petition allowed.

2012 (I) ILR- CUT- 638

L.MOHAPATRA, J & B.K.PATEL, J.

JCRLA NO.44 OF 2003 (Dt.03.01.2012)

RABI @ KHAGESWAR
MAHAKUD & ANR. ……..Appellants.

.Vrs.

STATE OF ORISSA …….Respondent.

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

Ocular evidence shows that the deceased sustained fatal injury caused by weapon like HEMADASTA GUDA (Pestal) – Evidence on record does not indicate any other cause of death of the deceased – Being infuriated by deceased's conduct in committing theft of money from the box in the hotel, appellant, all of a sudden and on the spur of the moment threw the Pestal at the deceased – There was no premeditation to commit murder of the deceased – Conduct of the appellant in throwing iron HEMADASTA GUDA at the deceased does not rule out knowledge on his part that such an act was likely to cause bodily injury as was likely to cause death – Held, appellants are liable to be convicted U/s.304, Part-II I.P.C. instead of U/s.302 I.P.C.

(Para 10)

For Appellant - Mr. Arunendra Mohanty
For Respondent - Mr. Sangram Das,
Addl. Standing Counsel

B.K. PATEL, J. By the impugned judgment dated 21.3.2003 passed by the learned Sessions Judge, Sundargarh in Sessions Trial No.88 of 1998 the appellants each of the appellant has been convicted under Section 302 and 201 read with 34 of the I.P.C.; and sentenced to undergo imprisonment for life and to pay fine of Rs.2000/-, in default to undergo R.I. for a period of six months, for the offence under Section 302 read with 34 I.P.C. and to rigorous imprisonment for 5 years and to pay fine of Rs.1000/-, in default to undergo R.I. for 3 months, for the offence under Section 201 read with 34 I.P.C.

2. Allegation in the case relate to commission of murder of deceased Chhedananda and disposed of his dead body in the jungle to cause disappearance of evidence. Appellant Rabi @ Khageswar is deceased's

step-brother. P.W.3 is their father. Deceased was aged about 12 years. Occurrence took place in between 20.10.1997 to 1.11.1997.

3. Prosecution case is that about 20 days prior to the occurrence there was dispute between appellant Rabi and deceased's mother in connection sharing of lands. However, the dispute was settled by the villagers. It is alleged that on the date of occurrence while the deceased was working in the hotel of appellant Parsuram @ Kunda Singh, appellants committed his murder and disposed of the dead body. In spite of search, deceased's parents could not trace the deceased. However, few days after the occurrence, a KANTHAWALA (nomadic quilt maker) came across the skeletal remains of the dead body, a pant, a shirt, and some hairs etc. while tending to his goat in the jungle. Being informed by the KANTHAWALA deceased's parents and other villagers went to the jungle and identified the skeletal remains from the pant and shirt to be that of the deceased. P.W.1, Surpanch of the village lodged written report at Talsara Police Station upon which the case was registered and investigation was taken up by P.W.11. On completion of investigation, charge-sheet was submitted against the appellants under Sections 302 and 201 read with 34 I.P.C.

4. Appellants took the plea of complete denial.

5. In order to substantiate the charge, prosecution examined 11 witnesses. P.W.6 was examined as solitary eye-witness. P.W.1 is the informant and P.W.3 is the deceased's father. P.Ws. 2,4,7 and 8 as well as P.W.9 Executive Magistrate were examined as seizure witnesses. Of them, P.Ws. 1,4 and 5 were declared to be hostile witnesses. P.W.10 is the doctor who examined skeletal remains of the deceased. P.W.11 is the Investigating Officer. Prosecution also relied upon documents marked Exts. 1 to 13 and material objects M.O.I to M.O.VI. No defence evidence was adduced.

Placing reliance on the evidence of eye-witness P.W.6 stated to have been corroborated by medical evidence of P.W.10 and other incriminating circumstances the trial court held the prosecution to have proved the charge against the appellants.

6. In assailing the impugned judgment it is submitted by Shri Arunendra Mohanty, learned counsel for the appellants that the entire prosecution case hinges upon testimony of P.W.6. It is argued that P.W.6 being a person of tender age, trial court should not have recorded conviction on the basis of his evidence. Alternatively, it is argued that evidence of P.W.6 indicated that on the spur of the moment, on being provoked by theft committed by the deceased, appellant Kunda Singh caused fatal injury on the deceased's

head by throwing HEMADASTA GUDA. It is clear from the evidence of P.W.10 that cause of death of the deceased was due to injuries on the skull bone, maxilla and mandible. Therefore, appellants at the worst are liable for commission of offence under Section 304, Part-II of the I.P.C.

7. On the other hand, learned counsel for the State places reliance on the evidence of P.W.6 and P.W.10 as well as circumstance of seizure of HEMADASTA GUDA in order to support the impugned judgment.

8. We have carefully examined the entire evidence on record upon reference to rival contentions. Informant P.W.1 as well as P.W.2 testified that being informed by the KANTHAWALA they went to the spot where deceased's parents identified pant and shirt lying there to be of the deceased. P.W.2 deposed to have witnessed seizure of articles from the spot under seizure list Ext.2. Deceased's father P.W.3 stated in his evidence that the deceased was a school going boy and at the same time he also used to work in the hotel of appellant Parsuram @ Kunda Singh. Appellant Rabi is his son through one wife and the deceased was his son through another wife. Both the wives at times used to quarrel with each other. On one occasion appellant Rabi assaulted the deceased's mother. However, the matter was settled due to intervention of the villagers. On the date of occurrence he had been to Dalbhanga Hat in Bihar. Deceased had gone to hotel of appellant Parsuram for work. On return, P.W.3 found that the deceased had not returned. He questioned appellant Parsuram regarding the whereabouts his son. He replied that after attending his work in the hotel deceased had left for Sundargarh in the bus. As it was Diwali time, P.W.3 thought that the deceased might have gone to Sundargarh for purchase of crackers. However, deceased did not turn up. In the subsequent days, he came to Sundargarh to search for him. Then he lodged a missing report at Talsara Police Station five days after missing of the deceased. P.W.3 further deposed that on being informed by KANTHA SELEI MAN he with co-villagers including P.Ws. 1 and 2 went to the jungle and found the deceased's shirt M.O.I and pant M.O.II as well as skull of human being and some bones lying scattered in the jungle. He and his wife identified the pant and shirt to be of the deceased. P.W.4 stated regarding seizure of one iron HEMADASTA GUDA from the hotel of appellant Kunda @ Parsuram Singh under seizure list Ext.3. P.W.5 is a signatory of seizure list Ext.4 under which a spade was seized. P.W.7 also is witness to seizure of articles from the jungle under seizure list Ext.2. P.W.8 deposed regarding seizure of cycle from the house of appellant Parsuram. P.W.9 was the Tahasildar-cum-Executive Magistrate in whose presence articles were seized under seizure list Ext.2.

8.1 P.W.10 was the Assistant Professor in the Department of F.M.T. in V.S.S.Medical College, Burla. He testified to have examined skeletal remains, i.e. skull bone, right side maxilla, a portion of the mandible, two pieces of scapula, six number of ribs, elongated heap bone, two thigh bones, three vertebra and a bunch of scalp hairs. Upon examination, he opined as follows:

> "1. All the bones excepting elongated heep bone, small slender thigh bones and the small size vertibra were of human origin, of one and same individual of the age 12 to 13 years.
>
> 2. I detected ante-mortem injuries on the skull bone, maxilla and mandible, which could be the cause of death of the deceased.
>
> 3. Time since death of a month or two from the date of my preliminary examination."

He also opined that injuries found on the skull may be possible by the weapon like HEMADASTA (Pestal).

Thus, prosecution has led cogent evidence to establish that death of the deceased was due to homicidal injuries sustained in the skull.

9. Prosecution has examined P.W.6, another boy who was working in the hotel of appellant Kunda Singh, as the eye-witness to the occurrence. P.W.6 testified that one day the deceased committed theft of money from the box of appellant Kunda Singh, and appellant Kunda Singh threw a HEMADASTA GUDA on the deceased. Getting the blow the deceased fell down. By then the other appellant Rabi who was also present in the hotel pressed deceased's neck by means of a gamuchha and the deceased died. Both the appellants put his dead body in a gunny bag and removed to the back side room of the hotel. P.W.6 further deposed that he was threatened not to disclose the same to any body or else he would be killed. However, subsequently during investigation he narrated the incident to the police as well as before Magistrate. Evidence of P.W.6 has not been discredited in any manner in course of cross-examination.

10. On analysis of evidence of P.W.6, upon reference to evidence of P.W.10, it is found that evidence of P.W.10 corroborates the ocular testimony that the deceased had sustained fatal head injury caused by weapon like HEMADASTA GUDA (Pestal). Evidence on record does not indicate any other cause of death of the deceased, save and except due to injuries on the skull. From the proved circumstances, it is evident that being

infuriated by deceased's conduct in committing theft of money from the box in the hotel, appellant Kunda Singh on the spur of moment all of a sudden threw a pestal at the deceased, as a result of which deceased sustained fatal injuries and fell down at the spot. Both the appellants thereafter combindly caused disappearance of the dead body of the deceased by throwing it in the jungle. There was no premeditation by any of the appellants in committing murder of the deceased. However, conduct of the appellant Kunda Singh in throwing iron HEMADASTA GUDA at the deceased does not rule out knowledge on his part that such an act was likely to cause bodily injury as was likely to cause death. Therefore, appellants are liable to be convicted under Section 304, Part-II of the I.P.C. instead of under Section 302 of the I.P.C. The impugned judgment and order are liable to be modified to that extent.

11. In view of the above, the appeal is allowed in part. While maintaining conviction and sentence of the appellants under Section 201 read with 34 of the I.P.C., conviction and sentence of the appellants under Section 302 of the I.P.C. is modified to one under Section 304 Part-II of the I.P.C. Accordingly, sentence of imprisonment for life and fine imposed on the appellants under Section 302 of I.P.C. is set aside and appellants are directed to serve sentence already undergone under Section 304, Part-II of the I.P.C.

Appeal partly allowed.

2012 (I) ILR- CUT- 643

L.MOHAPATRA, J & B.K.MISRA, J.

JCRA. NO.271 OF 2000 (Decided on 09.01.2012)

BUDHAN MAJHI ……Appellant.

.Vrs.

STATE OF ORISSA ……Respondent.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – S.300.

Clause 'fourthly' of Section 300 IPC – Essential requisite necessary to be established is that the degree of knowledge as to the dangerous character of the act should be such as to necessarily lead to the presumption that the assailant had full consciousness of the probable consequences that if the dangerous character of the act committed by the accused person is so imminent that it must in all probability cause death or such bodily injury as is likely to cause death, the conclusion is irresistible that the act was done with full consciousness of its probable consequences and it is this degree of knowledge which is spoken of in Clause 'fourthly' of Section 300 IPC.

In the present case both appellant and the deceased were in a dunken state and in a fit of anger the appellant assaulted to the abdomen of the deceased with a wooden pidhha and it can not be conclusively held that the appellant in inflicting the injuries on the deceased was fully conscious of the probable consequences of his act or of the fact that the act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death – Held, prosecution failed to prove the offence U/s.302 IPC beyond reasonable doubt against the appellant and the appellant found guilty for commission of offence U/s.304 (Part-II) I.P.C.

(para-6 to 9)

For Appellant - Mr. Prem Kumar Pattnaik
For Respondent - Mr. Sangram Das
Addl. Standing Counsel

B.K.MISRA, J. The present appellant having been convicted for commission of an offence under Section 302 of the Indian Penal Code (in short 'IPC') and sentenced to imprisonment for life by the learned Additional Sessions Judge, Rairangpur in S.T. Case No.20/81 of 2000, has preferred this appeal.

2. Case of the prosecution, bereft of unnecessary details, is as follows:-

It is alleged that on 18.12.1999 around 4 P.M., the appellant, who happens to be the brother-in-law of the informant-Champai Soren (P.W.1), asked the deceased-Duli Majhi to cook and feed Ghandacha Majhi, the elder brother-in-law of P.W.1 and his son-in-law, but the deceased, who was highly intoxicated then, refused to cook and told the appellant that he himself should prepare the food. It is alleged that Ghandacha Majhi and his son-in-law when left for their village, whereafter the appellant being enraged, assaulted the deceased to her abdomen and chest with a wooden 'pidhha' for which the deceased breathed her last. On hearing cry of the mother of P.W.1, Chhita, Dulari, Gouri, Gogan and others arrived at the spot. On getting this information, P.W.1 infoment proceeded to the house of Lalmohan Lohar (P.W.6), Gramarakhi of the village and reported the incident and as per his advice and other villagers, P.W.1 proceeded to Gorumahisani Police Station and orally reported about the incident, which was reduced into writing. The police on receipt of the said information, registered a case under Section 302 of IPC against the appellant and proceeded with the investigation. On completion of investigation i.e. prima facie materials, charge-sheet was placed against the appellant to stand his trial.

The plea of appellant was complete denial of the occurrence and it was his further plea that he has been falsely implicated.

3. The prosecution in order to establish its case against the appellant examined eight witnesses in all wherein P.W.1 is the informant, P.Ws.2, 3, 4 and 6 are the other independent witnesses to the occurrence. P.Ws.5 and 7 are the two seizure witnesses. P.W.8 is the I.O.

The appellant declined to examine any witness on his behalf.

The learned Additional Sessions Judge on appreciating the evidence on record arrived at the conclusion that the prosecution had been able to establish its case against the appellant, who was the proprietor of the crime and, accordingly, recorded the order of conviction and passed the impugned sentence.

4. The learned counsel appearing for the appellant while taking us through the evidence on record argued with vehemence that the learned Additional Sessions Judge should not have relied upon the uncorroborated testimony of P.Ws.2 and 4 and besides that the materials on record do not make out a case under Section 302 of IPC and at best there could have

been a conviction under Part-II of Section 304 of IPC and urged that the order of conviction under Section 302 of IPC should be set aside.

On the other hand, the learned counsel for the State supported the order of conviction and urged that the order of conviction needs no interference.

5. We have made an in-depth study of the facts and evidence on record. The postmortem report, which has been marked as Ext.7, shows that the doctor, who conducted postmortem examination over the body of the deceased on 19.12.1999 at 2 P.M., found two external injuries i.e. two bruises of the size 1 cm. x 1 cm. and 2 cm. x 1 cm. respectively on the left forearm, which were ante-mortem in nature and could have been caused by a hard and blunt object. On internal examination, one large haemotoma was found in the pretrial cavity. The spleen was found enlarged with a lacerated wound and the doctor opined that the death of the deceased was because of intra abdominal hemorrhage due to rapture of the spleen. Thus, the postmortem report shows that the deceased died because of a homicidal injury i.e. on a vital part of the body like spleen. P.Ws.2 and 4, who are two direct eyewitnesses to the occurrence, have categorically stated that it was the appellant, who requested the deceased, to cook and when the deceased did not agree to that, the appellant gave blows with a wooden 'pidhha' repeatedly for which the deceased died. It is the specific evidence of P.W.2 that the deceased dealt blows to the belly of the deceased with the wooden 'pidhha' Similarly, P.W.4 also has categorically stated that the deceased was assaulted by the appellant with M.O.I-'Pidhha.' The evidence of P.Ws.2 and 4 not only corroborate each other on the point of assault by the appellant but also their evidence have gone totally unchallenged from the side of defence, even though they were subjected to cross-examination. P.W.1, the informant, is admittedly a post occurrence witness and was not present when the occurrence took place. Similarly, P.W.3 simply deposed that on return of his house from the field, he found the deceased dead P.W.3 when did not support the case of the prosecution he was declared hostile by the prosecution. But that was a vain attempt P.W.5 is only a seizure witness. P.W.6 simply deposed that he arrived at the spot when he was called by the brother of the deceased, P.W.7. He only speaks about the seizure of wearing apparels of the deceased by the I.O. and has proved the seizure list, Ext.2. P.W.8 is the I.O and admittedly he is also a post-occurrence witness. There is nothing on record to disbelieve the evidence of P.Ws.2 and 4 on the point of occurrence even though there is no other corroboration to their evidence. The learned Additional Sessions Judge in our considered view

has elaborately discussed the evidence on record and there is hardly anything on record to take a different view in the matter.

6. But now coming to the point as to whether the action of the appellant could be covered under Part-II of Section 304 of IPC or under Section 302 of IPC. it is seen that in the instant case, the evidence shows that the appellant dealt blows with the wooden 'pidhha' to the abdomen of deceased. Under clause 'fourthly' of Section 300 of IPC, culpable homicide, unless attracted by any of the exceptions given therein, is murder if the person committing the act knows that it is imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits the act without any excuse for incurring the risk of causing death or such bodily injury as aforesaid. Thereunder, therefore, the essential requisite necessary to be established is that the degree of knowledge as to the dangerous character of the act should be such as to necessarily lead to the presumption that the assailant had full consciousness of the probable consequences; for if the dangerous character of the act committed by the accused person is so imminent that it must in all probability cause death or such bodily injury as is likely to cause death, the conclusion is irresistible that the act was done with full consciousness of its probable consequences; and it is this degree of knowledge which is spoken of in clause "fourthly" of section 300 of IPC. But it is not so in the case of the third and last part of section 299 of IPC. Therein knowledge required is not of this higher decree but of a decree which creates consciousness only to this extent that by his act he is likely to cause death, or in other words a consciousness which is not definite of this probable consequence. Therefore, it follows that so long as the circumstances are not so coercive and clear as to irresistibly lead to a presumption of full consciousness of its probable consequence, the offence cannot be said to be covered by clause "fourthly" of section 3000 of IPC but by the third and last part of section 299 of IPC. The third and last of section 299 of IPC laws down that-

> "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such badly injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide".

7. Therefore, in all cases of culpable homicide where its commission depends on the degree of knowledge as to its probable consequences, what has to be carefully looked into in order to decide whether it is a case of murder or culpable homicide not amounting to murder, it is a case of murder or culpable homicide not amounting to murder, is the degree of

knowledge which the assailant had about the probable consequences of his act. Therefore, in the ultimate analysis, it will be a question of fact, depending on the circumstances of each case, as to whether the knowledge on the part of the assailant was of a degree which must necessarily lend to a presumption that he was fully conscious of the probable consequences of his act.

8. In the instance case, overwhelming the evidence is available on record to show that the deceased as well as the appellant at the time of occurrence were in a drunken state. Thus, when in a fit of anger the appellant assaulted on the abdomen of the deceased with a wooden 'pidhha', it cannot be conclusively held that the appellant in inflicting the injuries on the deceased was fully conscious of the probable consequences of his act or of the fact that the act was so imminently dangerous that it must in all probably cause death or such bodily injury as is likely to cause death. Therefore, full consciousness of the probable consequences of his act cannot be attributed to the appellant . the knowledge that can act be held to have been proved in the present case is not what is required under clause 'fourthly ' of Section 300 of the Indian Penal Code.

Therefore, from the available evidence on record, we find that the offence under Section 302 9f the Indian Penal Code has not been by the prosecution beyond reaso9nable doubt against the present appellant.

9. In the result, we set aside the impugned judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Rairangpur in S.T. Case No.20/81 of 2000 against the appellant Budhan Majhi under Section 302 of I.P.C. and find the appellant guilty for commission of offence under Section 304 (Part-II) of IPC and convict him thereunder and sentence to imprisonment for a period of seven years.

As it appears from the record, the appellant is in custody. If that be so, the appellant be set at liberty forthwith, unless his detention is required in any other case. The appeal is allowed in part.

Appeal allowed in part.

2012 (I) ILR- CUT- 648

L.MOHAPATRA, J & B.K.MISRA, J.

W.P.(C) NOS.4941/2005 & 10370/2004 (Dt.24.02.2012)

BIDYADHAR BEHERA .....Petitioner.

.Vrs.

ORISSA STATE ROAD TRANSPORT CORPN. & ORS. ……..Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.311.

Compulsory retirement – Where to impose – Petitioner an employee in OSRTC – He was transferred from Baripada Zone to Dhenkanal Zone – He did not join and remained on leave – The said transfer was cancelled and he was reposted at Baripada but he did not join and remained on leave – In the departmental proceeding he was placed under compulsory retirement – Appellate Authority confirmed the punishment – Hence this writ petition – Held, punishment of compulsory retirement is grossly disproportionate to the alleged charge – Order of the Appellate Authority is set aside – Matter remitted back to the Appellate Authority to reconsider the question of punishment and impose punishment commensurating the alleged charge. (Para 6,7)

For Petitioner - Dr. M.R.Panda, M.K.Nayak, B.P.B. Bahali, M.Panda & C.Mohapatra.
For Opp.Parties - Mr. H.K.Tripathy

B.K.MISRA, J Both these writ petitions are being disposed of by this common order as they relate to the same person and same facts. The petitioner challenges the impugned order of the District Transport Manager (Administration), Orissa State Road Transport Corporation, Bhubaneswar (for short 'O.S.R.T.C.') at Annexure-7 in compulsorily retiring the petitioner from service as well as the dismissal of the appeal preferred by the present petitioner challenging the impugned order at Annexure-7 by the General Manger (Administration), Orissa State Road Transport Corporation, Bhubaneswar (Annexure-1).

2. The petitioner was appointed as a Conductor in the Baripada Zone of the O.S.R.T.C. on 7.2.1976 and while functioning as such he was transferred to Dhenkanal Zone of the O.S.R.T.C. by order dated 12.8.1996. The petitioner could not join at his new place of posting at Dhenkanal as he suffered from Maleria and A.P.D. and applied for leave to Opposite Party No.2 vide Annexure-2 series. Since the petitioner did not join his duties at Dhenkanal he was placed under suspension on 3.1.1997 in contemplation of initiation of a departmental proceeding. Ultimately, the petitioner was allowed to retire compulsorily by the authorities vide order at Annexure-7. It is the case of the petitioner that when on his representation the authorities were pleased to cancel his order of transfer from Baripada Zone of the O.S.R.T.C. to Dhenkanal Zone and he was allowed to continue at Baripada as per order dated 4.4.1997 (Annexure-6), the departmental proceeding which was taken up by the D.T.M., Dhenkanal was without jurisdiction and resultantly the impugned order at Annexure-7 is also vitiated because of want of jurisdiction. It is also his case that he has been denied opportunity of being heard in the departmental proceeding which was taken up behind his back and the authorities also illegally took into consideration his past conduct and punishment without affording any opportunity to him of being heard. Thus, the petitioner has challenged the action of the Opposite Parties and has sought for the intervention of this Court.

3. The Opposite Parties in their counter while refuting the allegations of the petitioner asserted that all procedures were followed in disposing of the departmental proceeding which was initiated against the petitioner but taking into consideration the antecedents of the petitioner, it was felt by the disciplinary authority to dispense with his services and thus compulsorily retired him without causing any pecuniary loss. Accordingly, it is prayed by the Opposite Parties for dismissal of the writ petition filed by the present petitioner.

4. We have heard the learned counsel for the respective parties and also perused the entire case record along with the Annexures. Dr. M.R. Panda, learned Senior Counsel appearing for the Petitioner assailed the impugned order of compulsory retirement of the Petitioner not only on the ground of disproportionality but also on the ground of fair play i.e. by denying the Petitioner the opportunity of being heard before awarding the impugned punishment and taking into consideration the past antecedent of the Petitioner.

5. Learned counsel appearing for the Opposite Parties fairly admitted that the past antecedent of the petitioner i.e. he was punished 12 times for

allowing the passengers to travel without ticket and also that the petitioner who was transferred to Keonjhar Unit from Baripada did not join and remained on long leave were taken in to consideration while passing the impugned order at Annexure-7. Similarly, it was also contended by the learned counsel appearing for the department that the draft charges and other notices were sent to the Petitioner by registered post with A.D. in his home address but the petitioner deliberately avoided to receive them and did not attend the departmental inquiry for which it was taken up in his absence and therefore it cannot be said that due procedure was not followed.

6. Without entering into the disputed questions of facts that there was no service of notice to the petitioner by the Disciplinary Authority and that no opportunity was afforded to the petitioner before passing the impugned order suffice is to say that when the petitioner was transferred from O.S.R.T.C., Baripada Zone to Dhenkanal Zone, he did not join and remained on leave and also when the said transfer order was cancelled and he was reposted at Baripada even thereafter he did not join at his place of posting, Baripada. Thus, taking into consideration the alleged delinquency on the part of the petitioner, it is to be seen as to whether the order of compulsory retirement of the petitioner is grossly excessive and disproportionate. It is trite that the quantum of punishment to be imposed is completely in the domain of the Disciplinary Authority and Court cannot substitute punishment. The Court can intervene and give direction to the Disciplinary Authority for reconsideration of the matter if it would be found that the punishment imposed on the delinquent is grossly disproportionate.

7. In the instant case, having found that the punishment of compulsorily retiring the petitioner is grossly disproportionate to alleged delinquency, we set aside the order of the Appellate Authority at Annexure-1 and remit the matter back to the Appellate Authority to reconsider the question of punishment and impose such punishment commensurating the alleged delinquency. The Appellate Authority may reconsider and pass appropriate orders within two months from the date of communication of this order.

Accordingly, both the writ petitions stand disposed of.

Writ petition disposed of.

2012 (I) ILR- CUT- 651

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

JCRA NO. 272 OF 2000 (Dt. 20.07.2011)

KARI @ KARTIK BEHERA …….Appellant.

.*Vrs.*

STATE OF ORISSA …….Respondent.

CRIMINAL TRIAL – Identification during night - P.Ws.2,4 and 7 consistently deposed that the appellant running away from the spot in darkness – Question raised by the counsel for the appellant that it could not have been possible by the above witnesses to identify the appellant – Since parties are used to live in the midst of nature and accustomed to live without light, they could have been identified easily not only from the voices but from the fact that they are known person and close relatives and living in the neighbouring huts – In this case the appellant and P.Ws. 2,4 & 7 are known to each other and they are close relatives and living in the neighbouring houses – Held, the contention that P.Ws.2,4 and 7 could not have seen the appellant as he fled from the spot in darkness is not acceptable. (Para 9)

Case law Relied on :-
(2003)6 SCC 392 : (Shivraj Bapuray Jadhav & Ors.-V-State of Karnataka)

Case laws Referred to:-
1.(2010)47 OCR 105 : (Pabitra Mohan Bagh-V-The State)
2.(2010)45 OCR (SC) 494 : (Arun Bhanudas Pawar-V-State of Maharashtra)

For Appellant - Mr. Prajit Ku. Pradhan
On behalf of P.K.Mohanty-2.
For Respondent - Mr. Soubhagya Ketan Nayak,
Addl. Govt. Advocate.

PRADIP MOHANTY, J. This appeal is directed against the judgment and order dated 8.9.2000 passed by learned Sessions Judge, Mayurbhanj, Baripada in Sessions Trial Case No.31 of 1998 convicting the appellant under Section 302 of the Indian Penal Code (for short 'the I.P.C.') and sentencing him to undergo imprisonment for life.

2. Prosecution case, in short, is that on 04.10.1997 Saturday at about 6.00 AM Iswar Behera (P.W.7) of village Adarpada and Nidhia Behera

(P.W.5) came to the house of Grama Rakhi Dasarath Behera (P.W.1) and disclosed before him that in the previous night accused Kartik Behera committing murder of his wife Saraswati Behera by assaulting her with knife and stone has absconded and the dead body of the deceased is lying on the Pinda of his house. Hearing this, while Grama Rakhi was going to village Adarpada on the way Janaka Bewa, the mother of Iswar Behera (P.W.7) and Gurubari Behera (P.W.2), the elder sister of P.W.7, met him and disclosed before him that the accused committed murder of his wife and absconded in the previous night. The Grama Rakhi went to the spot and saw that the deceased lying dead on the Pinda of her house and her head, face and neck were stained with blood. A blood stained stone had fallen near the Pinda. On that day at about 11.00 AM, Grama Rakhi orally reported the incident at Sarat P.S. The Officer-in-Charge of Sarat P.S. reduced his oral report to writing vide Ext.1, registered a case and proceeded with the investigation. On completion of investigation, he submitted charge-sheet under Section 302 of the I.P.C. against the accused.

3. Defence plea is one of complete denial to the allegation.

4. Prosecution in order to prove the charge examined as many as thirteen witnesses including the doctors and the I.O. and exhibited sixteen documents including chemical examination report and post-mortem examination report. The accused examined none in support of his plea.

5. Learned Sessions Judge, who tried the case, convicted the present appellant under Section 302 of the I.P.C. and sentenced him to undergo imprisonment for life mainly basing upon the ocular evidence of P.W.3 and dying declaration made by the deceased before P.Ws.2, 4 and 7.

6. Mr. Prajit Kumar Pradhan appearing on behalf of Mr. P.K. Mohanty-2, learned counsel for the appellant assails the impugned judgment on the following grounds:

(i) The evidence of P.W.3, who is the only ocular witness, is not trustworthy, since she is a child witness and was tutored by her uncle and that she could not have seen the occurrence as the verandah of the house where it took place was dark and she was inside the room.

(ii) Dying declaration made by the deceased before P.Ws.2, 4 and 7 is not believable as they are not consistent about the manner in which statement by the deceased was made before them.

(iii) Nature of injury as described by the medical officer does not tally with the evidence of ocular witness P.W.3.

In support of his contention, Mr. Pradhan, learned counsel for the appellant relies upon the decisions in ***Pabitra Mohan Bagh V. The State*****,** (2010) 47 OCR 105 and ***Arun Bhanudas Pawar V. State of Maharashtra,*** (2010) 45 OCR (SC) 494.

7. Mr. Soubhagya Ketan Nayak, learned Additional Government Advocate vehemently contends that P.W.3, the child witness, is the daughter of the deceased as well as the appellant. In her evidence, she has categorically deposed that with the help of the light of a dibiri, which was burning inside the room, through the space on the door of the house she saw her father brought a knife from the thatch of the house and stabbed her mother and thereafter dealt a blow to the face of her mother by means of a stone. P.Ws.2, 4 and 7 are witnesses to the dying declaration and there is no discrepancy in their evidence with regard to manner of statement given by the deceased. The doctor (P.W.8), who conducted autopsy, opined that the cause of death was as a result of injury to the brain and right lung and that the injuries described in the postmortem report except the incised wound over the left ear and the stab wound over the left side of the face could be caused by the stone (M.O.II). Human blood was detected in the wearing apparel (lungi) of the appellant, as it reveals from the Serologist's report, but no explanation was given by the appellant in regard to the same. Thus, there is no infirmity or illegality in the impugned judgment warranting interference by this Court. In order to substantiate his contention, Mr. Nayak, learned Additional Government Advocate relies upon the decision in **Shivraj Bapuray Jadhav and others V. State of Karnataka**, (2003) 6 SCC 392.

8. Perused the L.C.R. and the decisions cited by the parties. P.W.1 is the Gram Rakhi of village Adarpada who orally reported the death of the deceased to O.I.C., Sarat P.S. P.W.2 is the elder sister of the deceased. She deposed in her examination-in-chief that in the night of occurrence, hearing cry of Reba (P.W.3), the daughter of the deceased, she got up from sleep. Suspecting presence of a snake in the house of the deceased, she proceeded to deceased's house with a dibiri. Her brother (P.W.7) and his wife Gouri (P.W.4) also came to the house of the deceased with a light. On her arrival, she saw the accused running away from the spot towards jungle side. She saw her deceased sister lying on the outer verandah of her house and blood was oozing from her head and ear root. On being asked by her, the deceased told that she was assaulted by her husband. Then the deceased asked for and she provided her some turani. After some time, the

deceased succumbed to the injuries. She further deposed that P.W.3 was locked inside a room. Her brother (P.W.7) entered inside the room through the broken wall at back side of the house and brought the child. When she and her brother (P.W.7) asked the daughter of the deceased, she told them that the accused picked up quarrel with her mother (deceased) and asked her to come inside the house. When her mother did not respond, her father threatened to kill her. Then her father closed the door of the house, which was a tati door, and locked it from out side. Daughter of the deceased also told them that her accused father might have stabbed and killed her mother by stone. She also saw a stone stained with blood near the head of the deceased. On the following morning, her brother (P.W.7) and Nidhia Behera (P.W.5) went to village Chowkidar to inform about the incident. Subsequently, she and her mother also went to the village Chowkidar. Nothing has been elicited in cross-examination from P.Ws.1 and 2 to disbelieve their evidence.

P.W.3 is a child witness. She is the daughter of both deceased and appellant. In her examination-in-chief, she stated that in the night of occurrence she was sleeping in her house. Her father called her mother to go to the verandah of the house to sleep. Her father quarrelled with her mother and locked the door of the house from out side. She was inside the house. A dibiri was burning inside the room. Through the space on the door of the house, she saw her father brought a knife from the thatch of the house and stabbed her mother. She also saw her father after stabbing her mother by that knife dealt a blow to the face of her mother by means of a stone. She started crying. Hearing her cry, her uncle, aunt and grand-mother came to their house. They brought light with them. Her uncle (P.W.7) came inside the house through the broken wall and took her to outside. In her cross-examination, she stated that her elder brother and younger brother were in their house in the night of occurrence. They had slept after taking their night meal. The outer space of their house was dark in the night of occurrence. She further admitted that she could not tell when her father came to their house in the night of occurrence as she had slept. She also admitted that she was not examined by the police. P.W.4 is the sister-in-law of the deceased who corroborated the statement of P.W.2. She deposed in her examination-in-chief that the son of the deceased was sleeping with her mother-in-law in the night of occurrence. Hearing the cry of the daughter of the deceased from the side of her house, she along with her husband (P.W.7) got up from their sleep and went to the house of the deceased with a dibiri. On her arrival near the house of the deceased, she saw the accused running towards a bush at a little distance from the house. The deceased was lying on the verandah with bleeding injuries on her head and face. After

her arrival, her other sister-in-law (P.W.2) came there. On their asking, the deceased told slowly that she was assaulted by accused Kartika. The deceased requested them to give some turani and she obliged her request. Some time thereafter, the deceased succumbed to the injuries. In her cross-examination, she admitted that her house is at a distance of 15 cubits from the house of P.W.2 and house of P.W.2 is nearer to the house of the deceased. The deceased was not dead by the time they arrived near her. She was at her last stage by then. She was able to talk only once, then took turani from her and succumbed to the injuries. She further admitted in the cross-examination that she saw the accused running away from the spot in darkness. Nothing has been elicited from her in cross-examination to disbelieve her testimony. P.W.5 is a post-occurrence witness. P.W.6 is the witness to the seizure of blood stained earth and sample earth from the verandah, where the dead body of the deceased was lying, vide seizure list (Ext.2). P.W.7 is the brother of the deceased and a witness to the dying declaration. He corroborates the evidence of P.Ws.2 and 4. In his examination-in-chief, he specifically stated that hearing cry of P.W.3, he along with his wife went to the house of the accused with a light. Near the house of the accused they saw the accused running away towards the jungle side. Near the verandah of the house the deceased was lying with injuries on her head and face. On being asked, the deceased told that she was assaulted by accused. Then the deceased gave indication to provide her turani. His wife (P.W.4) supplied turani to the deceased. The door of the house of the accused was locked from outside. Hearing the sound of P.W.3 from inside the house, he went through the broken wall of the house and brought P.W.3 to outside. In cross-examination, he admitted that hearing the cry of P.W.3, he along with his wife and his sister Gurubari and her husband went to the house of the deceased. They saw the accused running towards the jungle at a distance of 7 to 8 cubits. He further admitted that when they approached, the deceased told his wife that she was assaulted by the accused and gave indication to supply turani.

P.W.8 is the doctor who conducted autopsy over the dead body of the deceased and found the following injuries:

> "(i) An incised wound at the junction of upper 3/4th & lower 1/4th of the left ear dividing the ear lobule.
>
> (ii) One stab wound over the left side of the face 4 cm in front of the ear of size 2 cm x 1 cm opening into the mouth cavity.

(iii) One haematoma of size 5 cm x 4 cm over the scalp on the right side above the right ear.

(iii) One depressed comminuted fracture of parietal, temporal and frontal bone of the right side."

He opined that all the injuries were ante mortem in nature and the cause of death was due to injury to the brain and right lung. He also opined that the injuries described in the postmortem report, except the incised wound over the left ear and the stab wound over the left side of the face, could be caused by the stone (M.O.II).

P.W.9 is the doctor who collected blood sample of the accused in cotton gauze and his nail clippings. P.W.10 is the C.I. of Police, Udala Police Circle, who took charge of investigation of the case from P.W.13 and on completion of investigation submitted charge sheet.

P.W.11 is the O.I.C. of Sarat P.S. who registered the case and took up investigation. He seized some blood stained earth and sample earth from the spot as well as blood stained stone from the courtyard of the house of the deceased. He held inquest over the dead body of the deceased and prepared inquest report Ext.4. He seized a lock and a key from the house of the accused and sent the dead body of the deceased for post-mortem examination. Nothing has been elicited from him in cross-examination to disbelieve his evidence. P.W.12 is the A.S.I. of Police of Sarat P.S. P.W.13 is the Circle Inspector of Police, Udala. He deposed in his examination-in-chief that on 5.10.1997 he took charge of investigation of the case from P.W.11, the then O.I.C. of Sarat P.S. On that day at 2.00 PM, he arrested the accused and sent him to Sarat P.H.C. for collection of his blood sample and nail clippings. He seized the wearing apparels (lungi and banian) of the accused. He specifically deposed that at the time of seizure the lungi and banian were stained with blood. On 12.12.1997, he handed over the charge of investigation of the case to P.W.10. In cross-examination, he admitted that no knife or dibiri was seized in this case.

9. In the instant case, P.W.3 has been projected by the prosecution as an occurrence witness. On careful perusal of her evidence it appears that she is a child witness and at the time of deposition she was ten years of age. According to her, she was inside the house and its door was locked from outside when the occurrence took place at the outer space of the house where darkness was prevailing. Although she claimed to have witnessed the occurrence with the help of dibiri light, P.W.13, the Circle Inspector of Police,

Udla in cross-examination has categorically admitted that no dibri was seized in this case. This apart, it has been brought out by the defence from P.W.3 by way of cross-examination that in the night of occurrence after taking meal she had slept in the house and its door was closed from outside and that she could not tell when her father came to their house in the night of occurrence as she had slept and that she had not stated before the police that her uncle brought her from inside the house through the broken wall. This being the evidence of P.W.3, she cannot be termed as an eye witness.

Coming to the evidence of P.Ws.2, 4 and 7, they have consistently deposed that while they arrived at the house of the appellant they saw the deceased lying injured on the outer 'Pinda' of the house and the appellant fleeing away from the spot. To their query as to who assaulted her, the deceased told them that she was assaulted by the appellant. Saying so, the deceased asked for some 'turani' which was complied by P.W.4. After taking turani, she succumbed to the injuries. All these witnesses are consistent about the manner in which statement by the deceased was made. These three witnesses have stated that when they arrived the deceased was lying injured near a stone which was stained with blood. During the course of investigation, blood stained saree of the deceased (M.O.I), a blood stained stone (M.O.II) and blood stained lungi of the appellant (M.O.III) were seized. As per chemical examination report (Ext.15), 'A' group blood of human origin, which was the blood group of the deceased, was detected from M.Os.I, II and III. No explanation has been offered by the appellant as to how blood stains of group 'A' came to his lungi. A question has been raised by the learned counsel for the appellant that as per evidence of P.Ws.2, 4 and 7 since the appellant was running away in darkness; it could not have been possible by them to identify him. The apex Court in a similar case, i.e., **Shivraj Bapuray Jadhav** (supra) has held that since parties are used to living in the midst of nature and accustomed to live without light, the parties could have been identified easily not only from the voices but from the fact that they are known person and close relatives and living in the neighbouring huts. In the case at hand, the appellant and P.Ws.2, 4 and 7 are known to each other and close relatives, and living in the neighbouring houses. So, the contention of the learned counsel for the appellant that P.Ws.2, 4 and 7 could not have seen the appellant as he fled away from the spot in darkness is not acceptable.

10. In view of the discussions made above, this Court does not find any reason to interfere with the impugned judgment of conviction and sentence passed by learned Sessions Judge, Mayurbhanj, Baripada in Sessions Trial

Case No.31 of 1998 and resultantly the JCRA is dismissed being bereft of merits.

Appeal dismissed.

2012 (I) ILR- CUT- 659

M.M.DAS, J.

CRLMC NOS.1957 & 1951 OF 2009 (Dt. 24.01.2012)

PRASANT KUMAR PATTNAIK & ANR. ……Petitioners.

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.197.

The word, "Offence" mentioned in Section 197 is not confined to an offence under the Penal Code or any other particular Act but also an offence committed under any statute including a special enactment by a public servant purportedly in discharge of his official duly, cognizance of such offence can not be taken by a Court unless sanction from the Central or State Government, as the case may be, is obtained before taking cognizance.

In the present case Sri Prasant Kumar Pattnaik is a public servant and the alleged offence having been stated to be committed in purported discharge of his official duly, in the absence of valid sanction, the learned Court below was debarred from taking cognizance of such offence alleged against him – Moreover there is no prima facie case made out to show that offence U/s.15 of the E.P.Act has been committed – Held, order taking cognizance against Sri Prasant Kumar Pattnaik U/s.15 of the E.P. Act, 1986 is not sustainable.

Case law Referred to:-

(2011) 3 SCC 351 : (Harshendra Kumar D.-V- Rebatilata Koley & Ors.)

For Petitioner - M/s. A.K.Parija, S.P.Sarangi, P.K.Dash, S.P.Panda.

For Opp.Parties - Addl. Govt. Advocate (for O.P.1)
M/s. B.B.Mishra, D.Sahoo (for O.P.2)
Mr. B.R. Behera (for Intervenor)

For Petitioner - M/s. Dr. A.K.Rath, D.Panda, D.Mohanty, S.Mohanty, S.M.Patnaik, S.Nanda, A.Pattnaik & B.P.Das.

For Opp.Parties - M/s. B.B.Mishra, D.Sahoo (for O.P.1)
Addl. Govt. Advocate (for O.P.2)

M.M. DAS, J. These two Criminal Misc. Cases have been filed under section 482 of the Criminal Procedure Code by the accused persons in ICC No. 483 of 2008 pending before the learned S.D.J.M., Puri challenging the order dated 4.5.2009 passed by the said learned S.D.J.M. taking cognizance of offence under section 15 of the Environment (Protection) Act, 1986 (hereinafter referred to as 'the E.P. Act') against them and further seeking quashing of the proceedings in the said ICC No. 483 of 2008.

2. As common questions of fact and law arise in both the Criminal Misc. Cases, they were heard together and are being disposed of by this common judgment.

3. The opp. party no.2 – Beach Protection Council of Orissa (in CRLMC No. 1957 of 2009) through Jagannath Bastia as its President filed the aforesaid complaint case against the petitioners in both the aforesaid Criminal Misc. Cases before the learned S.D.J.M., Puri impleading them as accused persons, making allegation that the accused no.1 - Shri Prasant Kumar Pattnaik, who is petitioner in CRLMC No. 1957 of 2009 illegally approved the building plan submitted by the accused no. 2, i.e., Shri Sudip Sen, Managing Director of M/s. JNB Build Tech Pvt. Ltd. (Petitioner in CRLMC No. 1951 of 2009) vide his letter No. 25/3/PKDA dated 24.8.2005 for construction of a commercial–cum-residential building and apartment over plot nos. 312/665, 312/666 and 312/6677 under khata No. 142/136, 142/137 and 142/138 in mouza - Sipasarubali under Brahmagiri Tahasil of Puri district on the Seaward side of the existing road and showing a newly developed road in the demarcated Coastal Regulation Zone (CRZ)-II area violating the provisions of the Costal Regulation Zone notification issued by the Ministry of Environment and Forests, Government of India, on 19.2.1991 under the provisions of the E.P. Act and the amended CRZ notification No. SO-494(E) dated 9.7.1997, by abusing his power with mala fide intention for the interest of the builder. It has been further alleged in the complaint petition that the accused no. 2 – Sudip Sen (Petitioner in CRLMC No. 1951 of 2009) has been constructing a commercial building and a residential apartment over the said land violating the provisions of the CRZ notification dated 19.2.1991 under the provisions of the E.P. Act and the amended notification as referred to above. The complainant has stated that as per the provisions of the notification, the State Government has demarcated and declared the said area as CRZ-II category in a High Level Committee meeting held on 25.4.2000 under the Chairmanship of the Chief Secretary, Government of Orissa. As per the provisions of the CRZ –II, building shall be permitted on the landward side of the existing road or roads proposed in the approved coastal zone management plan of the area or on the landward side of the

existing authorized structures. In the amended notification issued on 19.7.1997, it was clarified that no permission for construction of building shall be given on landward side of any new road except roads proposed in the approved coastal zone management plan, which are to be constructed on the seaward side. There was a specific statement in the complaint that in the instant case, there was no road on the seaward side of the above land neither in the revenue record and map of Government of Orissa nor in the approved costal zone management plan of the area. The roads and buildings division, Puri has started development of the said new road on the seaward side of the land in question on 28.2.2004 over plot Nos. 361 and 306, khata No. 344 in mouza - Sipasarubali and completed the construction of the road on 31.3.2006 by M/s. Nirmani Construction and Engineers Pvt. Ltd. The Collector, Puri has also alienated the said Government land in favour of the Executive Engineer, Roads and Buildings Division, Puri for construction of the said new road running from Hotel Hans Coco Palm to Sterling Holiday Resorts by district office letter No. 3631/Rev. dated 19.10.2004 and memo No. 139 dated 14.1.2004 respectively. It was alleged that as per Revenue record and map of the State Government published in the years 1977 and 1988, the kisam (status of the said land) is PATITA and BALIA and ABADAJOGYA ANABADI. Even from the development plan of Puri-Konark Development Authority (for short, 'the PKDA') prepared in the year 1998 under the signature of the then Secretary and Planning Member, it is seen that the said so-called road as proposed road, did not exist.

4. The complainant thereafter goes to allege that the Building Permission Committee of PKDA in their meeting held on 10.12.2002 under the Chairmanship of the Collector, Puri and Vice-Chairman, PKDA has rejected the building plan approval application of one Shri Ras Bihari Das, on the ground that the said road in question from Hotel Hans Coco Palm to Sterling Holiday Resorts was not existing as on 19.2.1991 and it has also not been reflected in the approved costal zone management plan. Therefore, the permission applied for cannot be considered as it does not confirm to the provisions of the CRZ notification. Allegation against the accused no.1 - Prasant Kumar Pattnaik, was made that he has changed the basic principle of PKDA for the interest of the accused no. 2-Sudip Sen, who is a powerful builder and approved the building plan submitted by accused no. 2 – petitioner in CRLMC No. 1951 of 2009 grossly violating the provisions of the coastal regulation zone notification. To cover up this irregularities, the accused no.1 – Prasant Kumar Pattnaik has prepared a Sub-Committee report dated 25.7.2003 under the signature of the Executive officer, Puri Municipality, Tahasildar, Puri and Executive Engineer, P.H. Division, Puri

and himself and resolved that the said road has not been reflected in the revenue record but it was in existence and use as a road before 19.2.1991.

5. In the initial deposition of the complainant recorded by the learned S.D.J.M., he has stated that he is the President of the Beach Protection Council of Orissa, which is a voluntary organization. He further stated that

there is provision that buildings should be allowed to be constructed on the landward side of the road as per the Government notification of 1991 and no permission shall be given for construction of buildings on the landward side of a new road which are constructed in the Seaward side of existing road as per the Government notification of the year 1997. He corroborated in his statement the allegation against accused no. 1 – Prasant Kumar Pattnaik.

6. The learned S.D.J.M. conducted an enquiry under section 202 Cr.P.C. and by the impugned order recorded that on perusal of the statements of the complainant and the witnesses recorded under section 202 Cr.P.C., a prima facie case under section 15 of the E.P. Act has been made out against the accused persons (petitioners in both the CRLMC) and took cognizance of the said offence and directed issuance of process against the accused persons.

7. Mr. Das, learned counsel for the petitioner in CRLMC No. 1957 of 2009 submitted that the impugned order taking cognizance has been passed without the sanction of the State Government or of the authority either under section 197 Cr.P.C. or under section 110 of the Orissa Development Authorities Act, 1982 (for short, 'the O.D.A. Act') for prosecuting of the petitioner – accused no. 1 – Prasant Kumar Pattnaik, who is a public servant, when the allegation made in the complaint is regarding an act while discharging his official duty. He further contended that permission for construction was granted under section 16 (3) of the O.D.A. Act, 1982 and, therefore, cognizance of offence under section 15 of the E.P. Act could not have been taken. Mr. Das also submitted that it is the Building Permission Committee of PKDA which has given approval to the plan and granted permission for construction, that too, on the land located in the landward side of the existing Marine Road behind Hotel Hans Coco Palm to Sterling Holiday Resorts. The existing road has been upgraded by the P.W.D., Puri, which exists since mid 1980 and was constructed and used by O.R.E.D.A. for maintenance of their Windmill. Thus, the road was in existence prior to CRZ-II notification issued on 19.2.1991. This fact is corroborated by the letter and Map issued by the Secretary PKRIT on 5.3.1987 to the Chief Architect, Government of Orissa which has been

annexed as Annexure-7 to the CRLMC No. 1957 of 2009. He further contended that the Sub-Committee constituted by the Executive Engineer, Puri Municipality, Executive Engineer, PHD, Puri Tahasildar, Sadar, Puri and Planning Member and Secretary, PKDA reported on 25.7.2003 that the road is in existence since mid 1980 and is used by the public. Also the National Remote Sensing Agency, Hyderabad has prepared a map which was published during 1995-96 showing the existence of the road from Hotel Hans Coco Palm to Sterling Holiday Resorts along the Sea beach. Even in the adjacent location, permission has been granted by the PKDA to one Dr. Sabyasachi Pattnaik in 1998 who completed his building before 2000. Hotel Dream Land was granted permission by PKDA on 16.12.1999 and the said building was completed in 2001 taking access from the existing road. Further, in Appeal Case nos. 58 and 68 of 2004 before the Secretary, Housing and Urban Development Department, a joint site visit report was submitted on 14.3.2005 showing the existence of road prior to 19.2.1991 and in the said joint site visit report, the complainant himself is a signatory along with the accused no. 1- Prasant Kumar Pattnaik.

8. Dr. A.K. Rath, learned counsel appearing for the accused no. 2-Sudip Sen (Petitioner in CRLMC No. 1951 of 2009) contended that the allegation of the complainant that there was no road existing is far from truth. There was a Sub-Committee constituted to ascertain the existing road leading from Hotel Hans Coco Palm to Sterling Holiday Resorts. The meeting was held on 25.7.2003. After detailed discussion, the Sub-Committee found that plot no. 187 (2) of Baliapanda 308 (P) as well as 361 (P) of mouza - Sipasarubali on which the morrum road is in existence has been recorded as Government land with kisam "PATITA" as per 1988 and 1977 ROR respectively. However, during 1988 plot nos. 361 and 306 of mouza - Sipasarubali was handed over to the Orissa Renewable Energy Development Agency (hereinafter referred to as 'the OREDA') for management of its windmill and during late 1980's. The OREDA constructed the said morrum road on the said land for maintenance of its windmills. On 19.2.1991, the Coastal Zone Regulation notification came into force. By that time the morrum road from the back of Hotel Hans Coco Palm over plot No. 187 (P) of Baliapanda, 306 (P) and 361 (P) of mouza - Sipararubali was in existence though it has not been reflected in the RORs and settlement map as settlement operations commenced before the road was constructed in late 1980's. Subsequently, the OREDA project was closed and the road was used by public. During 1992-93, the State Level Committee had approved a building plan in favour of Sterling Resorts with the aforesaid road as the access to the project. The proceeding of the Sub-Committee was annexed to the

complaint petition as Annexure-11. The same has been annexed as Annexure-8 in CRLMC No. 1957 of 2009.

Furthermore, in pursuance of the order dated 16.2.2005 of the appellate authority in Appeal Case Nos. 58 and 64 of 2004 preferred by one Sri Vivekananda Panigrahi, Sri Jagannath Bastia, Beach Protection Council, Orissa, Puri (complainant) and Secretary, PKDA jointly made the site visit on 19.3.2005. The committee on verification of the revenue record found that the road which is claimed to be in existence during 1990 and has been eroded subsequently has not been reflected in the revenue map. The committee further found that the said road was in existence much before 1990 and was being used by OREDA. Therefore, non reflection of the road on the revenue map should not be taken as a ground to negate existence of the road prior to 1991. It is apt to state here that Shri Jagannath Bastia was the member of that committee. After conducting site visit the committee submitted its report before the appellate authority vides Annexure–9. The complainant, Mr. Jagannath Bastia very cunningly withheld the said report. Much after the report of the committee vide Annexure – 9 the plan was approved in favour of the accused No.2-petitioner on 24.06.2005 vide Annexure – 2. The proceedings of the sub-committee vide Annexure – 9 is a public document.

9. Learned counsel for the complainant with regard to sanction of the State Government under section 197 Cr.P.C. in respect of the accused no. 1 – Prasanta Kumar Pattnaik, submitted that such sanction is not necessary before filing the complaint as the complainant has given 60 days notice by registered post with A.D. to the concerned authorities on 14.12.2005 as per the provisions of section 19 (b) of the E.P. Act, read with Rule ;11 of the Environment Protection Rules, 1986 with intention to file the complaint case against the violators. He, therefore, submitted that the E.P. Act being a special Statute, it has over riding effect on the general law. Hence, sanction under section 197 Cr.P.C. is not required for filing any case alleging violation of the provisions of the E.P. Act in view of section 24 thereof. He reiterated the allegations made in the complaint petition in order to substantiate that the road in question was not in existence prior to 1991. He further submitted that the accused no. 1 – Prasanta Kumar Pattnaik being the only technical person and Planning Member of the PKDA, he is to examine the building plan as well as the legal provisions before approval of the same and, therefore, the accused no. 1 – Prasanta Kumar Pattnaik cannot escape from the mischief of section 25 of the E.P. Act in the guise that the plan was approved by the Plan Approval Committee of PKDA.

10. Upon hearing the learned counsel for the parties, the following three questions arise for determination:

(i) Whether for prosecuting a public servant under section 15 of the E.P. Act, sanction under section 197 Cr.P.C. is required inasmuch as the plan having been sanctioned under the provisions of the O.D.A. Act, whether permission to prosecute the accused no. 1 – Prasant Kumar Pattnaik under section 110 of the O.D.A. Act is an essentiality ?

(ii) When the building plan in question submitted by the accused no. 1 – Sudip Sen (Petitioner in CRLMC No. 1951 of 2009) has been approved by the Building Permission Committee of PKDA, can the accused no. 1 be held responsible for such approval in case such approval is found to be in contravention of the provisions of the E.P. Act. ?

(iii) Whether this Court under law can consider the public documents annexed to the Criminal Misc. Case Petition at this stage of the case, in order to find out as to whether a prima facie case of commission of offence under section 15 of the E.P. Act has been made out by the complainant ?

11. To appreciate the rival contentions made by the parties, it would be apt to deal with question no. (iii), as set out above. Admittedly, the trial has not commenced in the criminal proceedings as further proceedings in the said case has been stayed by this Court. The question as to whether this Court can consider public documents, which have been annexed to the Criminal Misc. Case petitions at this stage of the case, was dealt with by the Supreme Court in the case of ***Harshendra Kumar D. v. Rebatilata Koley and others,*** (2011)3 SCC 351. The Supreme Court in the said case held as follows:-

> "It is not the law that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under section 482 or revisional jurisdiction under section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry I n respect of merits of the accusations.

However, in an appropriate case, if on the face of the documents – which are beyond suspicion or doubt – placed by the accused, the accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage".

(emphasis supplied)

It is, therefore, clear that documents which have been annexed to the Criminal Misc. Case Petitions, if are beyond suspicion or doubt, the said documents can be looked into in order to examine whether the accusations made by the complainant against the petitioners will stand in view of such documents.

13. Before traversing through the said documents annexed to the Criminal Misc. Case petition by the accused – Shri Prasanta Kumar Pattnaik, it would be appropriate to refer to the notification issued by the Ministry of Environment and Forests published in the Gazette issued under section 3 (1) and 3 (2) (v) of the E.P. Act, 1986 and Rule 5 (3) (d) of the E.P. Rules, 1986 declaring coastal stretch as Coastal Regulation Zone (CRZ) and Regulation activities in the CRZ, which has been annexed to the counter affidavit filed by the informant as Annexure-B/2 dated 19.2.1991. In the said notification, under Clause – 2, sub-clauses (i) to (xiii) certain activities were prohibited. The relevant portion of Annexure-1 to the said notification reads as follows:

"CRZ-II.

(i) Buildings shall be permitted neither on the seaward side of the existing road (or roads proposed in the approved Coastal Zone Management Plan of the area) nor on seaward side of existing authorized structures. Buildings permitted on the landward side of the existing and proposed roads/existing authorized structures shall be subject to the existing local Town and Country Planning Regulations including the existing norms of FSI/FAR.

(ii) Reconstruction of the authorized buildings to be permitted subject with the existing FSI/FAR norms and without change in the existing use.

(iii) The design and construction of buildings shall be consistent with the surrounding landscape and local architectural style".

By a subsequent notification dated 9.7.1997, considering the difficulties expressed by some of the State Governments, who drew the attention of the Central Government to such difficulties, by exercising powers conferred by sub-section (1) and Clause (v) of sub-section (2) of section 3 of the E.P. Act, 1986 read with sub-rules (3) and (4) of Rule 5 of the E.P. Rules, 1986, the Central Government made certain amendments to the earlier notification. Amendment of the above quoted CRZ (II) was to the following effect:

"4. In Annexure-I, in paragraph-6, in sub-paragraph (2)-

(1) xxx xxx xxx

(2) under heading CRZ-II, for item (i), the following shall be substituted, namely:-

"Buildings shall be permitted only on the landward side of the existing road (or roads proposed in the approved Coastal Zone Management Plan of the area) or on the landward side of existing authorised structures. Buildings permitted on the landward side of the existing and proposed roads/existing authorised structures shall be subject to the existing local Town and Country Planning Regulations including the existing norms of Floor Space Index/Floor Area Ration:

Provided that no permission for construction of buildings shall be given on landward side of any new roads (except roads proposed in the approved Coastal Zone Management Plan) which are constructed on the seaward side of an existing road".

Allegation of the complainant is that the above Coastal Regulation Zone-II, as amended, has been violated by the accused persons. A bare reading of the amended provision of Item No. (i) of CRZ-II clearly shows that construction of buildings shall be permitted only on the landward side of the existing road (roads proposed in the approved Coastal Zone Management Plan of the area) or on the landward side of the existing authorized structures. Such permission shall be subject to the existing local town and country planning Regulations. A proviso has been made that no permission for construction of buildings shall be given on the landward side of any new roads which are constructed on the Seaward side of an existing road. It is, therefore, vital to gather as to whether the permission granted to the accused –Sudip Sen (petitioner in CRLMC No. 1951/2009) is on the landward side of an existing road which was existing prior to the notification

dated 19.2.1991. In this regard, looking at the facts of the case, it is found that pursuant to an order passed by the appellate authority in Appeal Case Nos. 58 and 64 of 2004 on 26.2.2005, notices were issued to Shri Vivekananda Panigrahi, who was the appellant in said appeals and Sri Jagannath Bastia, who is the complainant in this case and to hold a joint inspection on 19.3.2005 at 3.30 P.M. In pursuance of the said order, the appellant –Vivekananda Panigrahi and the complainant herein, namely, Shri Jagannath Bastia himself made the site visit on 19.3.2005. During the course of joint inspection, the appellant Shri Vivekananda Panigrahi and his learned Advocate filed certain documents relating to the existence of road between the properties of the appellant land and the Sea. The documents thus filed includes a certified copy of the map of National Remote Sensing Agency taken through Satellite during the year1996-97, certified copy of the Master Plan of Puri Sea Beach (Part), Xerox copy of the Gazette notification dated 13.3.1998 publishing the draft modified interim development plan of Puri Municipal area, xerox copy of the relevant portion of CRZ – II notification permitting building to the landward side of the existing road etc. The minutes of the said inspection made by the complainant and the appellant in the said appeals have been annexed as Annexure-9 to the CRLMC No. 1957 of 2009. It appears that the complainant himself endorsed in the said inspection report to the following effect:

" xxx xxx xxx

> The appellant further states that the new road being constructed by PWD along the sea-shore starting from Hans Coco-Palm (Prachi Hotel) up to Sterling Resort also has not been mentioned/reflected in the revenue map. But it is a fact that the said road was in existence much before 1990 and was being used by OREDA. Therefore, non reflection of the road on the revenue map should not be taken as a ground to negate existence of the road prior to 1991".

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14. This Court, therefore, prima facie, finds that a road was in existence along with the Sea-shore starting from Hotel Hans Coco Palm (Prachi Hotel) up to Sterling Holiday Resorts though such road has not been reflected in the revenue map, which was being used by OREDA in 1990.

15. With regard to question no. (ii) framed above, it is also clear that the alleged sanction of construction was accorded by the Building Permission Committee of PKDA constituted under section 6 of the O.D.A. Act, 1982 which is a statutory body and such approval of construction having been

accorded by the Building permission Committee of PKDA, Shri Prasanta Kumar Pattnaik, who is the Secretary and Planning Member of PKDA and only communicated such approval of construction to the company of the other accused Sudip Sen cannot be individually held liable for such approval of construction, which also, prima facie, is not in contravention of CRZ-II .

16. In view of the above findings of this Court that there is no prima facie materials to show that the petitioners have committed the alleged offence. Though the question with regard to grant of sanction under section 197 Cr.P.C. has become academic, nevertheless, if the said question is considered in the facts of the present case, in relation to the accused Prasant Kumar Pattnaik (Petitioner in CRLMC No. 1957 of 2009), it would be seen that admittedly, the said accused is a public servant and the alleged offence is an act of the said accused purported to have been done in the discharge of his official duty. Section 197 of the Cr.P.C. bars a court from taking cognizance of such offences which are purportedly done in the discharge of official duty by a public servant except with previous sanction of the Central Government, in case, the person is employed at the time of commission of the alleged offence in connection with the affairs of the Union or sanction of the State Government if the person is employed at the time of commission of the alleged offence in connection with the affairs of the State.

17. The contention of the learned counsel for the complainant that section 197 Cr.P.C. has no application to the facts of the present case is not acceptable as the “offence” mentioned in section 197 Cr.P.C. is not confined to the offence under the Penal Code or any other particular Act. It is, therefore, clear that even for an offence committed under any Statute, be it a special enactment by a public servant purportedly in discharge of his official duty, cognizance of such offence cannot be taken by a court unless sanction from the Central or State Government, as the case may be, is obtained before taking cognizance. As stated above, in the instant case, Shri Prasanta Kumar Pattnaik (Petitioner in CRLMC No. 1957 of 2009) being admittedly a public servant and the alleged offence having been stated to be committed in purported discharge of his official duty, without a sanction being obtained, the learned court below was debarred from taking cognizance of such offence alleged against him. In these circumstances, even otherwise, the order taking cognizance of the offence under section 15 of the E.P. Act, 1986 against, Shri Prasanta Kumar Pattnaik (Petitioner in CRLMC No. 1957 of 2009) is also unsustainable.

18. A cumulative effect of all the above findings leads this Court to the conclusion that the order taking cognizance of the offence under section 15

of the E.P. Act, 1986 against the accused persons cannot be sustained as there is absolutely no prima facie case made out to show that such offence has been committed, more so, there is no sanction under section 197 Cr.P.C. to prosecute the accused - Shri Prasanta Kumar Pattnaik (Petitioner in CRLMC No. 1957 of 2009).

19. In the result, the order dated 4.5.2009 taking cognizance of the offence under section 15 of the E.P. Act, 1986 in I.C.C. No. 483 of 2008 is set aside and the entire proceeding in I.C.C. No. 483 of 2008 stands quashed.

20. Both the CRLMC accordingly stand allowed.

Applications allowed.

2012 (I) ILR- CUT- 671

INDRAJIT MAHANTY, J.

O.J.C. NO.6097 OF 1992 (Dt.22.06.2011)

MANGULI BARALA .....Petitioner.

.Vrs.

DHOI PRADHAN & ORS. .....Opp.Parties.

ORISSA LAND REFORMS ACT, 1960 (ACT NO.16 OF 1960) – S.56-A.

"Person under disability" – Petitioner claims to be a person under disability as defined U/s.2 (21) (e) of the Act – A person who claims the benefit of disability is required to make an application U/s. 56-A OLR Act before the Revenue Officer, who after being satisfied, shall issue certificate to that effect – In this case the petitioner has not made any application U/s. 56-A OLR Act seeking issue of certificate of disability –Finding of the appellate Court shows that the petitioner has more than 10 acres of land – Held, plea of the petitioner that he is entitled to be considered to be a person under disability has no substance and the same is hereby rejected.

(Para 8)

For Petitioner - M/s : N.C.Pati, B.Sahoo, A.K.Sahoo & A.K.Misra.

For Opp.Parties - M/s : M.Mishra, S.B.Mohanty & Miss Mamata Mishra.

I.MAHANTY, J. The petitioner, namely, Manguli Baral, son of late Radhu Baral has filed the present writ application, inter alia, seeking to challenge the order dated 10.9.1991 passed by the learned Additional District Magistrate (Land Reforms), Puri in O.L.R. Revision Case No. 53 of 1987, by which order the revisional court dismissed the petitioner's revision and confirmed the order passed by the Additional Tahasildar, Puri in O.L.R. Case No. 1001 of 1976 dated 11.6.1986 as well as the order dismissing the opposite parties' appeal in O.L.R. Appeal Case No. 50 of 1986 vide order dated 19.5.1987 under Annexure-1 and 2 respectively.

2. Learned counsel for the petitioner raised a claim that the petitioner was "a person under disability" as defined under Section 2(21) (e) of the Orissa Land Reforms Act, 1960 (in short "the Act") and the said plea of the petitioner not having been considered rendered the impugned order illegal.

Apart from the above, it is stated on behalf of the petitioner that there was no consultation with the local committee as contemplated under the Orissa Land Reforms Act and therefore, rendering the impugned order unlawful.

3. A common counter affidavit has been filed on behalf of private opposite parties 1 to 9 and opposite parties 10 (Additional Tahasildar) and 11 (O.S.D./OLR, Puri have also filed their separate counter affidavits.

4. From the facts and the pleadings of the parties it appears that the parties have been litigating for nearly forty years. The case of the petitioner is that he had purchased the land in dispute, i.e., Ac.2.86 decimals situated at village Balabhadrapur Utarans, District Puri, by way of registered sale deed in the year 1966. The petitioner claimed that he has been in cultivating possession since then.

It appears that certain disputes arose regarding possession of the said land and the petitioner-Manguli Baral had filed a civil suit registered as Original Suit No. 51-56 of 1974-76 before the learned Subordinate Judge, Puri, which came to be dismissed of by its judgment dated 16.7.1974 holding therein that the Civil Court has no jurisdiction to decide the issue relating landlord and tenant in view of the provisions embodied under Section 15 and the bar contained under Section 67 of the OLR Act, 1960.

The petitioner being aggrieved by the said order preferred Title Appeal No. 27-39 of 1976-74 before the learned District Judge, Puri, which was allowed in favour of the petitioner. Thereafter the present opposite parties preferred Second Appeal No. 10 of 1976 before the High Court and the said Second Appeal was allowed by judgment dated 8.12.1977, on a finding that, in view of provisions of Section 51-D, which has retrospective effect, the civil suit is barred under Section 67 of the OLR Act and therefore held that the Civil Court has no jurisdiction to entertain the suit and was pleased to direct dismissal of the suit.

During pendency of the Second Appeal before this Court, the private opposite parties herein, filed a petition under Sections 4(1), 4(5) read with Section 36-A of the OLR Act before the Tahasildar, Puri, with a prayer to declare whole of the disputed land as “non-resumable” and further to declare the opposite parties as “Sthitiban Tenants” on payment of compensation to the present petitioner in view of the fact that, the opposite parties had been recorded as “Sikim Tenants” in the Record of Rights prepared by the Settlement Authorities. This proceeding came to be

registered as OLR Case No. 1001 of 1976 and the same was allowed by order dated 8.9.1996 declaring the present opposite parties as tenants under the petitioner, who had purchased the landlord interest. Hence, the opposite parties were declared as “Bhag Tenant” under the petitioner and held that the disputed land was “non-resumable” and the opposite parties were directed to pay compensation at the rate of Rs.800/- per standard acre to the petitioner and were also declared as “Raiyat”.

5. The petitioner preferred OLR Appeal Case No. 231 of 1976 before the Additional District Magistrate, which came to be dismissed, affirming the order of the Revenue Officer-cum-Tahasildar. The petitioner thereafter preferred OLR Revision Case No. 582 of 1979 before the Revenue Divisional Commissioner, Central Division, Cuttack. The revisional authority allowed the said revision on 28.1.1983. The said order was challenged before this Court in OJC No. 350 of 1983 and this Court by its order dated 11.7.1983 set aside the said revisional order and directed the revisional court to dispose of the revision afresh. The order of remand the matter was directed to be heard de-novo and accordingly quashed the order passed by the Revenue Officer in OLR Case No. 1001 of 1976 and directed for disposal of the same “afresh” by affording opportunity of leading evidence to both the parties.

6. In the light of the aforesaid order, the Revenue Officer-cum-Tahasildar granted opportunities to both the parties to lead their evidence and thereafter passed orders afresh by order dated 11.6.1986 (Annexure-1) after taking note of oral and documentary evidence as well as the views of the local committee as required under OLR Act and came to conclude that, the present opposite parties were tenants in cultivating possession over the suit land and are entitled to “Raiyat rights” over the same under Section 36-A of the OLR Act.

This order of the Revenue Officer was challenged once again in appeal before the Officer on Special duty, Land Reforms, Puri in OLR Appeal Case No.50 of 1986 and the said appeal was dismissed by order dated 19.5.1987 affirming the order passed by the Revenue Officer. Thereafter OLR Revision No.53 of 1987 was preferred by the present petitioner which once again came to be dismissed by the Additional District Magistrate(Land Reforms), Puri under the impugned Annxure-4 vide order dated 10.9.1991, which is the subject matter of challenge in the present writ petition.

7. In view of the contention raised by the learned counsel for the petitioner, the Court had given anxious consideration to the same. Insofar as

the claim of the petitioner that he was the "person in disability" as contemplated under Section 2(21)(e) read with Section 56-A of the OLR Act is concerned, it is clear from the record, that, the Revenue Officer had dealt with such an issue in his order under Annexure-1 and had come to hold that, the present petitioner having not taken any step under Section 56-A of the OLR Act to declare him as a person under "disability" cannot be termed as such and his claim was rejected.

The Officer on Special Duty, Land Reforms, Puri (the lower appellate court) has also come to a finding that the "local committee" had been duly constituted and due notice had been issued to all the persons and that appellant (present petitioner) has got more than 10 Acres of land and hence, he cannot be said a persons under "disability" and certificate of disability has not been obtained.

The Additional District Magistrate, Land Reforms, Puri, the revisional authority also dealt with this part of the claim of the petitioner and came to hold that, the petitioner Mangu Baral, was never in cultivating possession of the suit land and could not claim any relief under disability since he had not made any application under Section 56-A of the OLR Act and no such certificate was also produced in course of the proceeding. Apart from the above, the revisional authority also came to a finding that although the petitioner had claimed to be a "person under disability", he could only be permitted to make such a claim and seek such relief under disability, if the land is actually cultivated by some one else other than him. The very fact that the petitioner had raised such a plea clearly goes to show that he was not in cultivating possession of the land. Apart from the above, it was also held that since the petitioner had raised such a plea, the onus was on the petitioner to substantiate the same and in the absence of any adjudication and/or certificate of disability being produced by the petitioner such claim was out rightly rejected.

Sections 56-A, 56-B and Section 2(21) (e) of the Orissa Land Reforms Act, 1960 are extracted herein below for reference:-

> **"56-A. Certificate of disability-** (1) A person under disability specified in Sub-clause (a), (b) or (c) of Class (21) of Section 2 may, subject to the rules made in that behalf, apply for a certificate specified in the proviso to that clause to the Revenue Officer.
>
> (2) On receipt of such application (the Revenue Officer) shall give the person concerned or his guardian, if he is minor or of unsound

mind an opportunity of being heard and may, after making such other enquiries (as he may deem fit) either reject the application or issue a certificate to the effect that such person is incapable of cultivating his land personally:

Provided that if no orders are passed on such application within thirty days from the date of its filing the application shall be deemed to have been rejected.

(3) The application under Sub-section 9(1) and the certificate to be issued under Sub-section (2) shall be in the prescribed form and the application shall be accompanied by the prescribed fee.

Section 56-B. Cancellation of certificate of disability and its consequences-(1) If the Revenue Officer, on application in that behalf by a tenant cultivating land under a person who is a person under disability, is satisfied that a certificate under Section 56-A was obtained by such person by fraud or by misrepresentation or suppression of the material fact, he may, after giving the tenant and the person an opportunity of being head, cancel the certificate.

(2) On cancellation of the certificate, the Revenue Officer may, on an application made in that behalf by the tenant within sixty days from the date of such cancellation and after giving the parties interested an opportunity of being heard, declare the whole of the land to be non-resumable and determine the fair and equitable rent and the compensation payable by the tenant in respect of the land in accordance with the provisions of Section 28 and on such determination the provisions of Sections 29 of 33 (both inclusive), 35-A and 36 shall, so far as may be, apply.

Section 2(21) (e) - a raiyat the total extent of whose land held in any capacity whatsoever does exceed three standard acres; or)"

8. On a plain reading the scope of Section 56-A of the OLR Act it is clear that any person who claims the benefit of "disability", is required to make an application before the Revenue Officer, who after being satisfied, shall issue certificate to that effect. Section 56-B mandates the procedure under which a certificate of disability can be cancelled. It would be suffice for the present purposes to take note of the fact that admittedly the petitioner has never made any application seeking issue of certificate of disability. There is a finding made by the appellate forum that the petitioner has more

than 10 acres of land. Therefore, the plea of the petitioner that he was entitled to be considered to be a person under disability is wholly without any substance of basis and is hereby rejected. The plea of non-constitution of the "local committee" and alleged non-consultation is also found to be false and stands rejected.

9. In view of the finding noted herein above, I find no justification to interfere in the present case and accordingly, direct dismissal of the writ application and confirm the order passed by the learned Additional District Magistrate, Land Reforms, Puri passed in OLR Revision No. 53 of 1987 dated 10.9.1991.

Writ petition dismissed.

2012 (I) ILR- CUT- 677

ARUNA SURESH, J.

W.P.(C) NO.17820 OF 2009 (With Batch) (Dt.18.01.2012)

BISWAMBHAR BEHERA & ORS. …….. Petitioners.

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Writ petition challenging the notice to show cause – Maintainability – Show cause notice of termination clearly reveals that the respondents had issued the notice with pre-meditation having already formed an opinion regarding disengagement of the petitioner – Show cause notice of termination does not remain in the realm of the show cause notice – Held, direction issued to the respondents not to enforce the order Dt.27.02.2008 and consequently the show cause notice of termination Dt.07.11.2009 is quashed – If any of the petitioners have been disengaged from service the respondents shall ensure that they are re-engaged. (Para 24,25)

Case law Referred to:-

(2006) 12 SCC 33 : (Siements Ltd. –V- State of Maharashtra & Ors.)

The Petitioners - M/s. Sameer Kumar Das & Associates
The Opp.Parties - Mr. Rangadhar Behera.
Sr. Standing Counsel for School & Mass Education Department.

ARUNA SURESH, J. All these writs have been clubbed together and are disposed of by this common order as the question of law involved in all these petitions is the same and the orders dated 27.02.2008 and 7.11.2009 pertaining to the show cause notice and termination of service of all the petitioners under challenge are similar in nature.

2. Petitioners were engaged as Swechha Sevi Sikshya Sahayak (S.S.S) in the Primary Schools, district Nayagarh in different years ranging from December 2004 to June, 2007. As per the Government Policy, the educational qualification for selection of Sikhaya Sahayaks (S.Ss) is High School Certificate (H.S.C)/+2 with Teachers' Certificate (C.T) or Graduation with B.Ed. All the petitioners having minimum educational qualification and

having a Diploma in Special Education from the National Institutes under the Ministry of Social Justice and Empowerment, Government of India, New Delhi, duly approved by the Rehabilitation Council of India (RCI), were selected by the competent authority and engaged as S.Ss. Some of the petitioners have subsequently been engaged as Junior Teachers (J.T). The Government had taken a decision on 27.02.2008 (Annexure-11) not to accept any equivalent certificate of C.T for engagement as S.Ss. Thereafter, petitioners have been served with the show cause notice dated 7.11.2009 intimating their termination from service on the grounds that Diploma in Special Education obtained by respective petitioners could not be considered as equivalent to C.T training. Aggrieved by the notice of termination dated 7.11.2009, petitioners have filed the present petitions.

3. Respondents have contested the petitions and have filed their counter affidavit. Case of the respondents is that none of the clauses of the respective advertisements contained any stipulation that a candidate having Diploma in Special Education qualification would be considered for appointment as S.S and, therefore, concerned authorities of Nayagarh appointed the petitioners as S.Ss on a wrong notion that the notification treating the qualification of Junior Educators from any National Institute as equivalent to C.T. recognized by the Education Department which was issued by C.D. & R.R. Department and not by the School and Mass Education Department, was to be followed. Since the petitioners did not possess the requisite qualification for appointment as S.Ss and were wrongly appointed, the show-cause notice of termination dated 7.11.2009 issued by the District Project Officer, SSA, Nayagarh is valid. Similarly, the order of the Commissioner-cum-Secretary, School & Mass Education Department, Government of Orissa dated 27.2.2008 dismissing the appeal/representation of petitioner, Goutam Pradhan is also legal and valid.

4. Mr. Sameer Kumar Das, learned counsel appearing for the petitioners has submitted that the State Government, C.D. & R.R. Department in its resolution dated 28.12.1987 had declared and accepted the Junior Educator Course organized by or in collaboration with any National Institute established or recognized by the Government of India as equivalent to C.T qualification recognized by the Education Department. He has further argued that the Women and Child Development Department vide its letter No. 8410 dated 21.3.2005 also accepted the equivalency of the certificate of Diploma in Special Education for visually handicapped, hearing handicapped and mentally handicapped to that of C.T Course of Board of Secondary Education, Orissa (B.S.E.) for engagement in special schools as well as in the normal schools.

5. He has submitted that the Director of Teacher Education & SCERT, Orissa, i.e. respondent No.5 in its letter 18.6.2005 had issued a clarification to the Joint Secretary, Government of Orissa, School and Mass Education Department to the effect that the candidates who had acquired professional qualification for Special Education offered by any National Institute be treated as equivalent to C.T offered by B.S.E., Orissa. He has also pointed out that the Director of Teacher Education & SCERT, Orissa is the Apex Body of the Academic Institutions imparting B.Ed or C.T. Courses and is the final authority of the Policy Planning Body of the Government. He has averred that in view of all these letters, there cannot be any dispute with regard to the equivalency of Diploma in Special Education Certificate to that of C.T Certificate issued by B.S.E., Orissa. He has also referred to a decision of this Court in Writ petition (C) No. 16637 of 2006 dated 8.8.2008 wherein the equivalency of Diploma in Special Education Certificate was accepted as that of C.T. certificate issued by B.S.E., Orissa.

6. The second limb of argument of learned counsel for the petitioners is that, D.P.C. being not the appointing authority, had no power and jurisdiction to issue the impugned show-cause notice and, therefore, the said notice is against law and is void.

7. As regards maintainability of the writs, it is submitted that since the authorities had already decided to disengage the petitioners from service and the show-cause notice dated 7.11.2009 was issued with a view to cover up the legal formalities and the latches, it is maintainable. He has prayed that the order dated 27.2.2008 and the subsequent termination notice dated 7.11.2009 are against law and procedure and are in violation of the earlier instruction issued from time to time, and deserve to be quashed.

8. Mr. Rangadhar Behera, Senior Standing counsel for respondents has submitted that the Diploma in Special Education Certificate possessed by the petitioners is considered equivalent to C.T by the School and Mass Education Department but, at the relevant time when the petitioners were appointed, Special Education Certificate was not considered as equivalent certificate to that of C.T. Since the appointment of the petitioners was dehors the guidelines, show cause notice of termination dated 7.11.2009 served upon the petitioners is valid and has been served upon them to provide them a fair opportunity to put up their defence. He has further submitted that neither the order dated 27.2.2008 nor the show cause notice of termination dated 7.11.2009 is ultra vires the guidelines or against the principles of natural justice and this Court under its writ jurisdiction cannot interfere in the administrative functioning of the Department. He has also

disputed the maintainability of the writ petitions having been filed only on receipt of show cause notice without even awaiting for the final decision of the Department.

9. Grievance of the petitioners is that many other persons with the same certificate of Diploma in Special Education are continuing and discharging the duties both as S.Ss and J.Ts in different Blocks of Nayagarh district whereas District Project Coordinator (D.P.C) (respondent No.4) issued a thirty days show cause notice for disengagement of the petitioners and others, on the ground that person holding a certificate of Junior Educator Course (Diploma in Special Education) is not eligible to apply for the post of S.S being not equivalent to the C.T Certificate in pursuance of order No. 4194/SME dated 27.02.2008 of the Commissioner-cum-Secretary (Annexure-11)**.**

10. The C.D. & R.R. Department, Government of Orissa had published a resolution dated 28th December, 1987 in the Orissa Gazette on 19th February, 1988, which relate to the Rules governing grant-in-aid to the institutions imparting Education to Handicapped Children. In Clause-5.A of the Resolution, there is a stipulation that a person, who has successfully completed the Junior Educators' Course organized by or in collaboration with any National Institute established or recognized by the Government of India shall be deemed to have acquired a qualification equivalent to the C.T. recognized by the Education Department.

11. Clause-5 (A) of the Resolution reads as follows:

> *(1) The teachers of the institutions shall be paid salary at rates applicable to teachers of comparable rank and qualification in Government schools subject to their possessing the qualifications prescribed for the posts.*
>
> Note-(i) *A person, who has successfully completed the Junior Educators' Course organized by or in collaboration with Any National Institute established or recognized by the Government of India shall be deemed to have acquired a qualification equivalent to the Teachers' Certificate (C.T.) recognized by the Education Department.*
>
> *(ii) Government may from time to time declare any other course or examination for teachers of handicapped children as equivalent to any recognized course or examination of teachers of normal schools.*

12. Thus, it is clear that even in the year 1987, the Government of Orissa had acknowledged and given recognition to Junior Educators' Course organized by or in collaboration with any National Institute established or recognized by the Government of India as equivalent qualification to the C.T. recognized by the Education Department, i.e. respondents. The Commissioner-cum-Secretary to Government vide letter No. 29557/S&ME. dated 4.11.2000, communicated to the Collector Balasore, clarified the guidelines governing engagement of S.S.Ss. In Para-4 of the letter there is a reference of the qualifications to be possessed by a candidate, to be scrutinized and considered by Selection Committee for appointment as S.S.Ss. The said letter also speaks that the candidates must have obtained H.S.C. or *equivalent* Examination and C.T. Examination or BA/B.Sc/B.Com and B.Ed. Examination.

13. A letter was issued by Women and Child Development Department on 21.3.2005 to the School and Mass Education Department pertaining to the equivalency of the Junior Educator Course to the C.T. Course. Vide this letter, the respondents were communicated that National Institute for Visually Handicapped (V.H), Hearing Handicapped (H.H) and Mentally Handicapped (M.H.) are organizing the Diploma Course in Special Education for V.H, H.H and M.H which are regarded as Junior Educators' Course and the trained persons are being engaged in special schools and in the normal schools under Integrated Education Programme to teach the disabled students. This letter further clarified that Junior Educators' Course has been declared equivalent to the C.T. recognized by the Education Department vide Resolution No. 10404 dated 28.12.1987 (supra).

14. A communication was sent by the Director, Teacher Education and SCERT, Orissa, Bhubaneswar on 18.6.2005 to the Joint Secretary to Government, Department of School and Mass Education, i.e. respondents. This letter was issued as a clarification relating to the Diploma for Primary School Teachers of Visually Handicapped issued by the National Institute of Visually Handicapped, Dehradun. Relying on the resolution dated 28.12.1987 issued by the C.D. & R.R. Department, it was clarified that Teachers Training Course organized by or in collaboration with any National Institute such as National Institute of Visually Handicapped, Dehradun, National Institute of Hearing Impaired etc. was equivalent to C.T recognized by the Education Department. It was directed that the candidates who had acquired professional qualification for Special Education offered by National Institute be treated as equivalent to C.T. offered by the B.S.E., Orissa.

15. A conjoint reading of aforesaid letters make it clear that at the time when the petitioners were selected and appointed as S.Ss. by the respondents treating their Diploma in Special Education Certificate issued by the National Institute of Ministry of Social Justice and Empowerment, Government of India, New Delhi as equivalent to C.T, the respondents were aware of the directives and subsequent clarification issued by various Departments regulating the qualification, selection and appointment of teachers for imparting education to the children including the handicapped children. To say, therefore, that at the time when the petitioners were appointed, the Junior Educator Course was not considered as equivalent to C.T. Course, would be dehors the guidelines issued by the C.D. & R.R. Department vide resolution dated 28.12.1987, subsequently accepted and clarified by Women and Child Development Department and Director of Teacher Education & SCERT, Orissa, and is not acceptable. It is pertinent that in the show cause notice dated 7.11.2009 issued by District Project Coordinator, S.S.A., Nayagarh did indicate that the certificates of equivalence were taken into consideration while engaging the petitioners as S.Ss.

16. It seems that respondents issued order No.-II-SME-LMC-772/07 4194/SME dated 27.02.2008 wherein it was categorically stated that the certificate holders of Junior Educators Course (Diploma in Special Education) were not eligible for being engaged as SS since in the guidelines of SS recruitment there was no stipulation that any candidate having qualification equivalent to C.T. could apply for engagement of SS. In view of this order, show cause notice dated 7.11.2009 was served upon the petitioners. This order was passed on the representation of Gautam Pradhan in pursuance of directions issued on 30.10.2007 by this Court in Writ Petition (C) No. 1175 of 2007 (Gautam Pradhan Vs. State of Orissa & others). While disposing of the petition, this Court did observe:

xxx *xxx* *xxx*

> *In the aforesaid scenario, to avoid further disparity, this Court feels that ends of justice and equity would be better served if the writ petition is disposed of giving liberty to the petitioner to approach the Secretary to Government, Department of School and Mass Education, Khurda, opposite party No.1, by filing a representation annexing all the testimonials and Government circulars. If such a representation is filing within a period of four weeks from today, opposite party No.1 shall consider as to whether the diploma acquired by the petitioner can be equated with the Teachers' Certificate as has bee n done in some of the districts and pass*

necessary orders strictly in accordance with law. It is made clear that this Court has not expressed any opinion with regard to the merits of the case."

17. Considering the directions issued by this Court in the said case, a representation was filed by Gautam Pradhan which was disposed of vide impugned order dated 27.2.2008. In his order, Commissioner-cum-Secretary while interpreting Para-5 Note-(i) of the resolution dated 28.12.1987 issued by C.D. & R.R. Department observed that the Teacher Educator qualification is to be considered as equivalent to the scale of pay of the teacher having C.T. qualification and not for the qualification for recruitment for the post of a teacher. Intriguingly, if Teacher Educator qualification is not to be considered as equivalent to C.T. qualification then how a person possessed with Teacher Educator qualification can be given an appointment and put at par with the teacher having C.T. qualification for the purpose of applicability of the scale of pay. Equivalency to the scale of pay is a subsequent matter to be considered after a person is so appointed. If a teacher Educator cannot be appointed there is no occasion to put him in the equivalent scale of pay as of a teacher having C.T. qualification. To my mind, the Commissioner-cum-Secretary to the Government made these observations without application of mind. In case the Teacher Educator qualification is to be considered at par with C.T. qualification for purpose of salary only then to say that Teacher Educator qualification cannot be considered at par with Teacher Certificate recognized by the Education Department would be mockery of provisions contained in Clause-5 of the Resolution dated 28.12.1987. While referring to the circular dated 7.3.2005 issued by Women and Child Development Department, he observed that certificate holders of Junior Educator Course were not eligible for S.Ss. since in the guidelines of S.S., there was no stipulation that any candidate having qualification equivalent to C.T. could apply for engagement of S.S. This order of the Commissioner-cum-Secretary has not only jeopardized the interest and right of eligible candidates having Teacher Educator qualification to be considered and appointed as S.Ss, but has also motivated the department to disengage S.S. who were appointed after considering their diploma in Special education certificate as equivalent to C.T. and is, therefore, violative of Principle of natural Justice**.**

18. True that the Rules regulating the appointment of S.S. of the years 2006 and 2007 as placed on record do not specifically speak of considering equivalency of Junior Educator qualification to C.T. Course. The fact remains that S.Ss. are appointed by Zilla Parishad, to be selected by a Selection Committee and the directions issued or resolutions passed by the

Department from time to time have been implemented by the respondents while considering and appointing the petitioners besides others as S.S.Ss.(now being called as S.Ss.). It is significant to note that respondents have not placed on record any resolution containing the terms and conditions for appointment of S.Ss. in the year 2005, when most of the petitioners were engaged. It is not the case of the respondents that resolution dated 28.12.1987 published by C.D. & R.R. Department is not applicable to or cannot be enforced by School and Mass Education Department in the absence of specific stipulation in the advertisement.

19. The SSs who have completed three years of satisfactory service are entitled to be appointed as Junior Teachers and such Junior Teachers who have completed three years of service are entitled to be considered and appointed as regular Primary school teachers by Zilla Parishad. From a bare perusal of the Rules and Guidelines regulating the Selection and appointment of S.Ss., it is crystal clear that they are appointed as teachers, may be with a different nomenclature i.e. S.S. The assignment of S.Ss. is to teach in the schools. Petitioners have been working as S.Ss. since after their joining in the said post and for all practical purposes they are discharging their duties as of a teacher. Since their basic job is to impart education to the children, the Department did and rightly so consider their Diploma in Special Education from National Institute under the Ministry of Social Justice and Empowerment, Government of India, New Delhi as equivalent to C.T. Course.

20. National Council for Teacher Education, Government of India issued a notification dated 23.08.2010 laying down the minimum qualifications for a person to be eligible for appointment of a teacher in class I to VIII in view of the Right of Children to Free and Compulsory Education Act, 2009. One of the recognized qualifications is Diploma/Degree Course in Teacher Education. A Diploma in Education (Special Education) and B.Ed (Special Education) is a course recognized by the Rehabilitation Council of India (RCI). This Resolution of National Council for Teacher Education was taken care of by the respondents as is evident from the circular No. 2618/SME/ dated 5.2.2011 by which a clarification was issued regarding engagement of SS during 2010-11. As per Para-2 of this letter, the courses of Diploma in Education (Special Education) and B.Ed (Special Education) recognized by the RCI have to be taken into consideration as equivalent to general C.T. candidates. As pointed out above, learned Senior Standing counsel for the respondents did admit that Diploma in Special Education is being considered as equivalent to C.T. course for appointment of S.Ss. by the Zilla Parishad. In fact, since 1987 the respondents have been treating the

Diploma in Special Education as equivalent to C.T. Course and have been appointing S.Ss. holding Diploma in Special Education as minimum educational qualification required to be possessed by a person to be eligible for appointment as S.S. The petitioners having been appointed after considering their Diploma in Special Education as equivalent to C.T. Course, the respondents cannot be permitted to terminate them from service in view of the order of Commissioner-cum-Secretary. The Commissioner-cum-Secretary to the Government while rejecting the representation of Gautam Pradhan pursuant to the direction of this Court erroneously enforced that order against the petitioners who have been continuing in service since the year 2005 onwards. This Court, in the case of Gautam Pradhan, did not in any manner issued any direction to the Department to issue show cause notice of termination to other persons, i.e., the petitioners who had been engaged as S.Ss. and are continuing in their services. Some of these persons have already been appointed as Junior Teachers after successful completion of requisite length of service as S.Ss. in accordance with Rules and Regulations. The order dated 27.2.2008, therefore, could not have been enforced against anyone else in the manner in which it has been done by the respondents. The respondents who had given engagement to the petitioners as S.Ss. on the basis of Certificate of equivalency are estopped by their own act from disengaging the petitioners. It is not the case of the respondents that the appointments were illegal. It is a show cause notice, which was issued in the light of order dated 27.2.2008 as the same could not be enforced against the petitioners. Gautam Pradhan was not given appointment by the Department on the basis of equivalency of Junior Educator Course whereas the petitioners were already in employment when they faced the displeasure of the Department and received the show cause notice of termination dated 7.11.2009. How could be the order dated 27.2.2008 be given retrospective effect against the petitioners to face anguish of the Department who were neither a party nor had any occasion to plead their case. Therefore, the show cause notice of termination dated 7.11.2009 is bad in law and cannot be enforced by the respondents.

21. In another writ filed by Paresh Kumar Rout and others against the respondents being Writ Petition (C) No. 16637 of 2006, the same Judge, who had given the liberty to Gautam Pradhan to file a representation before the Commissioner-cum-Secretary in its order dated 8.8.2008:- observed

"xxx xxx xxx

2. After hearing learned counsel for the parties and perusing the letter dated 18.6.2005 issued by the Directorate of Teacher Education and SCERT, Orissa, Bhubaneswar (Annexure-4) which clearly indicates that candidates who have acquired professional qualification in Special Education offered by any National Institute are to be treated as holders of equivalent certificate as Certified Teacher (CT) issued by the Board of Secondary Education, Orissa. This Court disposes of this Writ Petition with an observation that as and when fresh advertisements are issued, if the petitioners submit their applications their cases shall be considered along with others accepting the certificates issued by the National Institute of Visually Handicapped, Dehradun."

22. Thus, it is crystal clear that this Court had directed the respondents to enforce the letter dated 18.6.2005 issued by the Director of Teacher Education and SCERT, Orissa in case the said petitioners submitted their applications in response to fresh advertisement when issued by the respondents for appointment of S.Ss. It was clearly stipulated that the professional qualification for Special Education issued by the National Institute of V.H. Dehradun has to be accepted by the respondents while considering their applications.

23. Under the circumstances, I am of the considered opinion that the Collector in the impugned order dated 12.11.2008 did not adopt correct approach in interpreting various resolutions, guidelines and circulars issued by C.D. & R.R. Department, Women and Child Development Department and was unmindful of the communication issued by Director of Teacher Education and SCERT, Orissa on 18.06.2005 to the Department of School and Mass Education wherein it was clarified that Diploma of Primary School Teachers of Visually Handicapped issued by the National Institute of Visually Handicapped, Dehradun, National Institute of Hearing Impaired etc. was equivalent to C.T recognized by the Education Department. Petitioners in these petitions possessed Special Education Certificate issued by National Institute under the Ministry of Social Justice and Empowerment, Government of India.

24. As regards maintainability of the petition, a bare reading of the show cause notice of termination dated 7.11.2009 clearly reveals that respondents had issued the notice with pre-meditation having already formed an opinion regarding the disengagement of the petitioners. Therefore, the show cause notice of termination does not remain in the realm of the show cause notice. In such an event even if the Court directs the statutory authority to hear the matter afresh, ordinarily such hearing

would not yield any fruitful purpose. Reference is made to *Siements Ltd. versus State of Maharashtra and others (2006) 12 Supreme Court Cases 33*. Since the appointment of the petitioners was made by the respondents while considering their Diploma in Special Education as equivalent educational qualification to C.T. Course consciously in accordance with the resolution dated 28th December, 1987 and letter dated 18.6.2005 issued by the Director of Teacher Education and SCERT, Orissa and are continuing in service since after their appointment, they were validly appointed and cannot be terminated from service by giving retrospective effect to the order dated 27.2.2008 which was passed while disposing of representation filed by Gautam Pradhan in pursuance of the direction of this Court. Hence the show cause notice is uncalled for, is illegal, invalid and is devoid of any reasonable cause.

25. In view of my discussions as above, the petitions are hereby allowed. Respondents are directed not to enforce the order dated 27.2.2008 (Annexure-11) against the petitioners as it does not relate to them in any manner. Consequently, the show cause notice of termination dated 7.11.2009 (Annexure-10) is hereby quashed. If any of the petitioners have been disengaged from the service, the respondents shall ensure that he/she or they (as the case may be) are re-engaged within fifteen days of this order.

Writ petitions allowed.

2012 (I) ILR- CUT- 688

B.N.MAHAPATRA, J.

M.A. NO.50 OF 1999 (Dt.19.09.2011)

GUREI DEI & ANR. .....Appellants.

.Vrs.

D.M., M/S. NATIONAL INSURANCE CO.LTD. & ANR .....Respondents.

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

Non-earning person – Second schedule of M.V. Act prescribes Rs.15,000/- as annual income in case of a non-earning person.

In the present case father of the deceased deposed that the deceased was running a two wheeler garage engaging two assistants under him – Since there was no corroborative evidence Tribunal assessed his monthly income at Rs.750/- – Hence this appeal – Held this Court taking note of the Second schedule of the M.V. Act. enhanced the annual income to Rs.15,000/- and after deducting 1/3 towards personal expenses the amount of compensation per annum comes to Rs.10,000/-. (Para 12)

B. MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – S.168.

Deceased a bachelor aged about 26 years at the time of death – Multiplier can be determined by taking in to account the age of the deceased or claimants whichever is higher.

In this case the age of the mother was 50 years and age of father was 57 years – Held, if an average age of the parents is taken, appropriate multiplier comes to 11. (Para 13)

Case Law Relied on:-

2011(3) TAC 625 (SC) : (National Insurance Co.Ltd.-V-Shyam Singh & Ors.)

Case laws Referred to:-

1.2008(2) TAC 394(SC) : (Laxmi Devi & Ors.-V-Mohammad Tabbar & Anr.)
2.2007(1)TAC 252 (Ori.) : (Divisional Manage, Oriental Insurance Co.Ltd.,BBSR -V- Sri Kalandi Charan Jena & Ors.)

3. 2011 AIR SCW 1313 : (P.S.Somnathan & Ors.-V-District Insurance Officer & Anr.)

For Appellants - Dr. Tahali Charan Mohanty,
M/s. S.C.Swain, S.Mohanty, A.K.Rout,
S.K.Pattanaik &
Mrs. Babita Mohanty.
For Respondents – Mr. N.Ch. Mishra.(R.1)

B.N.MAHAPATRA, J. On the prayer of Dr.Mohanty, learned Senior Advocate appearing on behalf of the claimant-appellants, service of notice on Respondent no.2-owner of the vehicle is dispensed with at his risk.

Though the matter was listed for admission, on being requested by Dr.Mohanty, it is taken up for final disposal with the consent of Mr.N.Ch.Mishra, learned counsel appearing for respondent No.1-Divisional Manager, M/s National Insurance Company Limited.

2. This is an appeal under section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as the 'Act') filed by the claimant-appellants challenging the award dated 26.9.1998 passed by the 1st Addl. District Judge-cum-1st Motor Accident Claims Tribunal,(hereinafter referred to as the 'Tribunal') Cuttack, in Misc. Case No.453 of 1996 on the ground that the amount of compensation awarded by the Tribunal is on the lower side.

3. The facts of the case are that on 2.5.1996 at about 3.30.P.M. on N.H.42 while the deceased was going from his residence to Choudwar in his Spark Motor Cycle, at Dhumabati Chhak the offending vehicle bearing Registration No.ORY-1925 dashed against him. As a result of said accident, the deceased sustained injuries and succumbed to the injuries at the spot. The further case of the claimants is that the deceased was earning Rs.4,500/- per month as a mechanic.

The claimants, who are the parents of the deceased, claiming a sum of Rs.2,00,000/- towards compensation filed a claim petition before the Tribunal.

4. Before the Tribunal, the owner of the vehicle was set ex parte.

The Insurance Company filed its written statements denying all the averments made in the claim application and pleaded that the amount of compensation claimed by the claimants is high, exorbitant and without any basis.

5. On the pleadings of the parties, the Tribunal framed the following issues:-

(i) Whether due to rash and negligent driving of the driver of the vehicle ORY-1925 Bus, the accident took place and on that accident, one Basanta Pani succumbed to the injuries?

(ii) Whether the petitioners are entitled to get compensation, if so, what would be the extent?

(iii) Whether all the opposite parties or any of the opposite party is/are liable to pay compensation?

(iv) To what relief, if any, petitioners are entitled?

6. In order to prove their case, the claimant-appellants examined two witnesses, of whom Appellant no.1, the father of the deceased has been examined as P.W.1. A co-villager of the deceased has been examined as P.W.2. The claimants produced three documents which were admitted in to evidence and marked as Exts.1 to 3.

The Insurance Company neither examined any witness nor produced any documents on its behalf.

7. After taking into consideration both oral and documentary evidence, the learned Tribunal came to the conclusion that the accident took place due to the rash and negligent driving of driver of the offending vehicle, as a result of which the deceased died at the spot. Taking monthly income of the deceased at Rs.750/- and deducting 1/3rd of the income towards personal expenses, the learned Tribunal determined his yearly dependency at Rs.6,000/-. Since the deceased was aged 26 years at the time of accident, the learned Tribunal applied 16 multiplier and computed the amount of compensation at Rs.96,000/-. Besides the above, the learned Tribunal further awarded a sum of Rs.10,000/-under the head consortium, pains and sufferings as the deceased was a young man. In total, the learned Tribunal awarded a sum of Rs.1,06,000/-.

8. Dr. Mohanty, learned Senior Advocate appearing on behalf of the claimant-appellants submits that he has no dispute over the multiplier adopted by the Tribunal. His only dispute is regarding determination of the annual income of the deceased. According to him, notional income of Rs.15,000/- per annum has been prescribed in the Second Schedule of the Act in the case of non-earning person. He further submits that in view of the

decision of the Hon'ble Supreme Court in the case of ***Laxmi Devi & Ors. -v- Mohammad Tabbar & Anr.,*** 2008 (2) T.A.C. 394 (S.C.), the annual income of the deceased should have been taken as Rs.36,000/- for the purpose of determination of just compensation.

9. Per contra, Mr.N.Ch.Mishra, learned counsel appearing on behalf of the Insurance Company submits that the claimant-appellants have miserably failed to establish the annual income of the deceased. The learned Tribunal has also categorically held that the claimants did not adduce any evidence in support of their contention that the deceased was running a two wheeler garage engaging two assistants. Therefore, the learned tribunal is justified in taking into consideration the monthly income of the deceased at Rs.750/-. Mr.Mishra further submits that since the parents in this case are the claimants and the deceased was a bachelor, the multiplier should be applied taking the age of the claimants into consideration. Mr. Mishra further submits that since at the time of death of the deceased age of the mother was 50 years and that of the father was 57 years, the appropriate multiplier is 11. In support of his contention, Mr. Mishra placed reliance on the judgment of Hon'ble Supreme Court in the case of *National Insurance Co. Ltd. v. Shyam Singh and others* reported in 2011(3) T.A.C. 625 (S.C.) and judgment of this Court in the case of *Divisional Manager, Oriental Insurance Co. Ltd., Bhubaneswar Vs. Sri Kalandi Charan Jena & Ors.*, [2007 (1) T.A.C. 252 (Ori.)]

10. In reply Dr. Mohanty, learned counsel submits that in view of the judgment of the Hon'ble Supreme Court in *P.S. Somnathan & others v. District Insurance Officer and another,* reported in 2011 AIR SCW 1313, the age of the deceased should be taken into consideration for the purpose of applying the multiplier.

11. On the rival contentions of the parties, the following questions fall for consideration by this Court:-

(i) Whether the monthly income determined by the Tribunal at Rs.750/- is just and proper?
(ii) Whether in case of death of a bachelor in vehicular accident the age of the deceased or the age of the parents of the deceased should be taken into consideration for the purpose of determining the appropriate multiplier?

12. So far as the first question is concerned, it is not in dispute that the deceased was aged 26 years at the time of his death. Admittedly, except the

deposition of the father, P.W.1, there was no other corroborative evidence in support of his contention of the claimants that the deceased was running a two wheeler garage engaging two assistants under him. Before this Court, Dr.Mohanty also could not adduce any evidence in support of the contention that the deceased was running a two wheeler garage. The Second Schedule of the M.V. Act prescribes Rs.15,000/-as annual income in case of a non-earning person. This Second Schedule was prescribed in the year 1994. In the present case, the accident occurred in the year 1996. Therefore, the annual income of the deceased is taken at Rs.15,000/- as prescribed in Second Schedule of the M.V. Act for the purpose of determining the amount of compensation. The ratio of the judgment of the Hon'ble Supreme Court in the case of *Laxmi Devi (supra)* is not adopted for the reason that in that case the accident took place in the year 2004, but in the present case the accident took place in the year 1996.

13. The second question that arises for consideration is regarding the application of correct multiplier. Admittedly, in the present case, the deceased was a bachelor and he was 26 years old at the time of death. The Hon'ble Supreme Court in the case of *P.S. Somnathan (supra)* held that in case of death of a bachelor his age at the time of death should be taken into account for the purpose of applying multiplier. The Hon'ble Supreme Court recently in the case of *Shyam Singh (supra)* held that in case of death of a bachelor in vehicular accident the multiplier has to be determined by taking into account the age of the deceased or claimants whichever is higher. In that case the Hon'ble Supreme Court held that the Tribunal had rightly applied the multiplier of 8 by taking the average age of the parents of the deceased who were 55 and 56 years. Though the judgment of the Hon'ble Supreme Court in *P.S. Somnathan (supra)* delivered on 14.02.2011 is cited to contend that the age of the deceased is to be taken for fixing the multiplier, in a subsequent judgment of Coordinate Strength of the Hon'ble Supreme Court in the case of *Shyam Singh (supra)* delivered on 4th July, 2011 it has been decided that the multiplier is to be determined by taking into account the age of the deceased or claimants whichever is higher. This being a judgment delivered on a later date, I respectfully follow the ratio of the judgment in *Shyam Singh's case (supra)*. Therefore, the average age of the parents will be taken into account for the purpose of fixing the appropriate multiplier. It is not in dispute that at the time of death of the deceased, age of the mother was 50 years and age of the father was 57 years. If an average is taken, the appropriate multiplier comes to 11.

14. Taking the annual income of the deceased at Rs.15,000/- and applying multiplier 11 and deducting 1/3rd therefrom. towards personal

expenses, the amount of compensation comes to Rs.1,10,000/-. The Tribunal has awarded Rs.10,000/- under the head of consortium, pain and sufferings. Thus, the total compensation comes to Rs.1,20,000/-.

15. In view of the above, this Court directs respondent No.1 Insurance Company to pay a compensation of Rs.1,20,000/- to the claimants, since undisputedly at the relevant time the offending vehicle was covered by a valid Insurance policy. Therefore, respondent No.1-the Insurance Company is directed to deposit the above amount of compensation along with interest @ 9% per annum from the date of accident till the date of payment, after deducting therefrom the amount already paid.

16. The respondent No.1-Insurance Company is directed to deposit the amount of compensation along with interest, as directed above, before the Tribunal within a period of four weeks from today. It is stated by Dr.Mohanty, learned counsel for the appellants that in the meantime the father of the deceased has expired. Therefore, the amount of compensation as stated above shall be disbursed by the Tribunal to the mother of the deceased on proper identification.

17. With the above observations and directions the appeal is disposed of.

Appeal disposed of.

2012 (I) ILR- CUT- 694

S.C.PARIJA, J.

W.P.(C) NO.15864 OF 2011 (Dt. 17.01.2012)

C.V. RAMAN COLLEGE OF ENGINEERING …… Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.14.

Action of the state must be fair, valid and it can not be whimsical for any ulterior purpose.

In this case pursuant to the XIth Plan Guidelines of U.G.C. , Petitioner College applied for grant of autonomous status – U.G.C. intimated State Government and BPUT to nominate their respective nominees to be members of the Expert Committee within 90 days to evaluate the performance of the Petitioner College – State Government failed to nominate its nominee in time so BPUT nominee visited Petitioner College and recommended to confer autonomous status to which the UGC agreed – At no stage State Government or BPUT had raised any objection – Admittedly State Government has no authority in law to take any decision in this regard – Held, action of the State Government and BPUT in defying the order of the UGC to confer the autonomous status to the petitioner College can not be sustained - Direction issued to both the authorities to take immediate decision to grant autonomous status to the petitioner College.

(Para 44,48,49)

Case laws Referred to:-

1.AIR 1968 SC 718 : (Union of India-V- Anglo Afghan Agencies)
2.AIR 1979 SC 621 : (Motilal Padampat Sugar Mills Co.Ltd.-V-State of U.P. & Ors.)
3.AIR 1995 SC 874 : (Kasinka Trading & Anr.-V-Union of India & Anr.)
4.AIR 1997 SC 3910 : (Pawan Alloys & Casting Pvt.Ltd., Meerut etc.etc.-V-U.P. State Electricity Board & Ors.)
5.AIR 2004 SC 297 : (State of Orissa & Ors.-V-Mangalam Timber Products Ltd.)
6.AIR 2004 SC 4559 : (State of Punjab-V- Nestle India Ltd. & Anr.)
7.(2010) 3 SCC 274 : (State of Bihar & Ors.-V-Kalayanpur Cement Ltd.)
8.AIR 1986 SC 806 : (Union of India & Ors.-V- Godfrey Philips India Ltd.)

For Petitioner - M/s. J.Patnaik & Sri B.Routray, Sr. Advocate
with Sri K.K.Jena, A.K.Mohapatra,
S.N.Das, Adv.
For Opp.Parties - Sri. V.Narasingh, Addl. Govt. Advocate
(for O.P.No.1)
M/s. Sabir Palit, A.K.Mohapatra & A.Mishra,
(for O.P.No.2)
M/s. J.K.Mishra, Sr. Advocate
With Sri. P.C.Behera & S.S.Mohanty,
(for O.P.No.3.)

S.C.PARIJA, J. This writ petition has been filed challenging the inaction of the Biju Patnaik University of Technology (BPUT for short) in not implementing the decision of the University Grant Commission (UGC for short), granting autonomous status to the petitioner College and not taking necessary action in that regard. The petitioner also assails the decision of the State Government not to accord autonomous status to the petitioner College.

2. The brief facts as detailed in the writ petition is that the UGC-opposite party no.3 under its XIth Plan Guidelines (Annexure-1), prepared a Scheme of Autonomous College to increase the number of autonomous colleges in the country, with a target to make 10% of eligible colleges autonomous by the end of XIth Plan period i.e., 2007-2012. In terms of the said guidelines of UGC, the petitioner College submitted its proposal for autonomous status from the academic session 2010-11, in the prescribed format, duly signed and recommended by the Registrar, BPUT, to the Secretary, UGC, vide its letter dated 18.1.2010 (Annexure-2).

3. On receipt of the proposal from the petitioner College for grant of autonomous status, the UGC vide its letters dated 23.4.2010 intimated BPUT and the State Government that the UGC has constituted an Expert Committee consisting of three members to evaluate the performance and academic attainments for conferment of autonomous status to the petitioner College. Accordingly, both BPUT and the State Government were requested to nominate their respective nominee to be members of the Expert Committee. In the said letters of the UGC addressed to BPUT and the State Government it was clearly mentioned that if the State Government fails to provide its nominee within 90 days after issued of letter, the Export Committee may go ahead with the process to evaluate the performance and academic attainments for conferment of autonomous status to the petitioner College. Copy of the said letters were marked to the petitioner College with

the request to pursue the matter with the State Government, as per Annexure-3 and 4 to the writ petition.

4. As per the State Government did not nominate its nominee to the Expert Committee, the UGC vide its letter dated 25.8.2010 again requested the State Government to nominate its nominee for the Expert Committee and to instruct the nominee to attend and visit the petitioner College from 30.8.2010 to 01.9.2010, as per Annexure-5 to the writ petition. The petitioner College by letter dated 27.8.2010 (Annexure-6) also requested the State Government to nominate its representative for the Expert Committee constituted by the UGC for inspection of the petitioner College to be conducted on 30.8.2010. Ultimately by letter dated 8.9.2010 (Annexure-7), the State Government in the Industries Department intimated the UGC that Sri D.K. Mallick, Joint Director (Academic), Office of the DTE & T, Orissa , Cuttack is nominated as the State Government nominee to the Expert Committee constituted by the UGC, to evaluate the performance and academic attainments for conferment of fresh autonomous status to the petitioner College.

5. The State Government having failed to nominate its nominee in time, the Expert Committee of the UGC consisting of the nominee of BPUT and others inspected the petitioner College from 30.8.2010 to 01.9.2010 and submitted its detailed report, as per Annexure-8 to the writ petition, recommending that the petitioner College be made autonomous for a period of six years from 2011-12 to 2016-17, so that it grows better under the autonomous structure than the prevailing situation where the academic health is mainly constrained due to practical problems with the affiliating University, often resulting in delaying of all activities as well as results. Basing on the recommendation of the Expert Committee, the UGC vide its letter dated 15.10.2010 (Annexure-9) agreed to confer autonomy to the petitioner College, which was communicated to all concerned, including the petitioner College, BPUT and the State Government, with a request to the BPUT to go ahead and issue necessary orders in this regard. Subsequently, the UGC by its letter dated 13.1.2011 (Annexure-10) requested the BPUT to issue necessary orders for conferment of autonomy to petitioner College. The petitioner College also took up the matter with the BPUT for issuing necessary orders/notification regarding confirmation of autonomous status to the College, as per Annexure-11 series.

6. The BPUT, by its letter dated 17.3.2011 (Annexure-13), intimated the petitioner College that the matter regarding conferring of autonomous status has already been taken up by the University and the same shall be intimated

to the petitioner College shortly. Pursuant to the conferment of autonomous status to the petitioner College, the UGC by its letter dated 15.4.2011 (Annexure-14), nominated Prof. (Dr.) D.S. Chauhan, Vice-Chancellor, Uttarakhand Technical University, as its nominee to the Governing Body of the petitioner College. As the BPUT and the State Government did not nominate their representative/nominee to the Governing Body of the petitioner College, the petitioner made several requests in that regard. Having failed to elicit any response either from the State Government or the BPUT and due to the inaction of the BPUT in not passing necessary orders notifying the autonomous status of the petitioner College, the petitioner has approached this Court in the present writ petition.

During pendency of the writ petition, the petitioner having come to know that subsequently the State Government by its letter dated 21.5.2011 (Annexure-19) has intimated the BPUT its decision not to accord autonomous status to the petitioner College, the same has been incorporated in the writ petition by way of amendment with a prayer to quash the same.

7. Learned counsel for the petitioner submitted that the UGC, which is a statutory body established under the UGC Act, 1956, has framed the XIth Plan Guidelines for grant of autonomy to eligible colleges in order to carry out the National Policy on Education 1986-1992 of the Central Government. Once the UGC has granted autonomous status to the petitioner College in terms of its XIth Plan Guidelines, neither the BPUT nor the State Government has any authority in law to take a different stand and thereby defy the decision of UGC. It is further submitted that neither the State Government nor the BPUT having raised any objection before the UGC at any time regarding the eligibility and entitlement of the petitioner College for conferment of autonomous status and the BPUT having forwarded the application/proposal form of the petitioner College to the UGC for conferment of autonomous status and having participated through its nominee in the inspection conducted by the Expert Committee for evaluation of the performance and educational attainments of the petitioner College and recommended for grant of autonomous status, they are estopped from taking a contrary stand now, at this belated stage. It is submitted that the inaction of the BPUT in not passing necessary orders notifying the autonomous status of the petitioner College is only due to the belated decision of the State Government not to accord autonomous status to the petitioner College, as has been communicated to the BPUT by letter dated 21.5.2011.

In this regard, it is submitted that under XIth Plan Guidelines of UGC, the State Government has absolutely no role in the matter, except to

nominate its nominee to the Expert Committee and having nominated its nominee to the said Committee at a belated state and without any objection, the present action of the State Government in deciding not to accord autonomous status to the petitioner College on the ground that it does not fulfill the stipulation of permanent affiliation is wholly improper, illegal and without jurisdiction. It is accordingly submitted that the actions of both the State Government and BPUT are hit by the well established doctrine of promissory estoppel.

8. The State Government-opposite party no.1 in its counter affidavit has taken the plea that as the petitioner College has not been granted permanent affiliation by the parent university, i.e., BPUT and there is no concurrence of the State Government, it is not entitled to autonomous status as per the XIth Plan Guidelines of UGC. In this regard, it is submitted that as the First Statutes-2006 of BPUT does not envisage grant of permanent affiliation, which is a requirement under the XIth Plan Guidelines of UGC, no autonomous status can be conferred on the petitioner College. It is further submitted that as the Industries Department is the Nodal Department in respect of technical institutions in the State, as notified by the State Government, the communication by the UGC for nominating the State Government nominee to the Expert Committee having been addressed to the Department of Higher Education, no action could be taken thereon within the stipulated time. It is submitted that as the communication of the UGC reached the Industries Department only on 26.8.2010, the nominee was nominated by letter dated 8.9.2010 (Annexure-7) and the UGC instead of waiting for nomination of the State Government nominee, proceeded with the inspection of the petitioner College from 30.8.2010 to 1.9.2010 and therefore the recommendations made by the Expert Committee of the UGC is not binding on the State Government. It is further submitted that as the decision of the UGC conferring autonomy to the petitioner College is in violation of its own norms prescribed under the XIth Plan Guidelines, the same cannot be enforced in law. Accordingly, it is submitted that the decision of the State Government not to accord autonomous status to the petitioner College cannot be faulted.

9. The BPUT-opposite party no.2 has filed counter affidavit reiterating the plea that as there is no provision for grant of permanent affiliation under the First Statutes-2006 of BPUT, as required under the XIth Plan Guidelines of UGC, no autonomous status can be accorded to the petitioner College. In the second additional affidavit filed by the BPUT, a plea has been taken that the XIth Plan Guidelines published by the UGC does not have the statutory force inasmuch as, the same has not been notified as Regulation under the

UGC Act, 1956 and therefore the enforcement of the same cannot be insisted upon in law. In the regard, it is submitted that the said XIth Plan Guidelines of the UGC being only in the nature of a guidelines and/or instructions, the BPUT is not bound to comply with the same, especially when the State Government in the Industries Department has decided not to accord autonomous status to the petitioner College.

As an after thought, the BPUT has taken a new plea at the time of hearing of the writ petition that as the petitioner College is a technical institution, it is governed by the provisions of All India Council for Technical Education Act, 1987 ('AICTE Act' for short) and therefore it is the AICTE, who alone can take a decision regarding grant of autonomy to the petitioner College under Section 10 (m) of the said Act. Accordingly, it is submitted that the UGC has no authority to grant autonomy to the petitioner College.

10. This plea of the BPUT has been objected to by the learned counsel for the petitioner on the ground that the same is not supported by any pleading either in the counter affidavit or in the additional affidavits filed. It is further submitted that Section 10 (m) of the AICTE Act merely provides for laying down the norms for granting autonomy to technical institutions and admittedly no such norms having been laid down by the AICTE, the plea of the BPUT is misconceived. Accordingly, it is submitted that the UGC is not denuded of its authority to grant autonomy to the petitioner College.

11. The UGC-opposite party no.3 in its counter affidavit has stated that in view of the recommendations of the Education Commission (1964-65) regarding college autonomy, the UGC documents on the XIth Plan profile of higher education in India highlighted the importance of autonomous colleges as under :

> "The only safe and better way to improve the quality of under graduate education is to delink most of the colleges from the affiliating structure. Colleges with academic and operative freedom are doing better and have more credibility. The financial support to such colleges boosts the concept of autonomy. It is proposed to increase the number of autonomous colleges to spread the culture of autonomy, and the target is to make 10 per cent of eligible colleges autonomous by the end of the Plan."

12. It is further stated in the said counter affidavit that in order to confer autonomous status to the colleges, the UGC framed the XIth Plan Guidelines providing for a Scheme of Autonomous Colleges during the period 2007-

2012. clause-2 of the Guidelines dealt with the objectives of the XIth Plan in order to carry out the National Policy on Education (1986-1992), which formulated the objective for autonomous colleges. An autonomous college will have the freedom to :

- "determine and prescribe its own courses of study and syllabi, and restructure and redesign the courses to suit local needs; and
- prescribe rules for admission in consonance with the reservation policy of the state government;
- Evolve methods of assessment of students ? performance, the conduct of examinations and notification of results:
- Use modern tools of educational technology to achieve higher standards and greater creativity: and
- Promote healthy practices such as community service, extension activities, projects for the benefit of the society at large, neighbourhood programmes, etc.

13. It is further stated that Clause-2 (b) of the XIth Plan Guidelines provided for the relationship with the parent University, the State Government and other educational institutions. Clause-3 of the said XIth Plan Guidelines dealt with the eligibility target groups specifying that all colleges under Section 2(f) of the UGC Act, 1956, are eligible to apply for autonomous status and this includes Engineering Colleges also. So far as the criteria for identification of institutions for grant of autonomy is concerned, the said Clause-3 provided as under :

"CRITERIA FOR IDENTIFICATION OF INSTITUTIONS FOR GRANT OF AUTONOMY

(a) Academic reputation and previous performance in university examinations and its academic/co-curricular/extension activities in the past.

(b) Academic / extension achievements of the faculty.

(c) Quality and merit in the selection of students and teachers, subject to statutory requirements in this regard.

(d) Adequacy of infrastructure, for example, library, equipment, accommodation for academic activities, etc.

(e) Quality of institutional management.

(f) Financial resources provided by the management / state government for the development of the institution.

(g) Responsiveness of administrative structure.

(h) Motivation and involvement of faculty in the promotion of innovative reforms.

(i) Self-Financing college can also apply for autonomy after they have completed minimum 10 years of existence. However, conferment of autonomy will not entitle them to receive autonomy grant. They will have to follow the same procedure as applicable to other colleges.

(j) Colleges that provide professional courses in Education, Engineering Technology Management and Physical Education, etc. will also be eligible to receive grants from the Commission. The sanction of such grants will depend on the size and stage of development of these colleges after attaining autonomous status."

14. It is further stated in the counter affidavit that in view of the provisions contained in Clause-3 of the XIth Plan Guidelines dealing with target group and eligibility target group, it is clear that a college whether having temporary or permanent affiliation comes within the target group and is eligible to be considered for autonomous status within the meaning of Clause-3 of the said Guidelines. It is stated that the UGC has considered both categories of colleges which are having temporary affiliation and/or permanent affiliation from the parent University, for grant of autonomous status.

15. The UGC in its counter affidavit have categorically stated that they received the proposal of the petitioner College duly forwarded by the parent University, i.e., BPUT in January, 2010. Thereafter, the Chairman of UGC constituted an Expert Committee for on the spot inspection of the College for consideration of autonomous status. After the University nominees name was received and State Government did not nominate its nominee within the stipulated period of 90 days, in spite of repeated requests and reminders, the Expert Committee went ahead with the spot inspection of the petitioner College from 30.8.2010 to 1.9.2010 and the State Government was also informed in this regard. The Expert Committee visited the petitioner College from 30.8.2010 to 1.9.2010 and thereafter the report of the Expert Committee was placed before the Commission in its meeting held on 27th September, 2010.

16. It is further stated in the said counter affidavit that the UGC informed the Registrar, BPUT, vide letter dated 13.10.2010, that based on the recommendations of the Expert Committee, the Commission has agreed to confer autonomy to the petitioner College from the year 2011-12 to 2016-17 and the University may now go to ahead and issue necessary orders in this regard by endorsing a copy of the same to UGC. Further, as per the XIth Plan Guidelines, the UGC nominated Prof. (Dr.) D.S.Chauhan, Vice-Chancellor, Uttarakhand Technical University, Uttarakhand, to be a member of the Governing Body of the petitioner College on 15.4.2011 and it is for the BPUT and the State Government to nominate their respective nominees.

17. The UGC Act, 1956, is enacted under the provisions of Entry 66 of List I of the Seventh Schedule to the Constitution. It entitles Parliament to legislate in respect of "coordination and determination of standards in institutions for higher education or research and scientific and technical institutions."

18. The short title of the UGC Act repeats the words of Entry 66 thus:

> " An Act to make provision for the coordination and determination of standards in Universities and for that purpose, to establish a University Grants Commission."

Section 2 of the UGC Act is the definition section and clause (f) thereof defines a University to mean-

> "a University established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institution as may, in consultation with the University concerned, be recognized by the Commission in accordance with the regulations made in this behalf under this Act."

Section 12 sets out the functions of UGC. It says, so far as is relevant for our purposes:

> " It shall be the general duty of the Commission to take, in consultation with the Universities or other bodies concerned, all such steps as it may think fit for the promotion and coordination of University education and for the determination and maintenance of standards of teaching, examination and research in Universities, and for the purpose of performing its functions under this Act, the Commission may-

x x x

(d) recommend to any University the measures necessary for the improvement of University education and advise the University upon the action to be taken for the purpose of implementing such recommendation ;

x x x

(j) perform such other functions as may be prescribed or as may be deemed necessary by the Commission for advancing the cause of higher education in India or as may be incidental or conductive to the discharge of the above functions."

Section 12-A enables the UGC to regulate fees and it prohibits donations in certain cases. Sub-section (i) of Section 12-A sets out certain definitions expressly for the purpose of Section 12-A. Clause (d) thereof defines qualification to mean "a degree or any other qualification awarded by a University". Section 14 lays down the consequences of failure of universities to comply with the recommendations of the Commission.

Section 20 of the UGC Act reads as under ;

"(1) In the discharge of its functions under this Act, the Commission shall be guided by such directions on questions of policy relating to national purposes as may be given to it by the Central Government.

(2) If any dispute arises between the Central Government and the Commission as to whether a question is or is not a question of policy relating to national purposes, the decision of the Central Government shall be final."

Section 25 empowers the Central Government to make rules for the carrying out of the purposes of the UGC Act. Section 26 entitles the UGC, by notification in the Official Gazette, to make regulations consistent with the Act and the rules made thereunder.

19. From the above, it is seen that the Central Government enacted the UGC Act, 1956, to coordinate the standards of higher education, which include the power to evaluate, harmonise and secure proper relationship to any project of national importance. Such coordinate action in higher education with proper standards was of paramount importance to national

progress. The power of the UGC to coordinate and of necessity, implied therein is the power to prevent what would make such coordination impossible or difficult. This power of UGC is wide and absolute and in absence of any compelling reasons, it has to be given full effect according to its plain and expressed intention. The State has no power at all with regard to such matters.

20. With the passage of time there was a growing need for College autonomy as an instrument for promoting academic excellence. The affiliating system of colleges was originally designed when their number in a University was small. The University could then effectively oversee the working of the colleges, act as an examining body and award degrees on their behalf. The system has now become unwieldy and it is becoming increasingly difficult for a University to attend to the varied needs of individual colleges. The colleges do not have the freedom to modernize their curricula or make them locally relevant. The regulations of the University and its common system, governing all colleges alike, irrespective of their characteristic strengths, weaknesses and locations, have affected the academic development of individual colleges. Colleges that have the potential for offering programmes of a higher standard do not have the freedom to offer them. The 1964-66 Education Commission pointed out that the exercise of academic freedom by teachers is a crucial requirement for development of the intellectual climate of our country. Unless such a climate prevails, it is difficult to achieve excellence in our higher education system. With students, teachers and management being co-partners in raising the quality of higher education, it is imperative that they share a major responsibility. Hence, the Education Commission (1964-66) recommended college autonomy, which, in essence, is the instrument for promoting academic excellence.

21. The National Policy on Education (1986-1992) of the Central Government formulated the objective for autonomous colleges, as has already been detailed above. Highlighting the importance of autonomous colleges and in order to carry out the said objectives of the National Policy of Education, the UGC framed the XIth Plan Guidelines, providing for a Scheme of Autonomous Colleges during the plan period, i.e. 2007-2012.

22. The XIth Plan Guidelines, under Clause-2(b) provides for the relationship with the parent University, the State Government and other educational institutions, which reads as under :

" Autonomous colleges are free to made use of the expertise of university departments and other institutions to frame their curricula, devise methods of teaching, examination and evaluation. They can recruit their teachers according to the existing procedures (for private and government colleges).

The parent university will accept the methodologies of teaching, examination, evaluation and the course curriculum of its autonomous colleges. It will also help the colleges to develop their academic programmes, improve the faculty and to provide necessary guidance by participating in the deliberations of the different bodies of the colleges.

The role of the parent university will be :

To bring more autonomous colleges under its fold ;

To promote academic freedom in autonomous colleges by encouraging introduction of innovative academic programmes ;

To facilitate new course of study, subject to the requirement minimum number of hours of instruction, content and standards ;

To permit them to issue their own provisional, migration and other certificates ;

To do everything possible to foster the spirit of

To ensure that degrees/diplomas/certificates issued indicate the name of the college ;

To depute various nominees of the university to serve in various committees of the autonomous colleges and get the feedback on their functioning ; and

To create separate wings wherever necessary to facilitate the smooth working of the autonomous colleges.

The state government will assist the autonomous colleges by ;

Avoiding, as far as possible, transfer of teachers, especially in colleges where academic innovation and reforms are in progress, except for need-based transfer ;

> Conveying its concurrence for the extension of autonomy of any college to the Commission within the stipulated time of 90 days after receipt of the review committee report, failing which it will be construed that the state government has no objection to the college continuing to be autonomous, and
>
> Deputing nominees on time to the governing body of government colleges and other bodies wherever their nominees are to be included ;
>
> All three stake holders, the parent University, the State Govt. and UGC have to play a very harmonious and pro active role as facilitators in letter and spirits."

23. Clause-2 © of the said Guidelines provides that the parent university will confer the status of autonomy upon a college that is permanently affiliated, with the concurrence of the State Government and the UGC. Once the autonomy is granted, the parent university shall accept the students of autonomous college for award of such degrees as are recommended by the autonomous college.

24. Clause-3 dealt with target group and the criteria for identification of institutions for grant of autonomy. All colleges under Section 2(f), aided, unaided, partially aided and self-financing which are not covered under Section 12(b) of the UGC Act are eligible to apply for autonomous stains and this includes Engineering Colleges.

25. Clause-5 lays down the procedure for applying for autonomous status. Clause-6 prescribed the procedure for approval of autonomous status by the UGC, which reads as under;

> "The Commission further reviewed the present procedure for fresh proposal and resolved that an Expert Committee may be constituted for all fresh cases with representation of university and State Government nominees. The existing procedure of Screening Committee may be scraped and the Chairman may constitute Expert Committee for on the spot inspection for consideration of each proposal."

The parent University will notify the colleges concerned and that the autonomy will be conferred initially for a period of six years.

26. Clause-8 of the Guidelines dealt with governance of an autonomous college and the constitution of its Governing Body as per the structure given in Annexure-III.

27. The Biju Patnaik University of Technology Act, 2002 ("BPUT Act' for short) was enacted to provide for the establishment and incorporation of a technological university in the State of Orissa and for matters connected therewith or incidental thereto.

28. Section 5 of the BPUT Act provides for the powers and functions of the University and sub section (iii) thereof deals with grant of autonomy to affiliated colleges, which reads as under;

> "**5. Powers and functions of University-** Subject to such orders, rules, regulations, guidelines and directions, as may be issued from time to time, by the Central Government or the Council under the provisions of the All India Council for Technical Education Act, 1987. The University shall have the following powers and functions, namely, :
>
> xx xx xx
>
> xx xx xx
>
> (iii) to grant autonomy to any affiliated. College or institution imparting education in engineering and technology, including information technology and its application, architecture, pharmacy, applied arts and crafts, management and applied sciences."

29. Statute No.43 in Part-VI of the First Statuite-2006 of BPUT framed under Section 2(q) of the BPUT Act provides for grant of affiliation to institutions/colleges imparting technical education in the State and clause (4) thereof provides for grant of affiliation on annual basis, which reads as under

> " 43. The University shall grant affiliation from time to time to different institutions/colleges imparting technical education in the State as per the provisions under sub-section (ii) of Section 18 of the Act.
>
> x x x
>
> x x x
>
> (4) Affiliation of new courses/continuation of affiliation of existing courses in an existing institution/college in subsequent years or in a

> new college shall be subject to scrutiny by the University. This affiliation shall be ordinarily accorded on a yearly basis. Each year application for affiliation shall be submitted in the prescribed proforma along with affiliation fee and inspection fee, within a specified date to the Office of the Registrar, Biju Patnaik University of Technology for due processing before the respective academic session starts."

30. The XIth Plan Guidelines having been framed by the UGC to implement the objectives of the National Policy on Education of the Central Government regarding grant of autonomy to colleges, the same is binding on the BPUT. Moreover, the BPUT is required to exercise the powers and functions as enumerated in Section 5 of the BPUT Act, including the power to grant autonomy to any affiliated college or institution, which is subject to such orders, guidelines and directions, as may be issued by the Central Government from time to time. Hence, it is not open for the BPUT to question the authority of the UGC in framing the XIth Plan Guidelines and refuse to carry out the order/decision of the UGC granting autonomous status to the petitioner college.

31. There is no conflict between the XIth Plan Guidelines of the UGC and the provisions of BPUT Act and the First Statute-2006 framed thereunder, regarding grant of autonomous status to eligible colleges. The stand taken by the UGC in its counter affidavit clarifies the position that both colleges having permanent or temporary affiliation comes within the target group and are eligible to be considered for grant of autonomous status, as per Clause-3 of its Guidelines.

32. The State Government by its letter dated 8.9.2011 having nominated its nominee to the Expert Committee constituted by the UGC for inspection of the petitioner College for conferment of autonomous status pursuant to the communications of the UGC dated 23.4.2010 and 9.8.2010, as would be evident from the said letter itself, the plea now raised that the said communications were not addressed to the nodal department cannot be sustained.

33. As regard the contention of the BPUT that it is only the AICTE who can grant autonomous status to the petitioner College under the provisions of the AICTE Act, the same appears to be a belated ploy on the part of the BPUT to avoid its obligations under the XIth Plan Guidelines of the UGC. This is more so when seen in the light of the fact that no such objection has been raised by the BPUT at any stage of the matter. Moreover, no norms having been laid down as required under Section 10(m) of the AICTE Act,

there is no bar for the UGC to prescribe the guidelines and confer autonomy to eligible colleges.

34. Coming to the plea of the petitioner regarding application of the doctrine of promissory estoppel, the said doctrine is a principle evolved by equity to avoid injustice. In the celebrated decision of the Supreme Court in ***Union of India –vrs- Anglo Afghan Agencies,*** AIR 1968 SC 718, the doctrine of promissory estoppel found its most eloquent exposition. It was laid down by the Hon'ble Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promise and promise would after his position relying upon it. But if the Government makes such a promise and the promise acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual.

The Hon'ble Court after referring to various earlier decisions summed up the position as follows :

> "Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen."

35. In ***Motilal Padampat Sugar Mills Co. Ltd. –vrs.- State of Uttar Pradesh and others***, AIR 1979 SC 621, the Supreme Court observed as under:

> "The true principle of promissory estoppel seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact to acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between

the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not."

36. The Hon'ble Court referring to the decision in Anglo Afghan Agencies case (supra), proceeded to observe as follows :

> "The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and in fact the promise, acting in reliance on it, alters his position the Govt. would be held bound by the promise and the promise would be enforceable against the Govt. at the instance of the promise, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Art,299 of the Constitution."
>
> xx xx xx xx
>
> "It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned the former is equally bound at the later. It is indeed difficult to see on what principle can a Government committed to the rule of law, claim immunity from the doctrine of promissory estoppel? xx xx xx"

37. Relying upon a large number of decisions, the Hon'ble Court held that it is not necessary that by altering the position by the promises, he must have some detriment to his position. Thus, a person raising the plea of promissory estoppel does not have to establish that he suffers from any detriment. What is necessary is only that the promise should have altered his position by relying on the promise, meaning thereby that the promise must have lead to act differently from what he would otherwise have done. It is not a detriment but a benefit to him which he could have received on acting upon the promise made by the other side.

38. The ambit, scope and amplitude of the doctrine of promissory estoppel again came up for consideration before the Supreme Court in ***Kasinka Trading and another –vrs- Union of India and another***, AIR 1995 SC 874, wherein the Hon'ble Court observed as follows :

> "The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid

injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance of the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties."

39. In ***Pawan alloys and Casting Pvt. Ltd., Meerut etc. etc. –vrs.- U.P. State Electricity Board and others,*** AIR 1997 SC 3910, the Supreme Court held that it is sufficient to say that if a statutory authority or an executive authority of the State in exercise of its legally permissible powers has held out any promise to a party and relying on the same, the party has changed its position not necessarily to its detriment and if this promise does not offend any provision of law or does not fetter any legislative or quasi-legislative power inhering in the promissory, then on the principle of promissory estoppel, the promissor can be pinned down to the promise made by its by way of representation containing such promise, for the benefit of the promise.

40. In ***State of Orissa and others –vrs- Mangalam Timber Products Ltd.,*** AIR 2004 SC 297, the Hon'ble Court held as under :

"xxx xxx To attract the applicability of the principle of estoppel it is not necessary that there must be a contract in writing entered into between the parties. We are not satisfied even prima facie that it was a case of an error committed by the State Government of which it was not aware. The State of Orissa should have, while holding out the representation, taken into consideration the fact who will have to do the replantation and that the permission of the Government of India would be needed for the purpose.

The State cannot take advantage of its own omission. xxx xxx"

41. In ***State of Punjab –vrs.- Nestle India Ltd. And another***, AIR 2004 SC 4550, the Supreme Court while recapitulating the law on the subject of promissory estoppel, referred to a large number of its earlier judgments and

came to the conclusion that promissory estoppel long recognized as a legitimate defence in equity was held to found a cause of action against the Government, even when, and this needs to be emphasized, the representation ought to be enforced was legally invalid in the sense that it was made in a manner which was not in conformity with the procedure prescribed by statute. In the said case the Hon'ble Court came to find that the State of Punjab has not been able to establish any overriding public interest which would make it inequitable to enforce the estoppel against the State Government and accordingly proceeded to upheld the plea of promissory estoppel raised by the respondents therein.

42. The well established doctrine of promissory estoppel and its applicability has been discussed, affirmed and reiterated in a subsequent decision of the Supreme Court in ***State of Bihar and others –vrs-. Kalayanpur Cement Ltd.***, (2010) 3 SCC 274.

43. However, the doctrine of promissory estoppel has certain limitations regarding its applicability. There can be no promissory estoppel against the legislature in the exercise of legislative function nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. The doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires, if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it. (See. ***Union of India and others –vrs.- Godfrey Philips India Ltd***., AIR 1986 SC 806).

44. It is trite law that every action of the State executive authority or a statutory authority must be subject to rule of law and must be informed by reasons. So, whatever be the activity of the public authority, it should meet the test of Article 14 of the Constitution. Rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens. The wide sweep of Article 14 and the requirement of

every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

45. In the present case, from the pleadings of the parties it is abundantly clear that pursuant to the XIth Plan Guidelines of the UGC, the petitioner College submitted its application/proposal in the prescribed format, duly signed and recommended by the Registrar, BPUT, for grant of autonomous status. The UGC vide its letter dated 23.4.2010 intimated the BPUT and the State Government to nominate their respective nominees to be members of the Expert Committee constituted by the UGC, to evaluate the performance and academic attainments of the petitioner College, for conferment of autonomous status. In the said letter of the UGC it was made clear that if the State Government fails to provide its nominee within 90 days, the Expert Committee may go ahead with the process to evaluate the performance and academic attainments of the petitioner College, for conferment of autonomous status. In spite of repeated requests and reminders, the State Government failed to nominate its nominee to the Expert Committee in time. The BPUT nominated its nominee to the said Expert Committee constituted by the UGC, which visited the petitioner College from 30.8.2010 to 01.9.2010 and submitted its detailed report, with the following recommendations :

> "Based on 5 years results and strength of teachers and feedback of students, teachers and other staff and NAAC, 2(f) of UGC, NBA recommendations the Committee is of the view that the college be made autonomous for a period of 6 years from 2011-12 to 2016-17 so that it grows better under the autonomous structure than the prevailing situation where the academic health is mainly constrained due to practical problems with the affiliating University often resulting in delaying of all activities as well as results."

46. After inspection of the petitioner College by the Expert Committee, the State Government vide its letter dated 8.9.2010 intimated the UGC regarding nomination of its nominee to the Expert Committee constituted by

the UGC to evaluate the performance and academic attainments for conferment of autonomous status to the petitioner College.

47. The UGC considered the report of the Expert Committee and basing on the recommendations made by it, agreed to confer autonomous status to the petitioner College from the academic session 2011-2012 to 2016-2017 and accordingly intimated the Registrar, BPUT of the same vide its letter dated 15.10.2010 and subsequent reminder dated 13.01.2011, with the request to issue necessary orders in this regard. The BPUT vide its letter dated 17.3.2011 intimated the petitioner College that the matter regarding conferment of autonomous status has already been taken up by the University and that the same will be intimated to the petitioner shortly.

48. The above narration of facts situation clearly reveals that at no stage either the State Government or the BPUT had expressed any reservations or raised any objection regarding conferment of autonomous status to the petitioner College by the UGC under its XIth Plan Guidelines. Admittedly, the State Government has no authority in law to take any decision regarding grant of autonomy to colleges. No explanation is forthcoming from the State or the BPUT for the sudden volte face at such a belated stated, after the UGC agreed to confer autonomous status to the petitioner College based on the report and recommendations of its Expert Committee. The recalcitrant attitude of the State Government and the BPUT in refusing to comply with the order/decision of the UGC conferring autonomous status to the petitioner College is not reasonable and justified and therefore the plea of promissory estoppel raised by the petitioner is liable to be upheld. Moreover, the said opposite parties have not been able to establish any statutory bar or any overriding public interest which would made it inequitable to enforce the estoppel against them.

49. For the reasons as aforesaid, the action of the State Government and the BPUT in defying the decision/order of the UGC conferring autonomous status to the petitioner College cannot be sustained. Accordingly, the decision of the State Government not to accord autonomous status to the petitioner College, as communicated to the BPUT vide its letter dated 21.5.2011 is hereby quashed. Both the State Government and the BPUT are directed to take immediate steps to carry out their respective obligations under the XIth Plan Guidelines of the UGC for grant of autonomous status to the petitioner College.

Writ petition is accordingly allowed. There shall be no order as to consts.

Writ petition allowed.

2012 (I) ILR- CUT- 715

B.K.NAYAK, J.

W.P.(C) NO.6440 OF 2011 (Dt. 21.10.2011)

ASHWINI KUMAR NAIK …… ….Petitioner

.Vrs.

GOBARDHAN NAIK ……..Opp.party

CIVIL PROCEDURE CODE,1908 (Act No. 5 of 1908 - ORDER 6, RULE 17.

Amendment of written statement incorporating counter claim – In the instant case suit between the parties was decreed on compromise without trial and the decree being set aside in appeal the matter was remanded for hearing afresh – The amendment will not have the effect of prolongation of the trial or complicating the otherwise smooth flow of proceedings forcing a retreat on the steps already taken by the Court but on the other hand it would help avoid multiplicity of judicial proceedings facilitating all the disputes between the parties being decided finally – Held, there is no illegality in the impugned order of the trial Court in allowing the amendment of written statement introducing the counter claim.

For petitioner - Mr. Srikar Ku. Rath
For opp. Party - M/s. Alekh Ch. Mohanty & G.N.Rout

B.K.NAYAK, J. In this writ petition the petitioner, who is the plaintiff in Civil Suit No.85 of 2004 of the court of learned Civil Judge (Senior Division), Sundargarh, has assailed the order dated 24.1.2011 passed by the said court allowing amendment of the written statement of the opposite party-defendant by way of incorporation of counter claim.

2. The suit was filed by the petitioner seeking relief of declaration that the suit property was his absolute property. The defendant-opposite party is none other than the father of the petitioner. The plaintiff's claim was that though defendant purchased the suit land by his own salary income, a house was constructed thereon by the joint efforts and finance of both the parties. The loan incurred by the defendant for the purpose of construction of the house could not be repaid by him, but it was ultimately repaid by the plaintiff for which the property was mortgaged with him by the defendant. Since for the development of the property and construction of the house, the plaintiff has borne the entire expenses it has become his absolute property. As it

appears, the suit has been decreed on compromise in favour of the plaintiff-petitioner, but the opposite party filed RFA No.43 of 2007 in this Court which was allowed and the compromise decree was set aside and the matter was remanded to the trial court for fresh disposal. Thereafter, the opposite party filed petition under Order 6 Rule 17 of the C.P.C. with a prayer to incorporate a counter claim in the written statement. The counter claim mainly relates to additional prayer for declaration of defendant's right, title and interest over the suit land and for recovery of possession and for recovery of the rent realised by the plaintiff from the suit house pursuant to the compromise decree. The amendment was allowed by the impugned order subject to payment of cost of Rs.100/- by the opposite parties to the plaintiff-petitioner.

3. The only contention raised by the learned counsel for the petitioner is that the counter claim was not maintainable after settlement of issues. For this, he relied on the decisions reported in AIR 2003 SC 2508; ***Ramesh Chand Ardawatiya v. Anil Panjwani*** and AIR 2011 SC 785; ***Gayathri Women's Welfare Association v. Gowramma and another***. Learned counsel for the opposite party contends that those decisions have no application to the facts and circumstances of the present case.

4. In the case of ***Ramesh Chand Ardawatiya*** (supra), the apex Court held that generally speaking, a counter claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced, with the following observations:

> "Looking to the scheme of O.VIII as amended by Act No.104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under R.1 may itself contain a counter claim which in the light of R.1 read with R.6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by R.6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under R.9. In the latter two cases the counter-claim though referable to R.6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under O.VI, R.17 of the C.P.C. if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under O.VIII, R.9 of the C.P.C. if sought to be placed on record by way of subsequent pleading. The

> purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading could be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. xxx"

The factual matrix of the aforesaid case reveals that the suit therein had a chequered history. After the issues were settled, evidence was closed, arguments were heard and the judgment was reserved. In the meantime, the defendant made an application under Order 18, Rule 17 of the C.P.C. praying permission for cross-examining some of the plaintiff's witnesses, which could not be done earlier due to pendency of a civil revision at his instance that was dismissed. After the suit was posted for judgment, the said application was allowed subject to payment of cost. At this stage, defendant again filed an application to place on record a written statement under Order-VIII Rule 6-A of the C.P.C. by way of counter claim. Since the defendant had already been set ex-parte, the trial court refused to entertain the written statement containing the counter claim.

5. Quoting the aforesaid observations made in ***Ramesh Chand Ardawatiya*** (supra), the Supreme Court in the case of ***Gayathri Women's Welfare Association*** (supra) held that the aforesaid observation made it clear that generally speaking, a counter claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and evidence taken. Here again the case before the apex Court had a chequered career. The suit therein after evidence had been decreed which was challenged in a Regular First Appeal before the High Court. The High Court allowed the appeal and remanded the matter to the trial court for fresh disposal. After remand, the respondent sought to

amend their written statement for incorporating counter claim. The amendment incorporating counter claim was allowed and the plaintiffs filed written statement to the counter claim on the basis of which additional issues were framed. But, again the trial court decreed the suit of the plaintiffs and dismissed the counter claim of the defendant. Aggrieved by the dismissal of the counter claim, the defendant again filed RFA No.43 of 2007 before the High Court. During the pendency of such appeal, the defendant filed an application before the High Court seeking for amendment of the written statement to include an additional prayer in the counter claim. The High Court allowed the amendment of the counter claim and again remanded the matter directing the trial court to dispose of the counter claim of the defendant afresh. This order of the High Court was challenged before the apex Court and relying upon the decision in the case of ***Ramesh Chand Ardawatiya*** (supra), the apex Court allowed the appeal holding that counter claim at such stage was not entertainable.

6. The following observations in the aforesaid decisions are relevant: "The purpose of the provision enabling filing of a counter claim is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counter claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading could be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim".

Therefore, the Court held that generally speaking the counter claim not contained in the original written statement may be refused to be taken on record, especially when the issues were framed and more so when the trial was commenced. This proposition as it appears is not absolute and without exception.

7. In the instant case, it is not in dispute that the suit between the parties was decreed on compromise without trial, but the compromise decree was set aside in appeal at the instance of the defendant-opposite party and the matter was remanded to the trial court for hearing and disposal. Whereafter, the opposite party sought to amend his written statement by incorporating the counter claim seeking relief of declaration of right, title and interest and recovery of possession, as because basing on the compromise decree passed earlier the suit land had been mutated in the

name of the plaintiff-petitioner. In the circumstances, in my considered opinion, the general proposition laid down in the aforesaid decisions of the apex Court will have no application to the instant case. Permitting the counter claim of the opposite party by way of amendment of the written statement will not have the effect of prolongation of the trial or complicating the otherwise smooth flow of proceedings forcing a retreat on the steps already taken by the court. On the contrary, it would help avoid multiplicity of judicial proceedings, facilitating all disputes between the parties being decided finally.

8. In the aforesaid circumstances, I find no illegality in the order of the trial court allowing amendment of written statement introducing the counter claim. The writ petition is, therefore, dismissed. No costs.

Writ petition dismissed.

2012 (I) ILR- CUT- 720

S.K.MISHRA, J.

W.P.(C) NO.11415 OF 2010 (Dt.15.11.2011)

JOGENDRA JENA & ANR. … …..Petitioners.

.Vrs.

KRUSHNA JENA & ANR. ……Opp.Parties.

ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTAION OF LAND ACT,1972 (ACT NO.21 OF 1972) – S.35 (2).

Transfer of land by O.P.1 on 6.9.1985 in favour of the petitioners – In the year 2009 i.e. after 25 years O.P.1 filed petition U/s.35(2) of the OCH & PFL Act, 1992 before the Collector, Bhadrak to evict the petitioners and for restoration of the land in his favour – Application allowed – Hence the writ petition.

The application U/s. 35 (2) has not been filed within 12 years as required under Article 65 of the Limitation Act – Held, since the initial starting point of limitation shall be the date of execution of the sale deed, the petition filed by O.P.1 before the Collector is hopelessly barred by limitation – The impugned order passed by the learned Collector is quashed. (Para -7)

Case laws Referred to:-

1.AIR 1990 Orissa 64 : (Rankanidhi Sahu-V- Nandakishore Sahu)
2.2005(II) OLR-633 : (Abdul Gani Ansari & Anr.-V-Addl. District Magistrate & Ors.)
3.AIR 2004 SC 3782 : (Amrendra Pratap Singh-V- Bahadur Prajapati & Ors.)

For Petitioners - M/s. Prahallad Kar, G.D.Kar, A.K.Mohanty, J.Behera.
For Opp.Parties - M/s. P.K.Rath & his associates.

S.K. MISHRA,J. In this writ petition the petitioners assail the correctness of the order passed by learned Collector, Bhadrak on 28.05.2010 in OCH & PFL Misc. Case No.4 of 2009, wherein it was ordered that the petitioners be evicted from the land in question and the same be restored to the opposite party no.1 under Section 35 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972, herein after referred to as 'the OCH and PFL Act' for brevity.

2. The facts of the case are not disputed though the opposite party no.1 claims that he has mortgaged a piece of land measuring Ac. 0.20 decimals of land out of Ac 0.58 pertaining to plot no.261, holding no.70 to the petitioners, it has been established before the court below that the opposite parties have, in fact, executed a registered sale deed bearing no.2815 dated 06.09.1985 in favour of the petitioners. It is not disputed at the same time that the area, i.e. Basudevepur Mouza, was under consolidation operation. It is also not disputed the fact that the opposite party no.1 did not seek permission from the consolidation authorities for transferring the fragment of land in favour of the petitioners. Thus, the opposite parties initiated a proceeding under Section 35(2) of OCH and PFL Act and prayed to declare the mutation order in favour of the petitioners to be illegal and to evict the petitioners from the disputed land. It is also not disputed that the petition under Section 35 of the OCH and PFL Act was filed about 25 years after execution of the registered sale deed. Thus, the only question that arises in this writ petition is whether the application filed by opposite party no.1 against the petitioners is barred by limitation and if the petitioners have perfected title by way of adverse possession.

3. The learned Collector came to the conclusion that the limitation will not run against the opposite party no.1 as the document is a void document. On the basis of the same the petitioners cannot claim any right to have accrued in their favour due to limitation. Therefore, the learned Collector declared the sale deed executed in favour of the petitioners to be void and ordered that the petitioners be evicted from the land in question and the possession thereof be restored to the opposite party no.1. Such order is assailed in this writ petition.

4. In course of hearing the learned counsel for the petitioners submits that since Section 57 of the OCH and PFL Act provides that the provisions of Limitation Act except Sections 6, 7, 8, 9, 18 and 19 shall apply to all applications, appeals, revisions and other proceedings under the Act, the case should be covered under Article 137 of the Limitation Act, 1963. In other words, the learned counsel for the petitioners submits that as there is no specific provision guiding the limitation for such applications, Article 137 of the Limitation Act shall be applicable to the case, which provides that the limitation for any application for any relief, for which no period of limitation has been made in the Limitation Act, shall be three years. Alternatively, he submits that even if the petition is held to be for possession of land in question, then the petition is barred by limitation as it has filed much after expiry of 12 years from the date of execution of the deed and, hence, the petitioners have perfected their title by way of adverse possession.

5. Mr. Rath, learned counsel for opposite party no1, on the other hand, submits that since the document is void abinitio, it is not required to be set aside or cancelled the same and, therefore, the provisions like Articles 65 or 137 of the limitation Act will not be applicable to the case. He relies on the reported case of **Rankanidhi Sahu vs. Nandakishore Sahu,** AIR 1990 Orissa 64. The learned counsel for the opposite party no.1 further submitted, relying upon the reported case of **Abdul Gani Ansari and another Vs. Addl. District Magistrate and others,** 2005 (II) OLR-633, that in case of a void document, which contravenes the provisions like Section 3 of Regulation II of 1956, the plea of adverse possession is not available to be taken against the execution of the sale deed. On such submissions, the learned counsel for the opposite party no.1 prayed that the writ petition is without merit and the same be dismissed.

6. No doubt, the provisions as contained in Regulation II of 1956 provide that any transfer made by a scheduled tribe without seeking permission of the competent authorities is void. Therefore, taking into consideration the special status of the scheduled tribes, the Supreme Court in **Amrendra Pratap Singh vs. Bahadur Prajapati and others** reported in AIR 2004 SC 3782, has held as follows:

> " Acquisition of title in favour of a non-tribal by invoking the doctrine of Adverse Possession over the immovable property belonging to a tribal, is prohibited by law and cannot be countenanced by the Court. In other words a default or in action on the part of a tribal which results in deprivation or deterioration of his rights over immovable property would amount to 'dealing' by him with such property and hence, a transfer of immovable property. It is so because a tribal is considered by the legislature not to be capable of protecting his own immovable property. A provision has been made by para 3A of the 1956 Regulations for evicting any unauthorized occupant, by way of trespass or otherwise, of any immovable property of the member of the scheduled tribe, the steps in regard to which may be taken by the tribal or by any person interested therein or even *suo motu* by the competent authority. The concept of *locus standi* loses its significance. The State is the custodian and trustee of the immovable property of tribals and is enjoined to see that the tribal remains in possession of such property. No period of limitation is prescribed by para 3A. The prescription of the period of 12 years in Art. 65 of the Limitation Act becomes irrelevant so far as the immovable property of a tribal is concerned. The tribal need not file a civil suit which will be governed by law of limitation, it is enough if he or anyone on his

behalf moves the State or the State itself moves into action to protect him and restores his property to him. To such an action neither Art.65 of Limitation Act nor Section 27 thereof would be attracted." (emphasis supplied)

From a plain reading of the reasonings resorted to by the Hon'ble Supreme Court in the aforesaid case leaves no doubt in the mind of the Court that such a special treatment is meted out to the tribals because of the fact that the tribals are considered by the legislature not to be capable of protecting their immovable property. Such a reasoning is not applicable to this case. It is not the case of the opposite party no.1 that he is incapable of protecting his own property neither he pleads that he is illiterate and do not understand the process of registration etc. The basic object of prohibition of transfer of a fragment of land in the Act is to prevent fragmentation of consolidable lands, which is the main object of the Act. Such a prohibition of transfer is not intended to protect any class of persons, which is considered to be incapable of taking care of their own property. On the contrary, law of limitation requires that the parties should be vigilant to protect their right and that they should not sleep over the matter indefinitely. Such inaction and afflux of time in fact creates a right in favour of the purchaser or the party against whom a legal action is brought out.

7. In this case, it is admitted that 25 years has elapsed before the opposite party no.1 filed application to the Collector for restoration of the land in question. Thus, the initial starting point of limitation shall be date of execution sale deed and the court of law cannot but give a finding that the petitioners have perfected their title by way of adverse possession and, therefore, this Court comes to the conclusion that the petition filed by opposite party no.1 before the Collector is hopelessly barred by limitation as it has not been filed within 12 years as required under Article 65 of the Limitation Act.

Accordingly the writ petition is allowed. The order impugned dated 28.05.2010 in OCH and PFL Misc. Case No.4 of 2009 passed by the learned Collector, Bhadrak is hereby quashed. No costs.

Writ petition allowed.

2012 (I) ILR- CUT- 724

S.K.MISHRA, J.

W.P.(C) NO.18528 OF 2011 (Dt.11.01.2012)

BASANTA KUMAR PADHI … …..Petitioner.

.*Vrs.*

COLLECTOR-CUM-DISTRICT MAGISTRATE, SAMBALPUR & ORS. ……Opp.Parties.

ORISSA GRAMA PANCHAYAT RULES, 1968 – RULE 87.

Auction of ferry ghat – A bidder has no right till the bid is confirmed and the authorities have right to cancel the same before confirmation – However such cancellation must be for valid reasons and can not be whimsical or arbitrary.

In this case the authorities are of the view that the procedure adopted in the auction of the Deogarh ferry ghat is not regular – Secondly the present operator of the ferry ghat namely Maa Budhi Samaleswari Machhyajibi Cooperative Society has not been allowed to participate in the bid and a re-auction shall secure much more price than the price offered by the petitioner – Held, no illegality in the impugned order passed by the Collector for holding the auction afresh.

(Para 11,12)

Case laws Referred to:-

1.AIR 1978 SC 851 : (Mohinder Singh Gill & Anr.-V-The Chief Election Commissioner, New Delhi & Ors.)
2.AIR (39) 1952 SC 16 : (Commissioner of Police, Bombay-V-Gordhandas Bhanji)

For Petitioner - Mr. P.K.Khuntia &
M/s. B.K.Mohanty, R.Mohanty, P.K.Bhuyan, S.S.Chaulsingh & B.D.Dash.
For Opp.Parties - Mr. Somnath Mishra, Addl. Standing Counsel

S.K.MISHRA, J. This is the second journey of the petitioner to this Court. His earlier application bearing W.P.(C) No. 8927 of 2011 was disposed of on 25.04.2011 directing the Collector, Sambalpur to dispose of the representation of the petitioner. However, the petitioner claims that his

grievance has not been redressed. Therefore, he filed this writ petition seeking a direction to quash the notice of holding fresh auction of Deogarh ferry ghat and to direct the Collector, Sambalpur to dispose of the representation of the petitioner as per the order of the Court passed earlier.

2. The Block Development Officer, Maneswar issued a public notice on 24.02.2011 to auction Deogaon ferry ghat. The petitioner was one of the bidders with others, who wanted to participate in the auction and made a deposit on 14.03.2011. The auction price of the ferry ghat was fixed at Rs.5,51,500/- at the minimum. The auction was for the period 01.04.2011 to 31.03.2012. The petitioner was the highest bidder. He was required to deposit 75% of the bid amount within three days for confirmation of the auction. The petitioner arranged the funds, but he did not get any order of confirmation from the authorities. It is alleged that at the behest of Maa Budhi Samaleswari Machhyajibi Cooperative Society, which was temporarily operating the ferry ghat, the auction was not confirmed in favour of the petitioner. Thereafter, the petitioner approached to this Court in the aforesaid writ petition, wherein this Court directed to dispose of the representation of the petitioner after hearing the Sub-Collector, Sambalpur and B.D.O. Maneswar within a fixed time, but it is alleged that the petitioner was not heard in the matter.

3. The petitioner came to know that the Deogaon ferry ghat was going to be auctioned on 18.07.2011 as per auction notice issued by the Panchayat Samiti, Maneswar dated 25.07.2011. Hence, he has filed this writ petition with the aforesaid prayer.

4. Opposite parties 1 and 2 have filed their counter affidavit, wherein *inter alia* it is submitted that after auction was held on 14.03.2011 by the Block Development Officer, Maneswar Block, the President of Maa Budhi Samaleswari Machhyajibi Cooperative Society gave a representation to the Sub-Collector, Sambalpur on 16.03.2011 requesting the cancellation of the said auction. In the representation they have mentioned that the Society is formed by scheduled caste persons belonging to Keuta sub-caste and, therefore, their main source of income is fishing and boating in the river Mahanadi. They further represented that they are maintaining their families with the income of the above society. The said society has taken the ferry ghat in the year 2010 at Rs.2,511/- per day through Deogaon Gram Panchayat, but the competent authority did not allow the Society to participate in the auction for the year 2011-12. Further, in the said representation, they brought to the notice of the authorities that necessary steps be taken for fresh tender after giving them opportunity to participate in

the said auction. On such representation, the Sub-Collector, Sambalpur directed the Block Development Officer, Maneswar Block to make an enquiry about the matter and to submit a report within three days. Thereafter, the Sub-Collector, Sambalpur was constrained to direct the Block Development Officer for fresh auction of the Deogaon ferry ghat on 25.03.2011.

5. In response to the aforesaid letter of the Sub-Collector, the Additional Block Development Officer and the Block Development Officer, Maneswar gave a reply which was neither satisfactory nor in accordance with law. Finally on 08.04.2011, the Sub-Collector, Sambalpur came to the conclusion that the Additional B.D.O. is not competent to conduct the auction. Furthermore, there was no prior approval of the competent authority to carry on the auction. Then the Sub-Collector directed the Block Development Officer, Maneswar Block to re-auction the ferry ghat in question immediately. It is submitted by the State that the Block Development Officer can authorize the Panchayat Extension Officer to hold auction of the ferry ghat in question in case the property whose offset price is less than Rs.5,000/-. In this case, the Block Development Officer directed the Additional Block Development Officer to hold the auction, which is illegal. The State submitted that the writ petition be dismissed.

6. In course of hearing, learned counsel for the petitioner drew attention of the Court to Sub-Rule (h) of Rule 87 of the Orissa Gram Panchayat Rules, 1968, which provides that at the end of the bid, the officer conducting the auction shall send the record along with a report to the Block Development Officer or Sub-Collector, as the case may be, for confirmation of the bid. The Sub-Collector or the Block Development Officer, as the case may be, shall intimate his order of confirmation within thirty days from the date of auction. In case the Sub-Collector or the Block Development Officer fails to communicate his order of confirmation within thirty days from the date of auction, the bid shall be deemed to have been confirmed. The learned counsel, therefore, submitted that in this case, the auction was held on 14.03.2011 and thus after expiry of 30 days i.e. on 13.04.2011, the bid is deemed to have been confirmed.

7. The argument advanced by the learned counsel for the petitioner is not applicable in this case in view of the fact that even before expiry of the said period, the petitioner has approached this Court on 05.04.2011 in W.P.(C) No.8927 of 2011 and, therefore, the petitioner was aware that his bid has not been confirmed by the authorities. Therefore, the deeming clause of the aforesaid provision shall not be attracted in this case.

8. The learned counsel for the petitioner has relied upon the reported case of **Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others,** AIR 1978 SC 851, wherein the Supreme Court has held that fair hearing is thus a postulate of decision-making canceling a poll, although fair abridgement of that process is permissible. It can be fair without the rules of evidence or forms of trial. It cannot be fair if apprising the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law. The aforesaid ruling is not applicable to the fact of this case as it was an election matter, wherein this case is of an auction. Learned counsel for the petitioner also relied upon the case of the **Commissioner of Police, Bombay v. Gordhandas Bhanji**, AIR (39) 1952 SC 16, wherein the Supreme Court held that public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order.

9. The aforesaid observation is also of no avail to the petitioner as clause (d) of Rule 87 of the aforesaid rules provides that the Sub-Collector shall send a list of properties that are to be leased out by public auction indicating the period of lease and upset price, to the respective Block Development Officer, who shall thereupon fix the dates for auction of all or any such properties and issue notices for auction sale. He may authorize the Panchayat Extension Officer to conduct auction sale of properties whose upset price is rupees five thousand or less. The notice for auction shall be issued before fifteen clear days of the date fixed for auction and shall be published in the notice board of the Panchayat. The Panchayat Samiti, Sub-Division Office and at such other place or places as the Block Dedelopment Officer or, as the case may be, deem necessary. Clause (b) provides that if the Sub-Collector after hearing the Gram Panchayat and making such enquiry as he deems proper, finds either that the income derived from any property managed directly by it is inadequate or that there exists any other reasons to be recorded in writing for which the property should be leased, he shall direct that such property be leased out by public auction. It is further provided that by making a decision he may normally direct that any market and ferry ghat shall be leased out by public auction and shall not be managed by Gram Panchayat directly, unless for any specific reason to be recorded in writing, he considers that direct management of a particular market or ferry is necessary in the interest of the Gram Panchayat.

10. Before putting any ferry ghat to auction, it is necessary that the Sub-Collector must give such an order and send a list of property to be leased for the public auction by the Block Development Officer. It further provides that the Block Development Officer must and or in case where the value of the auction is less than Rs.5,000/-, the Panchayat Extension Officer may supervise the auction. In this case, the Addl. Block Development Officer has conducted the auction and that too there is no sanction of the Sub-Collector to conduct the said auction.

11. In that view of the matter, an error in procedure have crept in and the authorities at any time may cancel the proceeding to rectify such error. Moreover, it is trite that a bidder has no right till the bid is confirmed and the authorities have right to cancel the same before confirmation. However, such cancellation cannot be whimsical or arbitrary and only for valid reasons. In this case, there are reasons, firstly the authorities are of the view that the procedure adopted is not regular, secondly, the present operator of the ferry ghat namely Maa Budhi Samaleswari Machhyajibit Cooperative Society have not been allowed to participate in the bid and thirdly, it is seen that at are-auction shall secure much more price than the price offered by the petitioner.

12. In such view of the matter, this Court do not find any illegality in the order passed by the learned Collector for holding the auction afresh. The writ petition is, therefore, without merit and the same is dismissed.

Writ petition dismissed.