2012 (II) ILR- CUT- 194

V. GOPALA GOWDA, CJ.

M.A. NO. 698 OF 2000 (Dt. 9.12.2011)

TULSI PRASAD AGARWALA ……..Appellant

.Vrs.

NARAYAN DAS & ANR. ……..Respondents

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

Compensation – Injured claimant – Tribunal should not have brushed aside that the claimant is an Income Tax assessee – Tribunal should have taken into consideration the income of the injured while assessing the quantum of compensation – Tribunal should not have refused claim towards attendant charges – Held, compensation be awarded to the claimant towards shortening of leg, conveyance, attendant charges, medical expenses, loss of amenity, loss of earning capacity and physiotherapy expenses. (Para 8)

For Appellant - M/s. U.C.Behura & M.K.Swain.
For Respondent - M/s. P.Roy, S.Roy & A.A. Khan
(for Respondent No.2)

V.GOPALA GOWDA, C.J. This Miscellaneous Appeal against the order dated 9th December, 2011 passed by the Second Motor Accident Claims Tribunal, Sambalpur in Misc.(A) Case No. 69 of 1992 (SN), is filed by the injured in a motor vehicle accident that took place on 7.11.1991 at about 10.30 P.M. on the overbridge of Vedvyas-Panposh Main Road, seeking for enhancement of compensation at ₹ 1.65 lakhs with interest, urging various facts and legal grounds.

2. The brief fact is that the claimant-injured was returning from Vedyas to Rourkela with his friends in a scooter bearing registration number OIS 6609 on 7.11.1991 at about 10.20 P.M. When they reached the overbridge of Brahmani tarang, the offending truck OSO 443 came from the opposite side being driven in a rash and negligent manner, and dashed against the scooter. The claimant being pillion rider, fell down from the scooter and another rider died on the spot. He sustained multiple injuries on his leg and body and became unconscious. He was admitted in the I.G.H. as an indoor patient and was discharged on 30.12.1991. He also remained under treatment of Senior Specialist of Orthopaedic. Operation was conducted on his leg. Grafting and nailing of bones were also done on his foot.

3. The owner-O.P.No.1 remained exparte. The Insurance Company-respondent no.2 appeared and filed written statement denying its liability.

4. The Tribunal has awarded ₹35,000/- with interest @ 10% per annum from the date of filing the claim petition (16.4.1992) till the date of realisation directing the owner-O.P. No.1 to pay the same within two months from the date of order.

5. Mr. Behura, learned counsel for the claimant-appellant submitted that the Tribunal has erred in holding that there is no insurance policy of the vehicle though in para-7, the Tribunal has mentioned the policy number. He further stated that the Tribunal has erred in not considering Ext.10, the injury certificate and rejecting the claim for loss of earning capacity on the ground that the injury certificate is not available. Further it is urged that the Tribunal has commited gross illegality by not granting the loss of income for the period of hospitalisation and only awarded compensation towards the cost of the medicines, pain, discomfort and mental agony. It is further urged that the Tribunal has committed error in not granting the conveyance charges and expenses incurred on the attendants. It is further urged that the Tribunal committed material irregularities in not fastening liability upon the Insurer-respondent no.2 for payment of the compensation awarded to the claimant.

6. Mr. Roy, learned counsel for the Insurance Company vehemently opposed the claim. He submitted that driver of the offending truck is not known and the owner has not averred if the driver has valid Driving Licence at the time of accident. That apart the documents relating to the vehicle/accident are not filed. It is the duty of the claimant to file the police papers relating to the accident. The fact of accident was not brought to their notice and the injuries caused to the claimant was not within the knowledge of the insurance company. The policy number of the offending truck has not been disclosed. The respondent no.2 is not liable to trace out the policy. The owner was to produce the policy particulars in original. The rider of the scooter is also equally liable for the accident. The loss of income of the claimant no way diminished the life span of the injured. The owner and the insurer of the scooter involved in the accident should be made parties.

7. Considering the rival submissions, the points for determination are :

(i) whether the appellant is entitled for enhanced compensation ? and

(ii) what order ?

8. The claimant is an income tax assesse. This fact has been brushed aside by the Tribunal. The Tribunal is not correct in holding that the income of the injured is not a vital factor for assessing the quantum of compensation. That apart the claim towards attendant charges has been ignored. The Tribunal has opined that the injuries were grievous in nature. In absence of the injury certificate on record, the loss of earning capacity has been ignored. The contention of Mr. Roy that the loss of income of the claimant no way diminished his life span, is not acceptable to this Court. On being directed, learned counsel for the Insurance Company produced a copy of the certificate of Insurance by filing a memo. The finding recorded by the Tribunal that there is no insurance policy, is not correct. Therefore, this is a fit case to interfere and fasten the liability. For the reasons stated supra, this Court is inclined to enhance the compensation awarded.

9. Accordigly ₹ 50,000/- is awarded towards shortening of leg, ₹ 15,000/- is awarded towards conveyance, ₹10,000/- is awarded towards attendant charges, ₹15,000/- is awarded towards medical expenses, ₹ 20,000/- is awarded towards towards loss of amenity, ` 36,000/- is awarded towards loss of earning capacity of the claimant for one year as he had taken treatment and ₹ 2,500/- is awarded towards physiotherapy expenses. Total awarded amount is ₹ 1,48,500/-. Deducting ₹35,000/- as already awarded, the claimant would be entitled to get the balance enhanced compensation amount of ₹1,13,500/-which will carry interest @ 7% from the date of filing of the claim till payment.

With the above said terms, the impugned judgment is modified and the appeal is allowed in part. The Insurance Company is directed either to deposit or to pay the total compensation awarded in this judgment to the claimant within four weeks from the date of receipt of a copy of this judgment.

Appeal allowed in Part.

2012 (II) ILR- CUT- 197

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

W.P.(C) NO. 9519 OF 2009 (Dt.17.01.2012)

M/S. BAPUJI FUELS ……Petitioner.

.Vrs.

INDIAN OIL CORPORATION LTD. & ORS. ……Opp.Parties.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.114 (g)

The Court may draw adverse inference on a party who withholds important documents in his possession which can throw light on the facts at issue, even if, the burden of proof does not lie on such party.

In this case the Opp.Parties terminated the dealership of the petitioner under the Indian Oil Corporation Ltd. – Opp.Parties failed to produce original records relating to the proceedings of termination – There is also absence of material to show that there was adulteration of petrol and variation in respect of the stock in the outlet – Held, impugned order of termination as well as appellate order are quashed – Direction issued to Opp.Party Corporation to permit the petitioner to operate the retail outlet petrol tank. (Para 11)

Case law Referred to:-

AIR 1968 SC 1413 : (Gopal Krishnaji Ketkar-V-Mohamed Haji Latif)

For Petitioner - M/s. Ras Bihari Mohapatra, D.K.Mohanty, S.Debata & T.K.Biswal

For Opp.Parties- Mr. Sanjit Mohanty, Sr.Advocate S.Pattnaik, R.R. Swain, A.Mohapatra, A.Mohanty & A.Meher (For O.P.Nos.1 to 5)

V. GOPALA GOWDA, C. J. The petitioner has filed this writ petition praying for quashing the order dated 20.06.2007 (Annexure-4 series) and arbitrary decisions dated 08.10.2007 (Annexure-9) and order of termination of dealership of the petitioner dated 31.12.2007 (Annexure-11) passed by opposite party No.4-Divisional Retail Sales Manager and further he has prayed to *se t aside* the order dated 25.06.2009 (Annexure-17) passed by

opposite party No.2-Executive Director (Retail Sales)-cum-Appellate Authority on the ground that the said orders are perverse, non-application of judicial mind and arbitrary.

2. An affidavit on behalf of opposite party Nos.1 to 5 sworn to by opposite party No.4-Divisional Retail Sales Manager is filed in Court today giving reasons at paragraph-3 thereof for non-production of the original record in relation to the proceedings of termination of the dealership of the petitioner. Paragraph 3 of the said affidavit reads thus:

> "3. That the instant case is coming under the jurisdiction of Sambalpur Divisional Office of IOC. That the Sambalpur Divisional Office was earlier functioning at Lath Building, Ainthapali, Sambalpur. The said office has been shifted from Lath Building, Ainthapali to Kainsir Road, Ainthapali of Sambalpur during the month of December, 2009. That during shifting the office, the original record pertaining to the present case might have been misplaced some where, therefore, IOC is not able to produce the original records and therefore IOC may be permitted to produce the Xerox copy file containing the documents."

3. In the present case, the petitioner, who is a dealer having sole Proprietorship firm under Indian Oil Corporation Ltd., has challenged the correctness of the order of termination dated 31.12.2007 (Annexure-11) passed by opposite party No.4, which has been affirmed by order dated 25.06.2009 passed by opposite party No.2-Executive Director (Retail Sales)-cum-Appellate Authority (for short, "Appellate Authority") by raising certain basic questions i.e. the impugned order of termination is not a speaking order as is evident from the order itself. The unnumbered paragraph 4 of the said order is quoted below:

> "The same was communicated to you as "Speaking Order" vide our letter ref: SBPDO/IBP-RO/Mangalam dated 08.10.2007"

4. Mr. R.B. Mohapatra, learned counsel appearing for the petitioner invited our attention to the letter dated 08.10.2007 (Annexure-9) passed by opposite party No.4, which is extracted herein below:

> "Upon perusal of your explanation, it is decided that your explanation for stock variation is not satisfactory and as such we are constrained to initiate action against you as per the provisions of MDG 2005 and dealership agreement.

This has got the approval of competent authority."

In the said letter it is stated that the Corporation is constrained to initiate action against the petitioner as per the provisions of the Marketing Discipline Guidelines, 2005 (for short, "MDG, 2005") dealership agreement pursuant to the show cause notice under reference MOL/BF/SBP dated 23.06.2007 and subsequent reply of the petitioner dated 05.07.2007. The order of termination of dealership of the petitioner has been issued without any reason and without giving reasonable opportunity of hearing to the petitioner. Therefore, the same is in violation of the principles of natural justice. Against the impugned order of termination under Annexure-11, the petitioner filed a writ petition bearing W.P.(C) No.15592 of 2007 and the said writ petition was disposed of by this Court vide order dated 19.11.2008 with a direction to the petitioner to file an appeal before the appropriate authority and the appellate authority was also directed to dispose of the appeal within six weeks from the date of preferring the appeal. Accordingly, the petitioner filed an appeal before the Appellate Authority and the same could not be disposed of as no officer was available to hear the same. The petitioner filed another writ petition bearing W.P.(C) No.3897 of 2009 before this Court seeking for issuance of a direction for early disposal of the appeal. Finally, this Court vide order dated 04.05.2009 disposed of the said writ petition directing the appellate authority to dispose of the appeal filed by the petitioner as expeditiously as possible preferably within a period of two months from the date of production of certified copy of the order dated 04.05.2009. Thereafter, the appellate authority passed order dated 25.06.2009 (Annexure-17) rejecting the appeal of the petitioner without assigning any cogent reason. Hence, the present writ petition.

5. Mr. Mohapatra, learned counsel for the petitioner submits that the order of termination under Annexure-11 has been affirmed by the appellate authority by order dated 25.06.2009 without giving any cogent reason. The relevant portions of the appellate order dated 25.06.2009 are extracted hereunder:

"xx xx xx

Having carefully considered submission made by the appellant in his letters of appeal and personal hearing and after perusing all the relevant records my observations are as under:

The RO was inspected on 19.06.2007 and no stock variation was observed. Another inspection was carried out the next day i.e. on

20.06.2007 by Mobile lab in-charge (of BPC) & Field Officer and a positive stock variation of 5160 liters in HSD was observed. The dealer has acknowledged the inspection report by putting his signature & seal. Due to stock variation beyond permissible limits, in accordance with MDG 2005, sales and supplies of RO were suspended and DUs & tanks were sealed. The DJs of HSD tank were out of order on 20.06.2007 and hence the Field Officer along with DU mechanic and electrician visited the RO on 23.06.2007, operated one of the DUs manually and took sample of HSD. In case of stock variation beyond permissible limits, drawal of sample is mandatory as per MDG, 2005. It was also found that the dip of the tank had changed from 110.2 cm from 66.4 cm although the seals of the DUs & tanks were intact.

The appellant has contended that there was error in taking dip reading on 20.06.2007 and he signed the report in good faith and Corporation officials took advantage of his physical ailment. I find that sales and supplies of all products of the RO was suspended by the inspection team and DUs and tanks were sealed by stating reason on inspection report that excess stock of 5160 litres HSD was found. Two Officers of Corporation observed dips of the tanks in presence of the appellant. At the time of inspection the appellant did not raise any query regarding suspension of sales and supplies of RO and sealing of DUs and tanks and accepted the action taken by the inspection team and also signed on the inspection report, which mentioned dips of the tanks. This clearly signifies that the appellant accepted the irregularity of stock variation beyond permissible limits. No relief can be given to the appellant on basis of subsequent inspection on 23.06.2007 as during the inspection on 20.06.2007 the irregularity of stock variation was already established.

The contention of the dealer that samples had passed marker test/lab test is not a valid ground in this case as the dealership has not been terminated for adulteration.

Since the appellant failed to submit any satisfactory explanation regarding the irregularity of stock variation of HSD beyond permissible limits, I hold that the termination of the dealership for this irregularity is in accordance with MDG 2005. There is nothing to interfere with the order dated 31.12.2007 of Corporation and hence the appeal stands dismissed."

6. Mr. Mohapatra, further contends that the reasons quoted above, are not therein in the original order of termination under Annexure-11 and the appellate authority has also not stated that the original order of termination is a speaking order, which was passed by opposite party No.4 and served upon the petitioner. It is further contended that there is no variation in respect of the stock of the outlet of the petitioner as per the reasons recorded by the original authority; who terminated the dealership of the petitioner. Therefore, the order of termination under Annexure-11 is not legal and valid and the same cannot be allowed to sustain. Alternatively, learned counsel for the petitioner submits that neither the original authority nor the appellate authority has considered the tenable explanation submitted by the petitioner under Annexure-7. The explanation offered by the petitioner to the show cause notice has not been properly considered by the appellate authority and the said authority has passed the order dated 25.06.2009 under Annexure-17 affirming the order of termination of the original authority. Therefore, the order passed by the appellate authority is not on the basis of the allegation made in the show cause notice and the same is wholly unsustainable in law. Further, Mr. Mohapatra, submits that it was the duty of the appellate authority to examine the case of the parties in the backdrop of the original file that is not forthcoming in the impugned order and further it is contended that the reasons assigned in the order of termination under Annexure-11 are contradictory to the findings and reasons recorded by the appellate authority. Further, referring to paragraph-3 of the affidavit filed in Court today contended that the reason assigned in the said paragraph is not at all a tenable explanation and the same should not be accepted for the simple reason that the original file has been misplaced somewhere but the xerox copy of the same is available. It is stated that at the time of shifting of the office, the original record pertaining to the present case might have been misplaced somewhere. This explanation is not forthcoming as to why two sets of records are maintained and how the Xerox copy of the original file is available and missing of the original record of the case in question is only a reason assigned to withhold the file. Further, the said explanation cannot be accepted for the reasons stated supra**.** In the year 2007, the order of termination was challenged before this Court in W.P.(C) No.15592 of 2007, thereafter the petitioner was asked to file an appeal before the appellate authority vide order dated 19.11.2008. Accordingly, appeal was filed and the appellate authority passed the impugned order under Annexuyre-17 considering the memorandum of appeal and rejected the same without assigning any cogent reason, for which the present writ petition is filed on 07.07.2009. Therefore, the reasons assigned in paragraph-3 of the affidavit filed in Court today are not acceptable and Mr. Mohapatra requests this Court to quash the order of termination under Annexure-11 and also the

order of the appellate authority under Annexure-17 as the same don't disclose that the findings and reasonings are based on factual aspects.

7. Mr. Sanjit Mohanty, learned Senior Advocate appearing on behalf of opposite party Nos.1 to 5 sought to justify the order of termination contending that the original authority has initiated the proceedings by issuing show cause notice on the ground of violation of the terms and conditions of the agreement. The show cause notice was issued to the petitioner and the reply of the petitioner to the said show cause notice was examined and the same was found to be not tenable. Therefore, the order of termination under Annexure-11 was passed. The same was challenged before the appellate authority and the appellate authority passed the order under Annexure-17 affirming the order of termination giving findings and reasons which are valid reasons as it is a case of variation of stock beyond permissible limits. Therefore, the conduct of the petitioner is very serious as observed in the order passed by the appellate authority and the said order has been passed after hearing learned counsel for the petitioner. Therefore, no violation has been made with regard to the principles of natural justice and the grievance that the original authority had not given reasonable opportunity of hearing to the petitioner before passing the order of termination, is not correct. Hence, the findings and reasons recorded by the appellate authority cannot be substituted by this Court in exercise of its judicial review power under Articles 226 and 227 of the Constitution of India. Concluding his argument, he further submits that with regard to the affidavit filed by opposite party No.4 in Court today that the original file has been misplaced has to be accepted as the same while shifting of office from one place to another was misplaced at Sambalpur. The statement given by opposite party No.4 is bona fide. Therefore, no adverse inference can be drawn against opposite party-corporation for non-production of the original file and the writ petition is liable to be rejected being devoid of merit.

8. On the above rival factual & legal contentions, the questions that would arise for consideration by this Court:-

(i) Whether the order of termination under Annexure-11 and the order passed by the appellate authority by recording findings and reasons other than the allegation drawn in the show cause notice for the first time are legal and valid ?
(ii) What order ?

9. The first question is answered in favour of the petitioner for the following reasons:

The petitioner has questioned the correctness of the order of termination under Annexure-11 as well as the order of affirmation under Annexure-17 passed by the appellate authority. Those are required to be examined in the back drop of the allegation made in the show cause notice dated 23.06.2007 under Annexure-6. The allegation made against the petitioner in the second paragraph of the said show cause notice reads thus:

> "With the instruction from competent Authority we have come to your R.O. alongwith Fitter & Electrician to check the HSD Dispensing Unit which were not functions on 20.06.2007. For this we measure the HSD underground tank and it is found that oil dip has changed. Present Oil (HSD) in 66.4 cm on 20.06.2007 you were advised not operate any tank and sales and supply of all product was suspended with effect 20.06.2007 at 18.30 hrs. from the R.O. Hence, you are asked to show cause why company will not initiate action as per MDG-2005 and Dealership agreement for violating official in function against you. Your reply should come to signed within seven days from the date of this letter."

The said allegations are denied by the petitioner in its show cause reply dated 05.07.2007 under Annexure-7 and there is no reference to the explanation to show cause notice the alleged inspection on 23.06.2007. It is an undisputed fact that the order of termination under Annexure-11 has been passed without giving reasonable opportunity of hearing to the petitioner. The reasons assigned in the said order of termination reads thus:

> "xx xx xx
>
> During joint inspection on 20.06.2007 carried out by Industry mobile lab and our Field Sales officer an excess stock of 5160 ltr in HSD was observed. A show cause notice in this regard was issued by the Field officer concerned on 23-06-07 and your reply dated 05-07-2007 was received. Upon careful perusal of your reply/explanation on the stock variation it was not found to be convincing and **satisfactory.**
>
> Thus you have committed default and breach of terms, condition, covenant and stipulation contained in the MDG 2005 as well as Dealership Agreement dated 22.12.2004 having acted in manner prejudicial to the interest and good name of the Corporation and its product attracting action against you under MDG-2005.

The same was communicated to you as "Speaking Order" vide our letter ref: SBPDO/IBP-RO/Mangalam dated 08.10.2007

xx xx xx"

10. It appears that in the order of termination under Annexure-11, there is no finding recorded with regard to the alleged violation of the terms and conditions of the agreement and variation of HSD stock is the alleged misconduct on the part of the dealer-petitioner for initiation of the proceedings to terminate the dealership contract of the petitioner. The speaking order dated 08.10.2007 is referable to the permission granted by the competent authority to initiate proceedings against the petitioner. Therefore, the order of termination under Annexure-11 is not a speaking order. The reason referred to in the order of termination is that the petitioner has committed default and breach of the terms, conditions, covenant and stipulation contained in the MDG 2005 as well as the dealership Agreement dated 22.12.2004. Therefore, we have to record a finding that there is no finding and reasons recorded with reference to the allegation made in the show cause notice under Annexure-6 and it is a clear case of non-application of judicial mind on the part of the original authority, who has passed the order of termination. The order of termination also does not refer to the reply to the show cause notice submitted by the petitioner which is also another valid reason available in favour of the petitioner that the tenable explanation denying the charges has not been considered by the original authority. This order was challenged in appeal. The appellate authority was required to examine in the back drop of the original order of termination and was to record whether the order of termination is legal and valid. In stead of examining the same, the appellate authority has acted upon as an original authority and he has not made any attempt to go into the explanation given by the petitioner. The findings and reasons recorded in the order of the appellate authority are not forthcoming in the order of termination and are contrary to each other. There is a reference to the inspection made by the Corporation in presence of the petitioner and the RO were suspended and DUs & tanks were sealed. The DJs of HSD tank were out of order on 20.06.2007 and hence, the Field Officer along with DU mechanic and electrician visited the RO on 23.06.2007, operated one of the DUs manually and took sample of HSD. In case of stock variation beyond permissible limits, drawal of sample is mandatory as per MDG, 2005. It was also found that the dip of the tank had changed from 110.2 cm from 66.4 cm although the seals of the DUs & tanks were intact. Therefore, we have stated that the findings and reasons recorded with reference to the inspection on 23.06.2007 are not referred in the show cause notice and for the first time,

the appellate authority has gone into the record, examined the same and recorded the findings of fact without there being any material to show that the seals of the DUs and tanks were intact unless it is deemed, it is not possible either for the original authority or the appellate authority to record such a finding. The reasons recorded for the first time are contrary to the factual aspects and legal evidence. Therefore, we have to record a finding that the reasons recorded in the impugned order are not only erroneous but also totally non-application of mind. Hence, the order of termination and the order of the appellate authority affirming the order of termination by giving its own reasons which don't find in the original termination, order for our satisfaction, whether there is any record to examine and to find out the reasons assigned by the appellate authority are based on material evidence available on record. The record is not made available for our perusal and only xerox copies thereof are made available. The proceedings like this, where civil consequences upon the petitioner and litigation is pending since 2007 before the Court making available the Xerox copy withholding the original records, this Court is required to draw adverse inference, we are not accepting the contention of learned counsel for the Corporation on the basis of the explanation offered in the affidavit filed today for non-production of the original file. Placing reliance upon the judgment in the case of ***Gopal Krishnaji Ketkar v. Mohamed Haji Latif, AIR 1968 Supreme Court 1413,*** wherein the Hon'ble Supreme Court at paragraph-5 held that

> *"W*e are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In *Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi*, 44 Ind App 98 at p. 103 = (AIR 1917 PC 6 at p. 8) Lord Shaw observed as follows:
>
> "A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of he onus of proof, and failing. accordingly, to furnish to the Courts the best material for its decision With regard to third parties, this may be right enough - they have no responsibility for the conduct of the suit but with regard to the parties thee suit it is, in their Lordships' opinion, an inversion of sound practice for those

> desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

11. For the reasons stated supra, the order of termination under Anenxure-11 and the order of the appellate authority under Annexure-17 are not legal and valid in absence of the materials to show that there is adulteration of the petrol which it stocked and had variation the findings is totally without material evidence. Hence, the findings and reasons given by the appellate authority are perverse and the same are liable to be quashed. Accordingly, we quash the same. The opposite party-Corporation is directed to permit the petitioner to operate the retail outlet petrol Tank by intimating the petitioner within two weeks from the date of receipt of a copy of this order. If the Corporation fails to comply with the above direction then the petitioner is at liberty to operate the retail outlet Petrol Tank.

12. With the aforesaid observation and direction, the writ petition is disposed of. No order as to costs.

Writ petition allowed.

2012 (II) ILR- CUT- 207

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

W.A. NO. 527 OF 2011 (Dt.03.05.2012)

RAM PRASAD MISHRA ……Appellant.

.Vrs.

DINABANDHU PATRI & ANR. ……Respondents.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 26, RULE 9.

Appointment of Commissioner – Discretion of the Court – Suit for demarcation of the property between two allottees who have failed to settle the same in spite of demarcation made by the Tahasil Amin – When the controversy is as to identification, location or measurement of the suit land local investigation should be done at an early stage so that the parties can be aware of the report of the Commissioner and can go to trial with all preparedness and may choose an evidence in rebuttal – Held, learned trial Judge is right in allowing appointment of survey knowing Commissioner which should not have been interfered with by the learned Single Judge. (Para 6,7)

Case laws Referred to:-

1.99 (2005)CLT 720 : (Sri Prasanta Kumar Jena-V- Choudhury Purna Ch. Das Adhikari)
2.AIR 2005 SC 284 : (State of Uttar Pradesh & Ors.-V-Ram Sukhi Devi)
3.2009(4) Supreme 16: (Sri Krishna Tyres & Anr.-V- J.K. Industries Ltd.& Anr.)
4.AIR 1988 Ori 248 : (Mahendranath Parida-V- Purnananda Parida & Ors.)

For Appellant - M/s. P.Pattnaik, A.K.Dwibedi, R.K.Mohanty, A.K.Mohanty, G.M.Rath, M.K.Mishra & S.K.Pattnaik.

For Respondents - M/s. P.K.Rath, P.K.Satapathy, R.N.Parija, A.K.Rout, S.K.Pattanayak & D.P.Pattnaik.

V.GOPALA GOWDA,CJ. The order of the learned Single Judge dated 30.08.2011 in allowing the writ petition quashing the order dated 18.09.2010 passed by the Second Civil Judge (Senior Division), Bhubaneswar in C.S.

No.184/153 of 2010/2009 allowing the plaintiff-appellant for deputing Survey knowing Commissioner for measurement and demarcation of suit 'A' schedule lands is filed by the appellant-plaintiff urging various grounds.

2. It is contended by the appellant that the learned Single Judge failed to appreciate that the suit is for demarcation of the property between the two allottees who have failed to settle the same in spite of demarcation by the Tahasil Amin and ought to have held that the suit filed by the appellant of the nature of the demarcation of the lands of both parties is necessary through the process of Court. Hence, the trial Judge is right in appointing the Survey knowing Commissioner and quashing the said order, learned Single Judge by exercising judicial review power is bad in law; hence the same is liable to be set aside.

Further, it is contended that the learned Single judge is erred in law in holding that in a suit for demarcation in nature, measurement by the Civil Court Commissioner is not necessary for proper prospective of disposal of the dispute for the reason that the prayer in the application filed by the appellant is not clear in the sense that it does not reflect which land has to be demarcated and how such measurement by a Court Commissioner is necessary for adjudication of the issue to the suit by applying the judgments of the Hon'ble Supreme Court, which are not applicable to the fact situation having regard to the nature of the suit filed by the appellant; hence the impugned order is liable to be set aside.

Further, the learned Single Judge has erred in not appreciating the nature of the suit filed by the appellant further failed to record the demarcation of the land of the parties by the Tahasil Amin. Hence, the order impugned in this writ appeal in quashing the order of the learned trial judge in appointing Court Commissioner needs interference.

3. Another ground urged is that the petition filed under Order 26 Rule 9, C.P.C. by the plaintiff-appellant is to be read along with the plaint. The appellant has to seek for demarcation of the suit land. Learned Single Judge completely went in wrong saying that the petition is not clear as to which land is to be demarcated; hence the impugned order is not sustainable in law and the same is liable to be set aside. Learned trial Judge on consideration of the respective pleadings of the parties and in the background of the case pleaded by both parties exercised the discretionary power and directed for appointment of the Civil Court Commissioner for demarcation of the suit 'A' schedule land before commencement of the hearing; interference by the

learned Single Judge at that stage in exercise of certiorari power is wholly unwarranted and therefore the same is liable to be quashed.

4. With reference to the above said grounds urged before the learned Single Judge, learned counsel for the appellant as well as the respondents were extended preliminary hearing at the stage of admission.

5. Perused the order impugned as well as the order passed by the learned trial Judge. The suit filed by the plaintiff-appellant is for demarcation of 'A' schedule land by the Civil Court Commissioner and other consequential reliefs sought for permanent injunction against the respondents from encroaching upon and interfering with peaceful possession of the appellant as claimed by him over 'A' schedule land urging various facts and produced number of documents in the suit. The petition under Order 26 Rule 9 CPC was filed by the appellant having regard to the nature of the prayer, the demarcation of 'A' schedule land, learned trial Judge has exercised his original jurisdiction and also exercised the discretionary power and passed the order for appointment of Civil Court Commissioner for the propose of survey and demarcation of 'A' schedule land as the same is very much necessary. That decision is supported with the reasons, the correctness of which is challenged in the writ petition by the defendant No.1 and respondent No.1 by urging various legal contentions.

6. Learned Single Judge after referring to the judgments of the Hon'ble Supreme Court in the case of *Sri Prasanta Kumar Jena Vrs. Choudhury Purna Ch. Das Adhikari,* reported in 99 (2005) CLT 720, wherein this Court has ruled that the application under Order 26 Rule 9 of the Code of Civil Procedure be considered only after closure of the evidence when it finds difficult to pass an effective decree on the existing evidence. Further, reliance is also placed on judgments of the Hon'ble Supreme Court in the cases of *State of Uttar Pradesh & Ors. Vrs. Ram Sukhi Devi*, AIR 2005 SC 284 and *Sri Krishna Tyres & Anr. Vrs. J.K.Industries Ltd. & Anr.,* 2009 (4) Supreme 16, in support of the proposition of law that the final relief sought for in the suit is for demarcation of the case land, so an interim order cannot be granted in favour of the plaintiff to demarcate the suit land during pendency of the suit and such an order can only be passed after final adjudication of the suit. Relying on the above decisions, learned Single Judge has set aside the order ignoring the decision of this Court in the case of *Mahendranath Parida Vrs. Purnananda Parida & Ors.*, reported in AIR 1988 Ori 248 relied on by learned counsel for the plaintiff-appellant, wherein this Court has held that when the controversy is as to identification, location or measurement of the land or premise or object, local investigation should

be done at an early stage so that the parties can be aware of the report of the Commissioner and can go to trial with all preparedness.

7. The party against whom, a report might have given may choose an evidence in rebuttal. Therefore, further it is in the said case observed that ordinarily in such type of cases, local investigation should not have been deferred after closure of the evidence. Placing reliance on the said decision, having regard to the pleading of the parties learned trial Judge is right in allowing appointment of Survey knowing Commissioner. The same should not have been interfered with by the learned Single Judge applying various decisions referred to supra and the decision in 2006(II) OLR 43 which decision has no application to the fact situation.

8. The Writ Appeal is allowed accordingly.

Appeal allowed.

2012 (II) ILR- CUT- 211

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

W.P.(C) NO. 3399 OF 2011 (Dt.12.03.2012)

M/S. UMA ENTERPRISES .....Petitioner.

.Vrs.

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

BIHAR & ORISSA EXCISE ACT, 1915 (ACT NO.2 OF 1915) – Ss.2 (12-a), 49.

Incorporation of "Molasses" in Section 2 (12-a) is challenged being unconstitutional – Inclusion of Molasses to the definition of "intoxicant" is from Entry No.8 inter related to Entry Nos.6 and 51 – Most of the molasses produced were diverted for preparation of potable liquor leading to liquor tragedies – Justice B.K.Behera who was appointed as one man commission to enquire into a liquor tragedy in the state has suggested for inserting "Molasses" within the purview of "intoxicant" as it is the principal raw material used for manufacture of alcohol – Molasses has also been defined as "intoxicant" in other states and although vires of such inclusion has been challenged the same have been upheld by the Apex Court – Held, there are good reasons for inclusion of "Molasses" as "intoxicant" in the definition U/s.2 (12-a) of the Excise Act. (Para 14, 15)

Case law Relied on:-

AIR 2004 SC 1151 : (State of Bihar-V- Industrial Corporation Pvt. Ltd.).

For Petitioner - M/s. N.Patra, A.K.Patra, B.S.Shadangi.
For Opp.Parties - Govt. Advocate.

V.GOPALA GOWDA, C.J. The petitioner in this writ petition questions the competency of the State Legislature to incorporate 'Molasses' in the definition of Section 2(12-a) by way of substitution of Act No.36 of the Bihar and Orissa Excise Act and imposition of license fee and utilization fee as per paragraph-9(a) to (d) and paragraph-27 and some of the guidelines of the year 2010 issued by the Government vide letter dated 25.2.2012 addressed to the Excise Commissioner, Orissa, Cuttack and prayed for striking out said provision from the definition of 'intoxicant' as the same is unconstitutional

and lack of competence on the part of the State Legislature urging various facts and legal grounds.

2. The main ground of attack is that the molasses is a rectified sprit which does not fall within Entry 8 read with Entries 6 and 51 of List II of the Seventh Schedule of the Constitution. The incorporation of the said fresh molasses to the definition of 'intoxicant' without framing rules or regulation to regulate the use of molasses and levy of license fee are bad in law. The last contention urged is that incorporation of the said fresh molasses to the definition of 'intoxicant' affects the fundamental rights guaranteed to the petitioner under Article 19 (1)(g) of the Constitution. Therefore, Mr Patra, learned counsel for the petitioner requests this Court for striking out or withdrawal of the same from the definition of 'intoxicant' as it is unconstitutional.

3. The said prayer has been opposed by the learned Government Advocate Mr R.K. Mohapatra justifying the incorporation of the molasses raw material to the 'intoxicant' definition. Further, it is stated in the counter statement that the petitioner has no locus standi to challenge the same as he does not have the license for the year 2010-11, as he did not submit an application for the purpose after end of the financial year 2009-10, for renewal of the license he had. Therefore, the petitioner is not entitled to challenge the policy of the Government and the legislation made by the competent State Legislature.

4. Further, learned Government Advocate sought to justify the incorporation of the raw material 'molasses' are intoxicant which fall within the four corners of Entry 8 read with 26 and 51 of List II of the Seventh Schedule of the Constitution and no law can be made by the Parliament with regard to the entries made into List I and List III. Exercise of Legislative power by the Parliament in relation to List I and List III cannot affect the validity of the State enactment.

5. It is further stated that if a particular matter is within the exclusive competence of the State Legislature that is a prohibited field for the Union to legislate upon. Similarly, if any matter is within the exclusive competence of the Union, it becomes a prohibited field for the State's competence to legislate.

6. Further, it is contended that the concept of occupied field is relevant in case of the laws made with reference to entries in respect of List III. The entries in List III in the Seventh Schedule are mere legislative heads and it is

quite likely that very often they overlap. The State legislature must find out by applying the rule of pith and substance, whether such legislation falls within any of the entries contained in List II. If it does, no further question arises and the attack on the ground of legislative competence shall fail. In such a case, Article 246(3) of the Constitution of India cannot be employed to invalidate the legislation on the ground of legislative incompetence of the State Legislature.

7. Further, it is stated that Molasses is a by-product of sugar and it is mainly used as raw material for manufacturing of spirit including alcohol for human consumption. It was found that most of the molasses produced were diverted for preparation of potable liquor as a result of which many unscrupulous liquor mafia got scope for using molasses which are supplied for being used in industries for preparation of illicit liquor as a result of which not only State suffers huge revenue but also several liquor tragedies are taking place.

8. Further, he placed strong reliance upon the Report of the Justice B.K.Behera, wherein suggestion was given to amend the Excise Laws by inserting the Molasses within the purview of 'intoxicant' as it is the principal raw material used for manufacture of alcohol. Therefore, it is contended by the learned Government Advocate that there is no illegality whatsoever in bringing such amendment incorporating Section 2(12-a) of the Bihar and Orissa Excise Act. It is also contended that Molasses has also been defined as 'intoxicant' by other States like Bihar, U.P., Maharastra etc. and the vires of such inclusion were challenged and have been upheld by the Apex Court in ***State of Bihar v. Industrial Corporation Pvt. Ltd***., *AIR 2004 SC 1151*. He also placed reliance upon the report of Justice Behera Commission, wherein it is observed as follows:

> "Molasses have been the main raw material for manufacture of alcohol which traditionally has also been the source of organic chemicals in India. 60% of alcohol goes for potable liquor manufacturer and 40% towards industrial use, resulting in low capacity utilization of alcohol based industries. Compulsions of better revenues, recourse crunch and its easy availability forced the existing distilleries to go in for manufacture of potable alcohol despite specific recommendations of Expert Committees (Swaminathan Commission in 1977) to the effect that Molasses based alcohol be totally reserved for industrial purpose or in the alternative to freeze the alcohol allocation to potable liquor or in the alternative freeze the

> alcohol allocation to potable liquor at the pre 1977 levels but such a situation did not materialized and the industry continued in bondage to the drinking fraternity. No sobering thoughts prevailed upon the policy on the industries requiring alcohol. Alternative to meet the gap of about 2000 lakh liters of alcohol had to be evolved and in the process, appearance of cheaper intermediates like Naphtha and other Hydrocarbon substances in the liquor world, tempted the unscrupulous traders to divert a part of such cheaper substitutes to potable alcohol without caring for a while into the positive harmful effects of the alternate food stock like petroleum Naphtha and gases including methanol (based on gas) as a cheaper route for production of acetic acid. There is also demand for utilization of alternate food stock like Mahua Flowers and best root for manufacture of potable alcohol thereby saving alcohol from Molasses for being used as feed stock for alcohol based industries. Such a strategy would have saved the liquor consuming public from the dreadful tragedies that are reported in almost every part of the country"

9. Therefore, learned Government Advocate requested to dismiss the writ petition.

10. In the counter affidavit at paragraph-7, it is contended that Molasses Control Order, 1961 issued by the Government of India under Section 18(g) of the Industries (Development & Regulation) Act, 1951 was holding the field of control and regulation of Molasses. This order has been repealed by the Government of India on 10.6.1993. While decontrolling the molasses, the Government of India advised all the Sate Government to exercise strict vigilance on the undue diversion of molasses for manufacture of potable alcohol. At the time of withdrawal of Molasses Control Order, 1961, the Government of India, Ministry of Chemicals and Fertilizers, Department of Chemicals and Petro Chemicals have in their letter No.15021 dated 11.6.93 advised the State Government in the following manner:

> "While taking the decision to decontrol molasses and alcohol, the need to ensure that there is no undue diversion of molasses to the potable alcohol section has been emphasized by the Government fears have been expressed that molasses in a decontrolled situation may be diverted for potable alcohol production. It has also been alleged that the potable alcohol sector, with its ability to pay higher prices for molasses, may corner a major part of the molasses in the country. This would have a serious impact on the availability of

> molasses for industrial alcohol. It is therefore particularly important that strict vigilance is exercise in this regard. It hardly needs to be emphasized that even after the decontrol of molasses and alcohol the power of the State Governments/Union Territories Administration to regulate the potable alcohol section under their excise regulations and other laws would remain intact.
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> xx xx xx xx
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> In Orissa Act 2 of 1999, molasses has been included as an 'intoxicant' in Section 2 (12-a) of the Bihar and Orissa Excise Act, 1915. The import, transport, storage and use of molasses in the State is being regulated and controlled by issue of executive instructions in order to safe guard the interest of the Govt. and public at large and to ensure that molasses is not diverted for production of illegal potable liquor"

11. Further, the State Government has contended that so far as Molasses meant for being used for potable purpose is concerned, it shall be under the exclusive control of the State from the moment it is cleared and removed for that purpose. The power to prohibit and to regulate the manufacture, production, sale, transport or consumption of liquors being ancillary there to it is therefore under the jurisdiction of the State Government and therefore no illegality has been committed by including molasses under Section 2(12-a) of the Bihar and Orissa Excise Act.

12. Further, it is stated that one metric ton of molasses produces on an average 225 liters of rectified spirit with 94% alcoholic contents. It is accepted that molasses is the cheapest source for production of alcohol because of its availability and easy access. Therefore, this being the prime base for production of alcohol the same has been included in the list of 'intoxicants' by Act 2 of 1999 after the same was decontrolled by the Government of India since 1993. The inclusion of molasses as an intoxicant is not all detrimental to the intention of public at large as is being contended and rather it is meant to protect the society from the menace of unscrupulous dealers of illicit liquor and traders of death. Prior to amendment, pros and cons of the matter have been studied and meticulously examined at appropriate level. The amended provisions are in consonance with the provision of law and do not violate neither the equality clause under Article 14 nor the provisions of Article 19(1)(g) of the Constitution of India. Hence, it

is contended that the State Legislature has no competence is wholly untenable in law.

13. With reference to the above rival legal contentions, we have carefully examined as to:

(i) Whether the petitioner is entitled to the relief striking out inclusion of the Molasses as one of the intoxicants as defined under Section 2 (12-a) of the Act?

(ii) What order ?

14. Our answer to the aforesaid points is in negative for the following reasons.

Inclusion of Molasses to the definition of 'intoxicant' is from Entry No.8 inter-related to Entry nos.6 and 51 and in the backdrop of the said inclusion it must be considered de-controlling of the molasses the Government of India Molasses order, 1961, which was framed under Section 18(g) of the Industries (Development & Regulation) Act, 1951. Further, the Government of India at the time of withdrawal of Molasses Order, 1961 the Government of India, Ministry of Chemicals and Fertilizers, Department of Chemicals and Petro Chemicals have in their letter dated 11.6.1993 advised the State Governments in the manner stated supra. The said relevant factor was taken into consideration and further the State Legislature keeping in view the Orissa Act 2 of 1999 has rightly incorporated the Molasses as an intoxicant taking into consideration the suggestions given by Justice B.K. Behera who was appointed as one-man Commission to enquire into the aforesaid liquor Tragedy in the State. In his report, he has also referred to the percentage of the Molasses that 60% alcohol goes for manufacture of potable liquor and 40% towards industrial use resulting in low capacity utilization of the alcohol based industries. Further, lot of material is collected with regard to use of Molasses manufactured liquor and selling the same is not brought under control of the Excise Act and Rules thereby the tragedies which have taken away the lives of poor and socially and economically backward class people by consuming the same. On account of deregulated Molasses being used for manufacture of illicit liquor periodical tragedy are taken place in the State of Orissa is the reason for brining the said Molasses under the definition of Section 2 (12-a) of the Act. It is also rightly placed reliance upon the decision of the Supreme Court in ***State of Bihar v. Industrial Corporation Pvt. Ltd****., AIR 2004 SC 1151,* wherein, Molasses has been defined as 'intoxicant' in other States like Bihar, U.P. and

Maharashta the vires were challenged that have been extensively dealt with and answered in the aforesaid judgment. The aforesaid decision with all fours is applicable to the present case.

15. In view of the aforesaid decision and the reasons which have been assigned by the State Government in support of the inculcation of Molasses as 'intoxicant' to the definition of Section 2 (12-a) of the Excise Act, we do not find any good ground to interfere with the same. The writ petition is devoid of merit and is dismissed as such.

Writ petition dismissed.

2012 (II) ILR- CUT- 218

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

W.P.(C) NO. 14234 OF 2009 (Dt.16.03.2012)

M/S. BHARAT PETROLEUM CORPORATION LTD., …….Petitioner.

.Vrs.

THE SALES TAX OFFICER, CUTTACK …….Opp.Party.

A. CENTRAL SALES TAX (ORISSA) RULES 1957 – RULE 12(8).

Re-assessment proceeding on "change of opinion" – Merely because the assessing officer changes his opinion that cannot have any effect on the assessment which has been completed on the basis of the view taken on turnover considered in the earlier assessment – The reassessment proceedings initiated for the self same year cannot be said to be without jurisdiction on the ground of change of opinion unless and until it is established that the turnover brought to tax in the reassessment was subject matter of earlier assessment and no tax was levied by the assessing officer by taking a particular view.

(Para 17,18,19)

B. CENTRAL SALES TAX (ORISSA) RULES, 1957 – RULE 12(8).

Reasons must exist while passing order in a reassessment proceeding under Rule 12(8) of the Rules, for believing that the turnover of the dealer for any period to which the Act applies has escaped assessment or has been under assessed.

(Para 20)

C. Principles of Natural Justice – Violation of – In this case information received from Paradeep Port Trust and IOCL have been extracted in the reassessment order – Petitioner says he has been prejudiced due to non-supply of copy of the above informations – Merely by saying that non supply of copy of the informations supplied by IOCL and PPT is in violation of the principles of natural justice is not enough – Duty is cast on the assessee to show as to how prejudice has been caused to it on account of informations received from PPT and IOCL which have been referred to in the reassessment order.

Held, no prejudice is caused to the petitioner on account of referring the above reports in the reassessment order.

(Para 26)

D. CENTRAL SALES TAX ACT, 1956 (ACT NO.74 OF 1956) – S.6-A.

A dealer is competent to produce other evidence before the Taxing Authority at the relevant time to prove that he is not liable to be taxed, because there is nothing in Section 6-A or in Rule 12 of the CST (R&T) Rules, 1957 to suggest that Form "F" is the only mode for discharging the burden that lies on the dealer – Held, Section 6-A is an enabling provision and furnishing of declaration Form "F" cannot be held to be mandatory. (Para 36)

E. Re-assessment Proceeding - **Assessing Authority on receipt of information from higher authority verified the record and found that the turnovers alleged were not disclosed by the assessee – Being satisfied he sought to initiate reassessment proceeding which cannot be said to have been initiated mechanically.**

(Para 27,31,32,33)

Case laws Referred to:-

1.(2006) 148 STC 61 : (Indure Limited-V-Commissioner of Sales Tax, Orissa & Ors.)
2.AIR 1989 SC 997 : (State of U.P.-V- Maharaja Dharmandar Prasad Singh).
3.(2007)6 VST 783 (SC) : (Binani Industries Ltd.-V-Asst. Commissioner of Commercial Taxes).
4.(2008)15 VST 497(Orissa) : (Indian Oil Corporation Ltd.-V-State of Orissa & Ors.)

For Petitioner - M/s. Sanjit Mohanty, Sr. Advocate,
M/s. A.N.Ray, N.Paikray, B.P.Mohanty, P.K.Mishra & K.K.Sahu.

For Opp.Parties - Mr. M.S.Raman,
Additional Standing Counsel
(Commercial Taxes Department).

B.N.MAHAPATRA,J. This writ petition has been filed with the following prayers:

"(i) Issue a writ in the nature of Certiorari quashing the order dated 30.12.2006 as passed by the opposite party in initiating

proceeding under Rule 12(8) of the Central Sales Tax (O) Rules vide Annexure-6;

(ii) Issue a writ in the nature of Certiorari quashing the ex-parte order of reassessment dated 24.12.2008 passed by the opposite party for the period 2001-02 under Rule 12(8) of the CST(O) Rules along with demand notice vide Annexure-5;

(iii) Issue a writ in the nature of Prohibition, prohibiting the opposite party from collecting or demanding the amount of tax and penalty involved in the ex parte order of reassessment dated 24.12.2008 along with demand notice under Annexure-5;

(iv) Issue any such other writ(s) or pass such order(s) as would be deemed just and proper in the interest of justice;

(v) Allow this petition with cost"

2. Petitioner's case in a nutshell is that it is a Government of India Undertaking engaged in refining, receiving and selling of petroleum products, namely, MS, HSD, LPG (domestic and commercial) and SKO (domestic and commercial) among other petroleum products. It is a registered dealer under the Central Sales Tax Act, 1956 (for short, 'CST Act'). Paradeep is a Lighterage point for berthing of high capacity vessels received from other countries bringing in Superior Kerosene Oil (SKO) and High Speed Diesel (HSD) as well as indigenous products from Refineries situated nearer to coastal ports in the western sector and also from eastern sector like Vizag and Chennai. The petitioner has a coastal location at Paradeep. Petroleum product is supplied from RIL Refineries, Jamnagar by tanker to Paradeep. Petroleum product is also moved from West Bengal to Paradeep by way of stock transfer. From Paradeep, supplies of petroleum products are made to various other locations in Odisha. Besides, the petitioner has an MOU with other oil companies for safe keeping of their petroleum product. This arrangement envisages extending storage assistance by the Company owning the facilities to another Company who may or may not have storage facilities at that location and accordingly, there is no inter-state sale by the petitioner to other oil Companies in Orissa. Three Oil Companies, i.e., Indian Oil Corporation ltd. (for short, IOCL'), Hindustan Petroleum Corporation Ltd. (for short, 'HPCL'), and petitioner-Bharat Petroleum Corporation Ltd. (for short, 'BPCL') are having terminals for storage and handling of oil at Paradeep. Each of the Oil Companies has its own storage tank as well as loading and unloading facilities at the terminal. The ocean going tankers carry cargo (HSD and SKO) to and from Paradeep. However, the big ocean going tankers cannot call at Haldia

because of lower draft. Therefore, the cargo is brought in by big tankers and unloaded at Paradeep. For non-availability of tankers space of Oil Company, the cargo of one Oil Company is stored in the tanks of another Oil Company by virtue of the hospitality arrangement. Thereafter, the cargoes are sent to Haldia in small tankers. In this manner, all the Oil Companies received cargo from outside the State and dispatched the same to outside the State from Paradeep. At Paradeep, due to shortage in storage facility, other oil Companies like IOCL, HPCL etc. often keep their product in BPCL storage tanks as per the safe keeping agreement. Such product kept in BPCL tanks, belonging to the storing oil company, is moved by tanker charted by said storing oil company to Haldia. Since the product of storing oil company is kept in the BPCL tanks, the same are loaded by BPCL on behalf of the said Company in the tanker based on their advice. Therefore, the petitioner (BPCL) has never moved its own product outside the State of Odisha in tankers nor has sold any product by way of inter-state transaction to other Oil Companies on this score.

3. While the matter stood thus, the petitioner appeared and caused production of books of account before the Opposite Party in regular assessment proceeding where it was submitted by the petitioner that there was no inter-state sale by BPCL to other Oil Companies in Odisha. Due to shortage of storage facilities, other Oil Companies are often keeping their oil in storage tanks of BPCL as per safe keeping agreement which are moved from Paradeep as per the advice from the storing Oil Company and thus, BPCL has neither moved its own products to outside the State of Odisha in tankers nor has sold any product to other Oil Companies in this respect.

In support of its submission, the petitioner placed reliance on its safe keeping agreement as well as Memorandum of Understanding between the Oil Companies which were looked into, and the order of assessment dated 31.03.2005 for the period 2001-02 under Rule 12(5) of the CST(O) Rules was passed by computing a demand of Rs.31,46,129/- for non-submission of declaration in Form 'C' in respect of direct inter-state sales of HSD and SKO effected by the petitioner other than the matters covered under inter Oil Company arrangement and the safe keeping agreement between the Oil Companies.

4. While the matter stood thus, the petitioner has been issued with a notice dated 29.12.2006 in Form III issued under Rule 10 of the CST(O) Rules wherein the petitioner has been called upon to produce the books of accounts on the allegation that its turnover for the year ending 2001-02 has escaped assessment/under assessment. Another letter bearing No.5258

dated 30.12.2006 was also issued to the petitioner disclosing the reason for initiating reassessment proceeding for the year 2001-02 under the CST Act.

5. On the basis of the reasons disclosed in the letter dated 30.12.2006, the opposite party directed the petitioner to produce the 'tankerwise ocean loss report', bill of lading and 'proration report' in respect of all receipts/dispatches made at /from Lighterage Terminal at Paradeep including complete accounts of receipts and disposal of goods received at the terminal and all the documents and records relating thereto. Pursuant to such letter, the petitioner appeared before the opposite party on various dates. The petitioner by its letters dated 23.04.2007, 21.06.2007 and 10.09.2007 intimated the opposite party regarding the movement of product from Paradeep to Haldia Port and the petitioner also explained to the Sales Tax Officer regarding the safe keeping arrangement and submitted that the petroleum products were kept by BPCL under the safe keeping agreement with other Oil Companies for safe keeping. Since the product belongs to the storing Oil Companies and was taken delivery at Haldia by them, the question of paying any tax by treating the aforesaid arrangement as inter-state sales does not arise at all. On 10.09.2008, it was submitted by the petitioner orally that if the learned STO is not satisfied with the clarifications or the points agitated earlier, the petitioner should be given an opportunity of personal hearing so that there would be no levy of tax on the transactions claimed by the petitioner. The petitioner also submitted the sample copies of safe keeping statement jointly signed by HPCL and BPCL for the product of HPCL which was kept at BPCL tanker and subsequently loaded into cargo charted HPCL as an illustration as to understanding between different Oil Companies regarding the storage and movement of goods from Paradeep. As the opposite party was very much busy no oral hearing has taken place on 10.09.2008. Thereafter, the opposite party passed the order of reassessment on 24.12.2008 under Rule 12(8) of the CST(O) Rules by holding that the returns filed by the petitioner under the OST and CST Act during the period under assessment as well as the documents/statement furnished at the time of assessment, the transaction effected through Paradeep Terminal have never been reflected in the return nor disclosed at the time of assessment. The learned STO also held that the movement of goods from Paradeep in Orissa to Haldia in West Bengal having inextricable link in order to supply or sale of the goods by the receiving Oil Companies in the manner that the movement cannot be dissociated without breach of mutual understanding between the BPCL and the receiving Oil Companies and thus, the aforesaid transaction involving such goods from one State to another pursuant to the prior agreement is an inter-state sale falling under Section 3(a) of the CST Act. With the above observations, the opposite party

came to the conclusion that delivery of 38,881 KL of HSD and 29,728 KL of SKO by BPCL ex-tanker at the Port of destination at Haldia to other Oil Companies, i.e., IOC/IBP/HPC though are clearly inter-state sales falling under Section 3(a) of the CST Act, have not been reflected in the return filed for the respective return period by the petitioner. Therefore, the petitioner is liable to pay tax for such inter-state transaction and accordingly the impugned assessment order was passed raising levy of demand of Rs.45,28,82,697/- including penalty to the tune of Rs.27,17,29,618.27. Hence, the present writ petition.

6. Mr.S.Mohanty, learned Senior Advocate appearing on behalf of the petitioner submitted that the opposite party has initiated proceedings under Rule 12(8) of the CST(O) Rules as well as passed the order of reassessment on the basis of the report received from the Additional Commissioner of Commercial Taxes, Central Zone, Cuttack vide letter No.12867/CT dated 29.12.2006. Thus, the Additional Commissioner of Commercial Taxes being the higher authority the impugned order has been passed acting upon the direction of the higher authority which is evident from the order sheet dated 30.12.2006.

The exercise of the power under Rule 12(8) of the CST(O) Rules by the Assessing Officer has been vitiated as the learned Assessing Officer mechanically reopened the completed assessment and abdicated and surrendered to the report of the Additional Commissioner. Since the proceeding has been initiated on the basis of the report of the Additional Commissioner, Commercial Taxes, the “reason to believe” by the learned Sales Tax Officer and the “formation of opinion” by the learned STO is in a mechanical manner and the Assessing Officer has acted to the dictate of the higher authority, which is contrary to principles of law.

Placing reliance on the judgment of this Court in the case of *Indure Limited Vs. Commissioner of Sales Tax, Orissa & others*, reported in (2006) 148 STC 61 Mr. Mohanty submitted that as in the instant case, the report/direction of the Additional Commissioner was taken into consideration and the Sales Tax Officer did not have anything to form of his own objective opinion except acting upon the direction/opinion of the Additional Commissioner and no reassessment proceeding could have been initiated at the behest of the higher authority. In support of the above provision of law reliance was also placed in the case of *State of UP Vs. Maharaja Dharmandar Prasad Singh*, reported in AIR 1989 SC 997.

7. The order of assessment dated 24.12.2008 has been passed utilizing documents received from Paradeep Port Trust as well as IOC without supplying or disclosing copy of the said documents to the petitioner during the course of reassessment proceedings. The impugned order has been passed without affording reasonable opportunity of hearing and without production of books of account. In support of his contention that the assessment has been completed in violation of principles of natural justice, Mr.Mohanty relied upon the order sheet attached to the writ petition under Annexure-6.

8. While completing the original assessment, the opposite party was aware of the fact of "safe keeping arrangement" as well as "hospitality arrangement" regarding keeping stock of one Oil Company in the tanker of other Oil Company and also sending of cargo by one Oil Company on behalf of another Oil Company, the said STO now cannot say that those are all inter-state sales.

The reassessment proceeding is nothing but mere change of opinion which is not permissible as held by the Hon'ble Supreme Court in the case of *Binani Industries Limited Vs. Assistant Commissioner of Commercial Taxes*, reported in (2007) 6 VST 783 (SC).

9. In view of the safe keeping agreement, the alleged transaction does not fall within the ambit and/or sphere of Section 3(a) of the CST Act. In the present case, there was no contract for sale of goods between the petitioner and HPCL or the petitioner with other Oil Companies and therefore in absence of contract of sale, the movement of goods from one state to another was of no consequence. The goods had never moved from Paradeep to Haldia pursuant to any contract of sale and no sale was concluded at any point of time at Haldia. The learned STO failed to bring home the charge of inter-state sale between the parties against a money consideration. The movement of goods from Paradeep to Haldia cannot be linked to any supply or sale of goods and the said finding of opposite party is based on surmise and presumption.

10. Levy of Central Sales Tax coupled with penalty by the Assessing Officer based on the mere movement of goods from Paradeep to Haldia is without jurisdiction and without any authority of law. The opposite party is not justified to say that the dealer was not assessed due to default on the part of the dealer in disclosing the true and correct picture of business transactions in its return. The product of BPCL had never moved from Paradeep to any other State.

11. In similar context and/or premises, the Hon'ble Supreme Court in the case of *M/s Indian Oil Corporation Limited Vs. Commissioner of Sales Tax & another* (Civil Appeal No.2438 of 2009) has been pleased to set aside the order of reassessment passed by the authority and remitted the matter to the Assessing Officer with a direction to give full opportunity of hearing to the petitioner and decide the reassessment proceedings included in the jurisdictional fact and the effect of form of declaration submitted by the Corporation.

12. Mr. Mohanty further submitted that notice for initiation of reassessment proceedings under Rule 12(8) of the CST(O) Rules has been issued on 29.12.2006 whereas initiation of the proceedings was made on 30.12.2006. Thus, the opposite party issued notice prior to initiation of proceedings under Rule 12(8). Therefore, the impugned notice is void and consequently the entire proceedings are vitiated *ab-initio* in law. Concluding his argument Mr. Mohanty submitted that the proceedings initiated under Rule 12(8) of the CST(O) Rules by the Assessing Officer is without any authority of law and accordingly the same is liable to be quashed.

13. Mr. M.S.Raman, learned Additional Standing Counsel for the Commercial Taxes Department vehemently argued that along with the notice issued under Rule 10 of the CST(O) Rules for the year 2001-02, the opposite party authority vide its letter No.5258 dated 30.12.2006 has supplied the petitioner the reasons for reopening the assessment and afforded opportunity to the petitioner to produce the books of account and the documents on which it may rely in support of its contentions. The petitioner was also required to produce tanker-wise ocean loss report, bill of lading and proration report in respect of receipt and despatch made at/from the Lighterage Terminal at Paradeep including complete accounts of receipt and disposal of goods received at the terminal and all the documents and records relating thereto. In response to the said notice, the petitioner appeared before the Assessing Officer after availing sufficient opportunities through number of adjournments and explained its case with regard to the reasons disclosed to it for initiating reassessment proceeding.

14. Decision of the Hon'ble Supreme Court in the case of M/s Indian Oil Corporation Limited (supra) (Civil Appeal No.2438 of 2009) has no application to the present case. The issue involved in the earlier writ petition of IOCL is different from the issue involved in the present case. In that case, the Hon'ble Supreme Court has directed for verification of the declaration Form 'F' and consideration of the jurisdictional factor. In the present case, no 'F' Form was furnished by the petitioner-Company. The Assessing Officer

has jurisdiction to make the assessment/reassessment in view of the power vested in him under Rule 12(8) of the CST(O) Rules. It was not the case of change of opinion as earlier no opinion was formed by the Assessing Officer with regard to the alleged transaction in question, which has been brought to tax under the present reassessment order. Admittedly, the petitioner has not disclosed the transactions in question in its statutory returns periodically filed before the opposite party and in the original assessment order dated 31.03.2005 (Annexure-1) there is no reference to or adjudication of the issue with regard to alleged transfer of goods from Lighterage Terminal at Paradeep to Haldia. Hence, question of change of opinion does not arise. Therefore, it is a clear case of escapement of turnover from assessment and paying sales tax. Since there is efficacious remedy by way of appeal the present writ petition is not maintainable.

15. On the rival contentions raised by the parties, the questions that fall for consideration by this Court are as follows:-

(i) Whether in the present case, the completed assessment has been reopened by mere change of opinion?

(ii) Whether reasonable opportunity of hearing was afforded to the petitioner and the materials utilized against the petitioner-assessee were confronted to him before passing the order of reassessment under Rule 12(8) of the CST (O) Rules?

(iii) Whether in the facts and circumstances of the case, the Assessing Officer has passed the impugned reassessment order on the dictate of his higher authority, i.e., the Assistant Commissioner of Commercial Taxes and without applying his own mind has come to the conclusion that the transactions in question are inter-state sale in nature?

(iv) Whether notice for reassessment proceeding under Rule 12(8) of the CST(O) Rules has been issued on 29.12.2006 whereas initiation of the reassessment proceeding was made on 30.12.2006 and therefore the entire proceedings are vitiated in law?

(v) Whether the issues involved in the present case are similar/identical to that of the case of *Indian Oil Corporation Limited vs. State of Orissa and Others, [2008[15 VST 497(Orissa)?*

(vi) Whether dispatch of 38,881 KL of HSD and 29,728 KL of SKO during the year 2001-2002 has been effected by the petitioner

Company from the Lighterage Terminal at Paradeep to outside State of Odisha either by way of inter-state sale or branch transfer or that the alleged dispatch of goods in question has not been effected by the petitioner either by way of inter-state sale or stock transfer?

16. Question No.(i) is as to whether the completed assessment has been reopened by mere change of opinion.

Mr. Sanjit Mohanty, learned Senior Advocate appearing on behalf of the petitioner submitted that the Hon'ble Supreme Court in the case of Indian Oil Corporation Limited (supra) has been pleased to set aside the judgment dated 16.05.2008 of this Court passed in W.P.(C) No.3691 of 2007, inter alia, with the observation that the High Court has failed to consider the challenge to the order of reassessment by the petitioner-Corporation on the ground that it was a case for change of opinion. According to Mr. Mohanty, in the instant case also the impugned order of reassessment is not sustainable in law as the completed assessment has been reopened by mere change of opinion. Referring to Annexure-1, which is the order of assessment dated 31.03.2005 passed for the assessment year 2001-2002, it was argued that the turnover of the petitioner-assessee having been earlier assessed under Rule 12(5) of CST (O) Rules and that taking into consideration the MOU between the Oil Companies, the alleged transfer of stock in question has not been brought to tax, the initiation of reassessment proceedings under Rule 12(8) of the CST (O) Rules for self-same year is not permissible under law as the reassessment proceedings has been initiated on change of opinion. The Revenue's stand is that the turnover which has been assessed in the impugned order of re-assessment under Rule 12(8) of the CST (O) Rules was neither disclosed in the periodical returns filed for the year 2001-2002 nor it was the subject matter of consideration in the earlier assessment order dated 31.03.2005 passed for the same year.

17. Before proceeding further, it is necessary to know what is the meaning of making assessment on "change of opinion" under direct or indirect tax. It means, in respect of a particular income/transaction if the Assessing Officer after application of mind, takes a view that the particular goods or income is not liable to tax and completed the assessment, reopening of said assessment is not permissible by mere change of opinion of the Assessing Officer to levy tax on such goods or income.

18. The Hon'ble Supreme Court in the case of ***Binani Industries Ltd. vs. Asst. Commissioner of Commercial Taxes***, [2007] 6 VST 783 (SC), held that reopening of assessment is not permissible by mere change of

opinion of the Assessing Officer. Merely because the Assessing Officer changes his opinion that cannot have any effect on the assessment which has been completed on the basis of the view taken on turnover considered in the earlier assessment.

19. In the instant case, the earlier order of assessment passed on 31.03.2005 for the year 2001-2002 under Rule 12(5) of CST(O) Rules [in the reassessment order it is referred to as assessment under Rule 12(4)] does not reveal that the transaction in question which has been brought to tax in the impugned reassessment order passed under Rule 12(8) of the CST (O) Rules was the subject matter for consideration of Assessing Officer for the purpose of assessment and the Assessing Officer after forming any opinion about nature of transaction in question took a decision in that earlier assessment order not to levy tax on those transactions. On the other hand, the earlier assessment order dated 31.03.2005 (Annexure-1) shows that the dealer-assessee failed to appear along with the books of account and requisite declaration forms for which the assessment was completed on the basis of materials available on record. The gross turnover in respect of inter-state sale disclosed in its return was accepted and the entire turnover was brought to tax as the petitioner-dealer failed to furnish declaration forms against claims of concessional rate of tax. In course of hearing, Mr.Mohanty, learned Senior Advocate for the petitioner has not brought to our notice any material in support of his contention that in earlier regular assessment the transaction in question was subject matter of consideration of Assessing Officer who after considering the nature of transaction with reference to MOU of Companies took a view that no tax is leviable on those transactions except saying that the reassessment proceedings has been initiated on change of opinion. The reassessment proceedings initiated for the self-same year cannot be said to be without jurisdiction on the ground of change of opinion unless and until it is established that the turnover brought to tax in the reassessment was subject matter of earlier assessment and no tax was levied by the assessing officer by taking a particular view. Therefore, the first ground of challenge that the completed assessment has been reopened under Rule 12(8) of the C.S.T (O) Rules by mere change of opinion, fails the same being misconceived.

20. Question No.(ii) is as to whether reasonable opportunity of hearing was afforded to the petitioner and the materials utilized against the petitioner-assessee was confronted to it before passing the impugned order of re-assessment under Rule 12(8) of the CST (O) Rules. Rule 12(8) contemplates that there must exist reason for believing that the turnover of dealer for any period to which the Act applies has escaped assessment or

has been under assessed. When such a reason exists, the Sales Tax Authority may at any time within five years from the date of expiry of the year to which the said period relates call for a return after complying with the provision of Rule 10 and proceed to assess the amount of tax due from the dealer. The Sales Tax Authority may also direct in cases where such escaped or under assessment is due to the dealer having concealed particulars of his turnover or having without sufficient cause, furnished incorrect particulars thereof, the dealer shall pay penalty in addition to the tax assessed. However, such penalty shall be levied not exceeding two and half time, the amount of tax so assessed.

21. Undisputedly, in the instant case, the petitioner has been informed the reasons for reopening of assessment for the year 2001-2002 under Rule 12(8) of CST(O) Rules by the Assessing Officer in his letter dated 30.12.2006. The said letter is set out herein below:-

> "OFFICE OF THE COMMERCIAL TAX OFFICER: CUTTACK 1 EAST CIRCLE, CUTTACK
>
> No.5258/CT Dated 30.12.2006
>
> To
>
> M/s. Bharat Petroleum Corporation Limited Sikharpur, Cuttack bearing TIN-21901201770
>
> Sub: Reasons for reopening of the assessment for the year 2001-02 under the C.S.T. Act.
>
> A notice U/r. 10 of the C.S.T. (O) Rules, 1957 for the year 2001-02 is enclosed. Reasons for re-opening the assessment are as stated below-
>
> (a) It has come to the notice that you have brought in 104890 KL of HSD and 15714 KL of SKO during the year 2001-02 to the Lighterage Terminal at Paradeep. During the same period you have dispatched 38881 KI of HSD and 29728 KL of SKO to outside the State of Orissa.
>
> (b) Information received further shows that during the year, you have sold goods in course of inter-state trade or commerce from Paradeep Lighterage Terminal to other oil companies.

(c) The returns for the year 2001-02 under the CST Act do not appear to reflect these transactions of Lighterage Terminal. The same were also not disclosed during the assessment completed for the year.

The aforesaid position indicates that there is escapement of assessment during the year. Besides the books of accounts and documents on which you may rely in support of the contentions, you are required to produce the "tanker-wise ocean loss report", bill of lading and "proration report" in respect of all receipts/dispatches made at/from the Lighterage Terminal at Paradeep including complete accounts of receipt and disposal of goods received at the terminal and all the documents and records relating thereto.

Sd/-
Sales Tax Officer,
Cuttack 1 East Circle, Cuttack"

22. The above letter shows that in the return filed for the year 2001-2002 under the C.S.T. Act, the alleged transactions, i.e., dispatch of HSD and SKO in question from Lighterage Terminal at Paradeep to other Oil Companies outside the State were not reflected. It is further alleged that the same were also not disclosed during the assessment completed earlier for that year. The letter dated 30.12.2006 (Annexure-3) as quoted above clearly reveals that the Assessing Officer has indicated reasons for reopening of the assessment and the same was communicated to the assessee-petitioner. From the above letter, it also reveals that the petitioner was given opportunity to produce the books of account and documents in support of which it may rely upon. The petitioner was also required by the Assessing Officer to produce the "tanker-wise ocean loss report", "bill of lading and proration report" in respect of all receipts / dispatches made at/from the Lighterage Terminal at Paradeep.

23. Finally, the reassessment under Rule 12(8) of CST(O) Rules has been completed on the basis of the reasons stated in the notice dated 30.12.2006 (Annexure-3). The exact turnover alleged to have been escaped from earlier assessment, as indicated in Annexure-3, has been brought to tax in the impugned reassessment order. Therefore, it cannot be said that the petitioner was not aware of the reasons for initiation of reassessment proceeding under Rule 12(8) of the CST (O) Rules and reassessment was completed without confronting the materials utilized for making assessment.

24. Further, it is noticed that the reassessment proceedings was initiated on 30.12.2006 and the same was completed on 24.12.2008. Thus, two years' time was taken to complete the reassessment proceeding from the date of communication of reasons to the petitioner for initiating the reassessment proceedings. The reassessment order reveals that sufficient opportunity of hearing was given to the petitioner and it has taken a number of adjournments on different dates. On 10.09.2008, the Senior Accounts Officer of the petitioner company appeared before the Assessing Officer and clarified that the documents placed on earlier appearances would explain the view of the petitioner with regard to turnover alleged to have been escaped from assessment. Therefore, it cannot be said that reasonable opportunity of hearing has not been given to the petitioner and reassessment has been completed without confronting to the petitioner, the materials utilized for making the assessment. It is only on verification/examination of the returns filed by the dealer under OST Act and CST Act for the period of under assessment as well as the documents/statements furnished by the petitioner at the time of reassessment proceedings, the Assessing Officer came to the conclusion that the transactions in question effected from Paradeep Lighterage Terminal to other Oil Companies have neither been reflected in the return nor disclosed at the time of assessment.

25. The Assessing Officer has extracted the report of Paradeep Port Trust and Ocean Loss Report submitted by the IOCL in reassessment order only for the purpose of better appreciation of the alleged transactions effected by the petitioner dealer which has been informed to the petitioner vide letter dated 30.12.2006 (Annexure-3). The information of Paradeep Port Trust or IOCL has not been utilized by the Assessing Officer against the petitioner-dealer to enhance the turnover alleged to have been escaped from assessment in notice dated 30.12.2006 under Annexure-3. What is taxed in the impugned reassessment order was exactly the same transaction shown in the letter dated 30.12.2006 (Annexure-3) communicated to the petitioner much before passing the impugned order of reassessment. Therefore, it cannot be said that the petitioner was not aware of the materials on the basis of which the reassessment proceeding has been made. It also cannot be said that any prejudice has been caused to the petitioner for referring to information furnished by Paradeep Port Trust or IOCL in the reassessment proceedings. Therefore, it cannot be said that the assessment has been completed without affording opportunity of hearing to the petitioner and without confronting the adverse material to the petitioner.

26. Moreover, in the reassessment order the informations received from Paradeep Port Trust and IOCL have been extracted. Though in the

impugned reassessment order the information received from IOCL and Paradeep Port Trust have been referred to in course of hearing of the writ petition, nothing was brought to our notice as to how prejudice has been caused to the petitioner. Merely by saying that non-supply of copy of the information supplied by IOCL and Paradeep Port Trust is in violation of the principles of natural justice is not enough. Duty is cast on the assessee to show as to how prejudice has been caused to it on account of informations received from Paradeep Port Trust and IOCL which have been referred in the reassessment order. As discussed above, no prejudice is caused to the petitioner on account of referring the reports of Paradeep Port Trust and IOCL in reassessment order.

27. Question No.(iii) is as to whether the Assessing Officer has passed the impugned assessment order on the dictate of his higher authority, i.e., the Assistant Commissioner of Commercial Taxes without applying his own mind and came to the conclusion that the transactions in question are inter-state sale in nature and therefore, it is vitiated in law.

Mr.Mohanty, submitted that the reassessment proceedings initiated are illegal as the same has been initiated at the behest of the higher authority i.e. the Additional Commissioner of Commercial Taxes. In support of his contention, he has relied upon the judgment of this Court in the case of ***Indure Limited vs. Commissioner of Sales Tax, Orissa & Others.****, (2006) 148 STC 61* and also the judgment of the Hon'ble Supreme Court in the case of ***State of U.P. vs. Maharaja Dharmandar Prasad Singh****, AIR 1989 SC 997.*

28. In ***Indure Limited*** *(supra),* this Court has held that audit objection may be a relevant consideration but the Sales Tax Officer has to form his objective opinion taking that objection into consideration. But the Sales Tax Officer has totally abdicated or surrendered his discretion to the objection of the audit party by mechanically reopening the assessment. Therefore, this Court in the said case has held that the exercise of power under Rule 12(8) of the CST (O) Rules has been vitiated and accordingly quashed the impugned notice of reassessment.

29. In ***Maharaja Dharmandar Prasad Singh'*** *case (supra),* the Hon'ble Supreme Court held that when the State Government alleged to have directed the Authority to initiate the proceedings to cancel the permission for construction given in respect of lease land on the ground that the lessee had violated the terms of the lease. However, since no casual connection was shown between the Government's directives and the proceedings initiated

for cancellation of the permission, it could not be said that the cancellation of permission was vitiated by a surrender of discretion on the part of the Vice-Chairman.

30. In the present case, order sheet dated 30.12.2006 (Annexure-6) reveals as under:-

> "Instant case, the dealer has already been assessed u/r.12(4) of the CST (O) Rules for the period 2001-02 on 31.03.2005. Subsequently on receipt of a report from the Addl. Commissioner of Commercial Taxes (CZ), Cuttack, which is communicated by the Asst. Commissioner of Commercial Taxes, Cuttack 1 Range, Cuttack vide R.O. Letter No.12867/CT, dated 29.12.2006 it is revealed that there is some inter-state transaction effected by the dealer-Company during the period 2001-02. But on verification of assessment record it is found that the same transactions have not been disclosed by the dealer-Company at the time of assessment made u/r.12(4) of the CST (O) Rules. Thus, there is a reason to believe that the dealer-Company has been underassessed due to escapement of turnover for the period 2001-02.
>
> Hence, the case is reopened u/r.12(8) of the CST (O) Rules for re-assessment. Accordingly, notice u/r.10 of the CST (O) Rules is issued to the dealer-Company along with a letter disclosing the facts for reopening the case, fixing the date to 07.02.2007."

31. Thus, from the above order dated 30.12.2006, it is ample clear that the Assessing Officer applying his mind and being satisfied that the alleged turnover had escaped from assessment, initiated reassessment proceeding. Further perusal of the assessment order passed under Rule 12(8) of the CST (O) Rules also reveals that on receiving report from the Additional Commissioner, the Assessing Officer applied his mind, examined the case of the assessee with reference to the copy of the hospitality arrangement between BPCL and HPCL and the statement of inter-state sale of petroleum products dispatched by HPCL from Lighterage Terminal at Paradeep to other oil companies outside the State filed by the petitioner, documents and previous order of assessment and referring to all the relevant provisions of the CST Act came to the conclusion that there has been evasion of tax by the petitioner-assessee. The delivery of 38881 KL of HSD and 29728 KL of SKO by BPCL from Lighterage Terminal of Paradeep to outside State oil companies, i.e., IOC/IBP/HPC are clearly inter-state sales falling under Section 3 (a) of the CST Act and the same have not been reflected in the

return filed for the respective return periods and have been kept away from the knowledge of the statutory assessing authorities. The returns don't reflect the true and correct picture of the business transactions although it has been so declared in the returns itself. The declarations furnished don't also appear to have been truthfully made.

32. From the order dated 30.12.2006 and observations of the Assessing Officer in the impugned order, it is clear that the learned Assessing Officer has not mechanically reopened the completed assessment and abdicated and surrendered to the report of the Additional Commissioner. Hence, the decision of this Court in the case of ***Indure Limited*** *(supra)* has no application to the present case and the decision of the Hon'ble Supreme Court in the case of ***Maharaja Dharmandar Prasad Singh*** *(supra)* on the other hand supports the case of the Assessing Officer.

33. In view of the above, we are of the considered opinion that on receipt of report of the Additional Commissioner of Commercial Taxes, the learned Assessing Officer applied his mind and initiated the reassessment proceedings and after examining the documents, returns etc. filed by the petitioner has passed the impugned reassessment order.

34. Question No.(iv) is whether notice for reassessment proceeding under Rule 12(8) of the CST(O) Rules has been issued on 29.12.2006 whereas initiation of the reassessment proceeding was made on 30.12.2006 and therefore the entire reassessment proceedings are vitiated in law?

This allegation is not sustainable since the certified copy of the order sheet filed by the petitioner attached to the writ petition as Annexure-6 does not reveal that any order to issue notice under Section 10 has been passed on 29.12.2006. On the other hand, the ordersheet dated 30.12.2006 reveals that the case is reopened under Rule 12(8) of the CST (O) Rules for reassessment on that date. Accordingly, notice under Rule 10 of the CST (O) Rules is issued to the dealer-Company along with letter disclosing the reasons for reopening the case fixing the date to 07.02.2007. The notice under Rule 10 of the CST(O) Rules (Annexure-2) was also issued on 30.12.2006. However, in the left side bottom portion of the said notice, the date put on has been shown to be 29.12.2006. From the said notice, it further reveals that no date is put under signature of the STO, Cuttack-I circle, Cuttack. In view of the ordersheet entry dated 30.12.2006 and that notice under Rule 10 of CST(O) Rule has been issued on 30.12.2006, it can be safely concluded that the date 29.12.2006 appearing on the left side bottom portion of the notice (Anneuxre-2) is a mistake occurred

inadvertently. Therefore, the allegation that opposite party issued notice prior to initiation of proceedings under Rule 12(8) and the entire reassessment proceedings are vitiated, is not sustainable in law.

35. Question No.(v) is as to whether the issue involved in the present case are similar/identical to that of the case of ***Indian Oil Corporation Limited vs. State of Orissa and Others,*** *[2008[15 VST 497 (Orissa).*

Mr. Mohanty submitted that the issues involved in the present case are similar /identical to that of the case of ***Indian Oil Corporation's*** case (supra) and in that case the Hon'ble Supreme Court remanded the matter to the Assessing Officer to redo the assessment. Therefore, it was submitted to set aside the impugned reassessment order and direct the assessing officer to redo the assessment.

Mr. Raman vehemently argued that in the case of ***Indian Oil Corporation Limited*** *(supra),* the Hon'ble Supreme Court remanded the matter to the Assessing Officer with a direction to consider the effect of Form-F declarations submitted by the appellant-Corporation and also to decide the question of jurisdiction on the ground of change of opinion. So far as the present case is concerned, the petitioner has neither disclosed the transactions in question in its return much less furnished any declaration in Form-F to prove that the transfer of goods from Lighterage Terminal at Paradeep to outside the State, i.e., Haldia was otherwise than by way of sale. The completed assessment has also not been reopened by change of opinion. Therefore, the issue involved in present case is not identical / similar to that of the case of Indian Oil Corporation referred to supra and therefore there is no need to remand the case to the Assessing Officer to redo the assessment. We find substantial force in the contention of Mr. Raman. Moreover, we have already held that in the instant case the completed assessment has not been reopened by mere change of opinion.

36. Question No.(vi) is as to whether dispatch of 38,881 KL of HSD and 29,728 KL of SKO during the year 2001-2002 has been effected by the petitioner Company from the Lighterage Terminal at Paradeep to outside State of Odisha either by way of inter-state sale or branch transfer or that the alleged dispatch of goods in question has not been effected by the petitioner either by way of inter-state sale or stock transfer?

To deal with this question, it is necessary to refer to Section 6A of CST Act. Under Section 6A where any dealer claims that he is not liable to pay sales tax under the CST Act in respect of any goods on the ground that the

movement of such goods from one State to another was occasioned by reasons of transfer of goods by him to any other place otherwise than by way of sale, the burden of proving that fact shall be on the dealer. Sub-section (1) of Section 6A provides that for the purpose of discharging such burden the dealer may produce a declaration in the prescribed form duly filled in and signed by the consignee or recipient of the goods in other State and the evidence of dispatch of goods. Thus, when there are only stock transfers but not actual sale the benefit of Section 6-A is attracted. The declaration referred to Section 6-A(1) shall be in Form-F as provided in Rule 12 of the CST (R & T) Rules, 1957. Sub-section (2) of Section 6 of the CST Act provides that if the assessing authority is satisfied after making such inquiry that the particulars contained in the declaration furnished by a dealer under sub-section (1) are correct and genuine then he may make an order to that effect and there upon the movement of goods shall be deemed for the purpose of C.S.T. Act to have been occasioned otherwise than as a result of sale.

Law is well-settled that during the relevant time the dealer was also competent to produce other evidence before the Taxing Authority to prove that he is not liable to be taxed, because there is nothing in Section 6-A or in Rule-12 to suggest that Form “F” is the only mode for discharging the burden that lies on the dealer. Section 6-A is an enabling provision and furnishing of declaration Form “F” cannot be held to be mandatory.

37. Petitioner’s case is that dispatch of 38,881 KL of HSD and 29,728 KL of SKO from the Lighterage Terminal of Paradeep to outside the State, i.e., Haldia has not been effected by it either by way of inter-state sale or on stock transfer basis. It has not moved its own product outside the State of Odisha in tankers nor has sold any product by way of inter-state transaction to other Oil Companies. In view of the safe keeping arrangement, the alleged transaction does not fall within the ambit and/or sphere of Section 3(a) of the CST Act. In the reassessment proceeding the petitioner filed one Memorandum of Understanding (MOU) with other Oil Companies for safe keeping of their petroleum products and contended that on the basis of such MOU stock of HSD and SKO kept with the petitioner-Company were transferred to outside State on their request. The goods in question had never moved from Paradeep to Haldia pursuant to any contract of sale and no sale was concluded at any point of time at Haldia. There was no movement of goods resulting completed sale, system and procedure adopted by BPCL and other Companies cannot be treated as inter-state sale in the process of trade and commerce. The movement of goods from Paradeep to Haldia cannot be linked to any supply or sale of goods and the said finding of the opposite party is based on surmise and presumption.

38. The above claim of the petitioner with regard to transfer of the goods in question from Lighterage Terminal at Paradeep to Haldia has not been accepted by the Assessing Officer and he came to the conclusion that the said transactions are by way of interstate sale, inter alia recording the following findings in the impugned reassessment order.

> "It needs further mention that the goods of BPCL which are not intended to be supplied to any other oil company are taken delivery of by BPCL at the port of destination. Where, it is intended for supply to other oil company, it is delivered accordingly. Consignment in one tanker is taken delivery of by BPCL in part and the balance by other oil company. This shows that the cargo owned by BPCL and despatched from Paradeep terminal were all not intended for delivery to BPCL outside the state. The cargo, to the extent, it has been received by BPCL, can only be transfer of stock to self outside the State of Orissa other wise than by way of sale and not the entire consignment of cargo shipped from Paradeep.
>
> In view of the position so stated, despatches of goods outside the State of Orissa by sea through Paradeep terminal by BPCL, claimed ambiguously as safe keeping of the product of HPCL in BPCL storage tanks and loading of the said product on behalf of HPCL in the tanker, based on advice from HPCL, is contrary to material evidence and substantial part of the said transactions is inter state sale liable to tax in the hands of BPCL in the State of Orissa.
>
> In the situation, the conclusion appears to be irresistible that there has been evasion of tax by a corporate oil giant in the public sector. The delivery of 38,881 KL of HSD and 29,728 KL of SKO by BPCL ex-tanker at the Part of destination at Haldia to other oil companies i.e. IOC/IBP/HPC, though are clearly inter state sales falling under section 3(a) of the CST Act, have not been reflected in the return filed for the respective return period and have been kept away from the knowledge of the statutory authorities. The returns don't reflect the true and correct picture of the business transactions although it has been so declared in the returns itself. The declarations furnished don't appear to have been truthfully made."

39. Thus, the Assessing Officer has already recorded its finding on the facts and materials available on record. He has taken a view on the basis of various factual aspects involved in the transactions and come to the conclusion that the transactions in question are inter-state sales effected by

the petitioner. Therefore, there is no reason to remand the matter to him to examine this issue once again. The petitioner may avail the alternative remedy of appeal which is a substantive statutory right. Under the CST Act read with OST Act and Rules framed thereunder, there is provision for First Appeal and Second Appeal. The First Appellate Authority being the fact finding Authority the factual controversy involved in the case can be effectually adjudicated by the said Appellate Authority. Needless to say that appeal is continuation of assessment and appellate authority is empowered to re-appreciate the facts and material evidence available on record. Therefore, it is a fit case where the petitioner should approach the First Appellate Authority for appropriate relief.

40. In the fact situation, it is open to the petitioner to approach the First Appellate Authority challenging the impugned assessment order (Annexure-5), if so advised, taking all its contentions with regard to alleged transfers of HSD and SKO in question from the Lighterage Terminal at Paradeep to outside the State, i.e., Haldia and that the petitioner is not liable to pay tax under the CST Act. If any such appeal is filed within two weeks from today, the Appellate Authority is directed to adjudicate that issue, after affording opportunity of hearing to the petitioner, and pass order in accordance with law.

41. With the aforesaid observations and directions, the writ petition is dismissed.

Writ petition dismissed.

2012 (II) ILR- CUT- 239

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

W.P.(C) NO. 9140 OF 2011 (Dt.24.04.2012)

PRABIR KUMAR DAS …….. Petitioner.

.Vrs.

COMMISSIONER-CUM-SECRETARY, HEALTH DEPTT. GOVT. OF ORISSA, BBSR & ORS. …….. Opp.Parties.

P.I.L. – Mass cataract operation conducted by one NGO – Patients lost their eye sight – Lack of pre and post operation care – Negligence of NGO, doctors and the district administration – MOU signed to ensure complete incident free camp – Persons lost eye sight became disabled to earn their livelihood – Held, State Government to pay compensation and cause an inquiry to find out who is responsible for the loss of eye sight and to recover the entire amount from him.

(Para 17 & 18)

Case law Referred to:-

2011(I) OLR 443 : (Registrar (Judl.), Orissa High Court, Cuttack-V-State of Orissa).

For Petitioner - In person.

For Opp.Parties- Mr. R.K.Mohapatra, Govt. Advocate (for State)
M/s. Yeeshan Mohanty, Sr. Advocate, P.C.Biswal (for JMJ Grace Vision Netralay).

B.N.MAHAPATRA,J. This writ petition has been filed in the nature of Public Interest Litigation for grant of compensation to the persons who lost their vision after undergoing mass cataract operation organized at the Govt. Hospital (Sub-Divisional Hospital), Dharmagarh in Kalahandi District of Orissa between 9.9.2010 and 28.9.2010 and for prescribing guidelines/directions to ensure safety of patients during conduct of mass operations for the benefit of poor citizens.

2. Petitioner's case in a nutshell is that from 9.9.2010 to 28.9.2010 eyes of some poor persons were operated by the doctors in mass cataract

operation camp organized at the Govt. Hospital (Sub-Divisional Hospital), Dharmagarh in Kalahandi district. The said mass cataract operation was organized by JMJ Grace Vision Netralaya (for short, "GVN"), a non-government organization based in Sambalpur. Sixteen patients have lost their eyesight due to the alleged negligence of the doctors/authorities during the aforesaid mass cataract operation.

3. Mr. Prabir Kumar Das, an Advocate, who is also a Human Rights Activist, submitted that the present incident is the second incident in which 16 poor persons have lost their eyesight. During January 2007, 13 patients lost their eyesight after undergoing mass cataract operation in the District Headquarters Hospital, Bhawanipatna. The poor persons suffered from loss of eyesight and other ailments due to the negligence, carelessness and indifferent attitude of the doctors and authorities, who failed to ensure proper care during the mass cataract operation and its aftermath. The non-government organizations organizing such mass operations do not take proper care of the patients or educate them to ensure post-operation care. The poor and illiterate persons become victims because of lackadaisical approach of the non-government organizations as well as the authorities concerned, who put much emphasis only to achieve the target to create record and appropriate the grant/aid allocated for the purpose. The patients, who belong to poor and weaker sections of the society staying in rural areas are unable to incur expensive litigation to enforce their rights or to remedy the injustice caused to them. The sufferings of the poor victims were highlighted by the media. After operation, the only Co-ordinator was there but no doctor was available. Placing reliance on the judgment of this Court in the case of Registrar (Judl.), Orissa High Court, Cuttack v. State of Orissa , 2011 (I) OLR 443, Mr. Das prayed for granting compensation to the victims and prescribing the guidelines/directions to ensure safety of patients during mass operations.

4. The Chief District Medical Officer, Kalahandi in his affidavit dated 18.4.2011 submitted that National Programme for Control of Blindness (in short, 'NPCB') allowed Non-Government Organizations (in short, 'NGOs') for providing eye care service. One NGO namely JMJ Grace Vision Netralaya, Sambalpur approached CDMO, Kalahandi as well as Collector, Kalahandi for according permission to conduct cataract surgical camp in Kalahandi district. Basing on the record of past successful performance of cataract surgery by surgeons of GVN, Sambalpur, the said NGO was allowed to conduct cataract surgical camp at S.D. Hospital, Dharmagarh from 9.9.2010 to 27.9.2010 vide order no.4249 dated 8.9.2010. A Memorandum of Understanding (in short, 'MoU') was signed accordingly.

During the period from 16.9.2010 to 27.9.2010, the NGO GVN, Sambalpur with their own instruments and equipments and staff and in accordance with the terms and conditions enumerated in the MoU did operation of 1210 cases. Ophthalmic Surgeons posted at Headquarters Hospital, Bhawanipatna and Sub-Divisional Hospital, Dharmagarh were also instructed to visit/supervise the camp site. Dr. Jitendra Kumar Panda, Assistant Surgeon (Opth.), SDH, Dharamgarh initially detected 26 numbers of complicated cataract cases during the period when the GVN staff were not there to follow up and brought those cases to the notice of CDMO, Kalahandi on 22.11.2010 and thereafter the CDMO in consultation with the Collector, Kalahandi directed the said NGOs to shift the complicated cataract cases to LV Prasad Eye Institute, Patia, Bhubaneswar for treatment. Simultaneously, Ophthalmic Assistant posted at various Government Hospitals and Medical Officers, CHCs were requested for screening of all the operated cases at SDH, Dharamgarh camp during November, 2010 by convening an emergency meeting on 25.11.2010. Under the direct monitoring of District Administration, the concerned NGO shifted the cataract patients suffering from complications to LV Prasad Eye institute, Patia, Bhubaneswar phase wise on different dates between 23.11.2010 to 1.12.2010 for super specialist intervention. In total 34 numbers of complicated cases were detected. Basing on successful performance, the NGO was entrusted to conduct cataract surgical camp with a condition to ensure complete incident free camp with 100% efficacy. The CDMO, Kalahandi vide his Office Order deployed doctors on different dates for supervision of the Eye Camp and he himself visited the camp. The Sub-Collector, Dharmagarh-cum-Chairman RKS Sub-Divisional Hospital, Dharmagarh also visited the camp every single day. The NGO, GVN operated 1210 cases from 16.9.2010 to 27.9.2010 with their own instruments/equipments and staff as per conditions enumerated in the MoU. The Rogi Kalyan Samiti gave support by providing generators, water and food for patients, volunteer arrangements, mobilization of ASHA and Anganwadi workers for detection of cases, coordination of transportation of patients etc. Meticulous care was taken of the patients operated upon and detailed instructions were given to their attendants for prevention of post-operative complications and they were directed to attend the Post–operative check up from 1.11.2010 to 10.11.2010 which was scheduled to be conducted by GVN. As such the district administration on its part as per terms and conditions of MoU has taken maximum care for success of such Eye Camp and the allegation of not taking proper care, as stated in the writ petition by the petitioner is not true. Besides, pursuant to CDMO's letter No.1957 dated 16.04.2011, complicated ophthalmic cases, operated between 16.9.2010 to 27.9.2010 at Sub-Divisional Hospital, Dharmagarh, the patients had been shifted in a batch on 17.4.2011 and another batch was scheduled to be shifted on 19.4.2011 to MKCG Medical College & Hospital,

Berhampur for examination and necessary treatment. As per the terms and conditions of the MoU signed between the District Blindness Control Society and GVN, Sambalpur on 8.9.2010, the onus/responsibility lies with the GVN, Sambalpur to provide well qualified doctors, equipment and also to take care of post operative follow up and as part of moral and overall responsibility the District Health care Administration through Rogi Kalyan Samiti, Dharmagarh, CDMO and his medical team extended all support for success of the Eye Camp.

5. Learned Government Advocate Mr. R.K. Mohapatra referring to report of District Judge, submitted that cases of 34 patients were referred to LV Prasad Eye Hospital and 16 persons lost their eye sight because of negligence of the NGO GVN.

6. Mr. Y. Mohanty, leaned Senior Advocate appearing on behalf of GVN submitted that the NGO concerned had undertaken 25 operation camps. All except this camp were successful. Every case was taken by NGO GVN. Specialists were present at the time of operation. All expenses for treatment in LV Prasad Eye Hospital were borne by the NGO. Pre-operation and post-operation care was taken with the help of doctors. All the patients have not turned up for first and second check up. They were advised to take certain care and the NGO provided dark glasses and power glasses to the patients.

7. National Programme for Control of Blindness (in short, 'NPCB') and the strategy of "Vision-2020- the Right to Sight" of the Government of India permits the NGOs to conduct Eye Care Service programs in different areas of the country. Because of the aforesaid scheme/project, the GVN has been set up in the district Headquarters of Sambalpur in the Western Orissa. The service area comprises the districts of Sambalpur, Jharsuguda, Bargarh, Bolangir, Kalahandi and Kandhamal. The GVN conducts community outreach camps to screen needy patients essentially for cataract blindness, wherein surgery is conducted, medicines and dark-glass spectacles are supplied and thereafter power glass spectacles are provided to the patients free of cost including transportation, boarding and lodging along with proper post-operative care at the cost of the GVN as per the Scheme of NPCB of the State & Central Government. The GVN has all necessary and adequate infrastructures, requisite equipments and trained manpower to undertake cataract surgery having facilities for Intra Ocular Lens implantation using Operating Microscope Sterilization equipment and other equipments, required and trained Eye Surgeons. GVN has been duly identified as a qualified NGO by the District Blindness Control Authority fulfilling all the criteria thereof as per the Scheme for participation of voluntary

Organizations for the year 2006 as issued by the Director General of Health Services, Ministry of Health & Family Welfare, Government of India, New Delhi.

8. Since the date of its inception in August, 2007, the GVN has conducted near about 25,000 cataract eye operations successfully in different areas of Western Orissa, in collaboration and under the direct supervision of the District Medical Authority of Government of Orissa, with an aim to prevent/cure blindness in the under-served parts of Odisha. On 01.06.2010, the JVN sought for permission from the Collector, Kalahandi to conduct free cataract surgery camps at SDH, Dharamgarh. On 02.09.2010, the Collector duly accorded permission. Pursuant to such permission, the MoU was signed on 08.09.2010. Thereafter, GVN conducted publicity campaigns throughout the Dharmagarh Sub-Divisional area for public awareness with effect from 03.09.2010 to 14.09.2010, regarding conduct of preliminary screening eye-camps at different places of Dharmagarh Sub-Division with effect from 15.09.2010 to 26.09.2010 for detection of cataract affected patients and holding of eye surgery camp at SDH, Dharmagarh with effect from 16.09.2010 to 25.09.2010 for conducting cataract surgery. On 09.09.2010, Orientation Training Programmes were conducted by the GVN at SDH-Dharmagarh and Town Hall of Junagarh for about 290 Asha Workers and Anganwadi Workers, with prior permission and active collaboration of the District Administration. The main object of such training programme for Asha and Anganwadi workers was to train them to identify the cataract patients, motivating them to go for cataract surgery, intimating them about the camp date and place and to follow up with post-operative counseling at the door steps in their respective catchment areas regarding regularly putting the eye drops, taking precautions as instructed by the medical staff and also in the event of any kind of complication or discomfort in the operated eyes, to send them to SDH-Dharamgarh and/or to intimate the GVN immediately.

9. On 15.09.2010, preliminary screening eye camps were held by the qualified Ophthalmic Assistants at different places of Dharamgarh Sub-Division. The said screening camps continued till 26.09.2010 in the said areas. In the Screening camps, the cataract patients having been identified and motivated for free cataract surgery with their respective consent, they were brought to SDH-Dharamgarh for further diagnosis on the same day and thereafter for cataract surgery on the next day for those who are found fit for such surgery. On the next date, the cataract surgeries were conducted at SDH-Dharamgarh by the qualified and experienced eye Surgeons with the assistance of trained para-medical staff of GVN, under strict monitoring and

supervision of the medical and sub-Divisional authorities. The eye surgery camps were held with effect from 16.09.2010 to 25.09.2010 at SDH Hospital, Dharamgarh by JVN. Taking into consideration, the large number of cataract patients, the tenure of the camp was extended for another two days, i.e., till 27.09.2010, with due permission. The Specialist eye surgeons of GVN have conducted operations with much care and caution after proper diagnosis. As per Office Order No.4276 dated 09.09.2010 CDMO, Kalahandi, Dr.A.K.Mund, ADMO (Med.), Kalahandi, Dr.Lalishree Bhokta, Specialist in Ophthalmology, DHH, Bhawanipatna, Dr.Nivedita Sahoo, Specialist in Ophthalmology, DHH, Bhawanipatna and Dr.J.K.Panda, MS-Ophthalmologist (Assistant Surgeon) SDH-Dharamgarh have supervised the camp operations at the SDH-Dharamgarh on day-to-day basis in regard to sterilization standards, systems and procedures and allied post-operative activities.

10. Mr. Mohanty, further submitted that in the aforesaid eye camps, a total of 1210 numbers of cataract operations were conducted and the patients were checked, operated, discharged and taken to their respective destination after providing them required medicines and dark spectacles and also counselling them and their respective attendants on Post-Operative Care and the same were duly mentioned and/or narrated on the reverse-side of the Patient Discharge Slip. Such instructions pertaining to the Post-Operative Care contain the details of medicines, i.e., eye-drop and the manner of using the same and also general instructions regarding eye care such as not to wet the head, to keep distance from dust, sunshine, etc., to use dark-spectacles regularly, not to take any tobacco, alcohol, smoking and not to put any pressure on the eye for one and half months. Being satisfied with the performance of the N.G.O. during the eye camp the Sub-Collector, Dharmagarh wrote a “Letter of Appreciation” to the GNV. After operation, patients were discharged. After a week, they were called upon for follow-up checking. The said follow-up checkings were conducted by the eye Surgeons of the GVN. Though the eye operation camp was closed on 27.09.2010, the eye Surgeons and staff of GVN left the SDH-Dharamgarh on 28.09.2010 afternoon after conducting the 1st follow-up checking in the morning. During the remaining dates of 1st follow-up checking from 29.09.2010 to 05.10.2010, Mr.Paresh Kumar Rout, the Coordinator of GVN was all along present at SDH-Dharmagarh. During that period, the remaining patients who had turned up, were facilitated by the aforesaid Coordinator, in due consultation with the Government Resident Ophthalmologist Dr.J.K.Panda M.S. (Opth.), Assistant Surgeon, SDH-Dharamgarh. The number of operated patients, who attended the 1st follow-up and also the 2nd

follow-up checks, is well evident from the report of Dr.P.K.Singh, Eye Specialist, GVN.

11. On 03.10.2010 afternoon, an eye-operated patient, namely, Biswamitra Dhurua met Mr.P.K.Rout, the Coordinator of GVN. On being asked, the said patient complained of pain in his operated left eye and watering. The said Coordinator immediately sent him to the base Hospital at Sambalpur. The said patient was admitted to the base Hospital from 04.10.2010 to 07.10.2010 and was given proper treatment by the eye specialist of GVN. After suitable treatment, he was discharged on 07.10.2010 upon his request. On the last day of the 1st follow-up check-up i.e., 05.10.2010, another patient, namely, Rabi Chandan complained of pain in his operated left eye before Dr.J.K.Panda, while the Coordinator of GVN Mr.P.K.Rout, who was present there, immediately sent him to base Hospital at Sambalpur. From 06.10.2010 to 09.10.2010 he was admitted to the base Hospital at Sambalpur and was provided with proper treatment. After required treatment, he was discharged on 09.10.2010 upon his request. The Government Ophthalmologist at SDH-Dharamgarh was duly intimated and requested by the GVN authorities to refer the eye-operated patients to the base Hospital at Sambalpur immediately in the event of report of any complain in their operated eyes and/or noticed by him.

12. On the rival contentions, the following questions arise for consideration by this Court:

(i) Whether 16 persons named in the writ petition who suffered from post-operation complicacies resulting partial/complete loss of their eye sight are entitled to any compensation?

(ii) Who is liable to pay the compensation ?

(iii) What order?

13. All the above questions being interlinked, they are dealt with together.

Admittedly, the NGO, JMJ Grace Vision Netralaya, Sambalpur was permitted by the CDMO, Kalahandi to hold the eye camp from 16.9.2010 to 25.9.2010 at Sub-Divisional Hospital premises of Dharmagarh which stood extended till 27.9.2010. One MoU was signed on 8.9.2010 between the District Blindness Control Society and JVN, Sambalpur. During the aforesaid period, the NGO-JVN, Sambalpur with their own doctors, instruments, equipments and staff operated upon 1210 cases in the mass cataract

operation eye camp. In the said operation camp 16 persons lost their eyesight partially/fully.

14. Needless to say that poor people who were suffering from cataract blindness and were unable to afford for cataract operation, being assured of successful cataract operation by the NGO supported by the District Administration, reposed confidence in them and expressed their willingness for such operation. But in the said operation, and/or due to lack of post-operative care, if those poor people lost their eyesight, this is certainly an unfortunate incident. A poor man who earns his livelihood by working as a labourer or as a marginal farmer, after becoming blind he will be totally disabled to earn his livelihood. Therefore, utmost care should be taken while dealing with cataract operation of those persons. Because of their poverty they expressed their willingness for operation in the eye camp and in the eye camp operation instead of getting good vision if they lost their vision totally or partially, the back bone of their family is broken. It goes without saying that eye sight is most valuable for a human being. If for any carelessness, a person is deprived of his eye-sight, the person(s) responsible for such loss/damage must compensate the same.

15. In the instant case, as per the affidavit of CDMO, Kalahandi, the NGO-GVN, Sambalpur with their instruments, equipments and doctors operated upon 1210 cases in mass cataract operation camp. It is further stated by the CDMO that Ophthalmic Surgeons posted at Headquarters, Bhawanipatna and Sub-Divisional Hospital, Dharamgarh were also instructed to visit/supervise the camp site. Dr. Jitendra Kumar Panda, Assistant Surgeon (Opth.) SDH, Dharamgarh initially detected 26 numbers of complicated cataract cases during the period when the staff of JVN were not there for follow up and brought those cases to the notice of CDMO, Kalahandi on 22.11.2010 and thereafter the CDMO, Kalahandi in due consultation with the Collector, Kalahandi directed the NGO-GVN, Sambalpur to shift the complicated cataract cases to L.V. Prasad Eye Institute, Patia, Bhubaneswar for further treatment. Simultaneously, Ophthalmic Assistants posted at various Government Hospitals and Medical Officers, CHCs were requested for screening of all the operated cases at SDH, Dharamgarh camp during November 2010 by convening an emergency meeting on 25.11.2010. The concerned NGO shifted the cataract patients to L.V. Prasad Eye Institute, Patia, Bhubaneswar phase wise on different dates between 23.11.2010 and 01.12.2010 for super specialist intervention. In total cases of 34 complicated patients were detected. The CDMO, Kalahandi in his affidavit further stated that vide his Office Order, he deployed doctors on different dates for supervision of the Eye Camp and he

himself visited the camp. The Sub-Collector, Dharamgarh-cum-Chairman, RKS Sub-Divisional Hospital, Dharamgarh visited the camp every single day. The NGO-GVN operated 1210 cataract cases from 16.9.2010 to 27.9.2010. Thus, within a period of 11 days 1210 persons were operated. The number of doctors employed are not adequate to operate 1210 persons successfully within such short span of time. As it appears, the operations were conducted hastily. Neither the NGO-GVN nor the District Administration took any step to prevent taking up cataract operations in such a haste manner. In a haste, there is every chance of unsuccessful operation, more particularly the eye operation. Both the District Administration and the NGO should have kept in their mind that in case of failure of eye operation, it would result in blindness of the person and ultimately the person would lose the source of his bread and butter.

16. In course of hearing of this petition, the District Judge-cum-Chairman District Legal Services Authority, Kalahandi was directed by this Court vide order dated 6.4.2011 to conduct an inquiry and submit a report in this regard. In this report it is stated that as per the MoU signed between the District Blindness Control Society and GVN, Sambalpur on 8.9.2010 the onus/responsibility lies on GVN, Sambalpur to provide well-qualified doctors, equipments and also to take care of post operative follow up and as part of moral and overall responsibility, the District Health Care Administration through Rogi Kalyan Samiti, Dharamgarh, CDMO and his medical team extended all supports for success of the eye camp. On 11.4.2011 all the 16 affected persons, the Sub-Divisional Medical Officer in charge of Dharmagarh, the Eye Specialist of SDH, Dharmagarh Dr. Prasant Kumar Singh and Mr. S.P. Clemant, the M.D.-cum-C.E.O. of NGO GVN, Sambalpur were examined. According to learned District Judge-cum-Chairman, District Legal Services Authority, 16 persons, as has been listed, suffered from post operation complications resulting in partial/complete loss of their eye-sight. The Eye Specialist of SDH, Dharamgarh supervised the entire operation and after operation none from the GVN came to Dharamgarh for post-operation care except the local Co-ordinator and social worker. No doctor came to the camp for that purpose. Undoubtedly, with the permission of CDMO, the NGO conducted the cataract operation in the eye camp and in the said camp 16 persons lost their eyesight fully or partially. Not only the NGO, but the District Administration should have taken every care during operation and post-operation period. In the instant case, both the District Administration and NGO are claiming that they have discharged their duties and responsibilities perfectly and without any negligence. But fact remains that 16 patients in the cataract operation undertaken by NGO-GVN in the eye

camp with the permission and supervision of the CDMO have lost their eyesight fully or partially.

17. In the fact situation, we direct the State Government to pay a compensation of Rs.2.5 lakh (Rupees two lakhs and fifty thousand) to each of the persons, who have lost their eye-sight fully, and Rs.1.75 lakh (Rupees one lakh and seventy five thousand) to each of the persons who have lost their eyesight partially. We further direct the State Government to cause necessary enquiry through an Officer not below the rank of a Secretary of any Department of the Government of Odisha to find out as to who is responsible for loss of eyesight of these 16 persons. If it is found that the NGO is responsible for this unfortunate incident, Government is at liberty to recover the entire amount of compensation directed to be paid by it from the aforesaid NGO-GVN.

18. Before parting with the matter, we make the following observations and directions :

(i) After granting permission to any NGO to hold eye camp for cataract operation, the Government must monitor and supervise the entire work of the concerned NGO.

(ii) Necessary guidelines in detail may be issued by the Government for taking up pre-operation and post-operation care.

(iii) Before granting permission to an NGO, the said NGO must ensure that operation in camps must be undertaken by qualified/efficient doctors.

(iv) The patients must not be allowed to leave the camp immediately after operation, wherever the situation so demands.

(v) Before granting permission, the District Administration must be satisfied that the N.G.O. has adequate infrastructure facilities, equipments and required numbers of qualified doctors and Assistants to undertake the operation work in the camp keeping in view the number of persons to be operated.

(vi) After operation in the eye camps, good quality sun glass, power glass and required medicines should be provided to the patients.

(vii) In case of failure of the operation because of laches on the part of any NGO and/or Government authority, the suffering patients must be adequately compensated immediately.

These are all necessary to achieve the avowed object enshrined in the Scheme of the Central Government on the basis of which the NGOs are functioning and provided with financial assistance.

19. With the aforesaid observations and directions, the writ petition is allowed, but without any order as to costs.

Writ petition allowed.

2012 (II) ILR- CUT- 250

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

W.P.(C) NO. 25622 OF 2011 (Dt.24.10.2011)

ISWARLAL JAISWAL … …. Petitioner.

.Vrs.

COMMISSIONER OF COMMERCIAL TAXES, ORISSA & ORS. …. … Opp.Parties.

ORISSA VAT ACT, 2004 (ACT NO.4 OF 2004) – S.74 (6).

During pendency of proceeding U/s. 74 (5) a party interested in the subject matter may be impleaded – Party-transporter watching the proceeding – Contested by consignee sitting on the fence - Can not be entitled to relief having colluded. (Para 7,8,9)

Case law Referred to:-

(2005)142 STC 88 : (A.B.C.(India) Ltd.-V- State of Assam & Anr.)

For Petitioner - Mr. Santosh K. Mishra.

For Opp.Parties - Mr. R.P.Kar, Standing Counsel (Commercial Taxes Deptt.)

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to direct opposite parties 1 and 2 to release the vehicle No.OR-14-U-8398 belonging to the petitioner detained at Unified Checkgate, Jamsolaghat on the ground that such detention of the vehicle is illegal and arbitrary.

2. Petitioner's case in a nutshell is that he engages his vehicle for the purpose of transportation. M/s. Gupta Roadways, Jakaria Street, Kolkata asked the petitioner to carry the goods of opposite party No.3-M/s. Vinayak Agro Industry from Kolkata to Rourkela on hire payment basis. 16 MT of scrap spring patti leaf was loaded in the vehicle of the petitioner on 20.08.2011. M/s Gupta Roadways issued consignment note No.56236 and handed over the documents, i.e., tax invoice, challan of Lokenath Traders, Kolkata, manifest No.GR/4224/11 dated 20.08.2011 along with statutory way bill No.AAA3391612 in favour of opposite party No.3. When the vehicle reached at Jamsola Check post on 22.08.2011, the driver of the vehicle produced all the documents in connection with aforesaid goods before opposite party No.2 for verification. On verification and examination of documents with reference to goods, opposite

party No.2 alleged that the goods were not scrap spring patti leaf rather the goods were auto parts (spring leaf in sets). On the basis of the aforesaid allegation, opposite party No.2 issued notice dated 24.08.2011 to opposite party No.3-M/s Vinayak Agro Industry and handed over the same to the driver of the petitioner. On receiving said notice, the petitioner contacted M/s Gupta Roadways as well as opposite party No.3 and appraised them about the facts of the case. The petitioner handed over the notice dated 24.08.2011 to opposite party No.3. The dispute regarding levy of tax and penalty under the OVAT Act by opposite party No.2 had not been resolved till filing of the writ petition. The vehicle is standing being detained by opposite party No.2 since 22.08.2011. Hence, the present writ petition is filed for release of the vehicle.

3. Mr.Santosh Ku. Mishra, learned counsel appearing on behalf of the petitioner submitted that the petitioner being the transportor had produced the required documents, i.e., bills, challans, bilities, statutory way bills and despatch memo in terms of Section 74(2) of the Orissa Value Added Tax Act, 2004 (for short, 'OVAT Act') before opposite party No.2. So far as the petitioner is concerned, he had not committed any offence spelt out under Section 74(2) of the OVAT Act. The petitioner had carried all required documents and produced the same, when the vehicle was stopped for verification and also gave all information in his possession relating to the goods and allowed inspection of the goods to opposite party No.2 in compliance of Section 74(2) of the OVAT Act. It was further submitted that opposite party No.2 has not issued any notice to petitioner alleging commission of offence by him in terms of clause (b), (c), (d) or (e) of sub-section(2) of Section 74 or provisions of clause (a) of sub-section (4) of Section 74. The vehicle is exposed to sun and rain and is being damaged. The petitioner has purchased the vehicle by taking loan from Tata Motors Finance Limited, Rourkela and he is required to pay the instalments to the financing Company. The petitioner is losing income each and every day as his vehicle is being detained without any fault on his part. Despite petitioner's prayer to opposite party No.2 to release his vehicle, the same did not yield any result. Concluding the argument, learned counsel Mr. Mishra prayed for release of the vehicle.

4. Mr.R.P.Kar, learned Standing Counsel appearing on behalf of the Revenue tried to justify the action of opposite party No.2 in detaining the vehicle of the petitioner on the ground that the documents produced before the Check Gate Officer with regard to goods in transit were found to be false and forged.

5. On rival contentions of the parties, the question that falls for consideration by this Court is as to whether opposite party No.2-Assistant Commissioner of Commercial Taxes, Unified Check Gate, Jamsalaghat, Mayurbhanj is justified in detaining the vehicle of the petitioner.

6. Case of the opposite party-authorities is that on verification of documents produced by the driver of the vehicle before the S.T.O., Unified Check gate, Jamsolaghat (for short, "S.T.O.") with regard to the goods carried in the truck in question the stand of the petitioner that the goods loaded in the vehicle were scrap spring patti leaf was found to be false/forged. The description of goods carried in the vehicle has been declared in the document as scrap spring patti leaf but the goods were in good condition and each set consists of different number of leafs of auto parts (spring leaf in sets) to be used in different vehicles. After issuing show cause notice and considering the explanation of opposite party No.3, opposite party No.2 levied tax and penalty both under the OVAT Act and the Orissa Entry Tax Act. Being aggrieved by the imposition of tax and penalty both under the OVAT Act and the OET Act, opposite party No.3 approached this Court in W.P.(C). No.23516 of 2011 which was disposed of by this Court with liberty to the opposite party No.3 to approach the revisional authority and the revisional authority was directed to constitute a technical committee to find out status of the goods as to whether the same were old one or new. Pursuant to the order of this Court, technical committee was constituted which opined that the goods carried in the vehicle in question were new one. On the basis of such report, the Commissioner in its order dated 15.09.2011 upheld the order of S.T.O. with regard to levy of tax and penalty under the OVAT Act. Being dissatisfied with the said revisional order, opposite party No.3 approached this Court again in W.P.(C). No.25628 of 2011 and this Court vide judgment dated 24.10.2011 upheld the order of opposite party No.1. In view of the same, opposite party No.3 is liable to pay the amount of tax and penalty of Rs.11,34,000/- under the OVAT Act.

7. As per the provisions of sub-section (6) of Section 74, during pendency of a proceeding under sub-section (5) if one prays for being impleaded as a party to the case on the ground of involvement of his interest therein, the officer-in-charge or the authorised officer referred to in that sub-section if satisfied may permit him to be so impleaded and thereafter all the provisions of this Section shall mutatis mutandis apply to him.

8. In the instant case, in paragraphs 6 and 7 of the writ petition, it is averred that opposite party No.2 issued notice dated 24.08.2011 addressed to opposite party No.3 and handed over the same to the driver of the petitioner and on receipt of such notice the petitioner contacted M/s Gupta Roadways as well as opposite party No.3 and appraised them about the facts of the case. In his writ petition, the petitioner has stated nothing with regard to taking step(s) in terms of sub-section (6) of Section 74 before opposite party No.2 to implead him as a party to the case on the ground of involvement of his interest therein.

9. In the instant case, not only the waybill and invoice copy but also the manifest No.GR/4224/11 dated 20.08.2011 issued by the transporter M/s. Gupta Roadways attached to the writ petition as Annexure-2 series disclose that the goods carried in the vehicle were scrap spring patti leafs. The Revisional Authority in its order pointed out that in all the documents, such as consignee's own government waybill, consignment note of transferer and tax invoices of the consigner there is false declaration of description of the commodity/goods. Moreover, petitioner's conduct in not taking steps as provided under Section 74(6) of the OVAT Act and watching from the side lines the outcome of the attempts made by the consignee opposite party no.3-M/s. Vinayak Agro Industry to release the goods does not appear to be clean. This is clearly indicative of collusion between the present petitioner and opposite party No.3-consignee for which both the S.T.O. and the Revisional Authority in their orders directed the consignee for payment of tax and penalty for release of the vehicle.

10. The Hon'ble Supreme Court in ***A.B.C. (India) Ltd. V. State of Assam & Anr.,*** (2005) 142 STC 88 held as follows:-

> "…..As per the accepted norms of taxation the jurisdiction whatever is ancillary or subsidiary provision necessary for achieving the object of a tax statute is covered by Entry 54 of List II of the Seventh Schedule to the Constitution of India. The entries in the legislative List have a very wide meaning and scope and should have a broad interpretation so as to make provisions in the Act workable and in the interest of the Revenue. The obligation imposed upon the transporters under sections 42 and 44 of the Act is also a part of such preventive measures against any evasion of taxes and the same should not be read in a narrow sense.
>
> xx xx xx
>
> In our view, the transporters are not strangers to the sale or purchase of goods; to the contrary are parts and parcels and are directly involved in storing the goods purchased or sold by, and in many cases such, transactions are fictitiously carried on in false names and addresses besides false classifications vis-à-vis transportation of such goods in and outside the State making themselves party to the episode of such fictitious transactions for the sole purpose of evasion of tax by the dealers purchasing and selling such goods."

11. In view of the above, we are not inclined to issue a writ of mandamus to opposite parties 1 and 2 to release the vehicle of the petitioner without

realisation of penalty imposed under the OVAT Act in addition to tax payable on the value of the goods carried in the vehicle as provided under sub-section (7) of Section 74 of the OVAT Act. However, we make it clear that immediately after realization of the tax and penalty demanded under the OVAT Act to the tune of Rs.11,34,000/-, the S.T.O. shall release the vehicle No.OR-14-U-8398.

12. In the result, with the aforesaid observation and direction, the writ petition is dismissed.

Writ petition dismissed.

2012 (II) ILR- CUT- 255

V. GOPALA GOWDA, CJ & S. K. MISHRA, J.

W.P.(C) NOS. 17638/2011 & 6287/2012 (Dt.25.04.2012)

SASHIPRAVA BINDHANI & ANR. … …..Petitioners.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART. 226.

Witch craft and witch-hunting – Most of the victims are women – Prevalent mainly in tribal districts – It mainly happens due to ignorance and superstition etc. – Convention on the Elimination of all forms of discrimination against women (CEDAW) endorsed witch-hunting as one of the harmful practices – Legislation required to prevent such problem – Held, direction issued to the State Government to introduce an appropriate bill in the State legislature within one year – Till a suitable legislation is passed the State Authorities shall take preventive steps to tackle the menace of witch-hunting.

(Para 13,14)

Case law Referred to:-

AIR 1997 SC 3011 : (Bishaka & Ors.-V- State of Rajasthan & Ors.)

For Petitioner - M/s. Sujata Jena, G.B.Jena & Satyabhama Nath.

For Opp.Parties- Mr. Debashis Panda, Govt. Advocate.

For Petitioner - M/s. Kshirod Kumar Rout, T.K.Nayak, C.R.Mohanty, Ms. J.Naik, S.K.Rout.

For Opp.Parties – Mr. Debashis Panda, Govt. Advocate.

S.K.MISHRA, J. In these writ petitions, the petitioners pray to direct the State Government for framing of guidelines to deal with the cases of witch-hunting and to protect women from such hunting till legislation is framed in this regard.

2. The petitioners in their applications have described the instances of murders on the allegations that the deceased was practicing witchcraft. The petitioners have pleaded about several such incidents in the State of Orissa. It is further pleaded that the persons committing the murder do so under the influence of 'Gunias'. As such, it is pleaded that the propagators of the crime

are generally not in a fit state of mind while committing the crime. The person often believes that he is doing the right thing while committing murder of a person, who is alleged to be practicing witchcraft. Such state of affairs is prevalent in all the tribal districts of the State.

3. The petitioner pleaded that India is a signatory to the universal declaration of human rights to give protection to women from discrimination and all sorts of violence against them. Besides, the United Nations' International Covenant on Civil and Political Rights prescribe that all persons are equal before law and entitled to equal protection of law. Government of India is a signatory to the same in the year 1966. The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) resolved that the countries which have ratified the same should take appropriate steps to eliminate all forms of discrimination against women. Article 5(a) of CEDAW further provides that the State shall take appropriate measures to modify social and cultural patterns of conduct of men and women. Witch-hunting, which is prevalent in several States, leads to dispossession, torture and murder but as of date, although India is a signatory to CEDAW, no steps have been taken to enact appropriate law to curb the menace of witch-hunting, which is prevalent in this State. States like Bihar, Jharkhand and Chattisgarh have already taken steps to eradicate such practices but our State has not taken any steps with regard to eradicating such practice. Therefore, the petitioner prays that appropriate direction be given to the State to enact law in this regard.

4. The petitioners rely on the reported case of **Bishaka and others v. State of Rajasthan and others** reported in AIR 1997 SC 3011, wherein the Supreme Court has taken into consideration the provisions of the CEDAW and has held as follows:

> "16. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by this Court under Article 141 of the Constitution."

It is, therefore, urged that in view of the fact that there is no legislation to tackle the problem of witch-hunting, this Court should give

direction to the State Government to introduce appropriate law before the Legislature and in the interregnum provide guidelines to prevent witch-hunting in the State of Orissa.

5. It is seen that the Legislature of Bihar has passed the Prevention of Witch (Daain) Practice Act, 1999 (Bihar Act 9 of 1999). Similar Act has also been passed by the Legislature of Chhatishgarh.

6. Witch-hunting is also seen in the State of Karnataka and a Committee consisting of eminent Professors was asked to investigate and report about the practice of Banamathi. Banamathi is the Kannada word for witch. The Committee after careful and detailed investigation of a large number of cases and on the basis of discussions with number of persons, who were considered to have knowledge on the subject, came to the following conclusions:

> "People have been suffering from this so called witchcraft i.e. Banamathi due to various causes. Some of the prominent causes have been fear, ignorance, superstition, personal and family problems, poverty, religious feuds, and village politics. This phenomenon of Banamathi is more prevalent in remote villages cut away from the main stream of life. It is also a fact that most of the victims are women. Even among women those belongs to marriageable and child-bearing age groups seem to be more prone to this problem.
>
> All the sufferings of the victims attributed to Banamathi fit into familiar patterns of mental and physical diseases. Most of these are psychiatric cases. Many of these attacks were induced by a simple suggestion by the doctors and were also terminated by a similar suggestion. These people have been suffering from a variety of psychological disorders. Hysterical neurosis, a form of psychiatric disturbance, is the most common. This is characterized by episodes of abnormal behaviour, like screaming, developing fits, becoming unconscious, tearing away of clothes, inability to speak and so on. Theses are directly understandable in terms of strong socio-cultural beliefs, family and personal problems, poverty etc. It is common knowledge that such internal conflicts resulting in hysterical neurosis are found in other countries also. Their effects would be in accordance with the prevailing social and other conditions. In a few villages these psychological disturbances have assumed the form of 'mass hysteria' as witnessed in Yadlapur and in Benekanahalli

villages. There are other kinds of neuroses like depression, obsession etc. from which some of the victims have been suffering.

The phenomenon of Banamathi as already mentioned has been in existence for decades and is deep rooted among some sections of the people in North Karnataka which formed part of the erstwhile Hyderabad State governed by the Nizam. This malady exists in some parts of the present Andhra Pradesh adjacent to Gulbarga and Bidar Districts also. The belief has been handed over from person to person and passed on from generation to generation. In fact, the belief in Banamathi is so deep rooted that even common physical ailments such as asthma, leprosy, tuberculosis, anaemia, and vitamin deficiency diseases are attributed to Banamathi. Susceptible and ignorant people have become so sensitive and scared that they think of suffering from the effects of Banamathi whenever they are not feeling well. The fact that even normal variations in the yield of milk of a cow is also attributed to Banamathi shows to what extent the pernicious belief is deep seated in their minds.

The second category of the phenomena belongs to the appearance and disappearance of the objects, falling of stones, burning of sarees etc. It is very significant to note that nobody had ever witnessed those phenomena during the process of their actual occurrence. No body saw either the clothes catching fire or scares during the process of their marking. As already mentioned two persons were caught by the villagers when they were trying to throw stones. Besides, falling of stones is reported in many parts of the State and it is also interesting to note that according to such reports there was no falling of stones when a vigil was kept. A careful scrutiny of these phenomena will lead to the conclusion that there is no evidence of the working of any supernatural force. Many of the phenomena attributed to Banamathi must have been deliberately performed by persons due to various reasons such as to attract attention, to get sympathy, or to avoid extra work. These are all of common occurrence familiar to the doctors in the field of psychology and psychiatry. It may not be out of place to mention that nobody ever came forward to perform ‘Banamathi’ on the members of the team when they publicly offered themselves as subjects on many an occasion.

Thus, based on a careful analysis of all the available data and a close and searching examination of a large number of victims, the Investigation Committee has come to the unanimous and firm conclusion that the so called Banamathi is not due to any supernatural cause.

It is a fact that there has been a lot of suffering on account of these mental and physical problems. It is also a fact that vested interests have been using Banamathi as a means of exploitation. Attributing these phenomena to supernatural causes they have been reaping a rich harvest. Some of the families are ruined on account of spending large amounts of money in the hope of getting a cure of the ill-effects. Poor villagers and gullible people are being cheated.

The Committee would like to point out certain strong supporting factors which have lent credence to belief in Banamathi. The fact that many educated people, officials and men of public importance implicitly believing in Banamathi has also been responsible for its continued widespread belief among large sections of villagers. As we know superstitions are widely prevalent in our country. All of us know that an educated superstitious person is more harmful to society than his uneducated counterpart. Besides, occasional, nay, frequent dubious and unscientific reports, articles, and statements in some newspapers tend to give a final seal of confirmation to the existence of some kind of witchcraft. In fact the phenomena attributed to Banamathi are not peculiar to places in Gulbarga or Bidar Districts. They are widespread in all parts of the state and the country. But they are called by different names. All these can be attributed to the same root causes excluding any supernatural force.

Another important reason for the spread of Banamathi is that the Police Department under its existing laws are helpless and cannot take notice of cases coming under the purview of Banamathi. This has indirectly given a free hand and also encouragement to persons who in the name of Banamathi scare innocent people and exploit them." *(Emphasis supplied)*

7. Thus, it is clear that this social malady is prevalent because of the ignorance of the people and an effective measure to control the same is necessary to be taken. The Committee of Elimination of Discrimination Against Women of the United Nations in the 51st Session held between 13th February to 2nd March, 2012 has given its concluding observations on the

elimination of discrimination against women. The Committee also recommended to eliminate stereo-type and harmful practice. At paragraphs 21 and 22, the Committee observed as follows:

> "21. The Committee recognizes the rich culture and traditions of the State party and their importance in daily life. However, the Committee expresses its serious concern about the persistence of harmful norms, practices and traditions, patriarchal attitudes and deep-rooted stereotypes, regarding the roles, responsibilities and identities of women and men in all spheres of life, as well as the State party's limited efforts to address such discriminatory practices. These include, in particular, polygamy, bride price (lobola), and in certain regions, virginity testing and witch hunting. The Committee is concerned that such customs and practices perpetuate discrimination against women and girls and that they are reflected in women's disadvantageous and unequal status in many areas, including education, public life, decision-making and in the persistence of violence against women, and that, thus far the State party ahs not take sustained measures to modify or eliminate stereotypes and harmful practices.
>
> 22. The Committee urges the State party to :
>
> (a) Put in place, without delay, a comprehensive strategy to modify or eliminate patriarchal attitudes and stereotypes that discriminate women in conformity with the provisions of the Convention. Such measures should include efforts, in collaboration with civil society and community and religious leaders to educate and raise awareness of this subject, targeting women and men at all levels of the society;
>
> (b) More vigorously address harmful practice by expanding public education programmes and by effectively enforcing the prohibition of such practices, in particular, in rural areas;
>
> (c) Use innovative measures that target media people to strengthen understanding of the equality of women and men and through the educational system to enhance a positive and non-stereotypical portrayal of women; and
>
> (d) Monitor and review the measures taken in order to assess their impact and to take appropriate action."

8. From the above, it is clear that the CEDAW also endorse witch-hunting as one of the harmful practices. The State should formulate a preventive strategy to eliminate such practice. This Court, therefore, is of the opinion that the State should introduce a bill in the Legislature to enact law to tackle the menace of witch-hunting effectively. There should be concerted efforts to spread awareness to eradicate the superstitions among the people. In the meantime, we recommend the guidelines in following paragraphs for prevention of witch-hunting in the State of Orissa. It shall be the duty of the State and the District Administration to prevent or deter commission of witch-hunting and to provide protection to citizens from being victim of witch-hunting. The State shall also provide procedure for prosecution of the persons who endangers human life on the allegation that she is a witch.

9. For the aforesaid purpose, witch-hunting means and includes:

(i) Any person accuses another or defames a woman by calling her 'Dayan' or 'Dahani' or any other name or symbol suggesting her to be a witch; and

(ii) Any person/persons jointly or individually harms another person either physically or mentally or damages her property calling her to be a witch, shall be known to be practicing witch-hunting;

10. Whoever forces a woman to drink or eat inedible or obnoxious substances on the allegation that she is a witch, shall be punishable under the provisions of the Indian Penal Code or any special law attracted to such commission of offence.

11. Any person calling another a 'witch' or being possessed one, uses criminal force against her, or instigates or provokes others in doing so or abate with intent to harm and/or to displace her from the house by using criminal force or intimidates, which amounts to specific offence under the Indian Penal Code or any other law, the authorities shall initiate appropriate action in accordance with the law by lodging complaint in the Police Station.

12. The authorities also prevent any person from acting as a 'tantric' or a 'witch doctor' in the area claiming to have possessed spiritual and magical powers to cure witch-craft or in possession of super-natural powers and performs any rituals to free the woman from the evil spirit or entices a woman or any person or her behalf with a promise to bless the woman with a child or performs any ritual on behalf of any person with an intention to

harm the woman, should be prosecuted, if such an act amounts to any specific offence under the Indian Penal Code or any other law.

13. **Preventive steps.**

In the meantime, the authorities shall take appropriate steps to prevent witch-hunting and in particular take the following steps :

(i) Public awareness programmes should be launched in the Grama Panchayats to eradicate the superstitions of witch-craft;

(ii) Health camps should be organized in different village level to detect cases of the psychologically disordered, which may lead to a false acquisition being possessed or being a witch;

(iii) The Investigating Agency in cases involving allegations of witch-hunting, in order to avoid the witnesses turning hostile should take steps to get statement of the witnesses recorded under Section 164 of the Code of Criminal Procedure, 1973.

14. These directions are not exhaustive. The State may, in addition to such steps, take suitable and appropriate step to tackle the menace of witch-hunting.

Accordingly, we direct that the guidelines should be strictly observed by the authorities till a suitable legislation is passed by the State Legislature. The State Government shall introduce an appropriate bill in the State Legislature within a period of one year.

The writ application is accordingly disposed of.

Writ petition disposed of.

2012 (II) ILR- CUT- 263

V.GOPALA GOWDA, CJ & S.K.MISHRA, J.

W. A. NO. 29 OF 2012 (Dt.03.05.2012)

MEDICAL COUNCIL OF INDIA ..... Appellant.

.Vrs.

DR. JENITA SINGH & ORS. ……..Respondents.

EDUCATION – Mid-stream admission in P.G. Medical Course for the academic Section 2011-12 – Learned Single Judge allowed the prayer – Order challenged – Held, Mid-stream admission is illegal.

The course of Post Graduates in medical sciences are guided by a time bound programme in which the last date by which the students can take admission is 30.09.2011 – Hon'ble Apex Court in Madhu Sing's Case held that if any student is admitted after commencement of the course it would be against the intended object of fixing a time schedule – Time schedule is fixed by taking in to consideration the capacity of the students to study and appropriate spacing of classes – Even the seats are unfilled that cannot be a ground for mid-session admission – Held, the impugned order passed by the learned Single Judge allowing respondent No.1 to take admission in the P.G. Course on 15.12.2011 is liable to be set aside. (Para 5,6,7)

Case laws Referred to:-

1.(2002)7 SCC 258 : (Medical Council of India-V- Madhu Singh & Ors.)
2.(2005)2 SCC 65 : (Mridul Dhal (Minor) & Anr.-V-Union of India & Ors.)

For Appellant - M/s. Sri Rajani Ch. Mohanty, K.C.Swain & Miss. S.Mohanty.
For Respondents - Mr. Damodar Pati.

S.K.MISHRA, J. In this appeal, the Medical Council of India has assailed the judgment and order dated 15.12.2011 passed by the learned Single Judge in W.P.(C) No.18025 of 2011 directing the opposite parties to admit the writ petitioner, respondent no.1 in the vacant seat as direct candidate in M.D. Ophthalmology Course in the SCB Medical College, Cuttack.

2. The facts leading to filing of the present Writ Appeal may be stated as under :-

The respondent no.1, after completing her MBBS course, applied for admission in Post-Graduate Medical Courses under the reserved green card category in pursuance of the advertisement issued by respondent no.2, i.e. Chairman, Post Graduation Selection Committee, for Academic Session 2011-12. The respondent no.1 (writ petitioner) appeared in the entrance examination conducted by the respondent no.2, and as per the merit list published, she secured the rank of 429 in general unreserved category and rank 39 under the reserved green card category. As per the notice dated 25.03.2011 published by respondent no.2, the respondent no.1- candidate appeared in the counseling on 08.04.2011 under the direct reserved category. On that date of counseling under reserved green card category, the respondent no.1 was in 3rd position after Dr. Debasis Behera and Dr. Ranjit Behera. The respondent no.1 opted Pathology in VSS Medical College, Burla and took admission in that course. Dr. Ranjit Behera opted for ENT course in MKCG Medical College, Berhampur and took admission there.

Because of fact that few seats remained vacant, respondent no.2 issued another notice dated 27.06.2011 notifying there will be second counseling to the admission of the Post-Graduate Medical Courses, 2011 for the three Government Medical Colleges, which was scheduled to be held on 29.06.2011 and 30.06.2011. The respondent no.1 contended that she appeared in the second counseling on 30.06.2011. Dr. Ranjit Behera, who had taken admission under green card category in ENT Course in MKCG Medical College, Berhampur, opted to take admission under unreserved category in M.S. General Surgery in VSS Medical College, Burla, and thus, the seat in ENT Course in MKCG Medical College fell vacant. Subsequently, respondent no.1 surrendered her seat in Pathology Course in VSS Medical College and opted for the ENT Course in MKCG Medical College. Further, respondent nos. 2 and 3 refused admission to respondent no.1 and allotted the ENT seat to Dr. B. Radhika-respondent no.4, who is a general unreserved category candidate. That the representation submitted by the writ petitioner/respondent no.1 before respondent no.2 was rejected on the ground that, *inter alia,* no admission can be granted after 30.06.2011.

The respondent no.1 challenged the decision of the respondent nos. 2 to 4 by way of writ petition bearing W.P.(C) No.18025 of 2011 contending that the action of respondent nos. 2 to 4 is arbitrary. The respondent no.1 prayed that she be allowed admission and pursue her studies in ENT Course.

3. The learned Single Judge, vide order dated 15.12.2011, allowed the writ petition filed by respondent no.1 and permitted her to take mid-session admission. Such order has been assailed in this appeal mainly on the ground that it is violative of the principle decided by Supreme Court in **Medical Council of India Vs. Madhu Singh and Others,** (2002) 7 SCC 258.

4. While disposing of the said writ petition, the learned Single Judge came to the conclusion that clause 14.5 of the prospects provides that in case of non-availability of green card candidates, the seat will merge in respective general category. In the present case, the learned Judge observed that, the petitioner surrendered her seat in Pathology course in VSS Medical College, Burla and opted for reserved green card category in ENT course in MKCG Medical College, Berhampur, it was not a case of non-availability for reserved green card category candidate. It was, further, held by the learned Single Judge that the authorities were not justified in ignoring the claim of the petitioner and allowing the seat to the opposite party no.4, who comes under the general unreserved category. It, further, weighed in the mind of the learned Single Judge that in the State like Orissa where there is acute shortage of doctors to cater to the growing rural population, allowing seats in P.G. medical courses in Government Medical Colleges to remain vacant is a national waste and opposed to public interest, especially such seats cannot be carried forward to the next academic year. Finding no justification in denying admission to the petitioner against the vacant seat falling under the State quota when she possess requisite eligibility and merit, it was directed by the learned Judge that the petitioner be given admission in the vacant seat in Ophthalmology course in SCB Medical College, Cuttack, which comes under the State quota for direct candidate.

5. While disposing of the writ petition, the learned Single Judge has totally lost sight on the fact that the course of post-graduates in medical sciences are guided by a time bound programme in which the last date by which the students can take admission is 30.09.2011. This date has been fixed by the Medical Council of India, Post Graduate Medical Education Regulations, 2000 and the same cannot be breached. The Supreme Court in Madhu Singh's case (supra) after taking into consideration the fact that if any student is admitted after commencement of the course it would be against the intended object of fixing a time schedule. The Supreme Court, further, held that as the factual position goes to show, the inevitable result is increase in the number of seats for the next session to accommodate the students who are admitted after commencement of he course for the

relevant session. The Supreme Court, however, rejected the plea that with the object of preventing loss to the national exchequer such admissions should be permitted. The Supreme Court was of the opinion that midstream admissions cannot be permitted. The Supreme Court, further, held that the time scheduled is fixed by taking into consideration the capacity of the students to study and the appropriate spacing of classes. The students also need rest and continuous taking of classes with the object of fulfilling the requisite days would be harmful to the student's physical and mental capacity to study. Therefore, the Supreme Court arrived at the following conclusions.

(i) There is no scope of admitting students midstream as

that would be against the spirit of statutes governing medical education;

(ii) Even if seats are unfilled that cannot be a ground of mid-session admission;

(iii) There cannot be telescoping of unfilled seats of one year with permitted seats of the subsequent year;

(iii) MCI shall ensure that examining bodies fixing time scheduled specifying the duration of course, the date of commencement of the course and the last date for admission;

(iv) Different modality for admission can be worked and necessary steps for examination if prescribed, counseling and the like have to be completed within a specified time,

(v) No variation of the schedule so far as admissions are concerned shall be allowed;

(vi) In case of any deviation by the institution concerned, action as prescribed shall be taken by the MCI.

6. Similar is the view expressed by the Supreme Court in **Mridul Dhar (minor) and another Vs. Union of India and others,** (2005) 2 SCCs 65. In that case the Supreme Court, at paragraph-32, has held as follows:-

> "Having regard to the professional courses, it deserves to be emphasized that all concerned including Governments, State and Central both, MCI/DCI, colleges – new or old, students, Boards, universities, examining authorities, etc, are required to strictly adhere to the time schedule wherever provided for; there should not be midstream admissions; admissions should not be in excess of sanctioned intake capacity or in excess of quota of anyone, whether State or management. The carrying forward of any unfilled seats of one academic year to next academic year is also not permissible."

At paragraph-35 (4), the Supreme Court, further, has held that it shall be responsibility of all concerned including Chief Secretaries of each State, Union Territory and/or Health Secretaries to ensure compliance with the directions of the Court and requisite time schedule as laid down in the Regulations and non-compliance would make them liable for requisite penal consequences. At sub-paragraph-12 the Supreme Court, further, held that the time schedule for grant of admission to post-graduate courses shall also be adhered to.

7. In this case, the last admission was, as per the second counselling, held on 30.06.2011. So, the learned Single Judge committed error by directing that the petitioner should be admitted in the P.G. Course on 15.12.2011. On this ground alone, the order impugned is liable to be set aside.

Thus, on the basis of the aforesaid discussion, we come to the conclusion that the order passed by the learned Single Judge in W.P.(C) No.18025 of 2011 is not sustainable. Hence, the Writ Appeal is allowed. The order dated 15.12.2011 in W.P.(C) No.18025 of 2011 is hereby set aside.

Appeal allowed.

2012 (II) ILR- CUT- 268

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

W.P.(C) NO. 16957 OF 2010 (Dt.07.05.2012)

MAMATA DAS … …… Petitioner.

.Vrs.

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

SERVICE – Lady DLR Employee – Worked continuously about 12 years – Resigned from the post to contest Municipal Election – Failing to get elected she made a representation requesting O.P. to rejoin in the post – Representation rejected – Hence the writ petition.

Government of Orissa, General Administration Department in terms of Article 15(3) of the Constitution of India made a resolution Dt.14.12.1994 granting concession to women employees that if a woman employee of the State Government resigned, may be allowed to rejoin within a period of two years from the date of resignation if she is not engaged herself in undesirable activities during the period of absence from Government service – The resolution does not keep it confined to regular employees only – It is for the benefit of all categories of women employees of the State Government – Held, rejection of the representation of the petitioner is illegal – Direction issued to the Opp.Parties to re engage the petitioner as DLR employee.

(Para 7,8,9)

Case law Referred to:-

AIR 1995 SC 1648 : (P.Vijaya Kumar-V- Government of Andhra Pradesh).

For Petitioner - M/s. Rajashree Bahal, K.Mohanty & Saswati Mohanty.

For Opp.Parties - M/s. Prasanta Ku. Mohanty & M.K.Panda.

B.P.DAS, J. The petitioner is a lady, who was engaged as DLR under unskilled category for a period of 44 days by the order of the Project Engineer, Project Management Unit-opposite party no.3, Orissa Water Supply and Sewerage Board, Bhubaneswar, dated 2.12.1997, and she was getting due extension continuing as such till 10.11.2008. According to the petitioner, she has worked about 12 years without any complaint from any quarters till she intended to contest for the post of Corporator in Municipal

election and sought for permission from opposite party no.2 by filing an application on 10.11.2008. The petitioner failed to get elected to the post she contested in the Municipal election and hence on 8.12.2008 she filed an application before opposite party no.2 requesting him to allow her to join in the post she was working but the same was not accepted by opposite party no.2. Being aggrieved, the petitioner filed a writ petition, being W.P.(C) No.4980 of 2010, which was disposed of on 31.3.2010 with a direction to opposite party no.2 to take a decision on the representation of the petitioner dated 8.12.2008. Subsequently, the representation of the petitioner was rejected, hence the present writ petition.

2. A counter affidavit has been filed by opposite party no.2 taking a stand that the earlier engagement of the petitioner for 12 years has not been disputed but the petitioner filed an application seeking for permission to contest in Municipal election in which she has given a condition that if the permission was not granted by the authorities, the letter be treated as a resignation. Accordingly, the authorities who were reluctant to grant her permission accepted resignation as per her wish. According to learned counsel appearing for opposite party no.2 there is no infirmity in the order of acceptance of resignation of the petitioner.

3. In course of hearing our attention was drawn to Annexure-7, which is the order passed on the representation of the petitioner in terms of the direction of this Court dated 31.3.2010 passed in W.P.(C) No.4980 of 2010. The relevant paragraph of the order is quoted herein below :-

> "In the present case the letter of resignation had been sent by Smt. Mamata Das, out of her own volition. It was her conscious act. Such resignation had been accepted and she had been dis-engaged. Once I have accepted the resignation letter sent by Smt. Das, otherwise I can not review my own decision which has attained finality. Hence, the question of allowing her re-join the service cannot be accepted. The Govt. resolution dated 14.12.1994, carving out certain concession on woman Govt. employees who have resigned and subsequently allowed to be re-appointed within a time period of two years subject to certain conditions, is not applicable to the case of Smt. Mamata Das. Hence, her prayer to allow her to re-join in the earlier assignment is not permissible at this stage."

4. In course of hearing our attention is drawn to the resolution of the Government of Orissa, General Administration Department, dated 14.12.1994 (Annexure-8), in which certain concessions have been given to

women Govt. employees. The relevant concessions on which the petitioner relies upon, are quoted hereunder :

> "(i) A women employee of the State Government who has resigned from the service may be allowed to re-enter the service within a time period of two years from the date of resignation. She shall be re-appointed to the service from which she resigned provided she is found –
>
> (a) Suitable in all respects to re-enter Govt. service ;
>
> (b) fit to resume public service ;
>
> (c) not engaged herself in undesirable activities during the period of absence from Government service."

5. According to learned counsel for opposite parties the aforesaid Government resolution is not applicable to the Orissa Supply and Sewerage Board and as the petitioner is not a Government servant, the benefit of the aforesaid resolution cannot be granted to her. Learned counsel also draws our attention to Annexure-C wherein a clarification was sought for by the Orissa Water Supply and Sewerage Board from the Government.

6. We have perused the resolution of State Government, which is solely for the purpose of giving certain benefits to the women employees and it cannot be said that the same is not applicable to the women employees working under the Orissa Water Supply and Sewerage Board which is an instrumentality of State and under deep and pervasive control of the State Government. Annexure-8 which confers benefit to the women employees under the Government does not keep it confined to regular employees only. Its application, from the tenor of the resolution as it appears, is for the benefit of all categories of women employees working under the State Government or its instrumentality. The clarification over which the opposite party no.2 relies upon cannot negate the true purport and effect of resolution dated 14.12.1994.

7. In our considered opinion, the spirit of resolution is in terms of the mandate under Article 15 of the Constitution of India making special provision for women. This is one of such resolution meant for the welfare of women employees who may be DLR or regular. The opposite parties being instrumentality of State are bound by this resolution and cannot get away from the same.

8. In this regard, we may refer to the decision of the Apex Court in the case of ***P.Vijaya Kumar-vrs.- Government of Andhra Pradesh***, AIR 1995 SC 1648. In the words of Justice Mrs. Sujata V. Manohar :

> "The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women. To say that under Article 15(3), job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this Article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3)."

9. The order of rejection of the representation of the petitioner is therefore illegal and sustainable. Petitioner's application for re-employment should have been accepted by the opposite parties. Accordingly, we allow the writ petition directing the opposite parties to re-engage the petitioner as DLR employee.

10. The order shall be complied with within a period of two months from the date of communication of this order.

Writ petition allowed.

2012 (II) ILR- CUT- 272

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

W.P.(C) NO. 972 OF 2007 (Dt.06.01.2012)

NETRANANDA PATNAIK … …..Petitioner.

.Vrs.

UCO BANK & ORS. …….. Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.311.

Disciplinary proceeding – If charges are vague and defective and lacks detail particulars of which no notice has been given to the delinquent officer, no finding of guilt can be fixed on the basis of such charge.

In this case this Court comes to the conclusion that the enquiry was vitiated for vague and defective charges, sans detail particulars of the alleged violation of the Bank's policy and RBI guidelines and without supply of necessary documents and the appointment of the Enquiry Officer was void abinitio being in contravention of the Regulations which has totally vitiated the enquiry – Held, the enquiry report and the orders passed by the Disciplinary Authority and the appellate authority are quashed and the petitioner is declared to have continued in the same post which he was occupying at the time of imposition of the punishment. (Para 9,13)

Case laws Referred to:-

1.(2007)1 SCC 338 : (Government of A.P. & Ors.-V-A.Venkata Raidu.)
2.(2009)12 SCC 78 : (Union of India-V-Gyanchand Chhatar)
3.AIR 1986 SC 995 : (Sawai Singh-V- State of Rajasthan).

For Petitioner - M/s. R.K.Rath, N.R.Rout & P.Rath.

For Opp.Parties- M/s. Somanath Mishra, G.Tripathy, S.K.Swain.

B.K.NAYAK, J. In this writ petition, the petitioner challenges the enquiry report and the original and appellate orders of punishment of reversion under Annexures-9,11 and 13 respectively and further prays to declare the punishment illegal and without jurisdiction and to quash the same.

2. The petitioner while working as an Officer in the UCO Bank in the rank of Middle Management Scale-III was deputed as General Manager, Cuttack Gramya Bank, Friends Colony, Bajrakabati Road, Cuttack from 20.12.2001 till 20.04.2002. Certain allegations were levelled against him and served upon him vide Annexure-1 dated 16.08.2002 which are to the effect that while acting as General Manager of the Cuttack Gramya Bank he committed certain irregularities in the matter of investment made by the bank in GOI securities. It is alleged that on 09.01.2002 buy back arrangement was made with M/s. Home Trade Ltd. for a security of 12.69% GOI-2002 for a face value of Rs.4 crores and the same was bought back by the dealer on 09.04.2002 with offer of Government securities of 13.82% GOI-2002. Further on 09.04.2002 a sum of Rs.6.28 crores invested in 13.80% GOI-2002 was rolled over to 13.82% GOI-2002 through the same broker and that investment in GOI security made on 09.01.2002 through M/s. Home Trade Ltd. was done without insisting on physical delivery of scripts of earlier investment made in Government security through the same broker. It was further alleged that funds were invested in security through M/s Home Trade Ltd whose credentials were not established before parting with huge sum for investment to them and that the investment committee was not authorized to enter into buy back/roll over transactions in Government securities and that physical delivery of securities was not obtained and as such in the process, investment was undertaken in irregular manner violating RBI guidelines. It was also alleged that in May, 2002 M/S. Home Trade Ltd. closed their Company and as a result the bank suffered a loss of more than Rs.10 crores. With the aforesaid allegations, the petitioner was directed to show cause within a fortnight as to why a disciplinary proceeding should not be initiated against him.

3. In pursuance of the aforesaid show cause notice, the petitioner submitted his reply dated 29.10.2002 vide Annexure-2 contending inter alia that as the ex-officio Chairman of the Investment Advisory Committee of the bank, he had only recommended for investment of funds in GOI securities through broker, M/s. Home Trade Ltd. since the said broker was a registered Stock Broker with SEBI and that Cuttack Gramya Bank had previous dealings with it even before he took over charge as General Manager and that at the time of recommending for investment on 08.01.2002 and 09.04.2002 no defect or deficiency with the concerned broker firm was brought to the knowledge of the committee, nor any paper or document was placed before the committee by the convener, who was the Senior Manager(Accounts) of the Bank, questioning the credentials of the said broker firm. It was also replied that the committee recommendation to the Chairman was accepted by the latter, who was the final authority and

further that the committee recommendation dated 08.01.2002 for investment through the said broker firm was noted by the Board of Directors of Cuttack Gramya Bank in its meeting dated 08.03.2002 without any adverse comments. It was further stated that on the basis of notes/recommendation of the convener of the investment committee, the committee deliberated on the profitability aspect of the transaction and made recommendations to the Chairman for further consideration. The Chairman having approved the recommendation and the Board of Directors having noted the same, the committee recommended for buy back/rollover security on 09.04.2002 again which was also not objected to. It was also stated that the petitioner as the Chairman of the investment committee, his role was limited to only make recommendation, without having any role in the operational aspect of investment proper. It was outside the ambit of responsibility of the Committee or the General Manager to physically verify or to ascertain whether the securities in respect of earlier investments were obtained or not. As per Board Resolution dated 18.04.2001, obtaining of physical delivery of the securities is the job and responsibility of the Senior Manager (Accounts), who was the convener of the Investment committee. The Convener never apprised the Investment Committee about non-receipt of security for investment made earlier through M/s. Home Trade Ltd. and therefore the Committee had no reason to doubt that the securities might not have been received back by the Senior Manager (Accounts). The petitioner accordingly pleaded innocence in the whole transaction stating that he acted in good faith and without any negligence on his part and requested to absolve him from the allegations.

4. Not being satisfied with the aforesaid reply of the petitioner, the authorities initiated a Disciplinary Proceeding and vide letter of the Disciplinary Authority dated 25.08.2003 a statement of allegations along with articles of charges were served upon the petitioner. The charges are to the following effect:

"(i) Shri N.N.Pattanaik being the Chairman of the Investment Advisory Committee of Cuttack Gramya Bank had on 09.01.2002 recommended purchase and buy-back of 12.69% GOI-2002 Securities for a face value of Rs.4.00 crores which was bought back by the broker on 09.04.2002 with a roll over to 13.82% GOI Securities which is violative of the Bank's investment policy as well as extant RBI guidelines in this regard. He, thus, failed to ensure and to protect the interest of the Bank which is violative of Regulation-3 of the UCO Bank Officer Employees' Conduct Regulations, 1976, as amended.

ii) Further, on 09.04.2002, a sum of Rs.6.28 crores invested in 13.80% GOI, 2002 was rolled over to 13.82% GOI, 2002 through the same broker. This act is in violation of the extant RBI guidelines in this regard. Such transgression of established guidelines is violative of Regulation-3 of the UCo Bank Officer Employees' Conduct Regulations, 1976, as amended.

iii) Shri Patnaik as Chairman of the Investment Advisory Committee had recommended purchase/sale of GOI Securities through a broker, M/s. Home Trade Ltd. whose antecedents and credentials were not properly examined, which resulted in a total loss of Rs.10.81 crores to the Bank. His such negligence is unbecoming of an Officer of the Bank and violative of Regulation-3 of the UCO Bank Officer Employees' Conduct Regulations, 1976, as amended.

iv) Shri Pattnaik before recommending the fresh investments on 09.01.2002 did not care to take into consideration the fact that the broker, M/s. Home Trade Ltd. had failed to make delivery of Securities purchased on earlier occasions through them. His such negligence and lackadaisical attitude is violative of Regulation-3 of the UCO Bank Officer Employees' Conduct Regulations, 1976, as amended."

5. The petitioner submitted his defence on 20.10.2003 (Annexure-4) denying the charges. The substance of the petitioner's defence was similar to his show cause reply vide letter dated 12.02.2004 of the Disciplinary Authority (Annexure-6). The petitioner was intimated about the appointment of Sri S.K.Ghatak, the retired Assistant General Manager of UCO Bank as the Enquiry Officer and Mr.Niranjan Rath, Deputy Chief Officer as the Presenting Officer for the purpose of conducting enquiry. The Inquiry Officer submitted his report dated 29.12.2004 to the Disciplinary Authority wherein he had found charges No.1,3 and 4 proved and charge No.2 as not proved. The Disciplinary Authority however, in his letter dated 30.04.2005 (Annexure-9) sent a copy of the enquiry report to the petitioner and also his finding on Charge No.2 wherein he differed from the finding of the Inquiring Officer and found the petitioner guilty of the said charge and asked the petitioner to submit his preferred submission to the enquiry report as also to the dissenting finding of the Disciplinary Authority on charge No.2. The petitioner sent his submission dated 14.05.2005 (Annexure-10). On consideration of submission of the petitioner, the Disciplinary Authority found the petitioner guilty of charges No.1,2 and 3 and imposed punishment of reduction to lower grade, i.e., Scale-II with direction to fix his

basic pay at the maximum of the said scale. He however, exonerated the petitioner from charge No.4.The order of the Disciplinary Authority has been annexed as Annexure-11. Aggrieved by the punishment order, the petitioner preferred appeal before the Executive Director of UCO Bank (opposite party No.3). The appellate authority vide his order dated 07.09.2006 (Annexure-13) found charge No.1 proved and charge No.2 partly proved against the petitioner, but maintained the punishment of reduction to lower grade, i.e., Scale-II. He however, found the charge Nos.3 and 4 not proved.

6. The enquiry report as well as the original and appellate orders of punishment have been challenged by the petitioner mainly on the following grounds:

i) Charges were vague and not specific. There were no details of the policy, rules or guidelines of the Gramya Bank and guidelines of the RBI, which were allegedly violated by the petitioner in making recommendation for investment.

ii) The documents basing on which the charges were framed and statement of allegations was prepared were not supplied to the petitioner as required under Regulation-6 of the Bank's Disciplinary Regulation, which has caused prejudice to the petitioner from the stage of preparation of his defence.

iii) During the stage of enquiry some documents were supplied to the petitioner on his request as per list at Annexure-7. However, a vital document, i.e., CVO report was not supplied terming the same as privileged without indicating how the same was privileged. The said report would have shown that the petitioner was not in charge of the transaction except making the recommendation and that, on the other hand, the authority of the Cuttack Gramya Bank made the transaction. Therefore, denial to supply copy of CVO report has prejudiced the petitioner.

iv) The appointment of a retired officer as Inquiry Officer to conduct enquiry into the charges was abinitio void being in clear contravention of Rule 3(n) read with Rule 6(2) of Discipline and Appeal Regulations of the Bank.

v) The report of the Inquiring Officer was not served on the petitioner for submitting his representation and instead the Disciplinary Authority before giving any opportunity to the petitioner, gave categorical finding differing from the finding of the Inquiring Officer with respect to charge No.2 and then served his finding along with

the enquiry report and asked the petitioner to put in his submission thereto, which is wholly illegal.

vi) The proceeding against the petitioner was conducted in a biased manner inasmuch as the Disciplinary Authority Mr.B.K.Das was intrinsically connected with the charges inasmuch as he served as a Director of Cuttack Gramya Bank at the relevant time and as a Board member he had noted the recommendation of the Investment Advisory Committee of the Cuttack Gamya Bank in its 149th Board Meeting vide Annexure-15.

7. A counter affidavit has been filed on behalf of the Bank-opposite parties denying the contentions raised in the writ petition. It is stated that the enquiry was conducted in a free and fair manner giving adequate opportunity to the petitioner to defend himself at every stage and that there was no procedural irregularity. With regard to the competence of the Inquiring Officer, it is stated in paragraph-11 of the Counter Affidavit that as per Regulation 6(2) as amended the Disciplinary Authority may appoint any person as Enquiry authority, who is or has been a public servant and therefore, appointment of Sri S.K.Ghatak, a retired Bank Officer as Enquiry Officer is perfectly legal.

8. It is apparent that at the appellate stage, the petitioner has been found guilty on Charge No.1 and partly on Charge No.2 although the punishment of reduction to lower grade as imposed by the Disciplinary Authority has been maintained by the appellate authority. The appellate authority has however found Charge Nos. 3 and 4 not proved. Charge Nos. 1 and 2 relate to the petitioner's conduct and action as Chairman of the Investment Advisory Committee in making recommendation for investment by way of purchase and by-back and roll over of Government of India Securities by the Bank for the purpose of investment in violation of the Bank's investment policy and the RBI guidelines. Neither the charges nor the statement of allegations served with the charges indicate the details of the Bank's investment policy and the RBI guidelines which were allegedly violated by the petitioner in making recommendation for investment. It appears that the Inquiry Officer exonerated the petitioner from Charge No.2 holding the same as not proved. The dissent of the Disciplinary Authority with regard to charge No.2 as communicated under letter dated 30.04.2005 (Annexure-9) indicates that RBI guidelines permitted only ready forward transaction on selected GOI securities provided all such transactions are done through the Subsidiary General Ledger (SGL) Account with the Reserve Bank of India and that the RBI did not permit roll over of the securities. The appellate authority on the other hand has found as follows:

"Charge No.2

While doing the roll-over/switchover, Sri Pattanaik did not completely violate RBI guidelines. It was proved subsequently that such roll-over/switches were allowed under RBI guidelines. However, such transactions were necessarily required to take place through SGL A/C and at Mumbai. This was not observed while recommending the roll-over to the Competent Authority. Since the investment Policy made it obligatory for the Recommending Authority to follow bank's specific policy and also RBI guidelines. It was the duty of the Recommending Authority to follow the same. I, therefore, consider the charge as partly proved."

It therefore transpires that there is no consistency in the findings with regard to the RBI guidelines that was existing at the relevant point of time, inasmuch as while the Disciplinary authority held that the guidelines did not permit roll over, the appellate authority held that the guidelines did permit. The only objection that has been taken is that such transaction should have been through SGL Account at Mumbai. Nothing is there in the charges or in the statements of allegations about the detail particulars of the guidelines of the RBI and the policy of the bank which should have been followed and were violated.

9. It is settled principle of service jurisprudence that if the charges are vague and lack in detail particulars of which no notice has been given to the delinquent officer, no finding of guilt can be fixed on the basis of such charge. In this context it is apposite to quote the observation of the apex Court in the case of ***Government of A.P. and others –v. A.Venkata Raidu (2007) 1 SCC 338.***

"9. xxxxx It is a settled principle of natural justice that if any material is sought to be used in an enquiry, then copies of that material should be supplied to the party against whom such enquiry is held. In Charge I, what is mentioned is that the respondent violated the orders issued by the Government. However, no details of these orders have been mentioned in Charge I. It is well settled that a charge sheet should not be vague but should be specific. The authority should have mentioned the date of the GO which is said to have been violated by the respondent, the number of that GO etc. but that was not done. Copies of the said GOs or directions of the Government were not even placed before the enquiry officer. Hence, Charge I was not specific and hence no finding of guilt can be fixed

> on the basis of that charge. Moreover, as the High Court has found, the respondent only renewed the deposit already made by his predecessors. Hence, we are of the opinion that the respondent cannot be found guilty for the offence charged."

It is also held in ***(2009) 12 SCC 78: Union of India -v.- Gyanchand Chhatar*** that where a delinquent is served with a charge sheet without giving specific and definite charge, the enquiry stood vitiated as having been conducted in violation of the principle of natural justice. Similar view has also been taken in the decision reported in ***AIR 1986 S.C. 995: Sawai Singh-v.-State of Rajsthan.***

10. It is apparent that the charges against the petitioner which are said to have been proved relate to making recommendation by Advisory Committee in violation of the Bank's Investment Policy and RBI guidelines. No detail particulars with regard to what was the Bank's Investment Policy and what were the RBI guidelines and in what manner and which of the guidelines were violated have not been stated in the charges or in the statement of allegations, nor any document with regard to the Bank's Policy and the RBI guidelines which are said to have been violated were supplied with the charges. In the circumstances, it must be held that the enquiry and the subsequent orders of punishment stand vitiated.

11. The other important grounds taken by the petitioner is that the enquiry was void abinitio as the Enquiry Officer, who is admittedly a retired Officer of the Bank, was not competent to be appointed as Enquiry Officer. It is contended that appointment of Enquiry Officer was in contravention of Rule-3(n) read with Rule-6(2) of the UCO Bank Officer Employees' (Discipline and Appeal) Regulations, 1976 (herein after called 'the Regulations'). One Sri S.K.Ghatak, a retired Assistant General Manager of the UCO Bank was appointed as Enquiry Officer to enquire into the charges against the petitioner. Evidently the petitioner has been imposed with major penalty. The procedure for imposing major penalty has been prescribed in Rule-6 of the Regulation. Sub-Rule-(2) of Rule 6 of the Regulations which is relevant is quoted hereunder:

> "(2) Whenever the Disciplinary Authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against an officer employee, it may itself enquire into, or appoint any other public servant (hereinafter referred to as the inquiring authority) to inquire into the truth thereof."

The expression "public servant" has been defined in Rule 3(n) of the Regulations to mean a person as defined as public servant in Section 21 of the Indian Penal Code. Section 21 of the Indian Penal Code describes 12 categories of persons who can be termed as public servants. An Officer of a Nationalized Bank, who is in service can be termed as a public servant under clause (b) of 12th category described in the said section. However, an officer who has already retired from service can never be treated as a public servant within the meaning of Section 21 of the Penal Code. In such circumstances, appointment of a retired officer of the bank as Enquiry Officer being in gross violation of the Regulation, such appointment was void abinitio and the entire enquiry against the petitioner must be held to have become void and vitiated, on the basis of which no punishment can be imposed on the petitioner. Although in the counter affidavit filed by the opposite parties a plea has been taken that the Regulation has been amended and as per such amended provision a Retired Officer can be appointed as Enquiry Officer, no such amended Regulation was brought to our notice during the course of hearing.

12. It is apparent that the petitioner was only the recommending authority in the matter of Bank's Investment and his recommendation was subject to the approval by the Chairman of the Bank who was the final authority and without there being any approval by the Chairman, the recommendation could not be implemented. This factual position has not been denied by the opposite parties. It is apparent from the records that the petitioner came on deputation to Cuttack Gramya Bank hardly for four months as General Manager, during which he also acted as the Chairman of the Investment Advisory Committee. It is also apparent that the Gramya Bank had been investing in GOI securities previously through the very same firm, namely, M/s. Home Trade Ltd. There is also no denial of the fact that the convener of the Investment Advisory Committee, who is no other than the Senior Manager (Accounts) whose duty was to get the scripts (Securities) from the broker in case of investment in securities, did not bring it to the notice of the Investment committee that the broker, M/s Home Trade Ltd. had not supplied the scripts in respect of the earlier investment. Nothing was brought by the convener to the notice of the committee questioning or objecting to the viability of having investment transaction through the said broker. The recommendation if any was the joint action of the committee itself consisting of all its members including its Chairman. Therefore, it was not proper to single out the petitioner and proceed against him alone.

13. In view of the aforesaid, having come to the conclusion that the enquiry was vitiated for vague and defective charges, sans detail particulars

of the alleged violation of the Bank's policy and RBI guidelines and without supply of necessary documents and that the appointment of the Enquiry Officer was void abinitio being in contravention of the Regulations which has totally vitiated the enquiry, it is not necessary to go into the contentions noted in paragraph-6 (iii), (v) and (vi). We have no hesitation to hold that the enquiry report and orders of the Disciplinary Authority as well as the appellate authority vide Annexures-9,11 and 13 respectively are liable to be quashed and accordingly we quash the same. The petitioner is declared to have continued in the Scale-III post which he was occupying at the time of imposition of the punishment. He shall be entitled to all consequential service and financial benefits. The writ application is accordingly disposed of. No costs.

Writ petition disposed of.

2012 (II) ILR- CUT- 282

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

W.P.(C) NO. 27115 OF 2011 (Dt.20.12. 2011)

DIRECTOR OF ESTATES,
JOINT SECRETARY
TO GOVT. GENERAL
ADMINSTRATION, DEPTT. ORISSA. ……..Petitioner.

.Vrs.

KISHORE CHANDRA RAY
SAMANTA & ORS. …… . Opp.Parties.

LIMITATION ACT, 1963 (ACT NO.36 OF 1963) – S.5.

Exparte decree – Delay of 18 months in filing application to set aside such decree –Gross negligence on the part of the defendants including the petitioner and the learned Government pleader in taking steps in the suit as well as in filing the application Under Order 9 Rule 13 C.P.C. – Held, this Court is not inclined to interfere with the impugned order of the learned Civil Judge in refusing to condone the delay. (Para 6,7)

Case laws Referred to:-

1.AIR 2011 SC 1237 : (Union of India & Ors.-V- Nripen Sarma)
2.AIR 2011 SC 1199 : (Lanka Venkateswarlu(D) by L.Rs.-V-State of A.P.& Ors.)

For Petitioner - Addl. Govt. Advocate.
For Opp.Parties - M/s. Madhumati Agarawala & T.K.Mishra

L.MOHAPATRA, J. This writ application has been filed challenging the order dated 2.7.2011 passed by the learned Civil Judge (Senior Division), Bhubaneswar in C.M.A.No.388 of 2006 arising out of T.S.No.428 of 1999. Though this is a Single Judge matter, while hearing W.P.(C) No.24284 of 2011, it was brought to the notice of the Court by the learned counsel for the State that result of this writ application shall have a bearing on the result of above writ application. Therefore, we called for the records and heard both the writ applications together.

Before examining the legality of the impugned order, it is necessary to look into the background of the case. Opposite party no.1 filed the said suit for declaration of right, title, interest, correction of R.O.R. and for permanent injunction. The suit was presented on 5.7.1999. On 18.1.2000 the learned Government Pleader filed a memo of appearance on behalf of the present petitioner and other Government Officials and also filed a petition for grant of time to submit written statement. Learned Civil Judge allowed time till 18.2.2000 for filing of the written statement. When the case was taken up on 18.2.2000, the learned Government Pleader did not take any step nor file written statement. When the case was called, the learned Government Pleader was also absent. Therefore, the learned Civil Judge by order dated 18.2.2000 set the defendants ex parte including the present petitioner. Case was then posted to 17.10.2000. Notice on defendant no.4 was accepted as sufficient and he having not appeared or taken any step, he was also set ex parte and the case was again adjourned for service of notice on defendant no.5. By order dated 30.11.2000, the learned Civil Judge posted the suit to be taken up on 15.1.2001 for ex parte hearing having been targeted for early disposal by higher Court. The ex parte hearing could not be taken up as the plaintiff was not in a position to depose in Court being 81 years of age and a petition was filed under Order 26 Rule-1 CPC praying for issuance of commission for examination of the plaintiff and the said petition was allowed by order dated 17.4.2001. The order dated 29.6.2001 shows that report and evidence recorded by the Pleader Commissioner were put up before the learned Civil Judge and the case was posted to 11.7.2001 for ex parte judgment. On 13.7.2001, the ex parte judgment and decree were passed in the said suit.

2. As is evident from the dates, even though the petitioner and the other Government Officials, namely, defendants 1, 2, 3 and 6 in the suit had been set ex parte on 18.2.2000, no steps whatsoever were taken by any one of them to get the said order set aside till the ex parte judgment was delivered on 13.7.2001, almost one and half years thereafter. The order sheet also shows that the case was taken up on several dates in between but no steps were taken on behalf of the petitioner and the other defendants. Even after the ex parte judgment was delivered on 13.7.2001, application for setting aside the ex parte decree under Order 9 Rule 13 C.P.C. was filed on 1.2.2003. Thus, there was long delay in filing the application under Order 9 Rule 13 C.P.C. The petitioner therefore filed an application under Section 5 of the Limitation Act, 1963 to condone the delay. The said application having been rejected in the impugned order, this writ application has been filed.

3. Learned counsel appearing for the State-petitioner submitted that only on 5.2.2002, the petitioner came to know from the Revenue Inspector of

the department that the plaintiff is forcibly attempting to raise construction over the suit land through his agent and on inquiry, the agent of the plaintiff showed a copy of the ex parte judgment and decree passed in the said suit. After getting this information from the Revenue Inspector, it was ascertained from the Government Pleader that the ex parte judgment and decree had been passed on 13.7.2001. The petitioner thereafter immediately moved the file in the department for obtaining necessary approval from the authorities to file an application for setting aside the ex parte decree and ultimately after obtaining approval, application for setting aside the ex parte decree was filed on 1.2.2003.

According to the learned counsel for the State-petitioner, delay in filing the application under Order 9 Rule 13 C.P.C. was not deliberate. The petitioner had no knowledge about passing of the ex parte judgment and decree in the said suit and had taken steps immediately after he was informed about the same by the Revenue Inspector on 5.2.2002. Under these circumstances, learned counsel for the State prayed for allowing the writ application and condoning the delay in filing the petition under Order 9, Rule 13 C.P.C.

Ms. Agrawala, learned counsel appearing for the contesting opposite party no.1 submitted that the Government Pleader, who was appearing in the suit, did not take any step after 18.2.2000 for almost one and half years and ex parte judgment was delivered on 13.7.2001. Even thereafter also steps were not taken to file an application under Order 9, Rule 13 C.P.C. and only on 1.2.2003, the said petition was filed along with an application for condonation of delay. According to the learned counsel for the contesting opposite party no.1, the reasons assigned by the learned Civil Judge while rejecting the application filed under Section 5 of the Limitation Act should not be interfered with.

Following dates are relevant for the purpose of deciding the issue:

“5.7.1999	-	The suit was filed.
18.1.2000	-	Government Pleader entered appearance on behalf of defendant nos.1,2,3 and 6(including the petitioner) and prayed for time to submit written statement. Time was allowed till 18.2.2000 for filing of written statement.
18.2.2000	-	No steps were taken by them and the Government Pleader was also absent

		on call. Accordingly, the said defendants 1,2,3 and 6 were set ex parte.
13.7.2001	-	The ex parte judgment and decree were passed.
1.2.2003	-	Application under Order 9 Rule 13 C.P.C was filed for setting aside the ex parte decree.

4. On perusal of the order sheet, we find that on 18.2.2000, even though defendants 1, 2, 3 and 6 including the petitioner had been set ex parte, no steps had been taken by the Government Pleader thereafter to get the said order set aside. No written statement was also filed on behalf of the said defendants and ultimately an ex parte judgment was delivered on 13.7.2001. Even after the ex parte judgment and decree were delivered on 13.7.2001, no steps were taken by the petitioner and other defendants and only on 1.2.2003, a petition was filed on behalf of the petitioner under Order 9 Rule 13 read with Section 151 CPC to set aside the ex parte judgment and decree. The conduct of the petitioner and the learned Government Pleader appearing on behalf of the petitioner and other Government Officials clearly shows that after 18.2.2000, no steps had been taken and they were utterly negligent in contesting the suit.

The petition under Order 9, Rule 13 C.P.C. was filed on 1.2.2003 and other application under Section 5 of the Limitation Act for condoning the delay of around eighteen months was filed on the following ground. The ground taken in the petition under Section 5 of the Limitation Act 1963 seeking for condonation of delay is quoted below.

> "That the petitioner on dated 5.2.2002 came to know from Revenue Inspector of Department that the Opposite Party NO.1 forcibly attempted to raise the construction over the suit land through his agent and hired labour and on enquiring the agent on behalf of the opposite party show the copy of ex parte judgment and decree passed in T.S.No.428 of 1999.Thereafter the Revenue Inspector informed the matter to the petitioner and accordingly petitioner through Additional Land Officer and Government Pleader ascertained that the ex parte judgment and decree has been passed in T.S.No.428 of 1999 on dated 13.7.2001. Thereafter petitioner immediately moved the file in Department for obtaining necessary approval from the authorities to file application for setting aside the ex

parte decree. That while moving the file in Department through different section, from table to table and meeting the queries of different authorities the matter was delayed in obtaining the necessary approval. That in the official course of business the legal file of the Administrative Department moved to the Law Department for obtaining sanction for filing case and also for sanction of legal expenses for filing case. That while moving the file through different Department the matter was delayed. That the petitioner after obtaining necessary approval from the competent authority filed an application for setting aside ex parte judgment and decree passed in T.S.No.428 of 1999 before this Hon'ble Court".

5. The learned Civil Judge took note of the above ground taken in the petition, referred to several decisions and with a reasoned order, rejected the petition. As stated earlier, during pendency of the suit even after being set ex parte, no steps were taken by the petitioner and other defendants or the Government Pleader to get the ex parte order set aside till the suit was decreed ex parte. Even though the suit was set ex parte on 13.7.2001, no steps were taken by the petitioner and other defendants as well as the learned Government Pleader till February 2003 and only on 1.2.2003, application under Order 9 Rule 13 C.P.C. was filed. In this connection, reference may be made to a decision of the Hon'ble Supreme Court in the case of ***Union of India and others Vrs. Nripen Sarma*** reported in AIR 2011 S.C.1237. In the said reported case, the Union of India filed a writ appeal before a Division Bench of Gowahati High Court wherein there was delay of 239 days in filing the appeal. The ground taken in the writ application for condonation of delay was that it took some time for Union of India to decide as to whether a writ appeal should be filed or not. The said appeal was dismissed on the ground of limitation and the matter was carried to Hon'ble Supreme Court. While filing the appeal before the Hon'ble Supreme Court, there was also delay of 114 days and while dismissing the appeal, in paragraph-6 of the judgment, the Hon'ble Supreme Court observed as follows:-

> "The Union of India ought to have been careful particularly in filing this Civil Appeal because the Division Bench, by the impugned order, has dismissed the appeal before it on the ground of delay. It is a matter of deep anguish and distress that majority of the matters filed by the Union of India are hopelessly barred by limitation and no satisfactory explanations exist for condoning inordinate delay in filing those cases",

Reference may also be made to another decision of the Hon'ble Supreme Court in the case of ***Lanka Venkateswarlu(D) by L.Rs. Vrs. State of Andra Pradesh and others*** reported in AIR 2011 Supreme Court 1199. The Hon'ble Supreme Court in paragraphs-24 and 25 of the judgment observed as follows:-

> "Having recorded the aforesaid conclusions, the High Court proceeded to condone the delay. In our opinion, such a course was not open to the High Court, given the pathetic explanation offered by the respondents in the application seeking condoantion of delay.
>
> This is especially so in view of the remarks made by the High Court about the delay being caused by the inefficiency and ineptitude of the government pleaders. The displeasure of the Court is patently apparent from the impugned order itself. In the opening paragraph of the impugned order the High Court has, rather sarcastically, dubbed the government pleaders as without merit and ability. Such an insinuation is clearly discernable from the observation that "This is a classic case, how the learned government pleaders appointed *on the basis of merit and ability* (emphasis supplied) are discharging their function protecting the interest of their clients". Having said so, the High Court, graphically narrated the clear dereliction of duty by the concerned government pleaders in not pursuing the appeal before the High Court diligently. The High Court has set out the different stages at which the government pleaders had exhibited almost culpable negligence in performance of their duties. The High Court found the justification given by the government pleaders to be unacceptable. Twice in the impugned order, it was recorded that in the normal course, the applications would have been thrown out without having a second thought in the matter. Having recorded such conclusions, inexplicably, the High Court proceeds to condone the unconscionable delay.

6. On examination of the fact involved in the said reported case, we find that this case is no way different than the said reported case. As indicated earlier as well as in the impugned order of the learned Civil Judge, there was gross negligence on the part of the defendants including the petitioner and the learned Government Pleader in taking steps in the suit as well as in filing the application under Order 9 Rule 13 C.P.C.

7. We are therefore not inclined to interfere with the impugned order of the learned Civil Judge in refusing to condone the long delay in filing the application under Order 9 Rule 13 C.P.C. The writ application, being devoid of merit, is dismissed. Writ petition dismissed.

2012 (II) ILR- CUT- 288

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

CRA. NO.178 OF 2001 (Dt.19.03.2012)

MACHHU CHHURA … …..Appellant.

.Vrs.

STATE OF ORISSA ……..Respondent.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – Ss. 34, 302, 324.

Common intention and murder – When two accused persons charged for commission of an offence and there is acquittal of one accused the other co-accused can never be convicted – However for independent action one can be convicted separately.

In this case the appellant and another were charged for commission of offence U/s.302/34 I.P.C. – Since the co-accused has been acquitted the appellant can not be convicted U/s.302/34 I.P.C. – However the independent action of the appellant as per the prosecution case can be taken note of – Since P.W.13 deposed that the appellant independently assaulted him by means of a lathi causing one abrasion, the appellant is convicted U/s. 324 I.P.C. and he is sentenced to undergo 3 years imprisonment.

(Para 8, 9)

Case law Relied on :-

AIR 1963 SC 1413 : (Krishna Govind Patil-V- State of Maharashtra).

For Appellant - M/s. D.P.Dhal, S.K.Tripathy, B.K.Panda, S.K.Gupta, D.K.Pattnayak, A.R.Mohanty, A.K.Swain.

For Respondent - Mr. Sangram Das, Addl. Standing Counsel.

L. MOHAPATRA, J. This appeal arises out of judgment and order dated 9.8.2001 passed by the learned Additional Sessions Judge, Titilagarh in Sessions Case No.55(B)/21 of 1999. The appellant and one Sujan Naik were charge-sheeted for commission of offences under Sections 302 and 394 of the I.P.C. read with Section 34 of the I.P.C. as well as Section 27 of the Arms Act for committing murder of one Hamirmal Jain by firing from a country-made pistol in course of committing robbery. Both of them also faced trial for the said offences. By the impugned judgment the co-accused Sujan Naik was acquitted of the said charge and the appellant was convicted

for commission of the aforesaid offences. He was sentenced to undergo imprisonment for life under Section 302/34 of the I.P.C., to undergo R.I. for two years under Section 394/34 of the I.P.C. and to undergo R.I. for six months under Section 27 of the Arms Act.

2. The case of the prosecution as revealed from the record is that the deceased Hamirmal Jain and Shiba Prasad Jain @ Safar Jain (P.W.15) were transacting gold ornaments in different weekly markets. Khirasindhu Bhoi (P.W.13) was the servant of P.W.15. On 29.12.1996 the said Shiba Prasad Jain (P.W.15) alongwith his servant P.W.13 in a TVS Champ (two wheeler) and the deceased in a motor-cycle left Sindhekela for Sardhapur weekly market. On the way at Surda Jore two persons, one of whom was tall with fair complexion (the present appellant) and the other who was dwarf with black complexion (accused Sujan Naik), being armed with lathi and pistols stopped them. First, accused Sujan Naik having two pistols in his hands told the deceased to get down from the two-wheeler. When the deceased resisted, he fired from a pistol pointing at the deceased and at that point of time when P.W.15 held accused Sujan Naik, the present appellant is alleged to have dealt a lathi blow on him as a result of which he fell down and became unconscious. After regaining sense P.W.15 found the deceased lying dead. He also found that his T.V.S. Champ was missing and the motor-cycle used by the deceased was lying at a distance from the place of occurrence. He also found a sum of Rs.2,100/- which had been kept in his bag with two bharies of gold were missing. Some residents of Sindhekela after getting information reached there and took P.W.15 and the deceased to Sindhekela P.S. where P.W.15 lodged the F.I.R. The case was registered for commission of offences under Sections 394 and 302 of the I.P.C. On completion of investigation, charge-sheet was submitted for commission of the offences for which both the accused persons faced trial.

3. The prosecution in order to establish the charge, examined as many as nineteen witnesses, but none was examined on behalf of the defence.

4. The plea of both the accused persons was denial of the prosecution allegation. The present appellant took a further plea that his father was a boat-man and he used to sail boat. There was dispute regarding payment for which P.Ws.15 and 13 not only falsely implicated him but also purposefully identified him in the case.

5. P.Ws.1 and 2 turned hostile. P.W.3 is the doctor who conducted post-mortem examination. P.W.4 is a post-occurrence witness and has no direct knowledge about the incident. Similarly P.W.5 is also a post-

occurrence witness. P.W.6 was declared hostile and P.W.7 did not say anything about the incident. Similarly, P.W.8 also did not say anything about the incident. P.W.9 turned hostile and P.W.10 accompanied the dead body of the deceased for post-mortem examination. P.W.11 is the S.I. of Police who arrested the appellant. P.W.12 is the doctor who examined P.W.13 on police requisition. He also examined P.W.15 on police requisition. P.W.13 is the servant of Shiva Prasad Jain and was examined as an eye-witness to the occurrence. P.W.14 has not stated anything about the occurrence. P.W.15, Shiva Prasad Jain @ Safar Jain, informed about the incident and he was examined as an eye-witness. P.W.16 is a post-occurrence witness and is also a witness to the inquest. P.W.17 at the relevant time was the S.D.J.M., Tigilagarh and he conducted the T.I. parade. P.W.18 is the Inspector of Police, C.I.D.C.B., Cuttack who investigated into the case. P.W.19 was the O.I.C., Sindhekela P.S. at the relevant time.

6. The trial court accepting the evidence of P.Ws.13 and 15 read with the evidence of P.W.3, the doctor, who conducted post-mortem examination as well as P.W.12, the doctor, who examined both the injured persons, found the appellant guilty of the charge but acquitted the co-accused Sujan Naik.

7. Sri Dhal, learned counsel appearing for the appellant assails the impugned judgment on the grounds that there were only two accused persons and both of them had been charged for commission of offence under Section 302/34 of the I.P.C. If one accused was acquitted of the charge under Section 302/34 of the I.P.C., the other accused can never be convicted for the said offence. Therefore, the appellant's conduct should have been examined independent of the prosecution case and accordingly, finding should have been rendered by the trial court as to what offence had been committed by the appellant. It is further contended by the learned counsel for the appellant that the two witnesses on whom much reliance is placed by the trial court are P.Ws.13 and 15. P.W.13 was the servant of P.W.15 and he was accompanied P.W.15 in a T.V.S. moped to Sardhapur weekly market. The deceased was also going in a motor-cycle. This witness in his cross-examination admitted that after he was assaulted, he fled away from the spot and had got no idea as to who assaulted to whom. Therefore, whether the deceased and P.W.15 were assaulted by the appellant and the co-accused or not had not been seen by P.W.13. He also could not identify the co-accused Sujan Naik during the T.I. parade. Similarly, P.W.15 could not identify either the appellant or the co-accused Sujan Naik during the T.I. parade and, therefore, his version even if accepted can only show that two persons were involved in commission of the offence. P.W.15 does not

implicate the appellant and the co-accused Sujan Naik as he failed to identify both of them in the T.I. parade. With regard to the above evidence it is further contended by the learned counsel for the appellant that if evidence of P.Ws.13 and 15 is not accepted, there is no other evidence on the basis of which the order of conviction can be maintained.

Learned counsel for the State referring to the evidence of P.W.13 submits that this witness had identified the appellant in T.I. parade correctly and, therefore, whatever he stated in court in connection with the aforesaid offences cannot be discarded and involvement of the appellant with the commission of the alleged offences is proved from the evidence of P.W.13. It is also contended by the learned counsel for the State that evidence of P.Ws.13 and 15 gets corroboration from the evidence of P.W.3, the doctor, who conducted post-mortem examination as well as P.W.12, the doctor, who examined both the injured persons.

8. Out of nineteen witnesses examined on behalf of the prosecution P.Ws.1, 2, 6, 9 and 14 turned hostile and did not support the case of the prosecution. Similarly, P.Ws.7 and 8 also did not say anything about the incident. P.W.3 is the doctor who conducted post-mortem examination. From the evidence of P.W.3 it appears that the deceased had sustained one bruise over occipital area and one charred margined fractured wound with inverted margin (oval shaped) over right third intercostals space. Both the injuries were *ante mortem* in nature. He was of the view that the cause of death was due to injury to the vital organ like heart leading to severe haemorrhage. He also opined that the second injury was a gun-shot injury and first injury could be caused by hard and blunt weapon like lathi. From the evidence of P.W.3 it is, therefore, proved that Hamirmal Jain died a homicidal death.

P.W.13 is the servant of Shiva Prasad Jain P.W.15. He deposed that on the date of occurrence he was accompanying P.W.15 in a T.V.S. moped cycle to Sardhapur weekly market and the deceased was also going in a motor-cycle. After crossing the village Surda when they reached a nalla, the T.V.S. moped could not cross the sand in starting condition and he started pushing the same. The deceased crossed them by riding his motor cycle. At that point of time two persons appeared out of whom one was fair and tall and the other was dwarf and black. The dwarf person was having two pistols in his hands and the tall person was having a lathi in his hand. The tall person dealt blow by means of the lathi on his left leg and the dwarf person shouted in Hindi directing the deceased to stop. After he received the injury, he fled away out of fear by the side of the river towards Surda. On the way

he was also shouting for help. He came back to the spot after the incident and found the deceased lying with pool of blood and P.W.15 lying in injured condition. He also saw both the persons who had assaulted escaping with the T.V.S. moped. Though they tried to chase them, they failed. He identified the tall man as the appellant and dwarf man as the co-accused. In cross-examination he stated that after he was assaulted he fled away from the spot and had got no idea as to who assaulted to whom. He also stated in cross-examination that in jail he could not identify the co-accused Sujan Naik. P.W.15 had accompanied the deceased alongwith P.W.13. He has also described both the persons in the manner P.W.13 had described. He deposed that first of all the person having lathi assaulted P.W.13 and P.W.13 fled away from the spot. When he held that dwarf person, the other person started assaulting on him by means of a lathi. He sustained injuries on his head and pain in left shoulder. There was firing from the pistol at the deceased by the dwarf person as a result of which the deceased fell down. They were trying to take both the vehicles, but left the motor-cycle and fled away with the T.V.S. moped. Apart from two tolas of gold, cash of Rs.2,100/- kept in his bag had also been taken away. Coming to the question of identification P.W.17, the then S.D.J.M., Titilagarh, deposed that P.W.15 could not identify any of the two accused persons and P.W.13 could identify only the appellant stating that he was the person who had assaulted him by means of a lathi. When P.W.15 failed to identify the accused persons in T.I. parade, identification of the accused persons in court loses its importance. Though he has stated about the involvement of two persons describing their appearance to have committed the offence in absence of identification by the said witness, it cannot be conclusively said that it was the appellant and the co-accused Sujan Jain who were the said two persons involved in commission of the offences. P.W.13 on whom much reliance was placed by the trial court as well as learned counsel for the State has fairly admitted that he was assaulted by the appellant by means of a lathi. Immediately thereafter he fled away from the spot. This part of the evidence of P.W.13 is also corroborated by P.W.15. He also admitted that he had not seen who assaulted to whom. Therefore, identification of the appellant during T.I. parade helps the prosecution in establishing that it was the appellant who had assaulted P.W.13 by means of a lathi and the said evidence of P.W.13 also gets corroboration from the evidence of P.W.12 the doctor who examined P.W.13 on police requisition and found one abrasion over left leg. There is no other evidence which can connect the appellant with commission of the alleged offence under Section 302 of the I.P.C.

The question that is raised before this court is as to whether the appellant alone could be convicted for commission of offence under Section

302/34 of the I.P.C. when admittedly the co-accused had been acquitted of the said charge. Charge had been framed against both the accused persons under Section 302/34 of the I.P.C. and no independent charge under Section 302 of the I.P.C. had been framed against the appellant. It is not the case of the prosecution that this appellant alone had committed the offence. In the case of **Krishna Govind Patil –vrs.- State of Maharashtra** : reported in AIR 1963 SC 1413 similar question came up for consideration. In the reported case there were four accused persons who had been charged for commission of offence under Section 302/34 of the I.P.C. Out of four accused persons three had been acquitted by the High Court giving them benefit of doubt in view of the fact that their identity was not established. However, fourth accused who had filed appeal before the Hon'ble Supreme Court was convicted for commission of offence under Section 302/34 of the I.P.C. on the ground that he had committed the offence along with one or other of the acquitted accused. The Hon'ble Supreme Court held:

> "the conviction of the fourth accused was clearly wrong. When accused were acquitted either on the ground that evidence was not acceptable or by giving benefit of doubt to them the effect in law would be that they did not take part in the offence. Hence the effect of acquittal of the three accused was that they did not conjointly act with the fourth accused in committing the murder. If that was so, the fourth accused could not be convicted under Section 302 read with 34 of the I.P.C. for having committed the offence jointly with the acquitted persons."

In view of the law laid down by the Hon'ble Supreme Court the independent conduct of the appellant has to be taken into consideration. As we have already found from the evidence of P.W.13 that it was the appellant who assaulted P.W.13 by means of a lathi causing one abrasion over left leg in the medial aspect and the injury was simple in nature, for committing this offence the appellant can be convicted under Section 324 of the I.P.C. There is also no material to prove that it was the appellant who was in possession of the pistol and after firing he had fled away with the gold and cash. In absence of any material to that effect he could not have also been convicted for commission of offence under Section 394 of the I.P.C. or under Section 27 of the Arms Act.

9. For the reasons stated above, we allow the appeal in part and set aside the impugned judgment and order dated 9.8.2001 passed by the learned Additional Sessions Judge, Titilagarh in Sessions Case No.55(B)/21 of 1999 convicting the appellant for commission of offences under Sessions

302, 394 read with Section 34 of the I.P.C. as well as Section 27 of the Arms Act and sentencing him to undergo imprisonment for life under Section 302/34 of the I.P.C., to undergo R.I. for two years under Section 394/34 of the I.P.C. and to undergo R.I. for six months under Section 27 of the Arms Act. Instead, we convict the appellant for commission of offence under Section 324 of the I.P.C. and sentence him to undergo imprisonment for three years.

Since the appellant-Machhu Chhura has already served the sentence, he be set at liberty forthwith unless his detention is required in any other case.

Appeal allowed in part.

2012 (II) ILR- CUT- 295

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

W.P.(C) NO. 17260 OF 2011 (Dt.09.09.2011)

AMIR CHAND NAYAK ... .Petitioner.

.Vrs.

SPECIAL SECRETARY, G.A.
DEPT. & ORS. .....Opp.Parties.

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

"Catch up rule" - As decided by the Hon'ble Apex Court – Meaning of – Roster point promotees (reserved category) can not count their seniority in the promoted category from the date of their continuous officiation in the promoted post, vis-à-vis the general Candidates who were senior to them in the lower category and who were later promoted – On the other hand, the senior general Candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved Candidates he will have to be treated as senior, at the promotional level, to the reserved Candidate, even if the reserved Candidate was earlier promoted to that level.

In the present case the petitioner was given promotion to the Cadre of OF.S. Class-I (J.B.) as reserved category Candidate earlier to O.P.4 who belongs to unreserved category - While the petitioner was continuing in the cadre of O.F.S. Class-I (J.B.) O.P.4 was promoted to the said Cadre – If catch up rule is applied the inter se seniority between the petitioner and O.P.4 in the feeder cadre has to be maintained on promotion – Held, in the feeder cadre O.P.4 being senior to the petitioner can be treated as senior to the petitioner in O.F.S. Class-I (J. B.) by applying the "Catch up" principle.

(Para 4)

Case laws Referred to:-

1.AIR 1999 SC 3471 : (Ajit Singh & Ors.-V-State of Punjab & Ors.)
2.(2006)8 SCC 212 : (M. Nagraj & Ors.-V-Union of India Ors.)
3.(2011)ILR(CTC.)41 : (Man Mohan Mishra &Ors.-V-State of Orissa & Ors.
4.(2011)1 OLR 689 : (Lagnajit Ray & Ors.-V-State of Orissa & Ors.)

For Petitioner - M/s. Upendra Kumar Samal, C.D. Sahoo, M.R.Mohapatra, S.P.Patra, S.Naik,

Bijay Kumar Mohanty.
For Opp.Parties - M/s. Manoj Kumar Mishra, P.K.Das & S.Senapati (for Intervenor)
M/s.Er. N.K.Mohanty, B.K.Mohanty, S.K.Das & B.M.Mohapatra (Caveator)
Advocate General
Mr. R.K.Rath.

L. MOHAPATRA, J. This writ application has been filed challenging order of the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A.No.392(C) of 2010. The petitioner was respondent no.4 before the Tribunal and opposite party no.4 was the applicant.

2. Case of opposite party no.4 is that he was appointed as O.F.S. Class-II officer on 31.10.1988 whereas the petitioner was appointed as O.F.S. Class-II officer on 12.12.1988. The seniority of opposite party no.4 as per office order dated 1.2.1989 was fixed at serial no.8 whereas seniority of the present petitioner was fixed at serial no.34. The provisional gradation list was issued by the Finance Department in respect of all the officers belonging to O.F.S. Class-II cadre as on 31.3.1997 and was circulated amongst the employees on 5.11.1997. In the said provisional gradation list, opposite party no.4 was placed at serial no.105 whereas petitioner was placed at serial no.128. The Selection Board prepared a list of officers for promotion from O.F.S. Class-II to O.F.S. Class-I (Junior Branch) on 21.8.1998. The Board recommended the name of both the petitioner and opposite party no.4 but the petitioner was promoted conditionally to O.F.S. Class-I (Junior Branch) pending final decision in the matter of fixation of seniority of O.F.S. Officers. Opposite party no.4 was promoted to O.F.S. Class-I (Junior Branch) on ad hoc basis by notification dated 5.9.2002. Subsequently, opposite party no.4 was promoted on regular basis to O.F.S. Class-I (Junior Branch) in consultation with O.P.S.C. in the year 2005. By that time the petitioner was working as O.F.S. Class-I (Junior Branch). A decision was taken that opposite party no.4 along with others would maintain their inter se seniority as per the feeder cadre. Surprisingly, the Finance Department prepared a disposition list of O.F.S. Class-I (Junior Branch) Officers on 1.10.2006 in which opposite party no.4 was placed at serial no.57 and the petitioner was placed at serial no.17. Earlier decision for fixation of inter se seniority as per the feeder cadre was not taken into account for which opposite party no.4 filed an application ventilating his grievances on 2.1.2007 claiming for proper placement in the disposition list basing on the ratio of the decision of the Hon'ble Supreme Court in the case of ***M. Nagaraj and others***. Since the representation of opposite party no.4

was not considered, he approached the Tribunal in O.A.No.976(C) of 2007. The said Original Application was disposed of directing the State authorities to take a decision on the representation within a specified time. No decision having been taken on the said representation in spite of the order of the Tribunal, opposite party no.4 approached the Tribunal in the present Original Application. Prayer in the Original Application was for a declaration that the notification dated 10.2.2010 whereby the petitioner was promoted to the post of O.F.S. Class-I Super Time Scale on ad hoc basis, is not only violative of Articles 14 and 16 of the Constitution of India, ORV Act, 1975 but also violative of the Orissa Finance Service Rules, 1979. A further prayer was made to restore the inter se seniority in the feeder cadre i.e. O.F.S. Class-II. A prayer was also made on behalf of opposite party no.4 not to give the petitioner further promotion until finalization of inter se seniority. Opposite party no.4 before the Tribunal relied on decision of the Hon'ble Supreme Court in the case of ***Ajit Singh and others Vrs. State of Punjab and others,*** reported in AIR 1999 S.C. 3471**,** ***M. Nagraj and others Vrs. Union of India and others,*** reported in (2006) 8 SCC 212, ***Suraj Bhan Meena and another Vrs. State of Rajasthan and others (S.L.P.(Civil) No.6485 of 2010*** and the decisions of Orissa High Court in the case of ***Man Mohan Mishra and others Vrs. State of Orissa and others,*** reported in (2011) ILR (Cuttack) 41 ***and Lagnajit Ray and others Vrs. State of Orissa and others*** reported in (2011) 1 OLR 689.

The stand of the State authorities before the Tribunal was that as per the General Administration Department Resolution dated 20.3.2002, the Government servants belonging to SC/ST category on promotion to higher grade i.e. up to lowest rank of O.F.S. Class-I(Junior Branch) will retain their seniority there. Since O.F.S. Class-I(Junior Branch) is the lowest rank, O.F.S Class-I, the inter se seniority of the petitioner was fixed from the date of his promotion to O.F.S. Class-I (Junior Branch) grade. The 'catch up' principle having been withdrawn vide General Administration Department Resolution dated 20.3.2002 with effect from the date 17.6.1995, candidates belonging to unreserved category cannot claim seniority in O.F.S. Class-I (Junior Branch) grade on the ground of being senior in the base level post i.e. O.F.S. Class-II. The petitioner having been promoted to O.F.S. Class-I (Junior Branch) prior to opposite party no.4 by virtue of rule of reservation, he has been treated as senior to opposite party no.4. Similar is the stand taken by the petitioner before the Tribunal.

3. The undisputed facts are that in O.F.S. Class-II, the petitioner was appointed on 12.12.1988 whereas opposite party no.4 was appointed on 31.10.1988. In the provisional gradation list on 31.3.1997, opposite party no.4 was placed at serial no.105 whereas petitioner was placed at serial

no.128. Therefore, in the cadre of O.F.S. Class-II, opposite party no.4 was senior to the petitioner. So far as promotion to O.F.S. Class-I (Junior Branch) is concerned, the petitioner was promoted in the year 1998 whereas opposite party no.4 was promoted in the year 2002. It is also not in dispute that while the petitioner was continuing in the cadre of O.F.S. Class-I (Junior Branch), opposite party no.4 was promoted to the said cadre. In the case of ***Ajit Singh and others Vrs. State of Punjab and others, reported in AIR 1999 S.C. 3471***, it was held that roster point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, vis-à-vis the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level.

The above decision of the Hon'ble Supreme Court is popularly known as 'catch up' principle.

4. Admittedly, in the present case, the petitioner was promoted to O.F.S. Class-I (Junior Branch) as reserved category candidate and this fact is admitted in para-21 of the writ application.

Shri B.K. Mohanty, learned Senior Counsel appearing for the petitioner though initially submitted that promotion of the petitioner to O.F.S. Class-I (Junior Branch) cadre was not as reserved category candidate, in view of the admission in para-21 of the writ application, such a contention was not pressed any further. Therefore, the admitted fact is that the petitioner was given promotion to the cadre of O.F.S. Class-I (Junior Branch) as reserved category candidate earlier to opposite party no.4, who belongs to unreserved category. While the petitioner was continuing in the cadre of O.F.S. Class-I (Junior Branch), opposite party no.4 was promoted to the said cadre in the year 2002. If the 'catch up' rule is applied then, the inter se seniority between the petitioner and opposite party no.4 in the feeder cadre has to be maintained on promotion. In the feeder cadre admittedly opposite party no.4 was senior to the petitioner and, therefore, applying 'catch up' principle, opposite party no.4 has to be treated as senior to the petitioner in O.F.S. Class-I (Junior Branch). The Tribunal in the impugned judgment not only relied on the aforesaid decision of the Supreme Court but also several other decisions relating to 'catch up' principle in order to arrive at the above finding.

5. We therefore do not find any infirmity in the order of the Tribunal in allowing the Original Application filed by opposite party no.4. Accordingly, the writ application, being devoid of any merit, is dismissed.

Writ petition dismissed.

2012 (II) ILR- CUT- 300

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

W.P.(C) NO. 13737 OF 2006 (Dt.21.10.2011)

MANOJ KUMAR KAR … …..Petitioner.

.Vrs.

BOARD OF DIRECTORS,
KALINGA GRAMYA BANK& ANR. ……Opp.Parties.

A. SERVICE LAW – Past conduct – If past conduct is utilized for implicating a major punishment, the charge sheeted officer must be given an opportunity to make his submission in support of the past conduct.

In the present case both the disciplinary authority and the appellate authority took in to consideration the past conduct of the petitioner without giving him any opportunity of hearing – Held, impugned order is not sustainable. (Para 8,12)

B. SERVICE LAW – Departmental Proceeding – Petitioner and some other employees were served with similar charges – No difference between the stand taken by the petitioner and other employees – Petitioner was punished where as other employees were let off with warning – Held, petitioner has been treated differently – Action of the management in treating the petitioner differently amounts to discrimination – Punishment imposed is not sustainable.

(Para 12)

C. SERVICE LAW – Disciplinary Proceeding – Proceedings before the Inquiry Officer – Though notice issued to the petitioner, the same were received by the petitioner after the aforesaid dates on which the inquiry had been fixed for hearing – Inquiry Officer concluded the proceeding and submitted his report – Petitioner not given an opportunity to defend himself – No reason assigned by the Inquiry Officer for finding the petitioner guilty of the charges – Held, punishment passed by the disciplinary authority and appellate authority basing on such inquiry report cannot sustain and matter remitted back to conduct a de-novo enquiry. (Para 12)

Case law Relied on:-

(2010)5 SCC 783 : (State of Uttar Pradesh & Ors.-V-Raj Pal Singh)

Case Laws Referred to:-

1.1981(3) SLR 189 : (Babaji Charan Rout-V-State of Orissa & Ors.)
2.AIR 1964 SC 506 : (State of Maysore-V- K.Manche Gowda)
3.(2005)8 SCC 264 : (U.P. State Spinning Co.Ltd.-V-R.S.Pandey & Anr.).
4.AIR 2009 SC 161 : (Union of India-V- Y.S.Sandhu)
5.(2007)7 SCC 236 : (Bank of India & Ors.-V-T.Jogram)
6.(1996)3 SCC 364 : (State of Bank of India of Patiala & Ors.-V-S.K.Sharma).

For Petitioner - M/s. G.A.R. Dora, Smt. G.Rani Dora, J.K.Lenka, S.B.Mohanty.

For Opp.Parties - M/s. Ms. S.L.Pattnaik, M.K.Pattnaik, P.K.Das & S.Senapati.

L.MOHAPATRA.J. The petitioner, while working as Filed Officer, Judum Branch of Cuttack Gramya Bank, faced a departmental proceeding and having been found guilty of the charges, was dismissed from service by the disciplinary authority on 20.6.2003 in Annexure-23 and his departmental appeal against the order of punishment was also dismissed on 21.11.2003 in Annexure-25. This writ application has been filed challenging the order passed by the disciplinary authority in Annexure-23 as well as the appellate authority in Annexure-25.

2. The petitioner faced eight charges in the departmental proceeding, which are as follows:-

1. He created serious indiscipline in the Bank and misled others to work against the Bank without any reason for the same and thereby violated Regulation 19 of Cuttack Gramya Bank Officers & Employees Service Regulation-2000.

2. He did not obey the instructions of the higher authority to attend to an urgent work in Bank's exigencies and thereby violated Regulation 17 of the Regulation-2000.

3. He as an officer has illegally joined hands with the Workmen Union (Karmachari Sangha) and instigated them to make an agitation/dharana against the Bank's management in the name of Joint Coordination Committee without having any charter of demands/issues either from the Officers Association or from the Workmen Union and thereby violated Regulation 19 and 31 of the aforesaid Regulation-2000.

4. He was absenting himself from duty and overstaying his leave and thereby violated Regulation 22 of the aforesaid Regulation 2000.

5. He was neglecting his office work and keeping important official matter pending deliberately. He was neglecting branch reconciliation work and follow-up of old high value sundry debtor entries of branches like Panchupalli branch despite repeated reminders to him. He was hiding important sundry debtor correspondences in his custody and was not working on it. He has not acted honestly, sincerely and faithfully in his work and thereby violated Regulations 17 and 19 of the aforesaid Regulation-2000.

6. He was neglecting his office work by taking frequent leave and at times over staying his leave despite counseling, advises and warning to him and thereby violated the Regulations 17 and 19 of the aforesaid Regulation-2000.

7. He was leaving office without obtaining prior permission or informing anyone in office and not obeying the Bank's rules and regulations and behaving in an in-disciplined manner which is unbecoming on the part of an officer and thereby violated Regulations 17, 19 and 22 of the aforesaid Regulation-2000.

8. He remained absent un-authorisedly from 24.2.2003 onwards despite repeated calls to him to join back in duty in Bank's exigencies and thereby violated Regulations 22 of the aforesaid Regulation-2000.

In course of inquiry, around twelve documents were exhibited bearing nos.1 to 11 and 11(A). Relying on these documents, the inquiry officer found the petitioner guilty of eight charges and submitted his report to the disciplinary authority. The disciplinary authority without issuing a second notice to show cause, passed the order of punishment of dismissal from service. The departmental appeal preferred by the petitioner was also dismissed by the Board.

3. Shri G.A.R.Dora, learned Senior Counsel appearing for the petitioner drew attention of the Court to Annexures-1 and 2 series. With reference to the same, it was contended by Shri Dora, the learned Senior Counsel that on 29.11.2002 under Annexure-1, the petitioner was served with a memorandum of charges containing four charges. Similarly several other employees such as Shri Rajnikanta Das, Shri Pranab Pati and Shri Sudhansu Mohan Rout and some others were also served with charge memos containing exactly similar charges on the very same day i.e. 29.11.2002. The petitioner and rest of the employees, who were served with similar charges, submitted written statement of defence and promised the

management to render best services for development of the Bank. Except the petitioner, rest of the employees were let off with a warning, whereas no order was passed so far as petitioner is concerned. Later on, these four charges were added to another set of four charges and a departmental proceeding was initiated against the petitioner in respect of eight charges. According to Shri Dora, the learned Senior Counsel, like others the petitioner should have been let off with a warning so far as the first four charges are concerned and the proceeding could be initiated for the rest of the charges i.e. Charge no. 5 to Charge no.8. This procedure was not adopted by the opposite parties purposefully with a sole aim to get rid of the petitioner. Referring to the inquiry report, it was also contended by Shri Dora, the learned Senior Counsel that the Inquiry Officer has not at all discussed anything with regard to charges and only with reference to one or two documents produced by the management, the petitioner was found guilty of the charges. This clearly shows non-application of mind by the inquiry officer. It was further contended by Shri Dora that in course of the departmental proceeding, the petitioner was served with notice for appearance one day after the due date fixed by the inquiry officer and as such, he had no occasion to appear before the inquiry officer on those days and, therefore for all practical purposes, report of the inquiry officer is an ex pate report without giving an opportunity of hearing to the petitioner. Drawing attention of the Court to the orders of disciplinary authority as well as the appellate authority, it was contended that the petitioner was not served with a second show cause notice before the punishment was imposed and his past conduct, which did not form part of the charges, was taken into consideration for the purpose of imposing penalty of dismissal from service which is not permissible under law.

Shri Manoj Kumar Mishra, learned counsel appearing for the Bank, in his reply to the submissions made by Shri Dora, the learned Senior Counsel for the petitioner submitted that on 29.11.2002, the petitioner and some other employees were served with charge memos containing exactly similar charges. Except the petitioner, rest of the employees repented for their conduct and, accordingly, they were let off with warning. The petitioner in his reply only admitted to cooperate in development of the Bank but had no repentance for his conduct. Therefore, the petitioner was treated differently. So far as report of the inquiry officer is concerned, it was contended by Shri Mishra that the charges could only be proved on the basis of documents and the relevant documents in support of each charge were perused by the inquiry officer and on being satisfied, the inquiry officer found the petitioner guilty of the charges. Therefore, contention of Shri Dora, that the inquiry officer did not apply his mind is not correct. Shri Mishra also contended that

under the regulations of the Bank, there is no provision for issuance of second show cause notice before imposing a punishment and the past conduct of the petitioner was not the basis on which the order of punishment of dismissal from service had been imposed. The punishment was imposed on the basis of the charges levelled against the petitioner for which he had been found guilty.

4. Admittedly, on 29.11.2002 the petitioner and several others were served with charge memos containing exactly similar four charges. The petitioner in his reply requested to exonerate him of the charges and assured the Bank to render best of his service for development of the Bank. The other employees in their reply regretted for their act and assured the Bank to render best service for development of the Bank. We find no difference between the stand taken by the petitioner and other employees. But the other employees, who faced proceeding with similar charges, were let off with a warning, whereas the petitioner was directed to face a departmental proceeding in respect of eight charges including four charges, which had been framed against him on 29.11.2002. Therefore, the petitioner has been discriminated to the above extent.

5. So far as departmental proceeding is concerned, from Annexure-17, it appears that the inquiry officer fixed the date to conduct the inquiry on 29.4.2003 at 11 A.M. But notice of the said date for inquiry was sent to the petitioner on 22nd April 2003. The petitioner did not appear in the said date and the next date was fixed to 2.5.2003 and notice thereof was sent by the inquiry officer on 29.4.2003. On 2.5.2003, the petitioner did not appear and the next date was fixed to 5.5.2003. Notice of fixation of the said date was intimated to the petitioner by the inquiry officer in Annexure-19 on 2nd May 2003. The stand of the petitioner is that he received all the three letters after the date to which inquiry had been fixed and, therefore, had no occasion to appear before the inquiry officer. The inquiry officer thereafter submitted inquiry report on 10.5.2003. Twelve documents were produced before the inquiry officer and only with reference to the said documents, the inquiry officer found the petitioner guilty of the charges. One or two examples of the finding of the inquiry officer would indicate the manner in which the entire matter has been dealt with.

6. So far as charge no.1 is concerned, finding of the inquiry officer is as follows:-

> "The P.O. has exhibited ME-4 in support of the above charge. I have examined the same along with the reply dated 16.12.2002 of CSO and held that Charge No.1 as proved."

Similarly in respect of Charge no.2, following is the finding:-

> "The P.O. has exhibited document ME-11A in support of the above charge. I have examined the same and hold that Charge no.2 as proved."

Similar findings had been rendered by the inquiry officer in respect of all the charges. The above findings clearly indicate total non-application of mind by the inquiry officer. While holding the petitioner guilty of the charges, no reason whatsoever has been assigned by the inquiry officer even in respect of the relevant documents produced by the presenting officer.

7. So far as non-service of second show cause notice to the petitioner is concerned, it was admitted by Shri Mishra, learned counsel for the Bank that no such notice was served as there is no provision for service of such notice under the relevant regulations.

So far as the orders passed by the disciplinary authority as well as the appellate authority are concerned, it is clear from paragraph-7 of the order passed by the disciplinary authority and paragraph-7 of the order passed by the appellate authority, that the past record of the petitioner has been taken into consideration. The disciplinary authority in paragraph-7 of the order of punishment has observed that the past record of charge-sheeted officer is very bad and the chargesheeted officer was also earlier charge-sheeted on 8.1.1991 for his disobedience, indiscipline and riotous behaviour. The appellate authority in pagrapagrah-7 of the order passed by it, has observed that the past records of Shri Kar (the petitioner) was observed by the appellate authority and it was found that he was a serious offender and even the past Chairman, Dr. P.N. Choudhury was hackled by him and an F.I.R. was lodged by Dr. Choudhury against the petitioner in the Police Station on 19.4.1990. Such records were also available in the office file. Therefore, the disciplinary authority as well as the appellate authority took note of the past conduct of the petitioner, but he was not given notice thereof and as such he had no occasion to meet the same.

8. In the case of ***State of Uttar Pradesh and others Vrs. Raj Pal Singh*** reported in (2010) 5 SCC 783, the apex Court held that when charges are same and identical in relation to one and the same incident to deal with the delinquents differently in the award of punishment, would be discriminatory. Our findings earlier that in respect of first four charges, the petitioner had been treated differently find support from the above decision. In the case of ***Babaji Charan Rout Vrs. State of Orissa and others***

reported in 1981(3) SLR 189, this Court held that the past conduct if utilized for implicating a major punishment, the chargesheeted officer must be given an opportunity to make his submission in support of the past conduct. Admittedly, in the present case, both the disciplinary authority and the appellate authority took into consideration the past conduct of the petitioner without giving him any opportunity. Similar was the view expressed by the Apex Court in the case of ***State of Maysore Vrs. K. Manche Gowda*** reported in AIR 1964 S.C.506.

9. Shri Mishra, learned counsel appearing for the Bank placed reliance on a decision of the apex Court in the case of ***U.P. State Spinning Co.Ltd. Vrs. R.S.pandey and another*** reported in (2005) 8 SCC 264 to substantiate his contention in all cases, where the inquiry report is not furnished, the Court should not mechanically set aside the punishment order. Only when the Court finds that furnishing of report would have made a difference to the result of the case, it should set aside the punishment order. This judgment cited by Shri Mishra may not have much relevance to the present case considering his own submission that there was no provision in the regulation to issue second show cause notice to the petitioner before imposing punishment.

10. So far as the inquiry report is concerned, from Annexure-22, we find that the petitioner had given reply to the inquiry report and, therefore, question of non-supply of copy of the inquiry report does not arise in this case. Shri Mishra also placed reliance on a decision of the apex Court in the case of ***Union of India Vrs. Y.S.Sandhu*** reported in AIR 2009 SC 161 and submitted that if the Court finds any fault in the inquiry proceeding, it will be appropriate on the part of the Court to set aside the order of punishment and direct reinstatement and the Court should also direct the inquiry to continue from the stage, where it stood before the alleged vulnerability surfaced.

11. Shri Mishra, learned counsel for the Bank also relied on a decision of the apex Court in the case of ***Bank of India and others Vrs. T.Jogram*** reported in (2007)7 SCC 236 wherein it was held that when there were no allegations of procedural irregularities or illegalities, it is inappropriate on the part of the Court to interfere. The other decisions cited by Shri Mishra, are, more or less, in the same light as the above decisions. The only other decision on which much reliance was placed by Shri Mishra is the case of ***State of Bank of India of Patiala and others Vrs. S.K.Sharma*** reported in (1996) 3 SCC 364. Referring to the said decision, it was contended by Shri Mishra that the substantive provision is required to be complied with, but the procedural provision is not substantial or mandatory in character. Therefore,

if no prejudice is caused to the person proceeded against, there should be no interference from the Court and substantial compliance of the provision is enough.

12. As held earlier in respect of the first charge, the petitioner has been treated differently and, therefore, is squarely covered by the judgment of the Apex Court in the case of *State of Uttar Pradesh and others (supra).* Action of the management in treating the petitioner differently amounts to discrimination so far as departmental proceeding is concerned. Admittedly the proceeding had been fixed to three dates i.e. 29.4.2003, 2.5.2003 and 5.5.2003. Though notice of the said date had been issued to the petitioner in Annexures 17, 18 and 19, the same were received by the petitioner after the aforesaid date on which the inquiry had been fixed for hearing. Therefore, no fault can be found with the petitioner for not being in a position to attend the inquiry on the above three dates. Without giving any further opportunity, the inquiry officer concluded the above proceeding and submitted his report on 10.5.2003. Therefore, it is clear from the record that the petitioner had not been given an opportunity to defend himself in the departmental proceeding. As held earlier, the inquiry officer also did not assign any reason whatsoever for finding the petitioner guilty of the charges and only with reference to some documents, findings have been rendered without assigning any reason. The disciplinary authority as well as the appellate authority also took into consideration the past conduct of the petitioner and no opportunity had been given to the petitioner to make his submission in respect of his past conduct. All these deficiencies and irregularities found in the inquiry make the order of punishment passed by the disciplinary authority as well as the order passed by the appellate authority are not sustainable in law.

13. We, therefore, allow the writ application, set aside the order of punishment imposed by the disciplinary authority as well as the appellate authority in Annexures-23 and 25 and remit the matter back to conduct a de-novo enquiry in respect of charge nos.5 to 8 and proceed accordingly in accordance with law.

Writ petition allowed.

2012 (II) ILR- CUT- 308

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

JCRA NO. 236 OF 2000 (Dt.27.10.2011)

MANGLU KIRSANI … ….Appellant.

.*Vrs*.

STATE OF ORISSA ……..Respondent.

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

Appellant dealt one stab blow on the deceased and fled away – Medical evidence does not disclose injury to any vital organ – Circumstances established in the case do not indicate that there was premeditation on the part of the appellant to kill the deceased – Taking in to consideration the nature of injury and other circumstances it does not appear that the appellant had any intention to inflict injury as was likely to cause death of the deceased – However assault on the deceased's abdomen with knife was inflicted with knowledge to cause bodily injury which was likely to cause deceased's death – Held, appellant does not have required mensrea for commission of offence U/s.302 I.P.C. hence he is found guilty U/s.304 Part II I.P.C.

(Para 9)

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

B.K.PATEL,J. This jail criminal appeal is directed against the judgment and order dated 4.5.2000 passed by the Additional Sessions Judge, Malkangiri in Sessions Case No.77 of 1999 (S.C.No.34/98 of Sessions Judge,Koraput-Jaypore) convicting and sentencing the appellant to undergo imprisonment for life under section 302 of the Indian Penal Code (for short, the I.P.C.). for committing murder of deceased Mangala Kirsani.

2. Prosecution case is that on 19.9.1997 at about 7.30 P.M. Mangala Kirsani appeared before P.W.6, O.I.C. of Mudulipada Police Station and orally reported that at about 5.00 P.M. while he was going towards Dangara, in the middle of the village the appellant abused and threatened him saying that he would not spare the deceased. Thereafter the appellant brought out knife M.O.I from his waist, stabbed on the deceased's belly and left the place with M.O.I. P.W.6 reduced the oral report of the deceased into F.I.R. Ext.5 and registered the case under section 307 of the I.P.C. Deceased was sent

to Khoirput Hospital. As his condition became serious he was sent to Jeypore and he died on the way. In course of investigation P.W.6 examined witnesses and effected seizure of articles including knife M.O.I. On completion of investigation, charge-sheet was submitted against the appellant under section 302 of the I.P.C.

3. Appellant took plea of complete denial.

4. In order to substantiate the charge, prosecution examined 6 witnesses. P.W.1 is the witness to seizure of knife M.O.I. P.W.2 denied his knowledge regarding the occurrence. P.W.3 is deceased's son whereas P.W.4 is deceased's brother before whom the deceased made dying declaration implicating the appellant. P.W.5 is the doctor who conducted Post Mortem Examination over the dead body of the deceased. Prosecution also relied upon documents marked Exts.1 to 13 and material object M.O. I. No defence evidence was adduced.

Placing reliance on the dying declaration made before P.Ws. 3 and 4 stated to have been corroborated by medical evidence and circumstance of seizure of M.O.I, trial court held the prosecution to have proved the charge against the appellant.

5. In assailing the impugned judgment it is contended by the learned counsel for the appellant that there is no eyewitness to the occurrence though in the F.I.R. Ext.5 stated to have been lodged by the deceased many persons are alleged to have witnessed the occurrence. Prosecution adduced evidence of deceased's son P.W.3 and brother P.W.4 to prove that the deceased implicated the appellant in his dying declaration. P.Ws. 3 and 4 both alleged in a bald manner that the deceased told them that the appellant stabbed the deceased. Evidence is silent as to when and under what circumstances the occurrence took place. Therefore, trial court should not have placed reliance on the evidence of any of the said two witnesses. It is further argued that though in the F.I.R. it is stated that one Sundari, daughter of the deceased, accompanied him to the police station, she has not been examined by the prosecution. There is no corroboration to the evidence of P.W.6 with regard to the contents of the F.I.R. which has been treated as dying declaration. Alternatively it is argued by the learned counsel for the appellant that admittedly one stab injury was found on the deceased. F.I.R. Ext.5 also indicates that appellant dealt single knife blow on the abdomen of the deceased. Deceased appears to have died two days after the occurrence. Alleged occurrence took place all in a sudden and there is no premeditation on the part of the appellant in inflicting the injury. In such

circumstances, appellant cannot be said to have committed offence of murder.

6. In reply, learned Additional Standing Counsel contends that after receiving fatal injury deceased himself lodged the F.I.R. Ext.5 implicating the appellant to have stabbed on his abdomen. Contents of the F.I.R. find corroboration from the evidence of P.Ws. 3 and 4. That apart, evidence of P.W.1 and P.W.6 establishes seizure of knife M.O.I from the house of appellant. Knife M.O.I was found stained with human blood on chemical examination. Therefore, there is no infirmity in the impugned judgment.

7. We have carefully examined the materials on record. There is no eyewitness to the occurrence. It is in the evidence of P.W.6 that the case was registered on the basis of F.I.R. Ext.5 prepared on the basis of oral narration of the occurrence by the deceased on 19.9.1997. The deceased having died soon thereafter, F.I.R. amounts to a dying declaration. In the dying declaration deceased alleged that when he was going to Dangara the appellant abused him and stated that he would not spare him. Thereafter, he brought out the knife from his waist, stabbed on deceased's abdomen and fled away with the knife. Both P.Ws. 3 and 4 have stated that the deceased told them that the appellant stabbed him with the knife. P.W.5 in course of Post Mortem Examination found one incised wound over the left upper abdomen. Cause of death of the deceased was due to severe uncontrollable intra-abdominal bleeding which led to severe shock and death. On examination of M.O.I P.W.5 opined that the injury of the deceased was possible by said knife. It is in the evidence of P.W.5 that the deceased died while undergoing treatment at hospital before he could be shifted for further treatment. Evidence of P.W.6 regarding seizure of knife M.O.I from the house of the appellant under seizure list Ext.6 finds corroboration from the evidence of P.W.1.

8. Thus, prosecution has adduced cogent evidence to establish that the deceased made oral dying declaration not only before P.Ws. 3 and 4 but also before P.W.6 implicating the appellant with commission of offence. Dying declaration finds corroboration from the medical evidence and circumstance of seizure of M.O.I which was stained with human blood from appellant's house.Therefore, finding of the trial court that the appellant stabbed the deceased by means of the knife M.O.I which resulted in death of the deceased is immune from interference.

9. However, admittedly, circumstances established in the case do not indicate that there was premeditation on the part of the appellant to kill the

deceased. Appellant dealt one stab blow on the deceased and fled away. Medical evidence does not disclose injury to any vital organ. In the circumstances, we are of the considered view that appellant does not appear to have required *mens rea* for commission of offence under section 302 of the I.P.C. Taking the nature of injury inflicted on the deceased into account and other circumstances indicated above, it is also does not appear that the appellant had any intention to inflict injury as was likely to cause death of the deceased. However, assault on the deceased's abdomen with knife M.O.I was certainly inflicted with knowledge to cause bodily injury which was likely to cause deceased's death. Therefore, we find appellant guilty of commission of offence under section 304, Part-II of the I.P.C.

10. In view of the above, appeal is allowed in part. Conviction and sentence against the appellant under section 302 of the I.P.C. is set aside. Instead, appellant is convicted for commission of offence under section 304, Part-II of the I.P.C. and sentenced to undergo rigorous imprisonment for seven years.

It is stated that the appellant is in custody for more than 10 years. If that be so, the appellant Manglu Kirsani be set at liberty forthwith if his detention is not required in any other case.

Appeal allowed in part.

2012 (II) ILR- CUT- 312

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

CRA. NOS. 200, 202, 211 OF 1996 (Dt.24.02.2012)

LAXMIDHAR SWAIN & ORS. … … Appellants.

.Vrs.

STATE OF ORISSA … …..Respondent.

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

Dying declaration (Ext.5) – P.W.5 the Medical Officer recorded the dying declaration in presence of P.W.8 on police requisition – He stated that the deceased implicated six appellants and others but they were not named – Dying declaration has been recorded in a question answer form – To a question put to the deceased as to who had witnessed the occurrence he told that he was unable to remember the same – P.W.5 had also not given any certificate in Ext.5 that the deceased was capable to make the dying declaration – P.W.5 stated before P.W 11 that he recorded the dying declaration on the requisition of P.W.10 where as P.W.10 has not proved the requisition stated to have been issued for recording of the dying declaration – Moreover P.W.10 had never been associated with the investigation of the case – P.W.5 has stated that he recorded dying declaration at 8.30 P.M. where as the I.O. P.W.12 has stated that the deceased was received at Sainkul C.H.C. at about 8.30 P.M. and at that time no doctor was present at the C.H.C. – Held, neither the direct evidence nor the dying declaration relied upon by the prosecution establish the complicity of the appellants in commission of the deceased's murder – Impugned judgment is not sustainable. (Para 11,13)

For Appellant - M/s. S.K.Mund, D.P.Das, J.K.Panda,
(in CRA Nos.200 & 202 of 1996)
M/s. P.Palit, J.Katikia, B.S.Das, S.sen,
A.K.Padhi, L.Jena, S.Palit & P.K.Majee
(in CRA No.211 of 1996)
For Respondent - Mr. Sangram Das, Addl. Standing Counsel

B.K.PATEL,J. The three appeals are directed against the judgment and order dated 20.7.1996 passed by the learned Sessions Judge, Keonjhar in Sessions Trial No.68 of 1994 in which the six appellants faced trial along

with 10 co-accused persons for commission of offences under sections 148, as well as 341 and 302 read with 149 of the Indian Penal Code (for short 'I.P.C.'). While acquitting the co-accused persons, the learned Sessions Judge convicted the appellants for commission of offences under which they stood charged and sentenced each of them to undergo imprisonment for life under section 302 read with 149 of the I.P.C. No separate sentence was passed for commission of offences under sections 148 and 341 read with 149 of the I.P.C. Aggrieved, appellants have preferred the present appeals.

2. Accused persons are residents of occurrence village Dantia. Deceased Bishnu Prasad Mallik was their co-villager. Prosecution case is that prior to the occurrence some of the residents of the occurrence village cut and removed laterite stones from nearby reserved forest in connection with which deceased, P.W.2 who is agnate brother of the deceased, and others made allegations against accused persons before Forest Guard P.W.6. P.W.6 seized laterite stones from the spot and kept in zima of the deceased. It is alleged that infuriated by the above incident, on 30.12.1993 at about 6 P.M. the accused persons surrounded and brutally assaulted the deceased by means of lathis, iron rods, etc. when he was returning home on a bicycle. Deceased sustained injuries, shouted and fell down at the spot. When people gathered the accused persons fled away. Being informed about the occurrence deceased's father's brother informant P.W.1 came to the spot. Deceased was taken to Sainkul C.H.C. and thereafter to S.C.B. Medical College & Hospital, Cuttack where he succumbed to the injuries on 31.12.1993. On presentation of written report Ext.1 by P.W.1 at Sainkul Out Post at 7.P.M. on 30.12.1993, P.W.11 Sub-Inspector of Police made station diary entry, sent the report for registration to Ramchandrapur Police Station and took up investigation. On completion of investigation, charge-sheet for commission of offences under sections 147,148,149,341,323,325,307 and 302 of the I.P.C. was submitted against the accused persons.

3. Appellants took plea of complete denial. In addition, appellant Bhupati Bhusan Mallik took a plea of alibi.

4. In order to substantiate the charge prosecution examined 12 witnesses. Informant P.W.1 is a post-occurrence witness. P.Ws. 2,7 and 8 deposed to have seen the occurrence. Also P.W.8 deposed to have witnessed recording of dying declaration of the deceased Ext.5 by P.W.5 at Sainkul C.H.C. P.W.3 Assistant Professor of Forensic Medicine and Toxicology, S.C.B. Medical College & Hospital, Cuttack conducted post-mortem examination over the dead body of the deceased. P.W.4 is the doctor who medically examined P.W.2. P.W.5 is a doctor who medically

examined the deceased and recorded his dying declaration Ext.5 at Sainkul C.H.C. P.W.6 is the Forest Guard who deposed regarding earlier incident of seizure of laterite stones. P.W.9, Assistant Sub-Inspector of Police attached to Mangalabag Police Station, was associated with the enquiry in connection with U.D.Case No.600 of 1993. P.W.10 was the Officer-In-Charge of Ramachandrapur Police Station. P.W.11 was the Sub-Inspector of Police attached to Sainkul Out Post. P.W.12 was the Circle Inspector of Police, Anandpur. Prosecution also relied upon documents marked Exts. 1 to 26 and material objects M.Os. I and V.

D.Ws. 1 and 2 were examined and documents marked Exts. A to D were relied upon by the defence in support of plea of alibi raised by appellant Bhupati.

5. On appraisal of evidence on record, placing reliance on the evidence of P.Ws.2 and 7 stated to be eyewitnesses to the occurrence and the evidence of P.Ws.5 and 8 with regard to dying declaration stated to have been made by the deceased as well as the medical evidence of P.Ws. 3 and 5, trial court held the appellants guilty of the charges under sections 148 as well as 341 and 302 read with 149 of the I.P.C. Prosecution was held to have not been able to prove of the charge against co-accused persons.

6. In assailing the impugned judgment it is submitted by the learned counsel for the appellants that though P.Ws. 2,7 and 8 claimed to be eyewitnesses to the occurrence, learned Sessions Judge rightly did not refer to or rely upon evidence of P.W.8 with regard to his claim to have seen the occurrence in view of candid statement of P.W.2 in his cross-examination at paragraph 20 of the deposition that P.W.8 and others reached the spot after the occurrence was over. However, trial court miserably failed to appreciate evidence of P.Ws.2 and 7. P.W.7 made allegations against all the accused persons as well as others in an omnibus manner. Both P.Ws.2 and 7 materially contradicted in their evidence in court as well as with their statements made earlier before the Investigating Officers. It was further contended that the occurrence took place in the evening late in the month of December which fact has not been taken note of by the trial court. It was strenuously contended that it was not possible for any one to see the incident or identify the assailants due to darkness, especially when allegations are made against more than 16 persons. Therefore, P.W.2's claim to have seen the occurrence is not capable of being accepted. With regard to the dying declaration Ext.5, it was contended that circumstances of recording of dying declaration is shrouded in mystery. P.W.8 did not, and rather failed to, state regarding questions put to and answers given by the

deceased. From the evidence it is obvious that dying declaration was recorded without any requisition from any of the Investigating Officers before registration of the case. P.W.5 has not appended any certificate to the effect that the deceased was in a fit state of mind to make any statement. P.W.3, who conducted post mortem examination, categorically opined that in view of the nature of injuries sustained by the deceased, he could not have been in a proper state of mind due to shock that would have developed immediately after the assault. In view of the infirmities in the evidence, the impugned judgment is not sustainable.

7. Placing reliance on the evidence of P.Ws.1,2,3,4,5,7 and 8, learned counsel for the State supported the impugned judgment. It was specifically argued that P.W.2 being an injured eyewitness there is no infirmity in the impugned judgment.

8. In this case, prosecution relied upon direct evidence of the eyewitnesses and dying declaration of the deceased. P.Ws. 2,7 and 8 deposed to have seen the occurrence. However, learned Sessions Judge has neither relied upon nor referred to the evidence of P.W.8 as an eyewitness because of the unambiguous statement made by P.W.2 in cross-examination at para-20 of the evidence that P.W.8 Subash Chandra Mallik reached the spot after the occurrence was over. Also evidence of P.W.8 itself suffered from material contradictions.

9. P.W.2 happens to be one of the agnate brothers of the deceased. He stated in his evidence that on the date of occurrence he along with the deceased was coming from Barapada to the occurrence village. P.W.2 was riding the cycle whereas deceased was sitting on the front rod. No sooner did they reach near a bridge adjacent to the embankment of village tank than the co-accused Udit who was armed with a bamboo lathi dealt blow over the left side back of the head of the deceased. Deceased fell down upon P.W.2 and there was profuse bleeding from his left side back of the head. P.W.2 could not maintain his balance to hold the cycle and the deceased fell down on the ground. P.W.2 left the cycle and jumped therefrom. Immediately thereafter co-accused Udit dealt a blow by means of bamboo lathi which struck over P.W.2's right palm. When deceased fell down on the ground, co-accused Rajendra, who was armed with a bamboo lathi, dealt a blow which struck left side forehead of the deceased resulting in bleeding injury. Co-accused Kulamani dealt a blow by means of bamboo lathi over the left side below the knee of the deceased resulting in bleeding injury. At that time appellant Dayanidhi raised a cry SASURA SALA PADICHHI HABUDARE DAUDI ASA PITIKISAFA KARIBA and accused Udit again dealt blow on

P.W.2 but P.W.2 warded off the blow. P.W.2 raised cry to the people to come to their rescue. At that time other accused persons namely, appellants Bhupati, Dibakar, Laxmidhar and Nirakar as well as accused persons Lambodar, Kshyamakar, Ganeswar, Basudeb, Babaji, Sailendra and Suresh came from the side of a bush being armed with lathis, and surrounded and brutally assaulted the deceased. Appellant Bhupati went upon the chest of the deceased and pressed repeatedly. At that time deceased was shouting 'MARIGALI MARIGALI' and asked for water. Then appellant Bhupati told that it would be proper to pass urine over deceased's mouth and appellant Dibakar told appellant Bhupati that he would finish the deceased. Appellant Laxmidhar also threatened to finish the deceased. At that time, P.W.7 reached the spot. Accused persons abused him and P.W.7 went way. Accused persons having assaulted the deceased threw him by the side of the embankment near the spot. It was further stated by P.W.2 that while the deceased was shouting MARIGALI MARIGALI and asked for water, he and P.W.8 came to the rescue of the deceased and gave water to him. P.W.2 testified that he came to his house from the spot where he saw P.W.1 and reported about the occurrence to him. Then again P.W.2 along with P.W.1 came in a scooter to the spot. Deceased was taken to Sainkul C.H.C. His condition having deteriorated the deceased was referred to S.C.B. Medical College & Hospital, Cuttack where he died. P.W.2 categorically deposed that he himself was not examined medically.

9.1 In his cross-examination at para-10 of the evidence P.W.2 stated that co-accused Rajendra first dealt blow on the deceased, and thereafter all the accused persons together assaulted the deceased. Said assertion is not in conformity with the sequence of events as deposed by P.W.2 in his examination-in-chief. Therefore, P.W.2 contradicted himself while deposing in court.

9.2 It has been elicited in evidence that P.W.2 had told before P.W.9 that after the assault on the deceased, out of fear he left the spot and ran to his house, and that as soon as he and the deceased reached near the bridge they saw some people of their village viz. appellants Dibakar, Laxmidhar and Bhupati as well as accused persons Basudeb, Udit, Rajendra, Lambodhar and some others standing armed with lathis and iron rods and that they suddenly attacked on them upon which both of them fell down from the cycle. Such allegations are also not in conformity with P.W.2's evidence in Court that co-accused Udit first assaulted the deceased upon which he fell down from the bicycle.

9.3 Though P.W.2 gave a graphic description of the occurrence ascribing specific overt acts to some of the accused persons, it has also been elicited that P.W.2 had not stated before P.W.9 that no sooner did they reach the bridge adjacent to the embankment of the village tank than co-accused Udit being armed with bamboo lathi dealt blow on the head of the deceased, or that the deceased fell upon P.W.2 and there was profuse bleeding, or that P.W.2 could not maintain balance and the deceased fell down on the ground, or that immediately thereafter co-accused Udit dealt blow by means of bamboo lathi which struck on P.W.2's right palm, or that when the deceased was on the ground co-accused Rajendra with a bamboo lathi dealt blow which struck on the left side forehead of the deceased, or that co-accused Kulamani dealt blow by means of bamboo lathi on the left side leg below the knee of the deceased, or that appellant Dayanidhi raised cry SASURA SALA PADICHHI HABUDARE DAUDI ASA PITIKISAFA KARIBA, or that co-accused Udit again dealt blow but P.W.2 warded of the blow, or that P.W.2 raised a cry to the people to come to their rescue, or that at that time other accused persons came from the side of a bush being armed with lathis, or that other accused persons viz. appellants Bhupati, Dibakar, Laxmidhar and Nirakar as well as accused persons Lambodar, Kshyamakar, Ganeswar, Basudeb, Babaji, Sailendra and Suresh came from the side of a bush being armed with lathis, or that the aforesaid accused persons surrounded and brutally assaulted the deceased by means of lathis, or that appellant Bhupati went upon the chest of the deceased and pressed it repeatedly and the deceased shouted MARIGALI MARIGALI and asked for water, or that appellant Bhupati told that it would be proper to pass urine over deceased's mouth, or that appellant Dibakar told appellant Bhupati that he would finish the deceased, or that appellant Laxmidhar threatened to finish the deceased, or that accused persons having assaulted the deceased threw him near embankment of the tank.

9.4 P.W.2 had stated before P.W.11 also that co-accused Udit and three accused persons were coming in a cycle from their opposite direction from village Dantia. However, P.W.2 had not stated before P.W.11 that after reporting to P.W.1 he along with P.W.1 came in a scooter to the spot, or that when the deceased fell down on the ground co-accused Rajendra who was armed with a bamboo lathi dealt blow which struck the left side forehead of the deceased resulting in bleeding injury, or that appellant Dayanidhi raised cry SASURA SALA PADICHHI HABUDARE DAUDI ASA PITIKISAFA KARIBA, or that co-accused Udit again dealt blow on him which could not strike him as he warded off the same, or that appellant Bhupati went upon chest of the deceased and pressed repeatedly, or that deceased shouted MARIGALI MARIGALI and asked for water, or that appellant Bhupati told

that it would be proper to pass urine over deceased's mouth, or that appellant Dibakar asked appellant Bhupati that he would finish the deceased, or that appellant Laxmidhar also threatened the deceased to finish him, or that P.W.7 was going on a cycle from the occurrence village.

9.5 Further, P.W.2 had not stated before P.W.12 also that after reporting to P.W.1, he along with P.W.1 came in a scooter to the spot.

9.6 It is interesting to observe that P.W.2 admitted in paragraph 16 of his cross-examination to have alleged in his statement recorded under section 164 Cr.P.C. that 12 of the accused persons including appellants Dibakar, Laxmidhar, Nirakar and Bhupati assaulted the deceased with one bamboo lathi and reiterated that such statement was true.

9.7 According to P.W.2, occurrence took place when he along with the deceased was coming on a bicycle and being informed by him informant P.W.1 came to the spot along with him. However, F.I.R. Ext.1 is altogether silent that the deceased was sitting on P.W.2's cycle or was with P.W.2 when the occurrence originated. There is no mention in the F.I.R. that P.W.2 sustained injury in course of the occurrence. In the dying declaration Ext.5 also there is no indication regarding P.W.2's presence at the time of occurrence. No bicycle appears to have been seized from the spot though P.W.2 stated at paragraph 11 of his evidence in course of cross-examination that he left the bicycle at the spot. In addition, P.W.7, who claimed to have seen the assault on the deceased, stated in cross-examination that while accused persons were assaulting the deceased surrounding him he found none at the spot.

9.8 Thus, it is found that P.W.2 made material omissions in his statements made in course of investigation and developed the case from stage to stage. He contradicted himself in court and was contradicted by other materials on record. Worth of evidence of P.W.2 as an injured witness is substantially corroded in view of his admission that he was not examined medically. His presence with the deceased at the time of occurrence is not borne out from the contents of the F.I.R. and is negated by P.W.7. Therefore, evidence of P.W.2 cannot be accepted on face value as that of a wholly reliable evidence.

10. Seeking corroboration to the evidence of P.W.2 from the evidence of P.W.7, it is found that P.W.7 stated in his evidence that at the time of occurrence he was returning from Barpada weekly market to his house in village Gadabandogoda. He alleged in an omnibus manner without naming

any of the accused persons that no sooner did he reach the embankment of the tank of the occurrence village than he saw accused persons having surrounded the deceased were assaulting him by means of lathis and iron rods etc. Seeing the assault, he went away from the spot out of fear. Admittedly, occurrence took place in the evening of late December. P.W.7 stated in his cross-examination that he saw assault on the deceased by the accused persons at a distance of 50 feet while going on the way. He also stated that he was examined by police one and half months after the occurrence. It has been elicited in evidence that P.W.7 had stated before P.W.12 that he could not identify all the accused persons who were assaulting the deceased. He had also stated before P.W.12 that at the time of assault by the accused persons on the deceased, some other persons came armed with lathis and assaulted the deceased. This witness admitted that he was a classmate of the deceased. In view of the nature of evidence of P.W.7, it falls far short of a firm basis to provide assurance or corroboration to the evidence of P.W.2.

11. Dying declaration Ext.5 is stated to have been recorded by P.W.5, a Medical Officer attached to Sainkul C.H.C., at 8.30 P.M. on 30.12.1993 in presence of P.W.8 and one Pradip Kumar Mishra. P.W.5 stated that he medically examined the deceased at 8.05 P.M. on police requisition. It is stated by P.W.5 that the deceased, in his dying declaration, implicated the six appellants, and others, who were not named, to have assaulted him by lathis and then gas. Dying declaration Ext.5 has been recorded in a question-answer form. To a question put to the deceased as regards the persons who had witnessed the occurrence, the deceased is found to have told that he was unable to remember about the same. It is also observed that in the dying declaration Ext.5 P.W.5 has mentioned that it was recorded in Ramchandrapur P.S. Case No.99 of 1993, though it appears from F.I.R. Ext.1 that the case was registered at 11.30 P.M.. In Ext.5 there is no certificate regarding the state of mind of the deceased to be fit to make any statement. In fact, P.W.5 stated in cross-examination at paragraph 11 that he had not mentioned in Ext.5 nor directed his investigation while recording the dying declaration that the deceased was found in a sound state of mind to make the declaration and that he had not given any certificate in Ext.5 that the deceased was capable and fit to make the dying declaration. At paragraph 7 of his evidence in course of cross-examination P.W.5 stated that since the deceased had head injuries and multiple injuries, so, he felt it necessary to record the dying declaration. It has been elicited in the evidence that P.W.5 had stated before P.W.11 that he had recorded the dying declaration of the deceased on the requisition of P.W.10. It is observed that P.W.10 had never been associated with the investigation of this case.

He stated in his evidence that on receipt of F.I.R. Ext.1, he registered the case, and directed P.W.11 to continue with the investigation. He also admitted that he had not maintained any case dairy. P.W.10 has not proved the requisition stated to have been issued for recording of dying declaration and P.W.12 stated that he did not seize the requisition of P.W.10 or P.W.11 for recording the dying declaration. P.W.8 the only witness examined by the prosecution to support P.W.5's claim to have recorded the dying declaration Ext.5 simply stated that the doctor had recorded the dying declaration of the deceased in his presence to which he was a witness and put his signature Ext.5/3. P.W.8 did not whisper about the nature of statement made by the deceased in his dying declaration. On the contrary, P.W.8 stated at paragraph 15 of his evidence in course of cross-examination that besides the first question put by the doctor to the deceased at the time of recording the dying declaration he did not remember the answers given by the deceased during the course of dying declaration. He also stated that he had not seen what the doctor wrote in the dying declaration Ext.5. P.W.2 claimed at paragraph 11 of his evidence in course of cross-examination that he accompanied the deceased to Sainkula P.H.C. and, thereafter to Cuttack, and that he was all along with the deceased till his death at Cuttack hospital. However, evidence of P.W.2 is altogether silent regarding recording of dying declaration of the deceased. The assertion of P.W.5 to have recorded the dying declaration Ext.5 at 8.30 P.M. is further rendered vulnerable in view of the statement of investigating officer P.W.12 at paragraph 6 of his evidence in course of cross-examination that his investigation disclosed that the deceased was received at Sainkul C.H.C. at about 8.30 P.M. and that at that time the doctor was not present at the C.H.C.. That apart P.W.2 has not made any allegation against appellant Niranjan by name to be among the appellant's assailants. In such circumstances, contentions raised on behalf of the appellants to assail Ext.5 as doubtful is not found to be without substance.

12. P.W.1, who admittedly is a post occurrence witness, stated in his evidence that when he was going towards the spot he saw the accused persons, being armed with lathis and iron rods, were going towards the southern side of their village. He further stated that on his arrival, the deceased raised a cry by saying that the accused persons, namely, Bhupati, Dibakar, Laxmidhar, Ganeswar, Nirakar, Niranjan, Dayanidhi, Basudeb, Babaji, Udit, Kulamani and others having assaulted him brutally threw at the spot. Learned counsel for the State placed reliance on such statements of informant P.W.1 to urge that evidence of P.W.1 provided assurance to evidence of P.W.2. However, in the First Information Report Ext.1 informant P.W.1 had alleged neither to have seen the accused persons on his way to

the spot nor stated regarding any oral dying declaration made by the deceased on his arrival at the spot. While deposing in court also P.W.1 admitted in course of cross-examination at paragraph 11 of the evidence that he had not made any such allegations in the F.I.R. Rather, it has been elicited in evidence that P.W.1 had stated before P.W.9 that after receiving news regarding the assault on the deceased he immediately went to Ramachandrapur P.S. and reported the matter. Therefore, evidence of P.W.1 with regard to another dying declaration made by the deceased at the spot implicating the accused persons is also not acceptable.

13. Thus, on appraisal of evidence on record, neither direct evidence nor any of the dying declarations relied upon by the prosecution to establish the complicity of the appellants in commission of deceased's murder, inspires confidence to constitute basis to sustain any finding against the appellants. The impugned judgment is, therefore, not sustainable.

14. In the result, all the appeals are allowed. The judgment and order dated 20.7.1996 passed by the learned Sessions Judge, Keonjhar in Sessions Trial No.68 of 1994 convicting the appellants and sentencing each of them to undergo imprisonment for life under Section 302 read with 149 of the I.P.C. is set aside. The appellants are acquitted of the charge.

Appeals allowed.

2012 (II) ILR- CUT- 322

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

JCRLA. NO. 36 OF 2004 (Dt.16.05.2012)

MAGSIRA BISWAL ……. Appellant.

.Vrs.

STATE OF ORISSA …….Respondent.

A. EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S. 27.

Recovery of the weapon of offence at the instance of the appellant – P.W.5 is an independent witness to the factum of statement given by the appellant while in police custody – According to P.W.5, the appellant told the police that he had kept the axe in a Nala near Madhiapali and if he was taken to that place, he would point out the axe – P.W.5 further stated that before he and the police party proceeded to the place of discovery of the axe, the aforesaid statement of the appellant was recorded – There after the appellant took the police and the witnesses to the near by Nala and pointed out the place from where the axe was recovered by the police – Nothing in the cross-examination of P.W.5 to discredit his sworn testimony – Held, the evidence of the I.O. (P.W.14) for recovery of the axe, (M.O.1) at the instance of the appellant finds full corroboration from P.W.5 – No justification to disbelieve recovery of the weapon of offence.

(Para 8)

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

Dying declaration – Medical officer (P.W.10) examined the deceased in injured condition and sent requisition to the I.O. to make arrangement for recording his dying declaration – Basing on such requisition the I.O. (P.W.14) recorded dying declaration in presence of P.Ws.2 and 10 – Both P.Ws.2 & 10 adduced unimpeachable evidence on the factum of recording dying declaration of the deceased implicating the appellant and such fact is admissible U/s.32 (1) of the Act – The Medical Officer (P.W.10) has stated that the deceased was in good mental state at the time he gave the statement under Ext.1 and in his Cross-examination he specifically denied the defence suggestion that the deceased was in a state of coma till he succumbed to the injuries – There is also nothing on record to suggest that there was

possibility of tutoring the deceased to implicate the appellant – Held, no justification to reject the dying declaration vide Ext.1.

(Para 7)

For Appellant - Mr. Subhasis Sen, Advocate.
For Respondent - Mr. Sangram Das, Addl. Standing Counsel.

C.R. DASH, J. This appeal is directed against the judgment and order of sentence dated 23.12.2003 passed by learned Additional Sessions Judge(F.T.C.), Bolangir in Sessions Case No. 46-B/7 of 2003 convicting the appellant under Section 302, I.P.C. and sentencing him to suffer imprisonment for life.

2. The occurrence happened at about 9.00 P.M. on a Saturday during Dushera in 2002 under the jurisdiction of Bolangir Town Police Station. Rudramani Majhi (deceased) took his dinner and came out to the village lane to the shop of Antaryami Sai (not examined) to take betel. Near about that place appellant Magsira Biswal was shouting at the villagers using obscene words holding an axe. Deceased Rudramani Majhi counselled him to go back to his house. At this, appellant Magsira Biswal gave a blow with the axe he was holding on the head of Rudramani Majhi. Deceased Rudramani Majhi fell down The appellant continued to give several blows on different parts of his body by that axe and went away. P.W.1 Surekha Majhi, who happens to be the wife of deceased Rudramani Majhi and other villagers including P.Ws. 2 and 6, took Rudramani Majhi to Bolangir hospital. He was admitted in the state of unconscious. The Medical Officer attending the injured Rudramani Majhi sent medical report to Bolangir Town P.S. On arrival of the police, Surekha Majhi(P.W.1) lodged F.I.R. in the hospital. On registration of the case, Sadananda Pujari, S.I., Town P.S. Bolangir (P.W.14) took up investigation. On the next day of the occurrence Rudramani Majhi succumbed to the injuries. On completion of investigation P.W.14 filed charge-sheet implicating the appellant in offence under Section 302, I.P.C.

3. Prosecution has examined fourteen witnesses to prove the charge. P.W.1 Surekha Majhi is the widow of the deceased and she is the sole eye witness to the occurrence. P.Ws. 2 and 6 are post-occurrence witnesses. P.W.5 is witness to the seizure of axe (M.O.-I) at the instance of the appellant on the basis of his statement purported to have been recorded under Section 27 of the Evidence Act. P.W.2 and the Medical Officer (P.W.10) are the witnesses to dying declaration of the deceased recorded by the I.O. (P.W.14) on the basis of requisition from the Medical Officer (P.W.10). P.Ws.4 and 7 are witnesses to some seizures. P.W.3 is a witness

to inquest of the dead body of the deceased. P.W.12 is the scribe of the F.I.R. P.W.13 is the Revenue Inspector, who demarcated the spot of occurrence. P.Ws. 8, 9 and 10 are the Medical Officers. Out of whom, P.W.8 conducted the autopsy on the dead body of the deceased. P.W.9 sent the death report to the Town P.S. when the deceased succumbed to the injuries on the next date of the occurrence. P.W.10 examined the deceased in injured condition on police requisition and is a witness to recording of his dying declaration. P.W.14 is the Investigating Officer.

Defence plea is one of complete denial, but none was examined by the defence.

4. Learned trial court on the basis of evidence on record found the appellant guilty under Section 302, I.P.C. and sentenced him thereunder.

5. Learned counsel for the appellant submits that if evidence of P.Ws. 1, 2 and 6 are taken into consideration in entirety, P.W.1 cannot be believed as an eye witness. It is further contended that the deceased being in coma at the time of his admission in the hospital could not have made the dying declaration and the purported evidence under Section 27 of the Evidence Act is of no avail to the prosecution.

Learned Additional Standing Counsel on the other hand supports the impugned judgment and order of sentence.

6. Admittedly, P.W.1 is only eye witness to the occurrence. From her evidence it is found that she had also forbade the appellant from shouting with obscene words just before the occurrence and she had also seen him holding an axe before the occurrence. The spot of occurrence according to P.W.2 in his cross-examination is at a distance of 15 cubits only from the house of P.W.1 and the deceased. After taking his dinner the deceased came out of the house to take betel. The betel shop is at a distance of one house apart from the house of the deceased as testified by P.W.1 in her cross-examination. When the deceased came out, he told P.W.1 that he is going to take betel. P.W. 1 is quite emphatic on the fact that she came out and saw the assault by the appellant on her deceased husband. The defence has tried to demolish the evidence of P.W.1 by eliciting from her that the occurrence night was ‘Amabashya night’ and by the time of occurrence all in the village had retired to sleep. P.W.1 very emphatically in her cross-examination has explained that she had seen the appellant before the occurrence and even she asked him as to why he was shouting holding an axe and she (P.W.1) very emphatically told that she could also identify the

appellant from his voice as he was shouting. If the injuries sustained by the deceased as found by P.W.10 is taken into consideration, it may be unerringly concluded that the appellant has given 6 / 7 blows by the axe and after the first assault on his head the deceased fell down and the appellant continued to assault. If the proximity of the spot of occurrence from the house of P.W.1 and the deceased is taken into consideration which is only 15 cubits, it can be safely held that P.W.1 though was there in the house could have seen the occurrence rushing to the spot. Even if she is disbelieved on the point of her seeing the assault by the appellant on the deceased, the circumstances attending and following the assault as testified by P.W.1 would unerringly show involvement of the appellant so far as the assault is concerned and none else. P.W.1 is amply corroborated by P.W.6, who has testified that hearing the cries of P.W.1 he came out of the house and saw the deceased lying on the ground with bleeding injuries all over his body. There is no cross-examination of P.W.6 on this aspect and such evidence of P.W.6 amply prove that on seeing the occurrence of assault P.W.1 raised alarm and hearing such alarm and shout P.W.6 came to the spot on being attracted. P.W.2 is another post-occurrence witness, who corroborates P.W.1 in material particulars. Hearing hullah he (P.W.2) came out of the house and found the deceased was lying on the village lane with blood on his body. Both P.Ws. 2 and 6 also helped in bringing the injured Rudramani Mashi to the hospital. In view of the above, if the evidence of P.W.1 is read along with that P.Ws.2 and 6 we do not find any justification to disbelieve P.W.1 as an eye-witness to the occurrence.

7. Another clinching evidence by the prosecution is the evidence of dying declaration recorded in presence of P.Ws.2 and 10. P.W.10 is the Medical Officer, who examined the deceased Rudramani Majhi in injured condition and sent requisition to the I.O. to make arrangement for recording his dying declaration. On the basis of such requisition, the I.O. (P.W.14) recorded the dying declaration vide Exhibit-1 in presence of P.Ws. 2 and 10. Both the P.Ws. 2 and 10 has adduced unimpeachable evidence on the factum of recording of dying declaration of the deceased implicating the appellant and such a fact is admissible under Section 32(1) of the Evidence Act. The Medical Officer (P.W.10) in his cross-examination has specifically testified that the deceased was not in a state of coma and before recording of dying declaration the deceased has told him the history of the injuries at the time of his admission. Medical Officer (P.W.10) has further testified that the deceased was in good mental stage at the time he gave his statement vide Exhibit-1. P.W.10 is corroborated the material particular by P.W.2. There is nothing on record to suggest that there was possibility of tutoring the deceased to implicate the appellant, we would rather say that there is no

foundation of any sort in the evidence of any witness to even suggest possibility of tutoring of the deceased at the time of recording of dying declaration. We therefore, find no justification to reject the dying declaration vide Exhibit-1 on the sole ground that the deceased was in state of coma at the time of his admission into the hospital. We feel persuaded to say here that the alleged state of come of the deceased is on record in the form of a suggestion to Medical Officer (P.W.10) which he has denied and there is no other material to come to a finding that the deceased was in a state of coma till succumbed to the injuries.

8. Next evidence is the evidence regarding recovery of the axe at the instance of the appellant and admitted into the evidence purportedly under Section 27 of the Evidence Act. P.W.5 is an independent witness to the factum of statement given by the appellant while in police custody. According to P.W.5 the appellant told the police that he had kept the axe in a Nala near Madhiapali. He further told that if he was taken to that place, he would point out the axe. P.W.5 has testified that he and the police had already proceeded to the place of discovery, the aforesaid statement of the appellant was recorded. The appellant thereafter took the police and the appellant was recovered by the police personnel. There is nothing in the cross-examination to discredit his sole testimony. The evidence of the I.O. (P.W.14) on the point of axe (M.O.I) at the instance of the appellant finds full corroboration from P.W.5. We therefore find no justification to interfere in this aspect. Lastly, learned counsel for the appellant justifies acquittal for absence of motive on the part of the appellant. Such a contention does not however, commend to us as motive is not always necessary to prove a particular offence.

9. In view of the above, we find any reason than to concur the findings arrived at by learned trial court on the point of guilty of the appellant and the sentence recorded by it. In the result the appeal is dismissed to devoid of any merits.

Appeal dismissed.

2012 (II) ILR- CUT- 327

M. M. DAS, J.

R.S.A. NO. 218 OF 2002 (Dt.28.09.2011)

HAREKRUSHNA SAHOO ……. Appellant.

.Vrs.

BRAHMANANDA SAHOO
(DEAD) AFTER HIM, HIS
L. Rs.SUMITRA SAHOO & ORS. …….Respondents.

TRANSFER OF PROPERTY ACT, 1882 (ACT NO.4 OF 1882) – S. 106.

Original agreement executed on 29.09.1972 – After the death of the parties to the agreement original defendant continued as a tenant under the plaintiff and the rent was enhanced – After the death of the parties the agreement lost its force and no further agreement of tenancy executed between the parties and tenancy of the original defendant over the disputed shop room assumes the character of a "tenancy at will" – Moreover Act 3 of 2003 came into operation when the matter was pending before the first appellate Court and the appeal being a continuation of the suit the above transitory provision in the above amending Act applies to the notice issued by the plaintiff U/s.106 T.P. Act – Held, the learned lower appellate Court was incorrect in accepting the commencement of tenancy as 29.09.1972 for computing the period for the notice U/s.106 T.P. Act – Judgment and decree passed by the lower appellate Court is set aside and judgment and decree passed by the trial Court is restored.

(Para 5 to 8)

Case laws Referred to:-

1.AIR 1944 Calcutta 84 : (Calcutta Landing & Shipping Co.Ltd.-V-Victor Oil Co.Ltd.)
2.AIR 1973 Calcutta 515: (Bimalendu Bhusan Das -V- Firm Mitra & Ghosh).

For Appellant - M/s. B.H.Mohanty, R.K.Nayak, B.Das, J.K.Bastia, D.P.Mohanty & S.Burma.
For Respondents- M/s. S.C.Samantaray, N.K.Sahoo, U.N.Sahoo & D.Mohanty.

M. M. DAS, J. This Second Appeal has been admitted on the following substantial questions of law:-

(A) If the learned lower appellate court has correctly understood the provisions of Section 116 of the Transfer of Property Act and the effects of the tenancy by holding over, while coming to a conclusion that the notice under section 106 T.P. Act is a defective one ?

(B) If the learned lower appellate court is correct in its appreciation of the provisions of section 106, Transfer of Property Act, while interpreting the words "end of month of tenancy" and coming to a conclusion that the notice under section 106, T.P. Act is a defective one ?

(C) If the judgment of the learned lower appellate court lacks probity and good conscience, the same not having referred to the decision cited by the counsel for the present appellant reported in 90 (2000) CLT 384 (Andhra Pradesh Handloom Weavers Cooperative Society Ltd. Hyderabad v. Venkateswar Rao and another) ?

2. The appellant as plaintiff filed T.S. No. 69 of 1997 for ejectment of the defendant – Brahmananda Sahoo (since deceased) . During the pendency of the Second Appeal, the said original respondent – defendant having expired, his legal heirs have been substituted.

3. Though the question raised in this appeal lies within a small compass, but the litigation has a long history for which, it is necessary to refer to the facts of the case in brief which are as follows:-

The mother of the present appellant, namely, Kanika Sahoo, who was the sole owner of the disputed shop room, gave the same on rent to the father of the original defendant, late Brahmananda Sahoo in the year 1972 on a monthly rent of Rs. 37/-. It is admitted by the parties that there was a written agreement of tenancy executed between the said late Kanika Sahoo and the father of the original defendant. Late Kanika Sahoo, to evict the father of the original defendant, filed H.R.C. Case No. 19 of 1983 under the Orissa House Rent Control Act which was then in force but ultimately failed in the said proceeding before this Court in O.J.C. No. 172 of 1987. Thereafter, plaintiff filed Title Suit No. 138 of 1992 for eviction of the original defendant which was dismissed as the notice under section 106 of the Transfer of Property Act was found to be defective. The plaintiff alleged that his mother late Kanika Sahoo expired and thereafter he (plaintiff) became the absolute owner of the property by succession. Ultimately, the plaintiff issued a notice under section 106 of the T.P. Act on 14.1.1997 asking the original defendant to vacate the premises by 1.4.1997. As he did not vacate

the premises, the plaintiff filed the present suit, being T.S. No. 69 of 1997. The suit was decreed by the learned trial court, against which, the original defendant preferred Title Appeal No. 84 of 1999 and the learned Ad hoc Addl. District Judge, FTC No. I, Cuttack by his judgment dated 16.9.2002 allowed the said appeal by setting aside the judgment and decree passed by the learned trial court and dismissing the suit of the plaintiff – appellant. The present Second Appeal has been preferred against the said judgment of the learned first appellate court.

4. The learned appellate court considered the sole question with regard to validity of the notice under section 106 of the T.P. Act and referring to the said section, by taking "29.9.1972" to be the date of commencement of the tenancy came to the conclusion that the appellant was asked to vacate on the expiry of the month of March, 1997 when another month of tenancy had already begun, as the month of tenancy actually expires by 28th. He, therefore, concluded that, to that extent the notice in question becomes invalid in law. For the above conclusion, he relied upon the decisions in the cases of ***Calcutta Landing and Shipping Co. Ltd. v. Victor Oil Company Ltd***., AIR 1944 Calcutta 84 and ***Bimalendu Bhusan Das v. Firm Mitra and Ghosh,*** AIR 1973 Calcutta 515.

5. The agreement alleged to have been executed on 29.9.1972 was admittedly an agreement executed between the deceased mother of the appellant Kanika Sahoo and the deceased father of the original defendant, i.e., late Bhagaban Sahoo. After the death of the parties to the said agreement, the original defendant admittedly continued as a tenant under the plaintiff and the rent was enhanced to Rs. 70/- per month. There were no subsequent agreements of tenancy executed between the parties. The tenancy, therefore, could not have been held to have commenced from 29.9.1972 under the agreement executed between the predecessors of the parties, which agreement lost its force after the death of the parties thereto. Accepting this position, it would be clear that the tenancy of the original defendant over the disputed shop room assumes the character of a "tenancy at will". The learned lower appellate court, therefore, was incorrect in accepting the commencement of tenancy as 29.9.1972 which is the alleged date of execution of the agreement between the predecessors of the parties, for computing the period under the notice issued under section 106 of the T.P. Act by the plaintiff to the original defendant. Even otherwise, by Act 3 of 2003, section 106 of the T.P. Act has undergone exhaustive amendment . The amended section 106 of the T.P. Act reads as follows:-

> "106. **Duration of certain leases in absence of written contract or local usage.-** (1) In the absence of a contract or local law or usage

to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property)".

6. In Act 3 of 2003 which is the amending Act, it has been provided under the heading "Transitory provision" that the provisions of section 106 of the Principal Act as amended by section 2 of the Amending Act to (a) all notices in pursuance of which any suit or proceeding is pending at the commencement of the said Amending Act, and (b) all notices which have been issued before commencement of the Amending Act, but where no suit or proceeding has been filed before such amendment. When the Amending Act came into operation, the matter was pending before the first appellate court. It is a settled position of law that an appeal is a continuation of the suit. Therefore, the above transitory provision in the Amending Act (Act 3 of 2003) applies to the notice issued by the plaintiff under section 106 of the T.P. Act.

7. In view of such amendment, the ratio of the decisions relied upon by the learned lower appellate court clearly had no application to the facts of the case. This Court, therefore, finds that the learned lower appellate court was not correct in holding that the notice issued by the plaintiff under section 106 of the T. P. Act to the original defendant was defective and, therefore,

the learned lower appellate court has acted contrary to law in setting aside the judgment and decree of the learned trial court and dismissing the suit.

8. For the reasons indicated above, the judgment and decree passed by the learned lower appellate court in T.A. No. 89 of 1999 is set aside and the judgment and the decree passed by the learned trial court in T.S. No. 69 of 1997 is restored.

9. The Second Appeal is accordingly allowed, but in the circumstances without costs.

Appeal allowed.

2012 (II) ILR- CUT- 332

M. M. DAS, J.

W.P.(C) NO. 28864 OF 2011 (Dt.09.04.2012)

ARUN PANDA & ORS. …….. Petitioners.

.Vrs.

BANSHIDHAR MISHRA & ORS. …….Opp.Parties.

ORISSA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 (ACT NO.11 OF 1952) – S.27.

Appointment of non-hereditary trustees – Discretion of the appointing authority – If the appointment order satisfies the test laid down U/s.27 of the Act and if the persons appointed are not disqualified as per the provisions U/s.29 of the Act, the appointment will not be affected.

In this Case the Asst. Commissioner of Endowments has followed the mandate of Section 27 of the Act while appointing the non-hereditary trust board – Held, no reason to interfere with the impugned order appointing the non-hereditary trust board.

(Para 7)

Case law Referred to:-

AIR 1973 SC 2237 : (State of Andhra Pradesh-V-S.M.K. Parasurama Gurukul).

For Petitioner - M/s. S.K.Choudhury, S.R.Kanungo, M.R.Nayak.
For Opp.Parties- M/s. B.Baug, S.Rath & M.R.Baug, (for O.Ps. 1 to 5)
Dr. A.K.Rath (for O.P.7).

M.M.DAS, J. Deity Sri Sri Jaleswar Mahadev Bije, Kalarahanga under Mancheswar Police Station in the district of Khurda is an ancient religious institution existing for more than two to three hundred years, as stated by both the parties.

2. It appears from Annexure-A/1 to the additional counter affidavit filed on behalf of the opp. parties 1 to 5 that the Government of Orissa in its Sports, Culture and Youth Services Department issued a notification

exercising its power under sub-section (1) of section 3 of the Orissa Ancient Monuments Reservation Act, 1956 declaring the deity in question as a protected monument within the meaning of the said Act and thereby it has been so declared. It has been stated in the said notification under Annexure-A/1 that one Anirudha Panda and others were the Marfatdars and were acting under the Managing Trustee. O.A. No. 8 of 1994 was filed before the Assistant Commissioner of Endowments, Orissa, Bhubaneswar on behalf of the villagers represented by the opp. party no. 1 – Banshidhar Mishra for declaring that the deity is a public deity without any hereditary trustee. The present petitioners and their ancestors along with others numbering 34 in toto were the opp. parties in the said O.A., which was filed under section 41 of the Orissa Hindu Religious Endowments Act (for short, 'the Act'). The Assistant Commissioner of Endowments, after recording evidence from both the sides, both oral and documentary and after hearing the matter, passed the final order in the said O.A. No. 8 of 1994 on 13.10.2005. A copy of the said order has been produced before me. From the same, it appears that the Assistant Commissioner of Endowments elaborately discussing the evidence adduced before him, held that the opp. parties 1 to 24 (except 1/a) in the said proceeding are Sewaks in defacto management of the deity. But they have failed to prove that they are hereditary trustees or Sevayats of the deity and, accordingly, negatived the contention of the said opp. parties, out of whom, some are petitioners in this writ petition. The Assistant Commissioner of Endowments ultimately disposed of the said O.A. No. 8 of 1994 with the following order:-

O R D E R.

> "The case is decreed in part on contest against the opp. parties with cost. It is hereby declared that the deity Sri Sri Jaleswar Mahadev Bije, Kalarahanga, P.S. Mancheswar in the district of Khurda is a public deity along with its properties endowed without any hereditary trustees.
>
> (emphasis supplied)

3. The petitioners preferred an appeal against the said order of the Assistant Commissioner of Endowments under section 44 of the Act before the Deputy Commissioner of Endowments registered as F.A. No. 16 of 2005. The said appeal has been dismissed for default and the petitioners have filed Misc. Case No. 1 of 2011 for restoration of the appeal, which is stated to be pending.

4. At this juncture, the Assistant Commissioner of Endowments exercising jurisdiction under section 27 of the Act has constituted a non-

hereditary trust board for managing the affairs of the deity with the opp. party nos. 1 to 5 as members of the said trust board asking them to elect the managing trustee by way of resolution and send a copy of such resolution to his office through the concerned Inspector of Endowments for approval and directing such managing trustee to convene the meeting of the trustees by giving at least three clear days notice within the premises of the temple, ordinarily once a month, for passing of accounts of the previous month for sanctioning expenses and for considering other matters connected with the management. He further directed that such proceedings of the meeting to be held shall be signed by all trustees present and in case of any difference of opinion, the opinion of the majority shall prevail. Being aggrieved by the said order passed by the Assistant Commissioner of Endowments under Annexure-4 constituting the Non-Hereditary Trust Board, the petitioners have filed the present writ petition.

5. Mr. Choudhury, learned counsel for the petitioners vehemently urged that the Assistant Commissioner of Endowments during the pendency of the First Appeal before the court of the Deputy Commissioner of Endowments, without making any enquiry and without following the procedure established by law, illegally and in gross violation of the principles of natural justice and fair-play passed the impugned order on 30.9.3011 constituting the non-hereditary trust board in respect of the case deity. He further submitted that the Assistant Commissioner of Endowments without conducting any enquiry himself and without being convinced that there are no hereditary trustees in respect of the institution of the case deity, has constituted the non-hereditary trust board under section 27 of the Act, which is contrary to law.

6. Mr. Baug, learned counsel appearing for the opp. parties 1 to 5 as well as Dr. A.K. Rath, learned counsel appearing for the Commissioner of Endowments submitted that since in the proceeding under section 41 of the Act, the Assistant Commissioner of Endowments has already held that the deity is a public religious institution without any hereditary trustees or hereditary Sewaks, there is absolutely no illegality on the part of the Assistant Commissioner of Endowments in exercising jurisdiction under section 27 of the Act and constituting the non-hereditary trust board for smooth management of the deity/religious endowment, as the prime duty of the endowment authority is to see that the religious institution is smoothly and properly managed.

7. It may be clarified here that the appeal filed by the petitioners against the order passed in the proceeding under section 41 of the Act is in a state

of dismissal and as stated by the petitioners, an application for restoration of such appeal is pending adjudication. It is, therefore, clear that at present there is no management of the religious institution. It further appears from Annexure-B/1 to the additional counter affidavit that earlier also before the decision taken in the proceeding under section41 of the Act, the Assistant Commissioner of Endowments constituted a non-hereditary trust board on 1.10.1996 for two years. It was held in the case of ***State of Andhra Pradesh. v. S. M. K. Parasurama Gurukul,*** AIR 1973 SC 2237 that as the authority appointing non-hereditary trustees for temples does not perform a quasi judicial function, the order making such appointment need not be a speaking order. If the appointment order satisfies the test laid down in the section for appointing the trustees and if the persons appointed are not disqualified under any of the clauses of disqualification, the appointment will not be affected in any way. The administrative authority does not have to weigh the relative merits of various conditions in making the appointment of trustees. Normally it would exercise its own discretion as to who is best fitted to discharge the duties and functions of the trustees. It does not mean that it must set the reason as to why it has appointed some body as trustees and not appointed others as such, because the legislatures have left the matter to the discretion of the appointing authority subject to guidelines laid down in sections 15 and 16 of the Andhra Pradesh Act. (Sections 15 and l6 of the Andhra Pradesh Act is in pari materia with sections 27 and 29 of the O.H.R.E. Act).

8. It is well settled that if allegations of improper motive are made, the High Court will certainly examine the record to satisfy itself regarding the truth or otherwise of the allegations and interfere where the allegations are well founded.

9. It may be mentioned here that the petitioners have not made any allegation whatsoever with regard to appointment of any of the members in the non-hereditary trust board, to have incurred any disqualification to be appointed as such. The only ground the petitioners have canvassed is that during pendency of the Misc. Case for restoration of the appeal filed by them against the order passed in the proceeding under section 41 of the Act, the Commissioner of Endowments could not have appointed the non-hereditary trust board. There is absolutely no plausible reason to accept such contention as the appeal has been dismissed for default and the order passed by the Assistant Commissioner of Endowments in the proceedings under section 41 of the Act is in vogue where it has been held that the deity is a public religious institution having no hereditary trustee. Hence, for just administration of the said religious institution, it became incumbent on the

Assistant Commissioner of Endowments to constitute the non-hereditary trust board comprising of opp. parties 1 to 5 out of whom, it is stated that the opp. party no. 1 has been elected as the Managing Trustee, by exercising its power under section 27 of the Act.

10. On examining the impugned order, it is also seen that under sub-section (1) of Section 27, it is mandatory that the Assistant Commissioner of Endowments shall, in case, where there is no hereditary trustee (with the prior approval of the State Government) appoint non-hereditary trustee in respect of each religious institution other than a Math and specific endowments attached thereto and in making such appointments, the Assistant Commissioner of Endowments shall have due regard to the claims of persons belonging to the religious denomination for whose benefit the said institution is chiefly maintained.

11. From the impugned order, it appears that the Assistant Commissioner of Endowments has followed the mandate of section 27 of the Act, when he appointed the non-hereditary trust board which is impugned in the writ petition.

12. In view of the above discussions, I do not find any reason to interfere with the said impugned order of the Assistant Commissioner of Endowments under Annexure-4 to the writ petition passed on 30.9.2011 constituting the interim trust board in respect of the case deity, to manage the affairs of the said religious institution smoothly.

13. In the result, the writ petition, being devoid of any merit, stands dismissed.

Writ petition dismissed.

2012 (II) ILR- CUT- 337

INDRAJIT MAHANTY, J.

CRMC. NO. 5808 OF 2001 (Dt.03.03.2012)

RABINDRA LELE & ORS. ……..Petitioners.

.Vrs.

GEORGE BHAKTAN ..…….Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.482.

Complaint Case – Cognizance taken U/s.425, 468 and 471 I.P.C. – Complaint Case relates to alleged forged letters marked as exhibits before a Civil Court wherein complainant is a party – Held, in the absence of a complaint from the said Civil Court, taking cognizance of the above offences would be bad in law – Impugned order of taking cognizance is set aside.

Case laws Referred to:-

1.AIR 1983 SC 1053 : (Gopalakrishna Menon & Anr.-V-D.Raja Reddy & Anr.)
2.AIR 1973 SC 1100 : (Raghunath & Ors.-V.State of U.P. & Ors.)
3.AIR 1974 SC 299 : (Mohan Lal & Ors.-V-The State of Rajasthan & Anr.)
4.AIR 1979 SC 437 : (Dr. S.L.Goswami-V- The High Court of Madhya Pradesh).
5.AIR 1976 SC 2225 : (Legal Remembrancer of Govt. of West Bengal-V-Haridas Mundra).
6.AIR 1976 SC 1947 : (Smt. Nagawwa-V-Veeranna Shivalingappa Konjalgi & Ors.)

For Petitioner - M/s. J.K.Mishra, N.C.Mishra, S.S.Mohanty & P.C.Behera.
For Opp.Party - M/s. Y.Das, N.C.Mohanty, R.Sahu-3, P.R.Behera.

I. MAHANTY, J. The present application under Section 482 Cr.P.C. has been filed by the petitioners-proprietor and other employees of a proprietorship concern known as M/s. Ecoman, a proprietorship firm having its registered office at Vadodara in the State of Gujrat with a prayer to quash the order dated 18.10.2000 passed in I.C.C. Case No.92 of 1998, whereby,

the learned S.D.J.M., Panposh, Rourkela has been pleased to take cognizance of offences under Sections 425, 468 and 471 of I.P.C. against them, inter alia, on the ground that taking of cognizance itself in the facts and circumstances of the present case was not only without jurisdiction but also amounted to gross abuse of the process of the Court and miscarriage of justice.

2. Shorn of unnecessary details, it is suffice to note that the petitioners-firm i.e. M/s. Ecoman had entered into a tripartite agreement with the opposite party-company i.e. M/s. Ores Enterprises (P) Ltd. and the Orissa State Financial Corporation (O.S.F.C.) for supply of certain machineries to M/s. Ores Enterprises (P) Ltd. which were being financed by the Orissa State Financial Corporation. Since certain disputes arose between the parties, the petitioner-firm i.e. M/s. Ecoman has filed a Special Civil Suit bearing No.327 of 1998 before the learned Civil Judge (Sr. Division), Vadodara against the opposite party-M/s. Ores Enterprises (P) Ltd. as well as the Orissa State Financial Corporation and the same is pending adjudication as on date.

In the said suit, the petitioners-firm had made a prayer seeking injunction from encashment of bank guarantee along with other prayers. Although initially an interim order was passed injuncting encashment of bank guarantee but the same was vacated at the instance of the O.S.F.C. and the said suit remains pending for final adjudication.

During the pendency of the said suit the petitioners-firm alleging dishonour of certain cheques issued by the opposite party-company initiated a Criminal Complaint Case No.2349 of 1998 before the learned C.J.M., Vadodara, implicating the Director-Harbinder Singh Deengra of the opposite party-company for an alleged offence under Section 138 of the N.I. Act as well as Section 420 I.P.C. The aforesaid Criminal Complaint was lodged on 10.8.1998 and the same remains pending adjudication.

As a counter blast to the aforesaid complaint proceeding initiated by the petitioners-firm against opposite party-company, the opposite party-company filed a complaint case bearing I.C.C. Case No.92 of 1998 against the present petitioners-firm for alleged commission of offences under Sections 425, 467, 471 I.P.C. before the Court of S.D.J.M., Panposh, Udit Nagar, Rourkela in the State of Orissa. This Complaint case came to be filed on 15.9.1998 i.e. after Criminal Case was registered at Vadodara and subsequent thereto after recording statement of the complainant-opposite party under Section 200 Cr.P.C. and also recording the statement of two

witnesses namely H.S. Deengra and Afroz Azam under Section 202 Cr.P.C., by the order dated 10.11.1998, the learned S.D.J.M., Panposh, Rourkela had taken cognizance of offences as noted hereinabove which was the subject matter of challenge in CRLMC No.970 of 1998 before the Orissa High Court, which came to be disposed of by order dated 12.5.2000.

3. The essence of the complaint made in I.C.C. Case No.92 of 1998 pending before the learned S.D.J.M., Panposh, Udit Nagar, Rourkela is that the accused persons (present petitioners) personally behind the back of the complainant had procured a letter pad of the complainant-company from a staff of the company and typed a letter and the accused persons have forged the signature of George Bakhtan on that letter. Further, it is alleged that the said letter in question was forged by the accused persons and by forging it, the accused persons intended to harm fraudulently and dishonestly use the said letter as genuine for the purpose of cheating and also use it for personal gain on 30.4.1998. On perusal of the documents appended to the impugned proceeding, the following facts emerge.

"2. The complainant-opposite party in sub-paragraph 1 and 3 of paragraph 4 of the complaint petition has stated as follows:-

> "The accused persons personally behind the back to the complainant has procured a letter pad of the complainant from a staff of the company and typed a letter, and the accused persons have signed the signature of George Bakhtan on that letter."
>
> XXX xxxx xxxx
>
> "the said letter in question is forged by the accused person and by forging it the accused persons intended to harm fraudly and dishonestly uses it as genuine for the purpose of cheating and uses it for personal gain on 30th April, 1998."
>
> The complainant-opposite party in his initial statement recorded on 25.9.1998, has stated as follows:-
>
> "The accused persons obtained my letter pad from one Afroz Azam, my staff and utilized the same for filing in the court. The case filed by the accused person at Vadodara utilizing my letter pad was dismissed."
>
> P.W.1, H.S. Deengra in his statement recorded under Section 202 Cr.P.C. has stated as follows:-

"The Company Officials have obtained the letter pad from our staff and forged the signature of M.D. and accordingly extended the Bank Guarantee."

P.W.2, Afroz Azam in his statement recorded u/s,202 Cr.P.C. has stated as follows:-

"On the second visit of Rabindra Lele and his associates asked me to give 5 to 6 copies of letter pad required by Harbindra Singh. So out of good faith I handed over 5/6 letter pads of the company. Subsequently, I learnt that the letter pads were misutilized.

P.W.3, the complaint-opposite party himself in his further statement recorded on 8.9.2000 u/s.202 Cr.P.C. has stated as follows:-

"The accused persons came to inspect the factory premises in order to install the equipments and machineries during the second week of March, 1998. The accused persons met my staff Afroz Azam and asked for letter pad to prepare some letter saying that I have instructed them. The accused persons brought the letter head pad from my staff and typed out some letter in my office at Rourkela. These letter pads are printed in the name of my company. There was no signature on any of letter head pad kept in my office."

XXX XXX XXX

"Thereafter I proceeded to Ahemadabad. I enquired about this matter from the company of the accused persons. There I could ascertain that one letter has been filed under my signature giving an extension of Bank Guarantee. Thereafter I came to know that since this letter was prepared by using my letter head pad it appears that my forged signature was obtained and thereafter been filed in the Bank and extended the guarantee period which was not honoured by the Bank. The accused persons took plea on the basis of this forged letter and they have filed a Civil Suit in Civil Court at Ahemedabad. The injunction granted was vacated and the Civil Suit was dismissed which went in my favour."

Therefore the dispute raised in the complaint filed before the S.D.J.M., Panposh, Udit Nagar, Rourkela relates to an alleged letter dated 24.1.1998. Most importantly, these letters have been marked as Exts.60, 73

& 78 in Special Civil Suit No.327 of 1998 before the Civil Court, Vadodara, in which the complainant-opposite party is a party. Based on the said letter, the bank guarantee offered by the petitioners-firm was extended twice and the O.S.F.C. has acted upon it on 9.2.98, 12.3.98 as well as on 21.3.98.

4. At this juncture, it would be most important to take note of the fact that the opposite party-complainant in I.C.C. Case No.92 of 1998 has also filed its a written statement in Special Civil Suit No.327 of 1998 before the learned Civil Judge (Sr. Division) at Vadodara. This document i.e. the letter dated 24.1.1998 which is allegedly forged by the petitioner is very much a part of the pleadings and the said document has been exhibited in the said suit. On a perusal of the written statement filed by the opposite party-complainant, it is clear therefrom that the complainant has raised no allegation or complaint of forgery or otherwise in the said written statement and on the contrary affirmed the fact of the petitioners-firm and extended its bank guarantee up to 31.5.1998.

5. It is also important to take note of the fact that the petitioners-firm had approached this Court earlier in CRLMC No.970 of 1998 which had came to be disposed of by order dated 12.05.2000. Various observations and directions were issued by this Court in the aforesaid judgment and in particular paragraphs-8, 9 & 10 which are extracted herein below:-

> **"8.** In view of the foresaid finding before recording the consequential order it is relevant to dispose of the other contentions raised by the petitioners and resisted by the opposite party. One of the contentions of the petitioners is that the dispute is a civil dispute and a criminal proceeding may not lie. When the allegation of forgery is leveled the aforesaid contention of the petitioners does not hold good keeping in view the assertions made by the complainant. However, the aforesaid contention can be appropriately considered after the whole case of the complainant is properly putforth before the learned Magistrate.
>
> **9.** Another contention raised by the petitioners is that if at all the allegation of forgery is accepted for the sake of discussion, such forged document having been produced in a civil proceeding at Baroda and marked as exhibit without objection from the side of the complaint as defendant, a private complaint is not maintainable in view of the ratio in the case of ***Gopalakrishna Menon and another v. D. Raja Reddy and another,*** A.I.R. 1983 S.C. 1053. The repelling contention of the opposite party is that the allegation in the complaint

is not for using the forged document as evidence in a civil proceeding and therefore the ratio in the aforesaid case for the complaint u/s. 340 of the Code is not applicable and since the complaint alleges of forgery for the purpose of extending the bank guarantee which is not a proceeding before any court, a private complaint u/s. 200 of the Code is maintainable. In that respect he relies on a series of decisions viz: **Raghunath and others v. State of U.P. and others**, A.I.R. 1973 S.C. 1100; **Mohan Lal and others v. The State of Rahasthan and another,** A.I.R. 1974 S.C. 299; **Dr. S.L. Goswami v. The High Court of Madhya Pradesh**, A.I.R. 1979 SC 437; and **Legal Remembrancer of Govt. of West Bengal v. Haridas Mundra,** A.I.R. 1976 SC 2225. After going through the citations and the relevant provision of law and taking into consideration the argument advanced it is found that for the present, the argument of the complainant is acceptable unless some circumstances will appear in the case to show or suggest that the complainant is making allegation and desiring punishment of the accused persons for producing forged document as evidence in a court proceeding.

10. After deciding the contentions raised by the parties in the aforesaid manner and keeping in view the finding relating to deficiency of evidence to substantiate the existence of a prima facie case while passing the impugned order of cognizance this Court direct that the complaint need not be dismissed for a period of one month from the date of receipt of a copy of this order. If within that period the complainant shall appear in the court of S.D.J.M. and shall file an application expressing his intention to adduce further evidence in the enquiry u/s 202 of the Code. If such application shall be filed by the complainant, learned S.D.J.M. may do well to allow the same and to afford reasonable opportunity of adducing evidence at the stage of enquiry. If the complainant will desire to re-examine himself and the witnesses that may be permitted and on completion of the enquiry learned S.D.J.M shall carefully peruse the statement and evidence and pass appropriate order in respect of taking or not taking cognizance of any offence. It is made clear that at the stage of enquiry u/s.202 of the Code, the accused/petitioners have no role to participate in that proceeding save and except watching the same, if they so like."

6. Mr. Mishra, learned Senior Advocate appearing for the petitioners-firm placed reliance on a judgment in the case of ***Gopalakrishna Menon &***

another v. D. Raja Reddy and another, A.I.R. 1983 S.C. 1053, wherein, the Hon'ble Supreme Court has stated that in a case where there is no dispute that the alleged forged document produced in the suit brought by either party, Section 340 of the Cr.P.C. would apply and when such offence is alleged to have been committed in respect of document produced or given in evidence in a proceeding in any court, Section 195(1)(b)(ii) is attracted. In the absence of a complaint in writing of the Civil Court where the alleged forged document has been produced, taking of cognizance of the offence would be bad in law and the prosecution would not be maintainable since there would be absolutely no justification to harass the accused-petitioners by allowing prosecution to have a full dressed trial.

7. Mr. Sahoo, learned counsel for the opposite party-company strenuously urged that the power under Section 482 Cr.P.C. ought not to be exercised in the present case since it is well settled by a catena of decision of the Hon'ble Supreme Court and in particular in the case of ***Smt. Nagawwa v. Veeranna Shivalingappa konjalgi and other***s, A.I.R. 1976 S.C. 1947 wherein the Hon'ble Supreme Court has stated that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and if such Magistrate is prima facie satisfied that there are sufficient grounds for proceeding against the accused, he is legally bound to do so and it is not within the province of the Magistrate to enter into a detailed discussion of the merits or demerits of the case and nor can the High Court go into the matter.

Apart from the aforesaid contention, it is strenuously urged by the learned counsel for the opposite party-company that the argument addressed by the learned counsel for the petitioners-firm ought not to be taken into consideration at the present stage and can only be raised by the petitioners-firm in course of the trial.

8. In the case at hand, the prosecution is on the basis of a private complaint and in the absence of a complaint from the appropriate civil court, where the alleged fraudulent document has been produced, would not be sustainable and such proposition is no longer res integra what has been settled by the Hon'ble Supreme Court in the Judgment rendered in the case of **Gopalakrishna Menon & another** (supra).

9. In view of the aforesaid conclusion, I am of the considered view that if the prosecution is allowed to continue, serious prejudice would be caused to the petitioners and they would be called upon to face the trial which would

not be sustainable. Hence, the order of cognizance dated 18.10.2000 passed in I.C.C. Case No.92 of 1998 by the learned S.D.J.M., Panposh, Udit Nagar, Rourkela is set aside and it is left open for the opposite party-company, if so advised, to make such complaint before the Civil Court, Vadodara if aggrieved in any manner to the alleged forged document produced before the said court, who would be competent to deal with the same. Accordingly, the CRMC is allowed in terms of the directions noted above.

Application allowed.

2012 (II) ILR- CUT- 345

SANJU PANDA, J.

CRLREV NOS. 524,525 OF 2011 (Dt.25.04.2012)

JAMINI KRISHNA PATTNAIK & ANR. …….Petitioners.

.Vrs.

STATE OF ORISSA …….Opp.Parties.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S. 457,

Seizure of vehicle by mining squad – Seizure reported to the competent authority i.e. Deputy Director of Mines Joda – Since the petitioners-offenders don't want to compound the offence the competent authority reported the case to the learned J.M.F.C. Barbil to take cognizance of the offence – As per Rule 12 (2) & (3) and 13 of Orissa Minerals (Prevention of theft etc.) Rules 2007 the said Court is competent to take a decision in the matter of release or confiscation of the seized property – Held, learned J.M.F.C., Barbil is competent to consider the application U/s.457 Cr.P.C. and he is not correct in rejecting the said application – Held, impugned order set aside – Vehicle in question be released in favour of the petitioners.

Case laws Referred to:-

1.(2007)36 OCR 828 : (Kuril Tiria -V- State of Orissa).
2.(2003) 25 OCR 840 : (Soubhagya Kumar Panda-V-State of Orissa).
3.AIR 2004 SC 1851 : (State of West Bengal & Ors.-V-Sujit Kumar Rana).
4.(2003)24 OCR(SC)444 : (Sundarbhai Ambala Desai-V- State of Gujarat).

For Petitioner - M/s. Alok Kumar Panda, A.K.Choudhury(in both cases)

For Opp.Party - Learned Addl. Govt. Advocate, (in both the cases).

S.PANDA, J. Since common question of law is involved in both the revisions, they are heard together and disposed of by this common judgment.

The petitioners in both the revisions challenge the impugned orders dated 27.6.2011 passed by the learned J.M.F.C., Barbil in C.M.C. No.81 of 2011 and C.M.C. No.101 of 2011 respectively rejecting the applications under Section 457, Cr.P.C. for release of the Tippers bearing registration Nos.OR-14-J-9822 and OR-09-8049 in connection with offence under Section 21 of the Mines and Minerals (Development And Regulation) Act.

The petitioners being the owners of the seized vehicles filed applications before the learned J.M.F.C., Barbil for release of the vehicles, as they are entitled to the same. The vehicles were seized by the mining squad on the allegation that the same were illegally carrying mining ores. The seizure of the vehicles was reported to the competent authority i.e. Deputy Director of Mines, Joda and petitioners filed applications under Rule 12(2) of the Orissa Minerals (Prevention of Theft, etc.) Rules, 2007 to report the seizure of vehicle to the appropriate court of law. After the seizure, the petitioners approached this Court in W.P.(C) No.1023 of 2010 and W.P.(C) No.1512 of 2011 respectively with the prayer to direct the Deputy Director of Mines, Joda to report the vehicles to the appropriate court of law, since the petitioners do not want to compound the offence. Accordingly, the writ applications were disposed of on 3.2.2011 after hearing the parties with the direction to the Deputy Director of Mines to report the case to the court of learned J.M.F.C., Barbil. Accordingly, the case was reported to the court. The petitioners moved applications by release of the vehicles before the learned J.M.F.C., Barbil under Section 457, Cr.P.C. which were rejected erroneously on the ground that the confiscation proceedings have already been initiated against the vehicles vide Confiscation Proceeding No.27 of 2009 and Confiscation Proceeding No.213 of 2008 respectively. Since the confiscation proceedings were already initiated, the court below did not incline to release the vehicle.

Learned counsel for the petitioners submitted that as per Rule 13 of the Orissa Minerals (Prevention of Theft etc.) Rules, 2007 (hereinafter referred to as “the Rules,2007”) since the matter was reported to the court, the court has the jurisdiction to release the vehicles even if confiscation proceeding were initiated. However, learned Additional Government Advocate while supporting the impugned order, submitted that since the confiscation proceedings were initiated by the competent authority, in such a situation, learned Magistrate rightly did not entertain the application. In support of his contention, he has cited the decisions reported in the case of ***Kuril Tiria v. State of Orissa,*** (2007) 36 OCR-828, ***Soubhagya Kumar Panda-V- State of Orissa,*** (2003) 25 OCR-840 and in the case of State ***of West Bengal and other V. Sujit Kumar Rana***, AIR 2004

Supreme Court 1851. Except in the case of Soubhagya Kumar Panda (supra) which is a case under Bihar & Orissa Excise Act, the other cases are under the Forest Act. In W.P.(Crl.) No.683 of 2011 disposed of on 14.9.2011, the Division Bench of this Court taking into consideration the decision of the apex Court in the case of ***Sundarbhai Ambala Desai V. State of Gujarat*** (2003) 24 OCR (SC) 444 by distinguishing the decision of Soubhagya Kumar Panda (supra) released the vehicle under Section 457, Cr.P.C., which was involved in a case under Bihar & Orissa Excise Act.

On the aforesaid rival submissions of the learned counsel for the parties, to appreciate their arguments, it is necessary to quote the Rules 12 and 13 of the Orissa Minerals (Prevention of Theft. Etc.) Rules, 2007.

12. Seizure and Confiscation :

xxx xxx xxx

"(2) After seizing any property under Sub-rule (1), he shall keep such property under his custody with proper official seal and with detailed information in Form-N indicating that the same has been seized by him and shall, except where the offender agrees in writing to get the offence compounded, either produce the same before the Competent Authority having jurisdiction or make a report of such seizure to the court competent to take cognizance of the offence and the court will try the offence on account of which the seizure has been made.

(3) Upon receipt of any report under Sub-rule (2), the court shall except where the offence has been compounded, take such measure, as may be necessary, for arrest and trial of the offender and disposal of the property according to law". (Emphasis supplied).

xxx xxx xxx
xxx xxx xxx
xxx xxx xxx

"13. **Release of Property by Competent Authority:**

Nothing in these rules shall be deemed to prevent the Competent Authority from directing at any time the immediate release of any property seized under Sub-rule (1) of Rule 12 and the withdrawal of

any charge made in respect of such property in accordance with the provisions of Section 321 of the Code of Criminal Procedure, 1973 (No.2 of 1974):

Provided that where a report has been made to the competent court of the property seized, the Competent Authority shall not release the property without the consent in writing of such court, if a case is pending before the same."

On a conjoint reading of the aforesaid provisions, it appears that if the offender does not agree to compound the offence, the competent authority shall report the matter to the court competent to take cognizance of the offence and the court will try the offence on account of which the seizure has been made. On receipt of the report, the court shall take such measures, as may be necessary, for arrest and trial of the offender and disposal of the property according to law.

Since in the present case, the petitioners do not want to compound the offence, the competent authority reported the case to the court of learned J.M.F.C., Barbil. The court is in seisin of the matter. Therefore, the learned J.M.F.C. is competent to consider the application under Section 457, Cr.P.C. Rule 13 of the Rules, 2007 rather puts a condition that in case the competent authority has reported the matter to the court, he has to take written consent of the court for release of the property so seized. Therefore, in either case, the court is competent to take a decision in the matter of release or confiscation of the seized property in accordance with law.

In view of the above, learned J.M.F.C. is not correct in rejecting the applications filed under Section 457, Cr.P.C.. Accordingly, this Court sets aside the impugned orders dated 27.6.2011 passed by the learned J.M.F.C., Barbil in C.M.C. No.81 of 2011 and C.M.C. No.101 of 2011 and directs him to release the vehicles bearing registration numbers OR-14-J-9822 and OR-09-J-8049 after verifying the relevant documents with such terms and conditions as he deems fit and proper with the further condition that the petitioners shall furnish the cash security and bank guarantee as per the value of the vehicles reflected in the current insurance policy. The Criminal Revisions are accordingly allowed.

Revisions allowed.

2012 (II) ILR- CUT- 349

S. K. MISHRA, J.

W.P.(C) NO. 7091 OF 2004 (Dt.08.02.2012)

DEBENDRA KUMAR SAHOO ……. Petitioner.

.Vrs.

S.E.-CUM- AUTHORISED OFFICER ……..Opp.Party.

ORISSA ELECTRIC SUPPLY LINE MATERIAL (UNLAWFUL POSSESSION) ACT, 1988 – S. 7.

Confiscation of vehicle by the Authorized Officer U/s.7 of the Act, 1988 – Occurrence took place on 21.08.2003 – Electricity Act, 2003 came in to force on 10.06.2003 – Held, Section 7 of Act, 1988 is deemed to have been repealed by necessary implication on the passing of the Electricity Act, 2003 and any proceeding under taken in pursuance there of after passing of the Electricity Act shall be null and void – Held, order passed by the Authorized Officer is quashed being without jurisdiction and the vehicle be released in favour of the petitioner.

For Petitioner -M/s D.P.Dhal
For Opp.Party -M/s P.Ku. Mohanty

Heard learned counsel for the petitioner and learned counsel for the opposite parties.

A subtle but interesting question arises in this writ petition. The petitioner being the owner of an Ambassador Car, bearing No.OR-02-M-6169, has assailed the order passed by the Authorized Officer-cum-Superintending Engineer, Electrical Circle, Balasore, on 18.06.2004 in Confiscation Case No.1/03-04, whereby the vehicle in question has been confiscated to the State.

In course of hearing the facts of the case are not disputed. On 21.08.2003 at 3 A.M., while a team of the police department was performing patrolling duty, they intercepted the aforesaid car and found 4bundles of Aluminum supply line conductor together with some tools and cutting weapons. They seized the car and initiated a criminal case, bearing Bhadrak P.S. Case No.117 of 2008 for the offence under Section 3 of the Orissa

Electric Supply Line Material (Unlawful Possession) Act, 1988, hereinafter referred to as "the Act of 1988" and under Section 136(c) of the Electricity Act, 2003, hereinafter referred to as "the Electricity Act" for brevity. Thereafter the matter was reported to the Authorized Officer under the Electricity Act and a confiscating proceeding was initiated. The confiscation proceeding came for final disposal on 18.06.2004, wherein the Authorized Officer-cum-Superintending Engineer, Electrical Circle, Balasore ordered that the vehicle bearing No. OR-02-M-6169, Ambassador Car along with the supply line materials and the cutting weapons seized by the Police and handed over for confiscation are confiscated to the State.

In course of hearing, the learned counsel for the petitioner contended that the occurrence took place on 21.08.2003. The Electricity Act has come into force on 10.06.2003. In view of the aforesaid Act, the provisions of the Act, 1988 being repugnant to the Central Statute was not in force and therefore, any action taken by the Authorized Officer in pursuance of the Section 7 of the Act, 1988 is null and void.

The learned counsel for the opposite parties, on the other hand, vehemently challenges the submissions made by learned counsel and submits that as yet the Act, 1988 is in force and the Authorized Officer is competent to order for confiscation for any vehicle, tools, etc. as it has not been specifically repealed under Section 185 of the Electricity Act.

In order to appreciate the dispute involved in this writ petition, it shall be profitable to note the various provisions of the relevant Acts. Section-7 of the Act, 1988 provides for confiscation of seized articles. At sub-section-1, it provides that where any officer seized electric material or where any such electricity supply line material is produced before him or is made over to him by the police, he shall, if satisfied that a offence under the Act has been committed in respect thereof order the confiscation of the electric supply line material together with tolls, ropes, chains, vehicles, vessels and any other conveyances used for such committing the offence within the prescribed time. Provided, further, that no order of confiscating any electric supply line material or any tools, ropes, etc. used in committing the offence unless the person from whom the property it seized is given, a notice in writing informing the grounds on which it is proposed to confiscate such property, tools, ropes, etc. and an opportunity of making representation in writing within such reasonable time as were specified in the notice against the grounds of confiscating and a reasonable opportunity of being heard in the matters. Sub-section 2 provides for an exception, which is not relevant for the purpose of this case.

Section 136 of the Electricity Act provides for theft of electric lines and materials, which reads as follows:

"(1) Whoever, dishonestly –

(a) cuts or removes or takes away or transfers any electric line, material or meter from a tower, pole, any other installation or place of installation or any other place, or site where it may be rightfully or lawfully stored, deposited, kept, stocked, situated or located, including during transportation, without the consent of the licensee or the owner, as the case may be, whether or not the act is done for profit or gain; or

(b) stores, possesses or otherwise keeps in his premises, custody or control, any electric line, material or meter without the consent of the owner, whether or not the act is committed for profit or gain; or

(c) loads, carries, or moves from one place to another any electric line, material or meter without the consent of its owner, whether or not the act is done for profit or gain, is said to have committed an offence of theft of electric lines and materials, and shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(2) If a person, having been convicted of an offence punishable under sub-section (1) is again guilty of an offence punishable under that sub-section, he shall be punishable for the second or subsequent offence for a term of imprisonment which shall not be less than six months but which may extend to five years and shall also be liable to fine which shall not be less than ten thousand rupees."

This provision of section 136 is comparable to Section 3 of the Act, 1988, which provides for penalty for unlawful possession of electric supply line material. It is not disputed, at this stage, that no provision similar to Section 7 of the Act, 1988 is there in the Electricity Act of 2003. Thus, the question now arises whether the Orissa Electric Supply Line Material (Unlawful Possession) Act, 1988 is still in force in pursuance whereupon the Authorized Officer can confiscate the seized materials like the electric supply line, tools vehicles etc.

Section 185 of the Electricity Act provides for repeal and saving which reads as follows:

"(1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910 (9 of 1910), the Electricity (Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commissions Act, 1998 (14 of 1998) are hereby repealed.

(2) Notwithstanding such repeal –

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(b) the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 (9 to 1910) and rules made there under shall have effect until the rules under sections 67 to 69 of this Act are made ;

(c) the Indian Electricity Rules, 1956 made under section 37 of the Indian Electricity Act, 1910 (9 of 1910) as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made.

(d) all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 (54 of 1948) shall continue to have effect until such rules are rescinded or modified, as the case may be;

(e) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.

(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

(4) The Central Government may, as and when considered necessary, by notification, amend the Schedule.

(5) Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals".

Thus, it is clear that any Act passed by any legislature, which is not mentioned or listed in the schedule of enactment attached to the Act itself, shall be deemed to have been repealed by necessary implication because of the fact that Section 174 of the Act provides for overriding effect of the Electricity Act. It lays down that save as otherwise provided in Section 173, the provisions of the Act shall have the effect notwithstanding any thing inconsistent therewith contained in any other law for the time being in force or instrument having effect by virtue of law other than the Act, 2003.

The attention of the Court was also drawn to the provision of the Article 254 of the Constitution of India, which provides that whenever there is inconsistency between laws made by the Parliament and the laws made by the legislatures of the State with respect to any entries of the concurrent list then the law made by the Parliament whether passed before or after the law made by the legislature of the State shall prevail and the law made by the legislature shall, to the extent of repugnance, be void.

In the aforesaid view of the matter, this Court comes to the conclusion that Section-7 of the Orissa Electric Supply Line Material (U.P.) Act, 1988 is not in force any more as the same is deemed to have been repealed by necessary implications on the passing of the Electricity Act, 2003. As such any proceeding undertaken in pursuance thereof after the passing of the Electricity Act shall be null and void. Hence, this Court comes to the conclusion that the order passed by the learned Authorized Officer-cum-Superintending Engineer, Electrical Circle, Balasore on 18.06.2004 in Annexure-8 is without jurisdiction and the same is therefore, quashed. The vehicle be immediately released in favour of the petitioner on production of certified copy of this order. The Writ Petition is accordingly disposed of. Requisites be filed for communication of this order within three days.

Writ petition disposed of.

2012 (II) ILR- CUT- 354

B. K. MISRA, J.

W.P.(C) NO. 18109 OF 2011 (Dt.30.01.2012)

ANNAPURNA TRIPATHY ……..Petitioner.

.Vrs.

PRAFULLA KU. PANIGRAHI & ORS. ……..Opp.Parties.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – S.10.

Stay of Suit – Suit for declaration and permanent injunction – Dispute between the parties is pending in the form of consolidation appeals before the Deputy Director of consolidation Bhadrak – Since prayer for permanent injunction cannot be granted by the Consolidation Authorities and it can only be considered by the Civil Court it would have been proper on the part of the learned trial Court to stay further proceedings in the suit till disposal of the consolidation appeals. (Para 9,10)

Case laws Referred to:-

1.2010(Ii)OLR 379 : (Netrananda Behera –V- Khetrabasi Behera)
2.1990(I) OLR 511 : (Prafulla Kumar Behera-V-Mangalu Samal)
3.1991(Ii) OLR 158 : (Budhi Dei-V- Kalu Muduli & Ors.)
4.1987(1) OLR 403 : (Sadhu Charan Das-V-Sri Raghaba Mallik & Ors.).

For Petitioner - M/s. Dayananda Mahapatra, M.Mahapatra, G.R.Mahapatra, L.K.Nanda.
For Opp.Parties - M/s. Subash Ch. Acharya & K.K.Pati,Adv. (for Opp.Parties).

B.K.MISRA, J. In this writ petition, the petitioner has assailed the order of the learned Civil Judge (Sr. Divn.), Bhadrak in C.S. No.102 of 2003-1 dated 16.5.2011 (Annexure-3) wherein the learned Court disallowed the prayer of the petitioner for stay of further proceedings in the aforesaid Civil Suit.

2. I may mention here that the present petitioner was the defendant in a suit i.e. C.S. No.102 of 2003-1 instituted by her brother, the present opposite party no.1 Prafulla Kumar Panigrahi for declaration that the name of the petitioner i.e. defendant recorded in the Major as well as Consolidation

Record of Rights in respect of 'A' Schedule land to be illegal and void and also for permanent injunction restraining the petitioner from advancing any claim whatsoever over the suit property and from entering into the suit property. The sole defendant, namely, the present petitioner entered appearance in the said suit and contested the same. During pendency of the said suit in the Court below, a petition was filed by the present petitioner (as the defendant) that in view of the pendency of Consolidation Appeals i.e. D.D. Appeal Nos.6, 7, 8 and 9 of 2006 further proceedings in C.S. No. 102 of 2003-I should be stayed. Serious objection was raised to such prayer of the defendant by the plaintiff on the ground that the appeals which have been filed have not yet been admitted even after lapse of four years and besides that in view of disposal of W.P(C) No.8016 of 2006 the prayer of the Defendant to stay further proceedings of the Civil Suit should be rejected.

3. The certified copy of the order sheets in C.S. No. 102 of 2003-1 at Annexure-3 shows that the learned Civil Judge (Sr.Divn.), Bhadrak took up the prayer of the defendant, namely, the present petitioner for stay of further proceedings of the suit on 10.12.2010 and passed interim stay for 15 days directing the defendant to produce documents in support of filing of Consolidation Appeal Nos.6 to 9 of 2006 before the Consolidation Authorities. However, the matter was finally heard and disposed of on 16.5.2011 where the prayer to stay further proceedings of the suit was disallowed.

4. I have heard learned counsel for both parties in the matter and the impugned order at Annexre-3. Perused the order of the Director of Consolidation, Orissa, Cuttack in Consolidation Revision No.3533 of 2003 which was filed by the plaintiff impleading the present petitioner as opposite party challenging the recording of the present petitioner along with him in the finally published Consolidation Record of Right. The said revisions was disposed of by the Director, Consolidation and the matter was remanded back to the Consolidation Officer, Tihidi to hear the matter afresh with regard to the correction of records as it needs verification of records along with the documents. When the matter was remanded back to the Consolidation Officer, Tihidi the said Consolidation Officer, Tihidi disposed of the Remand Revision Case Nos. 3531, 3532 and 3536 of 2003 on 28.9.2005 directing the name of the present petitioner to be deleted from the record of right i.e. in respect of Hal Khata No.823, 684, 254 and 683. Challenging such order of the learned Consolidation Officer, Tihidi the present petitioner has filed appeals which have been registered as D.D. Appeal Nos.6,7,8 & 9 of 2006 on 20.2.2006 and those were directed to be put up before the Deputy Director for perusal and orders.

5. There is no dispute about the aforesaid facts. Learned counsel appearing for the opposite parties also very fairly conceded to the fact that challenging the entries in the record of right published by the Consolidation Authorities the matter is sub-judice before the Consolidation Authorities but the only grievance of the learned counsel for the opposite parties is that the post of Deputy Director, Bhadrak is lying vacant and there is no certainty as to when the said appeals would be disposed of and if the said Civil Suit would be stayed, great harassment would be caused to the plaintiff.

6. Admittedly, there is no controversy over the fact that with the order of remand passed by the Director of Consolidation in Consolidation Revision No. 3533 of 2003, the controversy which centers around with to joint recording of the name of the petitioner as well as opposite party in respect of the suit Schedule property the matter has been reopened and it can safely be held that in respect of the suit properties the consolidation operation has not attained its finality as the appeals are pending before the appropriate authority against the orders of the Consolidation Officer, Tihidi.

7. There is no dispute regarding the settled position of law that the question of title can be decided by the Consolidation Authorities but the Consolidation Authorities have no power to grant relief of permanent injunction and in that context we can profitably refer to the decisions of this Court as reported in ***2010 (II) OLR 379 Netrananda Behera –v- Khetrabasi Behera***, ***1990 (I) OLR 511 Prafulla Kumar Behera –v- Mangalu Samal, 1991(II) OLR 158 Budhi Dei –v- Kalu Muduli and others***. The position with regard to stay of the suit where consolidation proceeding in respect of the suit land is pending has been succinctly stated in another decision of this Court as reported in ***1987(1) OLR 403 Sadhu Charan Das –v- Sri Raghaba Mallik and others*** *that is as to w*hat the Court should do with regard to abetment of the suit under Section 4(4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 and also where stay of the suit would be considered. This Court observed that the stay of the suit must be understood in the background of the facts and circumstances of a case.

8. Attention of the Court was drawn to the order of this Court in W.P(C) No. 8016 of 2006 dated 13.9.2007 where liberty was given to the petitioner to approach the Civil Court regarding the allegation of fraud alleged to have been played on her in filling a compromise petition before the Deputy Director Consolidation, Bhadrak. I have gone though the said order in detail and found that the facts of that case are different from the facts of the Civil Suit i.e. C.S. No. 102 of 2003-1. Thus the decision in W.P.(C) No. 8016 of

2006 has no application to this case and the learned Civil Court have gone wrong in applying that case to the facts of this case.

9. In the instant case, the suit is filed for declaration that the entries made in the finally published consolidation record of right in respect of 'A' Schedule properties to be illegal and void and also for permanent injunction restraining the present petitioner of coming over the suit land and laying any claim over the same and when challenging the recording of the name of the present petitioner along with opposite parties in the consolidation record the appeal is still pending in the Court of Deputy Director of Consolidation, Bhadrak which has been registered and when admittedly the prayer for permanent injunction cannot be granted by the Consolidation Authorities and it can only be considered by the Civil Court. It would have been proper on the part of the learned Trial Court to stay of further proceedings in C.S. No.102 of 2003-1 and it should await till disposal of the Consolidation Appeals by the Deputy Director where those are pending. In situation like this, since the Consolidation Authorities have exclusive jurisdiction in the matters of title, the trial court should wait till adjudication of title by the authorities under the act.

10. Accordingly, the impugned order dated 16.5.2011 in C.S. No.102 of 2003-1 passed by the learned Civil Judge (Sr. Divn.), Bhadrak is set aside. Let further proceedings of the suit as has been referred to above be stayed till disposal of the Consolidation Appeal Nos.6 to 9 of 2006.

11. The appropriate authorities i.e. the Commissioner, Consolidation and Director of Consolidation, Orissa should make arrangement for immediate disposal of D.D.Appeal Nos.6 to 9 of 2006 which are pending in the Court of Deputy Director of Consolidation, Bhadrak if not already disposed of. If the Presiding Officer i.e. Deputy Director, Consolidation, Bhadrak has not yet joined, the matters may be assigned to any other competent authority for taking up the appeals as the parties cannot suffer for the inaction of the State in such matters.

With the aforesaid observation & direction, the writ petition stands disposed of.

Let a copy of the order be furnished to the Commissioner-cum-Secretary, Revenue & Disaster Management Department, Government of Orissa, Bhubaneswar, Commissioner of Consolidation and Settlement Bhubaneswar, Director Land Records and Surveys, Director of Consolidation, Cuttack and Commissioner of Consolidation, Cuttack for necessary compliance. Writ petition disposed of.

2012 (II) ILR- CUT- 358

B. K. MISRA, J.

W.P.(C) NO. 4474 OF 2012 (Dt.26.04.2012)

PURNA CHANDRA PANDA & ANR. ……..Petitioners.

.*Vrs*.

PRADIP KUMAR PANIGRAHI ……Opp.Party.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 39, RULE 1 & 2.

Injunction – Three basic requirements – (1) Prima facie Case; (II) Balance of Convenience and in convenience; and (III) Irreparable loss and injury.

In this Case Plaintiff (Present O.P.) filed suit against the defendants (Present Petitioners) for declaration of right, title and interest, confirmation of possession, alternatively for recovery of possession and filed an application under Order 39 Rule 1 & 2 C.P.C. for interim injunction – Application for injunction rejected by the Trial Court – In appeal lower appellate Court directed parties to maintain status quo – Hence the writ petition.

Consolidation record of right in respect of the suit land stands in the name of petitioner No.1 and he possessed rent receipts starting from 1972 till 2011 and sold the suit land to petitioner No.2 who is constructing a house over the suit land – There is no contra material on record to take a different view with regard to prima facie case established in favour of the petitioners – Admittedly the construction over the suit land has been completed up to roof level so it cannot be said that balance of convenience is in favour of the present Opp.Party – As a matter of fact stopping the present petitioner No.2 from completing the house may cause irreparable loss to him – Held, the Plaintiff has not fulfilled any of the requirements for obtaining the order of injunction – In the other hand the petitioner No.2 would be permitted to complete the structure on the suit land if the petitioners-defendants will give a written undertaking before the learned trial Court that they will deliver vacant possession (after demolishing the structure standing over the suit land) without claiming any equity, in the event plaintiff succeeds in the suit. (Para 14,15,16)

Case laws Referred to:-

1.2010 AIR SCW 3167 : (Joint Commissioner of Income Tax, Surat-V-Saheli Leasing & Industries Ltd.)
2.AIR 1993 SC 276 : (Dalpat Kumar & Anr.-V-Prahalad Singh)
3.AIR 1990 SC 867 : (Dorab Cawaszi Warden-V-Coomi Sorab Warden)
4.2010(1)CLR(SC)305 : (Kishorsinh Ratansinh Jadeja-V-Maruit Corporation & Ors.)
5.Vol.88(1999)CLT 297 : (Smt.Padmini Sekhar Deo-V-Pankajini Thakur & Anr.)
6.1993(II) OLR 194 : (Gulzar Khan-V-Commissioner of Consolidation & Ors.)
7.2007(II)OLR 548 : (Sri Tapan Kumar Mohanty-V-Smt.Sudhansubala Sahu &Anr.)

For Petitioners - M/s. Niranjan Lenka, M.R.Mohapatra, L.Sahoo, H.K.Mohanta, Miss. N.Behera.

For Opp.Party - None.

B.K.MISRA, J. The petitioners being aggrieved with the order of the learned Civil Judge (Sr.Division), Udala in F.A.O. No. 1 of 2012 (Annexure-12) have filed this writ petition.

2. I have perused the impugned order at Annexure-12 as well as the order of the learned Civil Judge (Jr.Division), Udala in Interim Application No. 8 of 2011 (Annexure-10). Perusal of the materials on record reveal that the opposite party of this writ petition as plaintiff has filed Civil Suit No. 7 of 2011-I in the court of learned Civil Judge (Jr.Division), Udala for declaration of his right, title, interest and confirmation of possession over the suit land, along with alternate prayer for recovery of possession, declaration that the Consolidation Record of Right to be illegal and without jurisdiction and for permanent injunction restraining the defendant from interfering with the peaceful possession of the plaintiff over the 'Khha' schedule suit land etc.

3. In the said suit a separate prayer was also made under Order-39, Rules 1 and 2 of the C.P.C. for injunction vide Interim Application No. 8 of 2011. The learned Civil Judge (Jr.Division), Udala by his order at Annexure-10 dismissed the Interim Application No. 8 of 2011. Being aggrieved, the plaintiff-petitioner filed F.A.O. No. 1 of 2012 in the court of the learned Civil Judge (Sr.Division), Udala and the learned Civil Judge (Sr.Division), Udala

by the impugned order at Annexure-12 allowed the said appeal and directed the parties to maintain status quo over the suit land as on date of the order till final disposal of the original suit.

4. I have perused both the orders as at Annexures-10 and 12 and also the copy of the plaint in Civil Suit No. 7 of 2011-I which has been annexed to the writ petition as Annexure-6. After perusing the impugned order passed by the learned Civil Judge (Sr.Division), Udala at Annexure-12 and hearing learned counsel for the petitioners, I thought of remanding the matter for a fresh decision on merits in accordance with law but on a deeper and studied scrutiny I thought it proper that instead of directing remand it would be just and proper to consider the matter on merits and to set at rest the legal controversy involved in the matter.

5. Before going into the merits of the case let me deal with one important aspect about the short comings which I noticed while perusing the orders of the court below as at Annexures-10 and 12. The order of the Court should be very clear and without any ambiguity. The opening para of the impugned order as per Annexure-12 speak volumes about the confusion.

6. No doubt, judgment writing is a skill that can be learnt, practiced, improved and refined. A well structured judgment enhances clarity and conciseness and helps ensure the reasoning process. It is extremely essential that the Judge should be able to command the confidence of both the parties and this depends a good deal on the manner in which he conducts himself in Court while hearing a case. The Judge must not only possess but exhibit a keen-ness to get at the root of the case and a desire to do justice so as to inspire confidence in the minds of the parties that their case is in the hands of an able, impartial and a wise judge. In the words of an eminent jurist, namely the formerly Chief Justice of Bombay High Court M.C. Chagla, “a Judge has to constantly ask himself whether in giving his judgment he is doing justice. Therefore, in every case a judge hears, he has to bear in mind the majesty of the Law, the contribution that it can make to the betterment of society and the protection it can give to the humble and weak who is pitted against the rich and the powerful”.

7. The Hon’ble Apex Court in the case of **Joint Commissioner of Income Tax, Surat V. Saheli Leasing & Industries Ltd. reported in 2010 AIR SCW 3167** led great emphasis on the manner in which judgments/orders are to be written. The Hon’ble Apex Court while expressing anguish observed that the guidelines issued from time to time in the matter are not being adhered to and again reiterated few guidelines for

the courts while writing orders and judgments with a further direction to follow the same. According to the Apex Court the following guidelines are only illustrative in nature, not exhaustive and can further be elaborated looking to the need and requirement of a given case:-

a) It should always be kept in mind that nothing should be written in the judgment/order, which may not be germane to the facts of the case; it should have a co-relation with the applicable law and facts. The *ratio decidendi* should be clearly spelt out from the judgment/order.

b) After preparing the draft, it is necessary to go through the same to find out, if anything, essential to be mentioned, has escaped discussion.

c) The ultimate finished judgment/order should have sustained chronology; regard being had to the concept that it has readable, continued interest and one does not feel like parting or leaving it in the midway. To elaborate, it should have flow and perfect sequence of events, which would continue to generate interest in the reader.

d) Appropriate care should be taken not to load it with all legal knowledge on the subject as citation of too many judgments creates more confusion rather than clarity. The foremost requirement is that leading judgments should be mentioned and the evolution that has taken place ever since the same were pronounced and thereafter, latest judgment, in which all previous judgments have been considered, should be mentioned. While writing judgment, psychology of the reader has also to be borne in mind, for the perception on that score is imperative.

e) Language should not be rhetoric and should not reflect a contrived effort on the part of the author.

f) After arguments are concluded, an endeavour should be made to pronounce the judgment at the earliest. Keeping it pending for long time, sends a wrong signal to the litigants and the society.

g) It should be avoided to give instances, which are likely to cause public agitation or to a particular society. Nothing should be reflected in the same which may hurt the feelings or emotions of any individual or society.

8. The aforestated guidelines are being referred to by this Court in this order because of the simple reason to remind our Officers of the District Judiciary especially posted in Mufsil Stations as to how judgment and orders are to be written so that people can repose faith on the majesty of law. The language should be plain and simple to be well within the comprehension of a lay man such as the litigant public. I refrain from making any observation and the conduct of the proceedings of the Courts below which has resulted in avoidable delay and unnecessary expense to the parties.

9. It is needless to mention here that while considering the question of grant of injunction, the court is required to consider three basic requirements, namely:-

I. Prima facie case;
II. Balance of convenience and inconvenience; and
III. Irreparable loss and injury

"Prima facie" case means where there exists a fair question to be raised as to the existence of right which the party claims and if that is necessary in the interest of justice to preserve the said right till disposal of the suit. Therefore, the court is to look into the matter on the face of it. Prima facie case does not mean that in all probability the party applying for injunction would succeed in the suit. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction as the court is also to satisfy itself that irreparable injury would be caused to the party seeking relief if the court would not interfere in the matter and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury which otherwise means that the injury which cannot be adequately compensated by way of damages. "Balance of convenience" means that the court while granting or refusing the prayer for injunction is to exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side, if the injunction is granted (AIR 1993 SC 276, ***Dalpat Kumar and another V. Prahlad Singh***, AIR 1990 SC 867, ***Dorab Cawaszi Warden V. Coomi Sorab Warden***, 2010 (1) Current Legal Reports (SC) 305, ***Kishorsinh Ratansinh Jadeja V. Maruti Corporation and others*** and Vol.88 (1999) CLT 297, ***Smt. Padmini Sekhar Deo V. Pankajini Thakur and another***).

10. Perused the materials on record i.e. the copy of the plaint filed in C.S.No.7 of 2011-1 (Annexure-6) and other Annexures, namely the photo

copy of the Consolidation Record of Right in respect of the suit land (Annexure-1), the rent receipts at Annexure-2 series, the letter of the Project Director, DRDA, Mayurbhanj sanctioning Rs.96,00,000/- for construction of different Godown-cum-Workshed of SHG for the year 2011-2012 (Annexure-5) as well as the proposal for construction of SGSY infrastructure building for SHG Maa Santoshi, Khuntapal and above all the photo copy of the registered sale deed Annexure-4.

11. According to the case of the petitioners Ac.0.11 decimals of land under Consolidation Plot No.256 appertaining to Consolidation Khata No.56 corresponding to Sabik Khata No.10 and Plot No.317 measuring an area of Ac.0.16 decimals of land in village Khuntapal under Udala Police Station limits stands recorded in the finally published consolidation record of right in the name of the Petitioner No.1. The said Petitioner No.1 being in exclusive possession of the suit land is paying rent to the Government. The photo copy of the Consolidation Record of Right has been annexed as Annexure-1 to the writ petition so also the rent receipts as at Annexures-2 series. According to Petitioner No.1 the land in question is his ancestral property which belongs to their common ancestor Baidhar Panda. Out of those Ac.0.16 decimals of land, Ac.0.05 decimals of land were acquired by the Government for irrigation purpose and compensation was disbursed to the Petitioner No.1. The Petitioner No.1 for construction of the building of Maa Santoshi Self Help Group, Khuntapal (Petitioner No.2) sold Ac.0.03 decimals of land to Petitioner no.2 being approached by the B.D.O., Udala and accordingly, registered sale deed was executed by the Petitioner No.1 in favour of Petitioner No.2 on 29.8.2011 through B.D.O., Udala. The copy of the registered sale deed has been annexed as Annexure-4 to the writ petition. The Petitioner No.1 delivered possession of the said land to Petitioner No.2 Organization and after money was released by the District Rural Development Agency, Mayurbhanj, Baripada, the Petitioner No.2 Organization proceeded with the construction work over that land up to roof level.

12. As I have already discussed above, the sole Opposite Party despite service of notice has not entered appearance in this case. The said Opposite Party as Plaintiff who has instituted C.S.No.7 of 2011 in the Court of learned Civil Judge (Sr.Divn.), Udala takes the stand that the suit property originally belonged to Gopinath Panda, who died leaving behind his only son Umakanta Panda. Umakanta Panda in order to meet his legal necessity sold away the suit property to Kasinath Panda in the year 1955 and the said Kasinath Panda in the year, 1956 sold away the properties in favour of Brundaban Chandra Dash, who subsequently in the year 1984 sold the

aforesaid properties to the Plaintiff, who is the sole Opposite Party in this writ petition.

13. It is the further case of the Opposite Party as Plaintiff in the court below that since he resides in village-Jaida and the suit property situates 5 K.M. away from his village he inducted one Ajay Kumar Panigrahi as 'Bhag' tenant in respect of the said property. The said Ajay Kumar Panigrahi while in cultivating possession was giving Bhag to the Plaintiff-Opposite party. But the Petitioner No.1 could manage to record the aforesaid land in his name in the consolidation record of right and subsequently sold away Ac.0.03 decimals of land in favour of Petitioner no.2 Self Help Group through B.D.O., Udala and the B.D.O., Udala is making construction over the said land. Accordingly, the present Opposite Party as Plaintiff instituted a suit initially which was registered as C.S. No.4 of 2011-1 in the court of the learned Civil Judge (Jr.Divn.), Udala, where B.D.O., Udala was arrayed as a Defendant but that suit was dismissed because of want of notice on the public servant before instituting the suit under Section 80 of the C.P.C. and thereafter the Plaintiff filed a fresh suit which has been registered as C.S. No.7 of 2011-1 for declaration of his right, title, interest and confirmation of possession over the suit land and also alternatively for recovery of possession if in the meantime the Plaintiff would be found to have been dispossessed. A further prayer was also made for declaration that the onsolidation Record of Right No.56 is without jurisdiction, illegal and for injunction.

14. The prayer for injunction in I.A.No.8 of 2011 was refused by the learned Civil Judge (Jr.Divn.), Udala vide his order at Annexure-10. The said order of the learned Civil Judge (Jr.Divn.), Udala at Annexure-10 was challenged in an appeal before the learned Civil Judge (Sr.Divn.), Udala vide F.A.O.No.1 of 2012. In the impugned order, the learned Civil Judge (Sr.Divn.), Udala vide Annexure-12 in Para-4 has categorically mentioned that the Opposite Party No.2 is in possession of the suit land and is constructing a house over the said purchased land but it is surprising that the learned Civil Judge (Sr.Divn.), Udala despite material available on record could direct for maintenance of status quo in respect of the suit land till disposal of the suit. On going through the plaint averment as well as on perusing the Annexures-1 to 5 prima facie it appears that the Consolidation Record of Right in respect of the suit land stands in the name of the Petitioner No.1 which was prepared in the year 1989 (Annexure-1). There are series of rent receipts starting from 1972 till 2011 which shows that the Petitioner No.1 paying rent in respect of the land under Khata No.56. There is no contra material available on record to take a different view with regard to the prima facie case established in favour of the petitioners. Without

expressing anything touching upon the merits of the case, suffice is to say that the genuineness of the Consolidation Record of Right so prepared can only be questioned on three counts as per the Full Bench decision of this Court rendered in ***Gulzar Khan –v- Commissioner of Consolidation and others reported in 1993 (II) OLR 194.***

15. The learned Civil Judge (Jr.Divn.), Udala had discussed these aspects in his order while disposing of the injunction petition i.e. I.A.No.8 of 2011 but very unfortunately the learned Civil Judge (Sr.Divn.), Udala without considering the case in its right perspective and the materials available on record disposed of the matter by observing many things touching upon the merits of the case. Admittedly, the Consolidation Record of Right in respect of the suit land stands in favour of Petitioner No.1 and the Petitioner No.1 had sold three decimals of land out of the suit land to Petitioner No.2 Organization through the Block Development Officer, Udala for a consideration of Rs.2,000/- and delivered possession of the same to Petitioner No.2 Organization. It is also the admitted fact that on the said purchase land as per the funds provided by the Government i.e. District Rural Development Agency, Mayurbhanj, Baripada the Petitioner No.2 Organization is constructing the SGSY Infrastructure building for Maa Santoshi Self Help Group, Khuntapal which was recommended by the B.D.O., Udala vide his letter at Annexure-3 and the funds released under Annexure-5. Thus when the Petitioner No.2 Organization is constructing the building on his purchased land and when the construction has been raised up to roof level, irreparable loss would be caused to Petitioner No.2 by the impugned order of the learned Civil Judge (Sr.Divn.), Udala. The three ingredients required for grant of injunction were not fulfilled by the present Opposite Party, who was the Petitioner in I.A.No.8 of 2011 in the court below and rightly the prayer of the petitioner for injunction was refused. On going through the impugned order at the cost of repetition, I am constrained to mention here that the lower appellate court even though found the present opposite party No.2 in possession of the suit property but surprisingly directed for maintenance of status quo to be maintained by the parties forgetting the well established position of law that even if a party seeking injunction is capable to establish a prima-facie case but unless he is in possession of the disputed property, the court may refuse to grant injunction and in this connection reliance can be placed on a decision of this Court as reported in **2007(II) OLR 548, Sri Tapan Kumar Mohanty V. Smt. Sudhansubala Sahu and another**. The learned first appellate court committed gross error and there has been a failure of justice by directing maintenance of status quo in respect of the suit properties in the absence of finding with regard to title, possession etc.

16. When the Consolidation Record of Right is of the year 1989 and its genuineness was never challenged by the Plaintiff who is the Opposite Party in this case, till 2011 and in view of the sale deed at Annexure-4 and the rent receipts Annxure-2 series and when admittedly the construction over the suit land has been completed up to roof level it cannot be said that balance of convenience is in favour of the present Opposite Party. As a matter of fact, stopping the present Petitioner No.2 from completing the house may cause irreparable loss to the petitioners. Learned counsel for the Petitioners in course of his argument contended that in case Opposite Party who is Plaintiff in the court below ultimately succeeds in the main suit, the present Petitioners who are the defendants would deliver vacant possession of the land along with the structure thereon as per the wishes of the Plaintiffs and in the worst case also if the Plaintiffs would want delivery of possession of the vacant land, the Defendants would give vacant delivery of possession after demolishing the structure for which again, no equity would be claimed. Thus, taking into consideration the entire fact situation of the given case and also keeping in mind the submissions made by the learned counsel for the petitioners it cannot be said that the opposite party of the present writ petition, who is the Plaintiff-Petitioner in the court below has fulfilled any of the requirements for obtaining the equitable relief of injunction. Ends of justice would be met if the petitioners who are the defendants in the court below shall give a written undertaking before the Trial Court that they will deliver vacant possession of the land by removing the materials used in the structure after demolishing the structure standing over the suit land without claiming any equity on the event the Plaintiff-Petitioner succeeds in the main suit. If such an undertaking is given within a period of three weeks from today, the Petitioner No.2 would be permitted to complete the structure on the disputed land and till such undertaking is given the impugned order for maintenance of status quo in respect of suit land vide Annexure-12 shall continue.

17. Keeping in view the nature of the dispute, it is necessary that the suit itself should be disposed of as expeditiously as possible. If written statement has not been filed, the same should be filed by the Defendants, namely the present Petitioners immediately and no extension of time shall be granted. The suit shall be disposed of by taking up hearing on day to day basis preferably within a period of three months hence. The observations made in this case shall not prejudice the trial court in any manner while disposing of the suit basing upon the materials on record and in accordance with law.

With the aforesaid observation and directions, the writ petition stands disposed of.

Writ petition disposed of.