2013 (II) ILR - CUT- 179

C. NAGAPPAN, CJ & I. MAHANTY, J.

W.P.(C) NO. 8700 OF 2013 (Dt.29.04.2013)

PRANABALLAV MAHAKUD .....Petitioner

.Vrs.

STATE OF ODISHA & ORS. .....Opp.Party

TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994- S.2 (i) r/w Rule 4 (e) & 4-A (4).

Kidney transplantation – Petitioner unable to get a "near relative" donor but obtained consent from a non-relative donor – SCB Medical College & Hospital, Cuttack did not refer such case to the Authorization Committee for consideration on the ground that the certificate of Registration granted to it and other hospitals has limited it to the "related transplantation only" – Hence the writ petition.

There is no pre-requisite that transplantation of Kidney can only be permitted from the related donor – When the proposed donor and the recipient are not "near relative" the Authorization Committee shall evaluate and ensure that no commercial activities are proposed between them – Held, imposition of the condition in the certificate of Registration granted to the SCB Medical College and Hospital, Cuttack and other such hospitals limiting such certification to the "related transplantation only" is opposed to Law which stands deleted from the certificate of Registration – Direction issued to O.P.3 to evaluate the donor strictly in terms of the Act, 1994 and the application may be forwarded immediately to the Authorization Committee for their consideration.

For Petitioner- Mr. Anjan Kumar Biswal
For Opp.Parties - Mr. B. P. Pradhan Addl.Govt. Advocate

Heard Mr. Anjan Kumar Biswal, learned counsel for the petitioner and Mr.B.P.Pradhan, learned Addl. Government Advocate for the State.

The writ petitioner-Pranaballav Mahakud has filed this writ petition seeking direction to the opposite parties, in particular, Opposite Party No.3-the Superintendent, S.C.B. Medical College & Hospital, Cuttack to forward the application of the petitioner in the prescribed format for transplantation of Kidney to the Authorized Committee under the Transplantation of Human Organs and Tissues Act, 1994 for consideration.

Shorn of unnecessary details, it appears from the pleadings that the petitioner is suffering from a disease of kidney and requires kidney transplantation. It further appears that he is unable to obtain a donor, who is a relative and in fact, he has obtained consent from a non-relative donor. The petitioner presented such non-relative donor before the S.C.B. Medical College & Hospital, Cuttack for verification and testing but, the same appears to have been rejected on the ground that the petitioner and the proposed donor were not related.

Pursuant to the direction issued by this Court to the learned Addl. Govt. Advocate, the Superintendent, S.C.B. Medical College & Hospital, Cuttack by letter dated 22.4.2013 has informed the office of the Advocate General that the petitioner has been advised to come with a "valid near relative donor for pre-transplant work up".

Mr. Pradhan, learned counsel for the State submits that the S.C.B. Medical College & Hospital, Cuttack has been issued with a Certificate of Registration under the Transplantation of Human Organs Rules, 1995 dated 5.1.2012 and although such Certificate of Registration has been issued in favour of the S.C.B. Medical College & Hospital, Cuttack, in Clause-1 thereof a condition has been imposed as "live related transplantation only". He further submits that since the proposed donor of the petitioner is not related to the petitioner, therefore, by the terms of the Certificate of Registration granted in favour of the S.C.B. Medical College & Hospital, Cuttack, they are not permitted to refer such cases of non-related donors to the Authorization Committee.

It would be material to extract the copy of the Certificate of Registration granted to the S.C.B. Medical College & Hospital, Cuttack under the Transplantation of Human Organs and Tissues Act, 1994 which is quoted herein below:

"FORM-12

(See Rule-7(i) of the Transplantation Human Organs Rules-1995 and Rule-9 of (Amendment) Rules-2008 Govt. of India, Ministry of Health & F.W. Nirman Bhawan, New Delhi)

GRANT OF CERTIFICATE OF REGISTRATION OF INSTITUTIONS/GOVERNMENT HOSPITALS FOR THE REGULATIONS OF REMOVAL, STORAGE AND TRANSPLANTATION OF HUMAN ORGANS FOR THERAPEUTIC PURPOSES FOR PREVENTION OF

COMMENCIAL DEALING IN HUMAN ORGANS AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THEREOF.

1.	Superintendent, SCB MCH, Cuttack is hereby issued a certificate of Registration to undertake Removal, Storage and Transplantation of Human Organs for therapeutic purposes **(Related transplantation only)**	G.U.Surgery Department of SCB MCH, Cuttack
2.	The Certificate of Registration:-	Valid for 5(five) years from the date of issue.
3.	The name(s) of the Technical person to remain in charge:-	• Prof(Dr) Datteswar Hota, H.O.D.Urology., is team leader in transplant Surgery. • Dr.Chittaranjan Kar Asso. Prof. Nephrology is the nephrologists.
4.	Registration Number of Certificate:- Date of Issue:-	11/12 05.01.2012

Sd/-
Director Medical Education & Training, Odisha
&
Appropriate Authority"

In course of hearing, learned Addl. Government Advocate was queried as to whether under the Transplantation of Human Organs and Tissues Act, 1994, there is no pre-requisite that transplantation can only be permitted from the related donor alone or not ? Mr. Pradhan fairly admits that under Rule-4(e) of the Transplantation of Human Organs Rules, 1995 the following has been stated:

> "in case of a donor who is other than a near relative and has signed Form 1(C) and submitted an application in Form 10 jointly with the recipient, the permission from the Authorisation Committee for the said donation has been obtained."

Apart from the same, Rule-4A(4) stipulates that when the proposed donor and the recipient are not "near relatives", as defined under clause-(i) of Section 2 of the Act, the Authorisation Committee shall

evaluate. In other words, it is the Authorization Committee who shall ensure that if the donor is not a near relative to ensure that no commercial activities are proposed between the recipient and the donor or in any other issues.

Considering the aforesaid fact, we are of the considered view that the imposition of a condition in the Certificate of Registration granted to the S.C.B. Medical College & Hospital, Cuttack and other such hospitals limiting such certification to the "related transplantation only" is wholly without any authority of law. Therefore, we declare that the term "related transplantation only" in the Certificate of Registration dated 5.1.2012 granted to the S.C.B. Medical College & Hospital, Cuttack and any other hospital is opposed to law.

Therefore, the words i.e. "Related transplantation only" stand deleted from the Certificate of Registration. In view of the urgency as stated at the Bar and noted in the petition for the transplantation of the kidney of the petitioner, we further direct Opposite Party No.3-Superintendent of S.C.B. Medical College & Hospital, Cuttack to evaluate the donor whom the petitioner will produce before the Professor of Nephrology, S.C.B. Medical College & Hospital, Cuttack within a period of one week from today along with a certified copy of this order. Upon receipt of the same, the donor's case may be evaluated strictly in terms of the Transplantation of Human Organs and Tissues Act, 1994 and the Transplantation of Human Organs Rules, 1995 and the application may be forwarded immediately to the Authorization Committee for their consideration. The Authorization Committee is at liberty to consider all aspects as required by law prior to granting such permission and the petitioner's case be expeditiously dealt with, preferably, within a period of four weeks from the date of receipt of application.

With the aforesaid observation and direction, the writ application is disposed of.

Free copy of this order be handed over to the learned counsel for the State for necessary communication and compliance.

Writ petition disposed of.

2013 (II) ILR - CUT- 183

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

W.P.(C) NO. 7539 OF 2011 (Dt.22.11.2012)

NIRMAL CHANDRA JENA & ANR. .....Petitioners

.Vrs.

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

URBAN LAND (CEILING & REGULATION) REPEAL ACT, 1999 – Ss.3(2) (a) (b) & 4

Competent authority issued declaration U/s. 10 (1) of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter called the principal Act) that the petitioners land in excess of the ceiling limit are deemed to have been acquired by the State Government w.e.f. 15.3.1988 – Petitioners preferred ULC appeals in 1990 – In the meantime Repeal Act, 1999 came into force – O.P.3 wrote letter to O.P.5 to prevent transfer of Government lands by the ceiling surplus land holders – Action challenged.

In this case though notification was issued U/s.10 (3) of the Principal Act possession in respect of the alleged excess vacant land has not been taken over by the State Government or any person duly authorized by the said Government – There is also non-compliance of mandatory provisions U/ss. 10(5) and 10(6) of the Principal Act – Moreover since compensation not paid to the petitioners U/s.11 of the Principal Act in respect of the vacant land, it implies that the Government has not taken over possession of the lands in question – Held, petitioners are entitled to get the benefit U/ss. 3(2) (a) and 4 of the Repeal Act, 1999 hence impugned letters issued by O.P.3 to O.P.5 are quashed. (Para 15)

Case laws Referred to:-

1.AIR 1975 SC 1767 : (Balwant Narayan Bhagde-V- M.D. Bhagwat & Ors.)
2.2012 (3) Scale 385 : (Vinayak Kashinath Shilkar-V- Dy. Collector & Competent Authority & Ors.)
3.(2010) 10 SCC 677 : (Ritesh Tewari & Anr.-V- State of Uttar Pradesh & Ors.)
4.(2007)10 SCC 448 : (Lachhman Dass-V- Jagat Ram & Ors.)
5.AIR 1999 SC 1281 : (Babu Verghese & Ors.-V- Bar Council or Kerala).

For Petitioners - M/s. Ajodhya Ranjan Dash, S.K. Nanda-1, A. Mohapatra, S.N. Sahoo, K.S. Sahu, L.D. Achari, P. Padhi.
For Opp.Parties - Mr. R.K. Mohapatra, Addl. Govt. Advocate

V.GOPALA GODWA, C.J. The petitioners, who are the declarant/ owners under the repealing Urban Land (Ceiling and Regulation) Act, 1976, in this writ petition have sought to quash the letter of the competent authority dated 6.6.2002 addressed to the District Sub-Registrar, Cuttack under Annexure-5 instructing him to prevent transfer of Government land by the ceiling surplus land holders by way of registered deed without permission of the Government urging various facts and legal contentions. Further, the petitioners have prayed to restore their rights as available to them over the properties in question.

2. Bereft of unnecessary details, the short facts, which are necessary for effectual adjudication of the case are that:

The petitioners are the legal heirs of the purchaser from the original recorded Sabik tenant in Sabik Khata No. 49, Sabik plot no. 3455(tank) measuring an area Ac.0.049 and Sabik plot no. 3456 (bari) measuring an area Ac.0.785 dec. After the settlement operation, the said lands have been recorded as Hal Khata No.1 and Hal Plot no. 75 (tank) measuring Ac.0.058 dec., Hal Plot No. 76(bari) area Ac.0.676 dec. and Hal plot no.134/1015 (private road) area Ac.0.014 dec. and the said Hal Khata No.1 has been renumbered as Khata No.04-1. The petitioners are in possession of the said lands, which is evident from the rent receipts granted in favour of the original land holder over Sabik Khata No.242. While the matter stood thus, final statement under Section 9 of the Urban Land (Ceiling and Regulation) Act, 1976 (Act 33 of 1976), hereinafter to be referred to as 'Principal Act', in short, was prepared on 30.11.1987 by opposite party no.3 mentioning the details of the property including the lands of the petitioners by initiating respective ULC cases bearing ULC Case Nos.477,478 and 479 of 1976. In the said statement, the opposite party no.3 has also mentioned about the exempted lands from ceiling under the Principal Act and the reasons thereof in the remarks column of the said statement enclosed to the letter under Annexure-4. Thereafter, the competent authority issued declaration under section 10(1) of the Principal Act that the lands of the petitioners including the aforesaid lands are deemed to have been acquired by the State Government with effect from 15.3.1988. Challenging the said declaration, the petitioners preferred appeals before the Revenue Divisional Commissioner (Central Division), Cuttack bearing ULC Appeal Case Nos.3,4 and 5 of 1990.

However, pending disposal of the said appeals, the Urban Land (Ceiling and Regulation) Repeal Act, 1999, (Act 15 of 1989) hereinafter to be referred to as "Repeal Act" came into force with effect from 22.3.1999, which was adopted by the State Government on 5.4.2002 vide resolution passed in the State Legislature published in the Orissa Gazette Extraordinary No. 574 dated 27.4.2002. Section 3(2) thereof provides that where any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the Principal Act, possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority and any amount has been paid by the State Government with respect to such land, then such land shall not be restored unless the amount paid, if any, has been refunded to the State Government and under Section 4 of the Repeal Act, all proceedings relating to any order made or purported to be made under the Principal Act pending immediately before the commencement of the Principal Act, before any Court, Tribunal or other authority, shall abate.

3. The case of the petitioners is that though a gazette notification under Section 10(3) of the Principal Act was published in respect of the alleged excess vacant land as per the schedule given in the ULC Case Nos.477, 478 and 479 of 1976 and the lands are deemed to have been vested absolutely in the State Government free from all encumbrances, no action under Sections 10(5) or 10(6) of the Principal Act had been taken and the petitioners have been in peaceful possession and enjoyment of the same.

4. While the matter stood thus, opposite party no.3 wrote a letter on 31.5.2002 (Annexure-5) to opposite party no.5 assuming the status of the lands of the petitioners as one under Sections 10(5) and 10(6) of the Principal Act calling upon the opposite party no.5 to prevent transfer of the Government lands by the ceiling surplus land holders. Thereafter the said opposite party no.3 by letter dated 21.6.2004 (Annexure-5/a) sent the sketch map showing the details of the lands surrendered to the Government. Challenging the said letters under Annexures-5 & 5(a), the petitioners have preferred this writ petition.

5. Mr.A.R.Dash, learned Counsel appearing for the petitioners submitted that the Repeal Act, which is adopted by the State Government of Odisha pursuant to the resolution of the State Legislature under Article 252(1) of the Constitution, is applicable to the cases, which are pending, and the same stands abated as per Section 4 of the said Repeal Act. It is vehemently contended by him that as on the date of adoption of the Repeal Act, since the ULC appeal cases are pending consideration before the

Revenue Divisional Commissioner, Section 4 of the Repeal Act is attracted. Apart from the said legal contention, he has vehemently contended that after passing order under Section 10(3) of the Principal Act, considering the objection to the draft statement prepared by the competent authority on the basis of the declaration made by the land owners regarding the surplus urban land, the Competent Authority declared the land as excess vacant land and the same shall be deemed to have been acquired by the State Government and upon publication of such declaration, such land shall be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified. Thereafter, sub-sections 4(i) & (ii) of Section 10 of the Repeal Act will come into operation that no person shall transfer by way of sale, mortgage, gift, lease or otherwise any excess land specified in the notification and any such transfer made in contravention of the said provision shall be deemed to be null and void and no person shall alter or cause to be altered the use of such excess vacant land.

6. Learned counsel has placed strong reliance upon sub-section (5) of Section 10, which says that where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorized by the State Government in this behalf within thirty days of the service of the notice. It is specifically averred that no such notice has been served upon the petitioners either by the competent authority or any other person duly authorized by the State Government in that behalf. Reliance is also placed upon sub-section (6) of Section 10, which stipulates that if any person refused or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorized by such State Government in this behalf and may for that purpose use such force as may be necessary. The said procedure has not been followed either by the competent authority or any other person duly authorized by such State Government in this behalf to take over possession by issuing thirty days notice to the petitioners. Therefore, the submission was made that formal possession was taken by the State Government. Thus, it makes it clear that by the said date, the Repeal Act was adopted by the State Government pursuant to the resolution passed by the State Legislature. Therefore, according to him, the provisions of Sections 3(2)(a) (b) and 4 of the Repeal Act are attracted to the fact situation. He further submitted that even assuming for the sake of argument that the State Government has taken actual physical possession of the said land, but as per Section 11 of the Act where any vacant land is deemed to have been

acquired by the State Government under Section 10(3), such State Government shall pay to the person or persons having any interest therein the amount as mentioned in the said provision. In the present case, no such amount has been paid either to the petitioners or the predecessors of the petitioners. Therefore, learned counsel submits that the benefit of the provisions of the Repeal Act referred to supra shall be extended to the case of the petitioners.

7. Mr.R.K.Mohapatra, learned Government Advocate seeks to justify the order of the competent authority on the ground that since the land has been vested in the State Government, the provisions of Sections 3(2)(a)(b) or Section 4 of the Repeal Act are not attracted to the case in hand and therefore, the benefit of the provisions of the Repeal Act as adopted by the State Government vide resolution of the State Legislature, is not available to the petitioners in the fact situation. Therefore, he has prayed for dismissal of the writ petition.

8. With reference to the aforesaid factual and legal contentions, the following points would emerge for consideration of this Court.

(i) Whether the provisions of Section 3(2)(a)(b) and Section 4 of the Repeal Act adopted by the State Legislature vide resolution published in the Orissa Gazette Extraordinary No.574 dated 27.4.2002 shall be applicable to the case of the writ petitioners?

(ii) Whether the mandatory provisions of Sections 10(5) and 10(6) of the Act have been complied with either by the competent authority or by any other person duly authorized by the State Government to take over possession of the declared surplus land of the petitioners ?

(iii) Whether during pendency of the ULC appeals before the appellate authority, the provisions of the Repeal Act have to be extended to the case of the petitioners?

(iv) To what order?

9. To appreciate the points involved in this case, it is necessary to quote the relevant provisions of Sections 3 and 4 of the Repeal Act, which are as under:

"3. (1) The repeal of the principal Act shall not affect-

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over by the State Government

or any person duly authorized by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where-

(a) any land is deemed to have vested in the State Government under sub-section (3) of section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land,

then such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

4. All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate:

Provided that this section shall not apply to the proceedings relating to sections 11, 12, 13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority."

10. The undisputed fact is that the competent authority passed order declaring the lands of the petitioners as surplus urban land and challenging the said orders, the petitioners moved the appellate authority and during pendency of the appeals, the Principal Act was repealed by Central Act 15 of 1999, which came to be effective from 22.3.1999. The said Repeal Act was adopted by the State Legislature vide Notification dated 26.4.2002, which was published in the Orissa Gazette Extraordinary No.574 dated 27.4.2002.

Further, pending disposal of the ULC Appeals, which were filed during the year 1990, the Repeal Act came into force. Therefore, the provisions of Section 4 of the Repeal Act are attracted to the fact situation. That apart, learned Addl. Government Advocate failed to produce any record of the Government whether the notification issued by the Government in Urban Development Department has been issued in the name of His Excellency, the Governor duly approved by the political executive in spite of adequate opportunity given to the learned Addl. Government Advocate. It is also a fact that, no compensation has been paid by the State Government in lieu of acquisition of the vacant land of the petitioners as required under Section 11 of the Act.

11. The apex Court in **Balwant Narayan Bhagde v. M.D.Bhagwat and others**, AIR 1975 SC 1767 while dealing with a case under the Land Acquisition Act, 1894, has distinguished "actual possession" and "symbolic possession". In para 26 of the said judgment, it has been held as follows:

> "In a proceeding under the Act for acquisition of land all interests are wiped out. Actual possession of the land becomes necessary for its use for the public purpose for which it has been acquired. Therefore, the taking of possession under the Act cannot be "symbolical" in the sense as generally understood in Civil Law. Surely it cannot be a possession merely on paper. What is required under the Act is the taking of actual possession on the spot. In the eye of law the taking of possession will have the effect of transferring possession from the owner of the occupant of the land to the Government."
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> "……It is therefore, clear that taking of possession within the meaning of Section 16 or 17 (1) means taking of possession on the spot. It is neither a possession on paper nor a "symbolical" possession as generally understood in Civil Law. But the question is what is the mode of taking possession ? The Act is silent on the point. Unless possession is taken by the written agreement of the party concerned the mode of taking possession obviously would be for the authority to go upon the land and to do some act which would indicate that the authority has taken possession of the land. It may be in the form of a declaration by beat of drum or otherwise or by hanging a written declaration on the spot that the authority has taken possession of the land. The presence of the owner or the occupant of the land to effectuate the taking of possession is not necessary. No further notice beyond that under Section 9 (1) of the Act is required. When possession has been

taken, the owner or the occupant of the land is dispossessed. Once possession has been taken, the land vests in the Government."

While dealing with a similar matter like the present one, the apex court in **Vinayak Kashinath Shilkar v. Dy. Collector & Competent Authority and others**, 2012(3) Scale 385 held as follows:

> "It is clear from the above provisions that where the possession of the vacant land has not been taken over by the State Government by any person duly authorized by the State Government in this behalf or by the Competent Authority, the proceedings under the Act would not survive. Mere vesting of the vacant land with the State Government by operation of law without actual possession is not sufficient for operation of Section 3(1) (a) of the Repeal Act."

Similar view has also been taken by the apex Court in **Ritesh Tewari and another v. State of Uttar Pradesh and others**, (2010)10 SCC 677 wherein it has been held that all proceedings pending before any court/ authority under the Principal Act, stood abated automatically on coming of the Repeal Act into force, provided the possession of the land involved in a particular case had not been taken by the State.

12. In view of the aforesaid legal position enunciated by the apex Court and the factual situation that the possession of the land in question has not been taken by the Government of Odisha, we are satisfied that the petitioners would be entitled to the relief as claimed and we declare that the proceedings under the Act in relation to the subject property stood abated. Therefore, the provisions of Sections 3(2)(a)(b) and 4 of the Repeal Act are attracted to the facts of the case.

13. Apart from that, the provisions of Sections 10(5) and 10(6) of the Act are to be strictly adhered to by the competent authority by issuing notice to the petitioners, who were the declarant/ owners by giving thirty days clear notice. In view of the factual contention urged by the petitioners' counsel, we also do not find any document evidencing the fact of service of notice, as required under Section 10(5), either by the competent authority or by any person duly authorized by the State Government in this behalf. If upon service of notice under Section 10(5) on the petitioners to deliver vacant possession of the land within thirty days they failed to comply with the same, then the competent authority or duly authorized person by the State Government on its behalf made for that purpose might have used such force, as may be necessary as provided under Section 10(6) of the Act. Therefore, without compliance of the statutory provisions as provided under Sections

10(5) & 10(6) of the Act, taking over possession of the land declared as surplus by the opposite parties would entail a serious civil consequence, as a result of which the petitioners will be deprived of their ownership of such land, which would be in violation of the constitutional rights guaranteed under Article 300-A of the Constitution. In the case of ***Lachhman Dass Vrs. Jagat Ram and others, (2007) 10 SCC 448***, the Supreme Court has held as follows:

> "……..To hold property is a constitutional right in terms of Article 300-A of the Constitution of India. It is also a human right. Right to hold property, therefore, cannot be taken away except in accordance with the provisions of a stature. If a superior right to hold a property is claimed, the procedures therefore must be complied with ……..."

It is necessary for this purpose to refer to the judgment of the Supreme Court reported in **Babu Verghese and others v. Bar Council of Kerala,** AIR 1999 SC 1281, wherein the apex Court referring the decision of the Privy Council and earlier decisions laid down that statute prescribes a particular procedure to do in a particular manner and it must be done in that manner or not at all. It is worthwhile to extract para 31 & 32 of the said judgment, which are as follows:

> 31. It is the basic principle of law long settled that if the manner of going a particular act is prescribed under any Statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor, (1875) 1 Ch D 426 which was followed by Lord Roche in Nazir Ahmad v. King Emperor, 63 Ind App 372: AIR 1936 PC 253 who stated as under:
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> "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."
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> 32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, 1954 SCR 1098: AIR 1954 SC 322 and again in Deep Chand v. State of Rajasthan, (1962) 1 SCR 662: AIR 1961 SC 1527. These cases were considered by a Three Judge Bench of this Court in State of Uttar Pradesh v. Singhara Singh, AIR 1964 SC 358: (1964) 1 SCWR 57 and the rule laid down in Nazir Ahmad's case (supra) was again upheld. The rule has since been applied to the exercise of jurisdiction by Courts and has also been recognised as a salutary principle of administrative law.

In view of the foregoing discussions, point nos.(i) and (ii) are answered in favour of the petitioners.

14. Point no.(iii) is required to be answered in favour of the petitioners and against the opposite parties. There is no dispute that against the impugned orders of the competent authority, the petitioners preferred appeal before the appellate authority and during pendency of the appeal, the Repeal Act came into force and the same has been adopted by the State Legislature with effect from 26.4.2002, as a result of which all proceedings including the order passed by the competent authority publishing the notification under Section 10(3) of the Act abated. Since the proceedings under the principal Act are pending before the appellate authority, the provisions of the Repeal Act are applicable to the case of the petitioners. Accordingly point no.(iii) is answered in favour of the petitioners.

15. Since point nos.(i) to (iii) are answered in favour of the petitioners, this Court is required to hold that the letter of the competent authority dated 31.5.2002 requesting the registering authority, opposite party no.5 to prevent transfer of the land in question by the ceiling surplus land holders and the subsequent letter dated 21.6.2004 (Annexure-5/a) furnishing the surrendered sketch map, are null and void and are accordingly quashed. The petitioners are entitled to get the benefit of the provisions of Sections 3(2)(a)(b) and 4 of the Repeal Act.

16. The writ petition is allowed. No cost. Writ petition allowed.

2013 (II) ILR - CUT- 192

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

W.P.(C) NO.12523 OF 2012 (Dt. 13.12.2012)

SURYAKANTA SANGANERIA & ORS. ……..Petitioners

.Vrs.

UNION OF INDIA & ORS. ……..Opp.Parties

P. I. L. – Closure of Binod Bihari Sub-Post Office – Ground is less work load and less income – Decision of the Government challenged by local people.

State has to undertake various non-profiting activities for the welfare of its citizens otherwise various non-profiteering institutions like hospitals, judiciary & primary Schools etc. could not function. Held, – Postal service being essential for human life the decision taken by O.Ps. 2 & 3 to close down Binod Bihari Sub-Post Office is quashed.

(Para 12 to 16)

Case law Referred to:-

AIR 1978 SC 851 : (Mohinder Singh Gill & Anr.-V- The Chief Election Commissioner, New Delhi & Ors.)

For Petitioners - Mr. A.N. Das & Prabodh Ch. Nayak.
For Opp.Parties - Mr. Saktidhar Das,
Asst. Solicitor General.

B.N.MAHAPATRA,J. This Writ Petition has been filed with a prayer to quash the decision of opposite party No.2-Chief Post Master General, Odisha Circle, Sachivalaya Marg, Bhubaneswar and opposite party No.3-Senior Superintendent of Post Offices, Cuttack City Division, Cantonment Road, Cuttack regarding closing down of Binod Bihari Sub-Post Office on 28.06.2012 on relocation basis as stated in letter dated 03.07.2012 (Annexure-2). Petitioners' further prayer is for issue of a writ of mandamus directing opposite parties 2 and 3 to maintain and continue the Binod Bihari Sub-Post Office as it was functioning prior to 28.06.2012.

2. This Writ Petition has been filed in the nature of Public Interest Litigation. Petitioner No.1 is the President of Balu Bazar Puja Committee, working President of Cuttack Mahanagar Shanti Committee and a practising Advocate, residing at Nayasarak, Cuttack. Petitioner No.2 is a resident of Alamchand Bazar and ex-Corporator of Cuttack Municipal Corporation and presently is the working Secretary of Balu Bazar Puja Committee. Petitioner No.3 is a resident of Banka Bazar and a former Member of Parliament (Rajaya Sabha) and a practising Advocate at Cuttack and a noted Social Worker and Vice-President of Balu Bazar Puja Committee.

3. Petitioners' case in a nutshell is that Cuttack is an old City of 1025 years old and known as Silver City for its silver and gold filigree business and is a heritage City. Balu Bazar is an old basti, consisting of seven sub-bastis, i.e., Banka Bazar, Nayasarak, Alamchand Bazar, Biswanath Lane, Nimchouri, Sahebzada Bazar and Bakhrabad. This basti was/is known as commercial hub of Cuttack, for the trade of textile, silver and gold filigree works including the famous daily market of fish and vegetable of small traders. Printer and publishers and sellers of books and stationeries and medicines were/are carrying their business in Nayasarak, Banka Bazar area. In these sub-bastis of Balu Bazar, more than 25,000 people are residing with their families. Binod Bihari Sub-Post Office was/is as old as about 70 years, when there were few Post Offices in Cuttack city, i.e., Chandini Chowk, Choudhury Bazar, Buxi Bazar and College Square and later on Sub-Post Offices were established in

number of places including Kazi Bazar and Upper Telenga Bazar etc. In Binod Bihari Sub-Post Office, there are more than 2000 postal book holders, saving bank account holders and other passbook holders with current account and holders of National Saving Certificates. Residents of Balu Bazar basti are depending upon the said Post Office for purchasing postal stamps, revenue stamps and they used to send registered letters and postal parcels in huge numbers particularly book sellers and medicine traders. Without any notice to the local residents of the area, opposite parties 2 and 3, mischievously, surreptitiously and without any valid cause and reasons took an arbitrary decision to shift Binod Bihari Sub-Post Office to Sector-11 of Markat Nagar (CDA) and when these facts came to the notice of local residents of the area, under the leadership of petitioner Nos. 2 and 3, about more than two hundred persons raised protest by sitting on Dharana and picketing, and submitted representations, as per requirement of Rule-8 of PIL of Orissa High Court Rules before opposite party No.3 by registered post with A.D. and also by meeting opposite party No.3 in person in his office. The said protest had come in print and electronic medias. The representation did not yield any result. Hence, the present writ petition.

4. Mr.A.N.Das, learned counsel appearing for the petitioners submitted that relocation of Binod Bihari Sub-Post Office at Sector-11, Markat Nagar, C.D.A. instead of opening a new Sub-Post Office at Sector-11, Markatnagar, CDA is arbitrary action of opposite parties 2 and 3 without valid reasons. Even though the Sub-Post Offices of Kazi Bazar and Upper Telenga Bazar are not so commercially viable to the Postal Department, but in the larger interest of local residents, these Post Offices were/are still functioning and have not been relocated. After receipt of representations under Annexure-1 series by opposite party No.3, opposite party No.3 sent a reply by registered post with A.D. to petitioner No.2 stating therein that Binod Bihari Sub-Post Office has already been closed down on relocation basis on 28.06.2012 and as such the representation under Annexure-1 could not be accepted. In case of closure or shifting of the Binod Bihari Sub-Post Office a lot of people shall suffer. Concluding his argument, Mr. Das submitted to allow the writ petition.

5. Mr.S.D.Das, learned Asst. Solicitor General appearing for opposite party No.3 submitted that the present writ petition is not maintainable. On review of the establishment of Binod Bihari Sub-Post Office, it was found that the total work load of the office came to 58 minutes and the income of the said office came to only 24.63% of the total cost. A copy of the statistical figures collected is annexed as Annexure-A/1. As per the norms prescribed by the Department of Posts, the working hours of an office requires minimum five hours and regarding income it should be self-supportive and the minimum

distance between two Post Offices should be two kilometers in urban areas with population less than twenty lakhs. A copy of the said Rule has been annexed as Annexure-A/2. Binod Bihari Sub-Post Office is surrounded by a number of Departmental Post Offices within a very short distance. Binod Bihari Post Office is situated at a distance of one kilometre from Kazi Bazar Sub-Post Office, 1.3 kilometres from Choudhury Bazar Post Office, one kilometre from Swaraj Ashram Post Office and one kilometre from Chandini Chowk Head Post Office. The said Post Office was running with very less workload incurring heavy loss to the Department. Hence, the working hours, income of the office and distance from other nearest Post Offices are not fulfilling the required norms. Thus, there is no justification for retention of the aforesaid Post Office. After review on the establishment of the said Binod Bihari Sub-Post Office by the competent authority, i.e., Chief PMG, Odisha Circle and as ordered vide memo No.ESP/20-1/2011 dated 18.06.2012, Binod Bihari Sub-Post Office was closed down on 28.06.2012 afternoon. Keeping in view the newly developed area in CDA, Cuttack, Sector-11, delivery Post Office with PIN Code- 753015 has already been opened on 29.06.2012 forenoon on relocation basis under Matching Savings Scheme. For convenience of general public (customers of Binod Bihari Sub-Post Office), order has already been issued to make transactions at Chandini Chowk Head Post Office, which is very nearer to the Binod Bihari locality. In order to enable the general public (customers of Binod Bihari Sub-Post Office) to make further transactions/withdrawal in/from their accounts, action was taken on 28.06.2012 to shift the records and other articles of Binod Bihari Sub-Post Office. But Balu Bazar Puja Committee put another lock on Binod Bihari Sub-Post Office over the office lock and due to protest of limited persons the records and other articles including Generator, UPS with batteries etc. could not be shifted. F.I.R. was lodged at Labag Police Station on 28.06.2012 for smooth and secured shifting of office records and other articles from Binod Bihari Sub-Post Office, which was registered under Lalbag PS Case No.83(14) dated 29.06.2012 under Sections 342/353/34, IPC. Keeping in view the importance and urgency of customers and members of public, the Deputy Commissioner of Police, Police Commissionerate, Cuttack as well as the Collector and District Magistrate, Cuttack were addressed vide letter dated 29.06.2012 for immediate rescue of the Central Government records/properties from Binod Bihari Sub-Post Office in presence of civil authority having magisterial power and police personnel. On 03.07.2012, a representation requesting not to shift Binod Bihari Sub-Post Office was received from the members of Balu Bazar Puja Committee. The representation was duly considered as per the policy decision of the Department. Since Binod Bihari Sub-Post Office has already been closed down on relocation basis on 28.06.2012 ternoon, the request could not be

acceded to, which was intimated to the Puja Committee. On 16.07.2012, steps were taken in the presence of Police force to rescue the Government records/properties, but due to violent protest of limited persons the records could not be shifted.

Mr.Das further submitted that despite several attempts and even with the help of Police, the records and other Government properties have not yet been rescued. Most of the customers of the said Post Office are coming with several complaints for non-transactions of their accounts as the relevant records are still inside Binod Bihari Sub-Post Office. Most of the depositors of the said Post Office, who are daily wage labourers, rickshaw pullers and poorer section of the society, are deprived of making withdrawals/transactions etc. In coming days, several litigations in shape of Consumer Court Cases may arise.

6. In their rejoinder affidavit, petitioners replied that this writ petition is legally and factually maintainable. Review for establishment of Binod Bihari Sub-Post Office is totally baseless and incorrect and has been created as a reply to the present Writ Petition by giving an absurd statistics figure as calculated under Annexure-A/1 to confirm their decision of closure of Post Office. Further, the norms prescribed by the Department of Posts and Rules under Annexure-A/2 have been put into operation by D.G. Posts letter No.1-36/77 PRP dated 21.10.1986, according to which, the minimum distance between two post offices has been raised 1.5 KM in the cities with population of 20 lakhs and above, and 2 KM in urban areas. These rules were not in existence earlier because the Binod Bihari Sub-Post Office is as old as 70 years. Even though there are many other Post Offices, which are not giving any income to the Postal Department and are situated within the less distance as prescribed under the Rules they are functioning. Binod Bihari Sub-Post office is about one kilometer distance from Chandini Chowk Post Office. Other Post Offices are less in distance from Chandini Chowk and none of those Post Offices has been relocated yet. Apart from putting up another lock in Binod Bihari Sub-Post Office while opposite party No.3 was making attempt to shift the Post Office, a protest was made by the local people in a democratic manner with placards and banners in their hands. The F.I.R. lodged under Annexure A/4 is mischievous and mala fide and just to make out a case against Balu Bazar Puja Committee. Petitioners ventilated their democratic right in the right manner by holding protest, placards, banners and raising slogans. The policy decision of Postal Department regarding relocation of Binod Bihari Post Office on 28.06.2012 at Sector-11 of CDA has been taken with a view to cause harassment to the people of the areas such as Banka Bazar, Binod Bihari Lane, Alam Chand Bazar, Nayasarak, Biswanath Lane, Sahebzada Bazar and Bakhrabad in availing the postal service. One member

of the Balu Bazar Puja Committee Shri Rama Chandra Sarkar submitted an application before opposite party No.3 under the Right to Information Act to provide certain information. Opposite Party No.3, after receipt of the application on 23.07.2012 has provided such information incorrectly, incompletely and haphazardly and has suppressed the correct material information in his reply letter 17/21.08.2012.

7. On the rival contentions of the parties the only question that falls for consideration by this Court is as to whether opposite parties 2 and 3 are justified in closing down the Binod Bihari Sub-Post office on relocation basis on 28.06.2012.

8. Facts, which are not in dispute, are that the Binod Bihari Sub-Post Office was started in the year 1939 and functioned there for last seventy three years till it was closed down on 28.06.2012. When the said Post Office was opened, few Post Offices were there in the City of Cuttack, i.e., Chandini Chowk, Buxi Bazar, College Square. Subsequently, to meet the need of the people and to make available the service of Post Office to the people in the nearby areas, opposite parties have opened Sub-Post Offices at Swaraj Ashram, Prajatantra Office, Dagarapada, Kafla Fandi, Collectorate Office, Kathajodi and in High Court premises. All these Post Offices which were subsequently established are located about less than half a kilometre or quarter kilometre from Chandini Chowk. These Post Offices are functioning and no order has been passed by opposite party No.3 to close down the same on relocation basis.

9. Apart from the above, the norms prescribed by the Department of Post under Annexure-A/2 have been put into operation by D.G. Posts letter No.1-36/77 PRP dated 21.10.1986. Annexure-A/2 provides the standard for opening of Departmental Sub-Post Office under Postal Sector. The standard norms provided under Annexure-A/2 are for opening of Departmental Sub-Office and not for closing down the existing Post Office. In the instant case, the Post Office in question was opened in the year 1939, i.e., prior to Annexure-A/2 came into operation in the year 1986.

10. Annexure-2 attached to the writ petition and Annexure-A/2 attached to the counter affidavit do not contain the reasons for closing down of the Binod Bihari Sub-Post Office. Annexure-2 simply says that Binod Bihari Sub-Post Office has been closed down on relocation basis on 28.06.2012 afternoon. Annexure-A/3 dated 18.06.2012 reveals that the Chief Post Master General, Odisha Circle, Bhubaneswar is pleased to order for closure of Binod Bihari NDT SO under Chandini Chowk Head Office of Cuttack City Division and to

relocate the said Post Office at Sector-11, CDA, Bidanasi, Cuttack as a DSO in the name of Sector-11, CDA, Cuttack with certain establishment purely on redeployment of surplus posts on Matching Saving Scheme. Annexures- A/4, A/5, A/6 and A/7 reveal that as per the policy decision of the Department of Posts, Binod Bihari Sub-Post Office becomes unremunerative due to heavy loss, therefore, the impugned order was passed to close down the said post Office on 28.06.2012 afternoon. Accordingly, the said Post Office was closed down on the very day. But nothing was brought to our notice to show as to who are those higher authorities, on what basis and what were the materials placed before those authorities to take such a decision to close down the Post Office in question. Therefore, it is contended by petitioners that subsequently documents were created to justify the action for passing the order of closure dated 28.06.2012.

11. An order passed by the authority cannot be supported by filing affidavit at later stage. The order itself should be self explanatory.

Hon'ble Supreme Court in ***Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors.,*** AIR 1978 SC 851, held as follows:-

> "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR 1952 SC 16) (at p. 18):
>
> Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.
>
> Orders are not like old wine becoming better as they grow older."

12. Otherwise also, reasons given in the counter affidavit are not valid reasons for closing down the Post Office which is working for 70 years in a particular locality upon which the people of that locality including the daily

wage labourers, rickshaw pullers and poorer section of the society were deprived for postal service. The reasons given in the counter affidavit are that total workload of the office comes to 58 minutes and the income of the said Post Office comes to only 24.63 % of the total cost. As per the norms provided by the Department of Posts working hours of a Post Office is five hours and regarding income it should be self-supportive and minimum distance between two Post Offices should be two kilometres in urban areas with population of less than twenty lakhs and that the Post Office in question is surrounded with number of departmental Post Offices within very short distance.

13. So far the working hours and income of the Post Office in question are concerned, in a welfare State the paramount consideration is the welfare of the citizens; the State has to undertake various non-profiting activities for welfare of its citizens. Otherwise, various non-profiteering institutions like the hospitals/health centres, primary schools, judiciary, railway services to under-developed areas etc. cannot function in the State. Postal service is essential in human life.

14. If Binod Bihari Sub-Post Office was running with very less workload incurring loss to the Department and the distance criteria is not satisfied, it is because of the action of opposite parties 2 and 3 in establishing other Post Offices subsequently around the Balu Bazar area. It was stated at the Bar that many Post Offices were established after the establishment of Binod Bihari Sub-Post Office. Moreover, if for any reason, a policy decision is taken at the Government Level to close down a Post Office in the Cuttack City on distance criteria, the said action should start with the Post Office established last and in descending order if permissible in law and should not start with an old Post Office of 70 years. It is not denied that there are number of passbook holders, savings bank account holders, and holders of National Saving Certificates in Binod Bihari Sub-Post Office. It is also not denied that Binod Bihari area is the business hub of various commodities such as textile, silver and gold filigree works, printer and publishers and sellers of books and stationeries and medicines including the famous daily market of fish and vegetable of small traders. At the time of establishment of Binod Bihari Sub-Post Office appropriate authorities after considering all the aspects and ground realities had opened such Post Office.

15. In view of the above, we are of the opinion that in the larger interest of the public of the locality, namely, Banka Bazar, Nayasarak, Binod Bihari Lane, Alam Chand Bazar, Bakharabad, Sahebazada Bazar and Manikghose Bazar etc., who have been depending on Binod Bihari Sub-Post Office since its opening in the year 1939, Opposite Party Nos.2 and 3 are directed not to

close down Binod Bihari Sub-Post Office and continue functioning of the said Post Office as usual.

16. In the result, the writ petition is allowed and the decision taken by opposite party Nos. 2 and 3 for closing down the Binod Bihari Sub-Post Office on 28.06.2012 on relocation basis is quashed. No costs.

Writ petition allowed.

2013 (II) ILR - CUT- 200

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

W.P.(C) NO.16742 OF 2011 (With Batch) (Dt.12.04.2012)

ANTARYAMI ACHARYA & ORS. ……..Petitioners

.*Vrs.*

ODISHA UNIVERSITY OF AGRICULTURE & TECHNOLOGY & ORS. ……..Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART.226, 227.

Petitioners are teachers working in Universities and aided colleges of the State – After preparation of the Scheme by the Government of India, Ministry of H.R.D. Department of Higher Education in 2008 UGC came forward with a Regulation named "University Grants Commission (minimum qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of standards in Higher Education) Regulations, 2010 – Petitioners filed writ petitions as the State Government accepted the pay scales but declined to enhance their age of superannuation from 60 to 65 years as per the Regulation-2010.

Shortage of teachers in Universities etc. cannot be a ground for enhancement of the age of superannuation – If there will be enhancement most of the qualified Post Graduates and Ph.D. holders waiting for employment in teaching faculties of colleges will be out of employment – UGC has clarified that stipulation regarding enhancement of age of superannuation is not mandatory for the State institutions – No data has been placed to draw an inference that standard of Higher Education is directly proportional to the age of

superannuation of teachers – Held, stipulation with regard to enhancement of age of retirement under the scheme is not made mandatory. (Paras 12,15,18,19,20)

Case laws Referred to:-

1.2009 STPL (LE) 41562 SC : (Annamalal University, represented by Registrar-V- Secretary to Govt. Information & Tourism Deptt.& Ors.)
2.(2005)5 SCC 420 : (Professor Yashpal & Anr.-V- State of Chhattisgarh & Ors.)
3.(2007) 11 SCC 58 : (B. Bharat Kumar & Ors.-V- Osmania University & Ors.)
4.AIR 1976 SC 2250 : (I.N. Saksena-V- State of Madhya Pradesh)
5.AIR 1975 SC 1646 : (N. Lakshmana Rao & Ors.-V- State of Karnataka & Ors.)
6.1984 LAB I.C. NOC 56 : (P.Javaryigowda-V- State of Karnataka & Ors.)
7.1975 LAB. I.C.799 : (Laxman Rajappa Garag & Ors.-V- The State of Karnataka & Anr.)
8.1978 LAB. I.C. 7 : (Virendrapal Singh-V- State of U.P. & Ors.)
9.1985 LAB. I.C. 1683 : (M/s. Poysha Industrial Co.Ltd.,Ghaziabad-V- State of U.P. & Ors.)

For Petitioners - M/s. G.A.R. Dora, G. Rani Dora & J.K. Lenka.

M/s. Pratyusha, N.P. Parija, M.S. Rizvi & S.K. Rout.
M/s. Biraja Pr. Das, S.R. Kanungo, A. Ekka & P.Acharya.

M/s. H.S. Mishra, R. Dash, A.S. Behera & T.K. Sahoo.
M/s. R.K. Rath,, B.B. Mohanty & B.P. Acharya.
M/s. Rajendra Mishra, S. Mishra, D. Sahoo, B.K. Mishra & B.S.Mishra.
M/s. B.R.Sarangi & S.N. Jena.
M/s. B.B. Mohanty & B.P.Acharya.
M/s. S.R. Mulia, R.C. Moharana, M. Mulia, R.R. Nayak & H.K. Singh.
M/s. Bisweswar Mishra, R. Mishra, S. Mishra, D. Sahoo & B. Pani.
M/s. P.K. Jena, D.P. Mohapatra.

M/s. S.P. Mishra, Soumya Mishra, S.Das.
M/s. Sidhartha Mishra, R. Mishra, D. Sahoo, B. Pani.
M/s. J.K. Lenka & P.K. Behera.
M/s. A.K. Mohanty, B. Mohapatra, S.K. Sahoo.
Mr. S.N. Sharma.
M/s. B.N. Mishra, S.Natia & B. Mohapatra.
M/s. Abhiram Swain, S.C. Mohanty, N.C. Moharana, P.K. Mishra.
M/s. K.N. Jena, D.K. Mohapatra, M. Ganguli, B.P. Bal, A.K. Sahu & N. Satpathy.
M/s, D.R. Bhokta, N. Afreen & R.P. Panigrahi.
M/s. D. Routray, P.K. Sahoo, R.P.Dalai, S. Das, S. Jena, S.K. Samal, S.P. Nath & S.Rout.
M/s. J. Sengupta, D.K. Panda, G. Sinha, A. Mishra, P.P. Behera.
M/s. R. Sharma, P.R. Pattanaik, A. Ekka, J.S.Maharana & B.P. Das.
M/s. D.K. Sahu, A.Pradhan, K. Badhei & S.K.Samal.
M/s. Bharat Jalli & S. Satpathy.
M/s. Basudev Mishra, B.L. Tripathy.
M/s. Sanjibani Mishra, S. Mishra & D.K. Panda.

For Opp.Parties - M/s. P. Acharya, S. Rath, B. Bhadra & B.K. Jena. (for O.P.No.1)

Mr. Ashok Mohanty, A.G. (for O.P.Nos.2 & 3).
Mr. J.K. Mishra (for O.P.No.4).
Mr. Saktidhar Das, Asst. Solicitor General of India, (for O.P. No.1)

M/s. S.K. Purohit, A.K. Dash & R.C. Pattnaik. (for O.P. No.1).

M/s. Ashok Mishra & S.C.Rath (for O.P.No.1).

L.MOHAPATRA, J. This batch of writ applications has been filed by the teachers working in different Universities and aided Colleges functioning within the State and the common question involved for adjudication is as to whether the Scheme prepared on recommendation made by UGC for revision of pay of teachers and equivalent cadres in Universities and Colleges following the revision of pay scales of Central Government employees on the recommendation of the 6th Central Pay Commission on fulfillment of terms and conditions mentioned therein can be modified and accepted by the State in part thereby declining to enhance the age of superannuation of such teachers from 60 to 65 as suggested in the Scheme.

2. Consequent upon revision of pay scale of the Central Government employees on the recommendation of the 6th Central Pay Commission, the Ministry of Human Recourses Development, Department of Higher Education, Government of India on the recommendation of the University Grants Commission formulated a Scheme under which pay of the teachers and equivalent cadres of the Central Universities and Colleges was revised with effect from 1.1.2006 with a stipulation that Central Government would bear the additional expenses to the extent of 80% whereas 20% expenses shall be borne by the State Government. This decision of the Ministry was communicated to the University Grants Commission on 31.12.2008.

The UGC after receipt of the Scheme, forwarded the same to the Education Secretaries of all the States requesting the respective State Governments to initiate immediate action so that implementation of the said Scheme may be in a time bound manner. This letter was written by the Secretary, UGC on 28.2.2009. The Government of Orissa in the Agriculture Department vide resolution dated 5.2.2010 decided to implement the Scheme of revision of pay scales for the teachers of Orissa University of Agriculture and Technology (OUAT) with certain modifications. Similarly in respect of other Universities and aided Colleges, decision was taken by the State Government to implement the Scheme with certain modifications. According to the petitioners though the State Government accepted the pay scales recommended, it did not agree to enhance the age of superannuation from 60 to 65 as suggested in the Scheme. Therefore, the question for adjudication is as to whether the Scheme has to be accepted as a composite one by the State Government without any modification or it can be accepted in part with modifications.

3. In order to adjudicate the above dispute, it is necessary to refer to certain provisions contained in the Scheme. Clause 8 (p) of the Scheme

provides for applicability of the same. It is provided in the said Clause that the Scheme shall be applicable to teachers and other equivalent cadres of Library and Physical Education in all the Central Universities and Colleges thereunder and the Institutions Deemed to be Universities whose maintenance expenditure is met by the UGC. The implementation of the revised scales shall be subject to the acceptance of all the conditions mentioned in the said letter as well as Regulations to be framed by the UGC in that behalf. Universities implementing the Scheme shall be advised by the UGC to amend their relevant statutes and ordinances in line with the UGC Regulations within three months from the date of issue of the letter. Clause 8 (p) (v) further provides that the Scheme may be extended to Universities, Colleges and other higher educational institutions coming under the purview of State legislatures, provided State Governments wish to adopt and implement the Scheme subject to the terms and conditions such as the State Government opting for revision of pay shall meet the remaining 20% of the additional expenditure from its own sources and the financial assistance shall be provided for the period from 1.1.2006 to 31.3.2010. It also provides that the entire liability on account of revised of pay scales etc. of the University and College teachers shall be taken over by the State Government opting for revision of pay scales with effect from 1.4.2010. Clause 8 (g) is the relevant clause on the basis of which all the writ petitions have been filed and therefore, for convenience, the said clause is quoted below:

> "Payment of Central assistance for implementing this Scheme is also subject to the condition that the entire Scheme of revision of pay scales, together with all the conditions to be laid down by the UGC by way of Regulations and other guidelines shall be implemented by State Governments and Universities and Colleges coming under their jurisdiction as a composite scheme without any modification except in regard to the date of implementation and scales of pay mentioned herein above."

4. Undisputedly the said Scheme prepared by the Government of India, Ministry of Human Resources Development, Department of Higher Education was communicated by UGC to all the State Governments on 28.2.2009 and so far as State of Orissa is concerned, the said Scheme was accepted and implemented. Though the State implemented the Scheme so far as it relates to the scale of pay as per the recommendation of the 6th Central Pay Commission, it did not enhance the age of superannuation from 60 to 65 as provided in the Scheme on the ground that the service conditions of such teachers working in the Universities and the aided

educational institutions are regulated by the State legislations.

The State legislations governing the service conditions of the teachers working in the Universities and aided educational institutions provide for superannuation at the age of 60 whereas the Scheme provides the age of superannuation as 65. The relevant clause of the Scheme providing for the age of superannuation is quoted below:

> "(f) **Age of Superannuation**:
>
> (i) In order to meet the situation arising out of shortage of teachers in universities and other teaching institutions and the consequent vacant positions therein, the age of superannuation for teachers in Central Educational Institutions has already been enhanced to sixty five years, vide the Department of Higher Education letter No.F.No.119/2006-U.II dated 23.3.2007, for those involved in class room teaching in order to attract eligible persons to the teaching career and to retain teachers in service for a longer period. Consequent on upward revision of the age of superannuation of teachers, the Central Government has already authorized the Central Universities, vide Department of Higher Education D.O. letter No.F.1-24/2006-Desk(U) dated 30.3.2007 to enhance the age of superannuation of Vice-Chancellors of Central Universities from 65 years to 70 years, subject to amendments in the respective statutes, with the approval of the competent authority (Visitor in the case of Central Universities).
>
> (ii) Subject to availability of vacant positions and fitness, teachers shall also be re-employed on contract appointment beyond the age of sixty five years up to the age of seventy years. Re-employment beyond the age of superannuation shall, however, be done selectively, for a limited period of 3 years in the first instance and then for another further period of 2 years purely on the basis of merit, experience, area of specialization and peer group review and only against available vacant positions without affecting selection or promotion prospects of eligible teachers.
>
> (iii) Whereas the enhancement of the age of superannuation for teachers engaged in class room teaching is intended to attract eligible persons to a career in teaching and to meet the shortage of teachers by retaining teachers in service for a longer period, and

whereas there is no shortage in the categories of Librarians and Directors of physical Education, the increase in the age of superannuation from the present sixty two years shall not be available to the categories of Librarians and Directors of Physical Education."

5. After the Scheme was prepared by the Government of India, Ministry of Human Resources Development, Department of Higher Education in December, 2008, the UGC came forward with a Regulation on 30.6.2010 called "University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) Regulations, 2010 (hereinafter called the 2010 Regulations). The said Regulations cover the following category of teachers as provided under Regulation 1.1.1:

> "**1.1.1** For teachers in the Faculties of Agriculture and Veterinary Science, the norms/Regulations of Indian Council of Agriculture Research; for Faculty of Medicine, Dentistry, Nursing and AYUSH, the norms/Regulations of Ministry of Health and Family Welfare, Government of India; for Faculty of Education, the norms/Regulations formulated in consultations with National Council of Teacher Education; for Engineering and Technology, Pharmacy and Management/Business Administration, the norms/Regulations formulated in consultations with All India Council for Technical Education; and the qualifications in the field of rehabilitation and special education at Degree, PG Diploma and Masters level, the norms/Regulations formulated in consultations with Rehabilitation Council of India, shall apply."

Regulation 2.3.1 provides that the revised scales of pay and age of superannuation as provided in Clause 2.1.0 may also be extended to Universities, Colleges and other higher educational institutions coming under the purview of the State Legislature and maintained by the State Governments, subject to the implementation of the scheme as a composite one in adherence of the terms and conditions laid down in the MHRD notifications provided as Appendix I to the Regulation with all conditions specified by the UGC in the Regulations and other Guidelines. The age of superannuation is provided in Clause (f) of Regulation 4.1.0 which has already been quoted from the Scheme in the earlier paragraph.

6. Shri G.A.R. Dora, Shri R.K. Rath, Shri S.P. Mishra and Shri B. Routray, the learned Senior Counsel appearing on behalf of the petitioners submitted that the 2010 Regulations have been framed in exercise of power conferred under Clause (e) and (g) of sub-Section (1) of Section 26 of the University Grants Commission Act, 1956. The Scheme prepared by the Government of India on recommendation of the UGC forms a part of the 2010 Regulations. Since the 2010 Regulations provide that the Scheme has to be accepted as a composite one, without any modification therein, it is not open for the State Government to accept the same in part. It was further contended by the learned Senior Counsel appearing for the petitioners that the Scheme not only provides for payment of salary in terms of the recommendation made by the 6th Central Pay Commission but also provides for enhancement of the age of superannuation up to the age of 65 years. Since the Scheme and the Regulations provide that it has to be accepted as a composite one, the State Government cannot accept the same in part by allowing the revised scales of pay in terms of the 6th Central Pay Commission recommendation and refuse to enhance the age of superannuation to 65 years on the ground that the teachers working under different Universities and aided Colleges are governed by the respective State legislations which provide the age of superannuation at 60 years. According to the learned Senior Counsel appearing for the petitioners, the 2010 Regulations have been framed in terms of Entry 66 of the Union List of Seventh Schedule whereas the State legislations are framed under Entry 25 of the Concurrent List of Seventh Schedule. Article 254 of the Constitution takes care of a situation when there is inconsistency between laws made by Parliament and laws made by the Legislatures of States. It clearly provides that if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void. In view of the above provision in the Constitution, the 2010 Regulations having been framed in exercise of power under Section 26 of the University Grants Commission Act, 1956 which is a Union subject, any legislation made by the State under Entry 25 of the Concurrent List to the extent it is repugnant to the Legislation of the Parliament shall be treated to be void and therefore, the age of superannuation prescribed in the State Legislation for these category of teachers at 60 years has to be treated as void and the State Government has no other option except enhancing the age of superannuation to 65 years

having accepted the Scheme and implemented it in part. Reliance was placed by the learned counsel for the petitioners on some decisions on this issue with which we shall deal later on.

7. The learned Advocate General, Shri Pitambar Acharya appearing for the Orissa University of Agriculture & Technology and Shri B.S. Mishra appearing on behalf of the Berhampur University in reply submitted that the Scheme prepared by the Government of India in the Ministry of Human Resources Development Department of Higher Education is only a Scheme and the same can be accepted in part by the State Government. It was further contended by the learned Advocate General and other Counsel appearing for the Universities that even if the said Scheme has been made a part of the 2010 Regulations, the State legislation provides that superannuation of these category of teachers shall be at the age of 60, and their service conditions are governed by those State legislations. Therefore, they cannot claim for enhancement of the age of superannuation from 60 to 65 as provided in the Regulations of 2010. Referring to the Scheme, it was also contended on behalf of the State and the Universities that under the Scheme and the 2010 Regulations, the State Government has a discretion to either accept the Scheme as a composite one without modification or in part with modifications and accordingly while implementing the Scheme, the State Government has rightly decided not to enhance the age of superannuation from 60 to 65. It was also contended that legislations enacted by the State governing the service conditions of the petitioners are under Entry 41 of List II of Seventh Schedule. Therefore, the decisions relied upon by the petitioners have no application, the Courts having not taken note of the same in the judgments.

8. Undisputedly the Parliament is competent to enact law for coordination and determination of standards in institutions for higher education, research and scientific and technical institutions under Entry 66 of the Union List of Seventh Schedule. Accordingly the Government of India have enacted the University Grants Commission Act, 1956. Similarly the State Government can enact laws in relation to education including technical education, medical education and Universities subject to the provisions of Entries 63, 64, 65 and 66 of the List I, vocational and technical training of labour under Entry 25 of the Concurrent List and accordingly State have made legislations governing the conditions of service of teachers working in different Universities and aided Colleges.

The 2010 Regulations have been framed in exercise of power conferred under Clause (e) and (g) of sub-section (1) of Section 26 of the

University Grants Commission Act, 1956 and accordingly it can be said to be a legislation under Entry 66 of the Union List. The Scheme prepared by the Government of India referred to above forms a part of the 2010 Regulations. The 2010 Regulations provide not only for payment of salary in terms of the recommendation of the 6th Central Pay Commission but also provide for enhancement of the age of superannuation to 65 years. The State legislations governing the service conditions of the teachers working in the Universities and the aided Colleges provide for superannuation at the age of 60 years. It was, therefore, contended by the learned Senior Counsel appearing on behalf of the petitioners that the age of superannuation provided by the State legislations are repugnant to the age of superannuation provided in the 2010 Regulations and under Article 254 of the Constitution of India, the legislation made by the Parliament shall prevail over the State legislations to the extent the State legislation is repugnant.

Similar cases came up for consideration before the Patna High Court, Uttarakhand High Court, Jharkhand High Court and the High Court of Karnataka. The learned Single Judges of Uttarakhand High Court, Jharkhand High Court and the High Court of Karnataka accepted such argument advanced by the learned counsel appearing for the petitioners therein and held that since the 2010 Regulations provide the entire scheme to be accepted as a composite one, the age of superannuation as provided in the Regulations has to be extended up to 65 years and accordingly amendments should be brought in the State legislations providing a lesser age of superannuation. However, the judgment of the Hon'ble Single Judge of Karnataka High Court was reversed in the Writ Appeal and now the matter is pending before the Hon'ble Supreme Court for consideration.

In the light of the above decisions relied upon by the learned counsel appearing for the petitioners, the submissions of the learned Advocate General and the learned counsel appearing for different Universities have to be examined. It was contended by the learned Advocate General and the learned counsel appearing for different Universities that the Scheme can be accepted in part with modification as compliance of all the provisions contained in the Scheme or the Regulation is not mandatory. The learned Advocate General referred to the 2010 Regulation published in the gazette on 30.6.2010. Clause 3 of the said Regulation provides that if any University grants affiliation in respect of any course of study to any college referred to in sub-section (5) of Section 12-A in contravention of the provisions of the sub-section, or fails within a reasonable time to comply with any recommendations made by the Commission under Section 12 or Section 13, or contravenes the provisions of any rule made under clause (f) of sub-

section (2) of Section 25 or of any regulations made under clause (e) or clause (f) or clause (g) of sub-section (1) of Section 26, the Commission after taking into consideration the cause, if any, shown by the University for such failure or contravention, may withhold from the University the grants proposed to be made out of the fund of the Commission. Referring to the said paragraph, it was contended by the learned Advocate General that if the State contravenes the Regulations, the only option left to the University Grants Commission is to withhold the grants proposed to be made out of the Commission funds. Therefore, the provisions contained in the Regulations need not to be accepted in its entirety and an option is available to the State to accept the same in part with modifications. Reference was also made to clause 4.1.0 (p) (v) and it was contended that the Scheme may be extended to Universities, Colleges and other higher educational institutions coming under the purview of State legislatures, provided State Governments wish to adopt and implement the Scheme subject to the conditions enumerated in sub-clauses (a) to (g) of the said provision. The entire provision referred to is quoted below for convenience:

"(a) Financial assistance from the Central Government to State Governments opting to revise pay scales of teachers and other equivalent cadre covered under the Scheme shall be limited to the extent of 80% (eighty percent) of the additional expenditure involved in the implementation of the revision.

(b) The State Government opting for revision of pay shall meet the remaining 20% (twenty percent) of the additional expenditure from its own sources.

(c) Financial assistance referred to in sub-clause (a) above shall be provided for the period from 1.01.2006 to 31.03.2010.

(d) The entire liability on account of revision of pay scales etc. of university and college teachers shall be taken over by the State Government opting for revision of pay scales with effect from 1.04.2010.

(e) Financial assistance from the Central Government shall be restricted to revision of pay scales in respect of only those posts which were in existence and had been filled up as on 1.01.2006.

(f) State Governments, taking into consideration other local conditions, may also decide in their discretion, to introduce scales of pay higher than those mentioned in this Scheme, and may give effect to the revised bands/scales of pay from a date on or after 1.01.2006; however, in such cases, the details of modifications proposed shall

be furnished to the Central Government and Central assistance shall be restricted to the Pay Bands as approved by the Central Government and not to any higher scale of pay fixed by the State Government(s).

(g) Payment of Central assistance for implementing the Scheme is also subject to the condition that the entire Scheme of revision of pay scales, together with all the conditions to be laid down by the UGC by way of Regulations and other guidelines shall be implemented by State Governments and Universities and Colleges coming under their jurisdiction as a composite scheme without any modification except in regard to the date of implementation and scales of pay mentioned herein above."

As is evident from clause (v) (g), payment of Central assistance for implementing the Scheme is also subject to the condition that the entire Scheme of revision of pay scales, together with all the conditions to be laid down by the UGC by way of Regulations and other guidelines shall be implemented by the State Governments and Universities and Colleges coming under their jurisdiction as a composite scheme without any modification except in regard to the date of implementation and scales of pay mentioned therein. Referring to this clause, it was contended by the learned Senior Counsel appearing for the petitioners that it was open for the State Government to either ignore the Scheme or implement the Scheme in its entirety as a composite one. It was not open to the State Government to implement the Scheme in part. The learned Advocate General and the learned other Counsels appearing for different Universities submitted that even on the face of the above provision, the option is still left to the State Government to implement the Scheme in part.

9. We would now refer to the judgments relied upon by the learned counsel appearing for both the parties deciding the issue involved. The first decision relied upon by the learned counsel appearing for the petitioners is the case of ***Annamalai University, represented by Registrar v. Secretary to Government, Information & Tourism Department and others,*** reported in ***2009 STPL (LE) 41562 SC.*** The question to be determined before the Hon'ble Supreme Court in the said case was interpretation and application of the University Grants Commission (the minimum standards of instructions for the grant of the first degree through non-formal/distance education in the faculties of Arts, Humanities, Fine Arts, Music, Social Sciences, Commerce and Sciences) Regulation, 1985 framed by the University Grants Commission in exercise of power under Section 26 of the University Grants Commission Act, 1956 vis-à-vis the provisions of the

Indira Gandhi National Open University Act, 1985. On Examination of the 1985 Regulations framed by the University Grants Commission and the provisions contained in the Open University Act, the Hon'ble Supreme Court came to hold that to the extent the State legislation is in conflict with the Central legislation though the former is purported to have been made under Entry 25 of the Concurrent List but in effect encroaches upon legislation including subordinate legislation made by the Centre under Entry 25 of the Concurrent List or to give effect to Entry 66 of the Union List, it would be void and inoperative. Reliance was also placed on another decision of the Hon'ble Supreme Court in the case of ***Professor Yashpal and another v. State of Chhattisgarh and others,*** reported in ***(2005) 5 Supreme Court Cases 420***. In the said judgment, the Hon'ble Supreme Court was examining the provisions of the University Grants Commission Act, 1956 and the provisions contained in Chhattisgarh Niji Kshetra Vishwavidhyalaya (Sthapana Aur Viniyaman) Adhiniyam, 2002. A public interest litigation had been filed under Article 32 of the Constitution for declaring certain provisions of the said Adhiniyam, 2002 as ultra vires and also for quashing of the notifications issued by the State of Chhattisgarh in exercise of power conferred by Section 5 of the said Adhiniyam for establishing various Universities. The Hon'ble Supreme Court referring to an earlier decision of the same Court observed that education including universities was a State subject until by the Forty-second Amendment of the Constitution in 1976 that entry was omitted from the State List and, was taken into Entry 25 of the Concurrent List. But as already pointed out the Act essentially intended to make provisions for the coordination and determination of standards in universities and is squarely covered under Entry 66 of List I. While legislating for a purpose germane to the subject covered by that entry and establishing a University Grants Commission, Parliament considered it necessary, as a regulatory measure, to prohibit unauthorized conferment of degrees and diplomas as also use of the word 'university' by institution which had not been either established or incorporated by special legislation. The Hon'ble Supreme Court ultimately held Sections 5 and 6 of the Adhiniyam as ultra vires and consequently quashed the notifications notifying the Universities and further directed that all such universities shall cease to exist. The Patna High Court in the case of Dr. Nawal Kishore Choudhury v. Rajendra Agricultural University & others vide CWJC No.13450 of 2010 and in the case of Dr. Brij Bihari Singh and others v. Rajendra Agricultural University and others vide CWJC No.13455 of 2010 held in paragraph-19 of the judgment that the selective or piecemeal implementation of the directives is not permissible since those directions are composite whole and have to be implemented as a package. If there is reluctance on the part of the State on this count, then intervention will be

required by the Court. After holding as above, the Court issued a direction directing the State of Bihar as well as the University to take immediate steps to ensure enhancement of the age of superannuation of the employees like the petitioners therein of the Agricultural University to 65 years. While deciding thus, reference was also made by the Court to the decision of the Jharkhand High Court as well as the decision rendered by the Hon'ble Single Judge of Karnataka High Court. Similar view was expressed by Jharkhand High Court by Hon'ble Single Judge in the case of Dr. Maheshwar Tiwary and Mr. Shashi Kishore Narayan Vs. The State of Jharkhand in W.P. (S) No.363 of 2010 and a Division Bench of the Uttarakhand High Court at Nainital in the case of Pant University Teachers Association v. Chancellor, Govind Ballabh Pant University of Agriculture & Technology in Writ Petition No.52 of 2010. Undisputedly the decision of the Hon'ble Single Judge of the Karnataka High Court was reversed in appeal.

When on one hand the above High Courts decided the case in favour of the petitioners therein holding that the State Government has no other option except accepting the 2010 Regulation as a composite one, a Division Bench of Karnataka High Court and some other High Courts took a different view.

10. A Division Bench of the Karnataka High Court at Bangalore in a batch of Writ Appeals reversing the judgment of the Hon'ble Single Judge held in paragraph-19 of the judgment that while adherence to the revised pay scales prescribed by the University Grant Commission is mandatory on all State Governments, increase of age of superannuation was intendedly optional and only recommendatory. Therefore, whatever be the wisdom behind the reluctance of the Government of Karnataka for adherence to the suggested age of superannuation, it is beyond the province of the Court to issue a writ for its observance. A Division Bench of the Kerala High Court in a similar case also did not accept the contention raised by the learned counsel appearing for the petitioners in this batch of cases and held that when the Central assistance is conditional, it is for the State Government to decide as a matter of policy which is best for the State, i.e. whether to adopt the recommendation as a package in full and complete or to take the consequence for non-compliance with part of the recommendations. This is within the realm of the Government policy and it is not for this court to recommend to the Government which course it should adopt. Regulation of the UGC and package of incentives by the Central Government are only recommendatory or advisory in nature. It is not within the powers of the Court to direct the State Government to increase the retirement age in line with the recommendation of the UGC to 65. In a similar batch of cases, a

Division Bench of the Punjab and Haryana High Court at Chandigarh also took a similar view while relying upon a decision of the Hon'ble Supreme Court in the case of ***B. Bharat Kumar and others v. Osmania University and others,*** reported in ***(2007) 11 Supreme Court Cases 58***. In paragraph-20 of the judgment it was held that the service conditions regarding age of retirement prescribed in statutory service rules under Proviso to Article 309 of the Constitution or under a statute cannot be deemed to have been amended by virtue of Scheme dated 31.12.2008 except with regard to "Centrally funded higher and technical education institutions coming under the purview of the ministry in order to overcome the shortage of teachers". A Division Bench of High Court of Andhra Pradesh in a batch of similar writ applications also declined to grant the relief of enhancement of superannuation to 65 not only relying on the case of the Hon'ble Supreme Court in B. Bharat Kumar and others v. Osmania University and others but also some other decisions of the Hon'ble Supreme Court. In the case of B. Bharat Kumar v. Osmania University, all the petitioners therein were serving in different private colleges which were enjoying the grant-in-aid by the Government. They were serving in the capacity as Lecturers, Professors, Readers, Librarians, Physical Education Teachers etc. and their common prayer was that their age of superannuation which had been fixed either at 58 or 60 years, as the case may be, should be raised to 62 years and such claim was made on the basis of a communication dated 27.7.1998 prescribing revision of pay scales of teachers in Universities and Colleges following the revision of pay scales of Central Government employees on the recommendations of the Fifth Central Pay Commission. The said letter while providing for pay revision also provided for enhancement of age of superannuation to 65 years under a Scheme. It was contended before the Hon'ble Supreme Court that the decision of the Government of India introducing the Scheme was mandatory and binding vis-a-vis the Colleges/Universities as the Central Government was providing financial assistance to the State in implementing the Scheme of revision of pay scales. While deciding the above question, the Hon'ble Supreme Court referred to the Scheme and held that it is for the University Grants Commission to extend the benefit of the Scheme or not to extend the benefit of the Scheme, depending upon its satisfaction about the attitude taken by the State Government in the matter of implementing the same. That is a matter entirely between the State Government on the one hand and the University Grants Commission on the other. The teachers cannot claim as a matter of right that they are entitled to retire on attaining the age of 60 years.

This decision cited by the learned Advocate General was sought to be distinguished on the ground that the Hon'ble Supreme Court in the said

case was examining the Scheme which had not been formed a part of any Regulation and therefore, it is distinguishable. In para-15 of the judgment, the Court held in the following manner:

> "Once we take this view on the plain reading of the scheme, it would be necessary for us to take stock of the subsequent arguments of Mr. Rao regarding Entry 66 in List I vis-à-vis Entry 25 in List III. In our opinion, the communications, even if they could be heightened to the pedestal of a legislation, or as the case may be, a policy decision under Article 73 of the Constitution, they would have to be read as they appear and a plain reading is good enough to show that the Central Government or as the case may be UGC also did not introduce the element of compulsion vis-à-vis the State Government and the universities. We, therefore, do not find any justification in going to the entries and in examining as to whether the scheme was binding, particularly when the specific words of the scheme did not suggest it to be binding and specifically suggest it to be voluntary".

It is therefore, clear from the above that even if the communications made in the said letter are heightened to the pedestal of a legislation, or as the case may be, a policy decision under Article 73 of the Constitution, they would have to be read as they appear and a plain reading is good enough to show that the Central Government or as the case may be UGC also did not introduce the element of compulsion vis-à-vis the State Government and the universities. This decision has been relied upon by the Division Bench of Punjab and Haryana High Court as well as the High Court of Andhra Pradesh.

11. In the light of the above decisions and on examination of the Scheme as well as the 2010 Regulation, we find that the Scheme is not mandatory and it is open for the State Government to accept the Scheme or not to accept the same. Even if the State Government accepts the Scheme in part, the consequence provided in the Regulations is, after notice to show cause, the UGC may withhold the University grants proposed to be made out of the fund of the Commission. Alternatively also we find that the clause relating to age of superannuation in the Scheme as well as in 2010 Regulation provides that in order to meet the situation arising out of shortage of teachers in universities and other teaching institutions and the consequent vacant positions therein, the age of superannuation for teachers in Central Educational Institutions has already been enhanced to sixty five years vide Department of Higher Education letter dated 23.3.2007 for those

involved in class room teaching in order to attract eligible persons to the teaching career and to retain teachers in service for a longer period. It further provides that consequent on upward revision of age of superannuation of teachers, the Central Government has already authorized the Central Universities, vide Department of Higher Education D.O. letter dated 30.3.2007 to enhance the age of superannuation of Vice-Chancellors of Central Universities from 65 years to 70 years, subject to amendments in the respective statutes, with the approval of the competent authority. The other two conditions contained in the said clause nowhere prescribes that the entire clause relating to age of superannuation is relatable to the teachers working in the Universities and aided Colleges functioning within the State under enactments made by the State Government under Entry 25 of the Concurrent List of Seventh Schedule. In other words, even if the State Government decides to implement the Scheme as a composite one, the age of superannuation prescribed in the Scheme as well as in the 2010 Regulations only relate to the teachers working in the Central Universities and has no application to the teachers working in the Universities and aided Colleges functioning within the State as their service conditions are regulated by the respective enactments made by the State under Article 309 of the Constitution prescribing the age of superannuation at 60. Even in the case of B. Bharat Kumar v. Osmania University, the Hon'ble Supreme Court held that even if the scheme is heightened to the pedestal of a legislation, a policy decision under Article 73 of the Constitution has to be read as it appears or as the case may be and UGC also did not introduce the element of compulsion vis-à-vis the State Government and the universities. In view of what has been held by the Division Benches of different High Courts referred to above and the observation of the Hon'ble Supreme Court in the case of B. Bharat Kumar v. Osmania University (supra), we find no reason to agree with the submissions of the learned counsel appearing for the petitioners.

12. The above view taken by us is also fortified in view of the stand taken by the UGC in the counter affidavit filed by it in W.P.(C) No.17747 of 2011 after the judgment was reserved in this batch of cases. In paragraphs-24 and 25 of the said counter affidavit, it is clearly stated that enhancement of age of superannuation up to 65 years is for the teachers of the Central Universities and the Colleges affiliated thereto which are being funded and maintained by the University Grants Commission/MHRD, Government of India. In case of teachers of other universities, it is open to the concerned State Governments or other appropriate authority to adopt the same. It is also specifically stated that in case of an employee of a University/College which is not funded and maintained by the University Grants Commission,

the age of superannuation as notified by the MHRD vide letter dated 23.3.2007 is not applicable but shall be open for the State Government or other competent authority to adopt the decision or to take any other decision, as considered appropriate in respect of the age of superannuation of teachers in higher and technical educational institutions under their purview with the approval of their appropriate competent authority. This stand also appears to have been taken by the UGC in cases filed in some of the High Courts and reference to the same has been made by those High Courts in their judgments. In view of such stand taken by the UGC, we find that the grounds taken in the writ petition have no substance.

13. We accordingly find no merit in any of the writ petitions and dismiss the same being devoid of merit. In some cases this Court while issuing notice had granted stay and those interim orders stand vacated from today. The petitioners who continued to work even after the age of superannuation by virtue of interim orders shall be entitled to salary for the period they worked by virtue of the interim orders.

B.K. PATEL, J.

14. I have had the privilege of going through the judgment of my brother Hon'ble Shri Justice L. Mohapatra with whom I fully agree. However, I am propelled by certain other reasons which support the stand of the State that acceptance of the scheme under 2010 Regulations as a whole or as a part is voluntary, and not mandatory to supplement it.

15. In the counter-affidavit of the UGC clear stand has been taken at paragraphs 24 and 25 that dispute with regard to enhancement of age of superannuation up to 65 years under Regulation 2010 is for the teachers of the Central Universities and the Colleges affiliated thereto which are being funded and maintained by the UGC/ Government of India. In case of an employee of a University/ College which is not funded and maintained by the UGC, same is not applicable. Rather it shall be open for the State Government or competent authority to adopt the decision or to take any other decision, as considered appropriate in respect of the age of superannuation of teachers in higher and technical educational institutions under their purview, with the approval of their appropriate competent authority.

16. Presumably in taking the stand that stipulation regarding enhancement of age of superannuation is not mandatory for the State institutions, the UGC, and for that matter the Central Government, were

conscious of the Entry 41 of the State List under Seventh Schedule of the Constitution which reads:

"State Public Services; State Public Service Commission"

Under the Entry, State Legislature has plenary power to legislate on State Public Service. It is not disputed that age of retirement is a condition of service. The State Legislature derives its competence not only from Article 309, but also from Entry 41 of List II of the Seventh Schedule. Indeed, within its allotted sphere, that is, with respect to any of the matters enumerated in List II of the Seventh Schedule the State Legislature has, by virtue of Article 246 (3), exclusive, plenary powers of legislation. It has been held by the Supreme Court in **I.N. Saksena –vrs.- State of Madhya Pradesh** : AIR 1976 SC 2250:

> "32. It is well settled that the entries in these legislative lists in Sch.VII are to construe in their widest possible amplitude, and each general word used in such entries must be held to be comprehend ancillary or subsidiary matters. Thus considered, it is clear that the scope of Entry 41 is wider that the matter of regulating the recruitment and conditions of service of public servants under Article 309. The area of legislative competence defined by Entry 41 is far more comprehensive than that covered by the proviso to Article 309."

17. Teachers in State Universities and other educational institutions are receiving UGC scale of pay and members of State Public Service. Therefore, there cannot be any directive which would have the effect of encroaching upon Legislative competence of State in respect of Entry 41 of the State List. UGC can simply issue advisories to the State to amend its enactments enhancing the age of retirement. In this context, decision of Hon'ble Supreme Court in **N. Lakshmana Rao and Ors.-vrs.- State of Karnataka and Ors.** : AIR 1975 SC 1646 and decisions of Karnataka High Court in **P. Javaryigowda –vrs.- State of Karnataka and Ors.** : 1984 LAB. I.C. NOC 56 and in **Laxman Rajappa Garag and Ors. –vrs.- The State of Karnataka and another** : 1975 LAB. I.C. 799 as well as of Allahabad High Court in **Virendrapal Singh –vrs.- State of U.P. and Ors.** : 1978 LAB. I.C. 7, in **M/s. Poysha Industrial Company Ltd., Ghaziabad –vrs.- State of Uttar Pradesh and ors.** : 1985 LAB. I.C. 1683 may also refer to.

18. Moreover, grant of financial assistance to State to meet additional burden incurred for payment of salary at the UGC scale under the scheme is for a temporary period up to 30.3.2010.Therefore, on the basis of a grant for a limited period State could not be saddled with the burden of enhanced age

of superannuation resulting in incurring of additional financial burden by the State on its own beyond the scheme period.

19. As has been pointed out by the Division Bench of **Kerala High Court** in **M.M.Mathai –vs- Elizabeth Xavier and others** (R.P.No.190 of 2011(B) a batch of other petitions) the retirement age of teachers in the colleges in Kerala is fifty five. State of Kerala took the stand that problem of unemployment does not justify enhancement of age of retirement. It has been held by Kerala High Court:-

> "Before parting with the subject, we feel there is merit in the contention of the State Government in declining to accept UGC recommendation to increase the retirement age at a stroke from 55 to 65. If this is done, the consequence would be that most of the qualified Post-graduates and Ph.D. holders waiting for employment in teaching faculties of colleges will be out of employment in Kerala for another 10 years. In the course of these 10 years, these people will either seek some other employment or may even remain unemployed for such long period and in either case there will be substantial erosion in their R.P.190/2011 & amp;conn.14 quality and capacity to take up teaching profession in colleges thereafter. Further, increase in retirement age by 10 years will be a disincentive and discouragement o those waiting for joining Post-graduate courses and for Research Degrees for the fear of long term unemployment on account of want of slots for employment for10 years."

20. No data has been placed before us to draw an inference that standard of higher education is directly proportional to the age of superannuation of teachers. Standard of education in Kerala has not been shown to be inferior to that in other States in which age of superannuation is higher than fifty five. Scheme of the Constitution has been pragmatic in leaving conditions of service of the members of State Public Service to the discretion of the State taking into account the exigencies of local conditions.

21. Therefore, the legal framework under the Constitution as well as the objective and purpose of the scheme lead to the only conclusion that the stipulation with regard to enhancement of age of retirement under the scheme is not, and cannot be, mandatory. There is no merit in any of the writ petitions.

Writ petitions dismissed.

2013 (II) ILR - CUT- 220

M. M. DAS, J.

W.P.(C) NO.14653 OF 2011 (Dt.09.10.2012)

KAMALAKANTA PARIDA & ANR. .....Petitioners

.Vrs.

SAROJ BADAN PARIDA & ORS. .....Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-18, R-16

Jurisdiction under O-18,R-16 can be exercised where the witness sought to be examined is about to leave the jurisdiction of the Court and the second is where sufficient cause is shown to the satisfaction of the Court with regard to his/her immediate examination – However such jurisdiction is to be exercised with circumspection and subject to satisfaction in a judicious manner and not just for asking of the same.

In this case no case is made out that the person to be examined is about to leave the jurisdiction of the Court so the Court is to record reasons with regard to the second condition – The learned trial Court has not assigned any reason as to how the evidence of the witness is relevant for just decision of the case or for his non-examination the said case will become infructuous while allowing the prayer – Held, the impugned order being unsustainable is quashed.

(Paras 8,11,12)

Case laws Referred to:-

1.2005 (1) Bom. C.R. 618 : (Daulat Jehangir Mehta-V- Piloo Dadabhoy Broacha & Ors.)

2.1997 (1) RLR 742 : (Ajay Kumar Bhargava-V- Vishnu Kumar Bhargava).

For Petitioner - M/s. Dayaanda Mohapatra, M. Mohapatra, G.R. Mohapatra, L.K. Nanda.

For Opp.Parties - M/s. Ranjan Kumar Rout & P.K.Mishra, (Caveator).

M. M. DAS, J. Order under Annexure – 3 to the writ application passed by the learned Civil Judge (Senior Division), Bhadrak, in Probate Case No.20 of 2008/401 of 2009 allowing an application under Order – 18, Rule – 16 CPC filed by the petitioners in the said Probate Case to examine

one of the witnesses, namely, Benudhar Pati before recording the evidence of the other witnesses, is under challenge.

2. When a partition suit was proceeding between the parties, an amendment was sought for, consequent upon a probate proceeding being filed to the writ application, was filed before this Court in connection with the said amendment petition registered as W.P.(C) No.17001 of 2009 by the present petitioners, which was disposed of by this Court by order dated 01.11.2010 directing the learned trial court to dispose of the application for amendment filed by the plaintiff within a period of two weeks. It was further directed that in the event, the amendment is allowed, the learned trial court shall try the partition suit as well as the Probate Misc. Case together, as both the cases involve a cover issue. In the meanwhile, the petition for amendment of the plaint was allowed.

3. While the matter stood thus, the petitioners, in the probate proceeding, filed an application under Order – 18, Rule – 16 CPC seeking examination of one Sri Benudhar Pati, who is allegedly a witness to the Will sought to be probated on the ground that he is aged about 85 years and may expire at any moment and his evidence is very much essential to prove the Will inasmuch as, if the said witness is not examined before commencement of hearing of the proceeding, the petitioners in the Probate Misc. Case, will suffer irreparable injury. The present petitioners, who are the opposite parties in the said Probate Case, filed an objection to the said application, inter alia, denying the allegations made in the petition by specifically stating that the said Benudhar Pati is not a witness to the Will nor he is aged about 85 years and there is no probability of his expiring and non-examination of the said Benudhar Pati will not cause irreparable injury to the petitioners, i.e., the opposite parties herein. It was further averred in the objection that stamp duty has not been paid in the probate case. Property involved in the Will has been valued at a very low amount and the applicant is attempting to avoid payment of stamp duty. The learned trial court, on the said application, under Order – 18, Rule – 16 CPC, passed the following order on 20.04.2011 :-

> "Advocate for the Both parties files their respective hazira. Advocate for the petitioner files documents as per list. Copy served petition on dtd. 8.8.11 is put up. Heard from the Ld. Counsel for the both parties. Perused the record and objection filed by the parties. Advocate for the O.Ps. vehemently objected in their objection. As the witness of the petitioner Sri Benudhar Pati is on the point of death, his recording of the evidence is necessary otherwise filing of case

will be infructuous. Considering the facts and circumstances, I am inclined to allow the petition filed by the petitioner. Put up on 26.4.2011 for recording of evidence of Benudhar Pati. Parties to get ready"

4. Mr. Dayananda Mohapatra, learned counsel for the petitioners brings to the notice of the Court that the impugned order is ex facie unsustainable, in view of the fact that the court, while considering the application under Order – 18, Rule – 16 CPC, has to record sufficient reasons for its satisfaction to form the basis for allowing such an application, which is in departure of the usual procedure prescribed under the Code, inasmuch as, only by considering the age factor of a person and without considering as to whether the said person is a necessary witness to be examined in the case and/or to be examined for any other sufficient cause, cannot mechanically pass the order, without assigning any reason whatsoever for exercising jurisdiction under the said provision, as has been done in the instant case and, therefore, the impugned order is clearly unsustainable and liable to be set aside.

5. Learned counsel for the opposite parties, who have entered as Caveators in the case, on the other hand, relies upon a decision of the Bombay High Court in the case of ***Daulat Jehangir Mehta v. Piloo Dadabhoy Broacha and others*** reported in 2005 (1) Bom. C.R. 618. In the said case, the Bombay High Court has categorically held that Order – 18, Rule – 16 CPC of the Code deals with the power of the Court to examine witnesses without waiting for the suit to reach the state of recording evidence of the parties. Sub-rule (1) thereof provides that where witnesses about to leave the jurisdiction of the Court or other sufficient causes are shown to the satisfaction of the Court as to why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner provided in the Code. The Bombay High Court further held in the said case that non-availability of a person at the time, when the suit will be ripe for recording of evidence of the parties after framing of the issues, could be a justifiable ground for recording the statement of such person, even without waiting for the stage of recording evidence in the suit. With regard to non-availability of a person, the said High Court observed that it could be for various reasons, including the reason that the person may go beyond the jurisdiction of the Court and it may be difficult if not impossible to secure his presence before the Court at a later stage and there can be various other reasons including old age coupled with serious illness. However, the said High Court categorically laid down in the said case that the party applying for the same, has to make out a case for exercise of such

power by the Court and the order should be a reasoned order. The Court has to exercise its discretion in this regard judiciously.

6. Mr. Dayananda Mohapatra, learned counsel for the petitioners relies upon the decision in the case of ***Ajay Kumar Bhargava v. Vishnu Kumar Bhargava*** reported in 1997 (1) RLR 742 of the Rajasthan High Court. In the said case, the Rajasthan High Court was dealing with an application filed under Order – 18, Rule – 16 CPC in a probate proceeding. Quoting the provisions of Order – 18, Rule – 16 CPC and examining the impugned order, the said High Court, interpreted the expression "other sufficient cause" occurring in Order – 18, Rule – 16 (1) CPC and held that the expression "sufficient cause" implies presence of legal and adequate reason. The word "sufficient" means "adequate", "enough", "as much as may be necessary to answer the purpose intended". It was further held that the said expression embarrasses not more than that, which provides a plentitude, which, done, suffices to accomplish the purpose intended in the light of the existing circumstances and when viewed from reasonable standard of practical and cautious men. In the facts of the said case, the Rajasthan High Court, finding no adequate reason for immediate examination of the witness sought to be examined in the said case, set aside the order passed by the learned trial court.

7. It would be profitable to quote the provisions of Order – 18, Rule – 16 CPC for better appreciation of the contentions raised before this Court, which is as follows :-

> "16. **Power to examine witness immediately**.-(1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.
>
> (2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.
>
> (3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit".

8. The above provision is unambiguous and clearly provides that on fulfillment of any of the two conditions, jurisdiction under the said provision can be exercised, the first being where the witness sought to be examined is about to leave the jurisdiction of the Court and the second is where sufficient cause is shown to the satisfaction of the Court with regard to his or her immediate examination.

9. In the facts of the present case, fulfillment of the first condition does not arise, as the opposite parties, in their application under Order – 18, Rule – 16 CPC, have not made out any case that the said Benudhar Pati is about to leave the jurisdiction of the Court. Therefore, the petition was clearly based on the second condition.

10. The Court, in order to find out as to whether the second condition is fulfilled in a given case, has to record his satisfaction that sufficient cause exists for examining a witness immediately and such sufficient cause must be shown to be existing by the applicant.

11. From the impugned order, as quoted above, it would be clear that the learned trial court has assigned absolutely no reason as to in what manner, the evidence of the said witness Benudhar Pati is relevant for just decision of the probate case and, if he is not examined immediately, there will be no scope for examining such witness by the petitioners at a later stage except stating that the said Benudhar Pati is on the point of death, which fact was not supported by any material, such as, medical documents etc. produced before him. The learned court has also not given any reason in support of his finding that the said case will become infructuous for non-examination of the said witness while allowing the prayer made under Order – 18, Rule – 16 CPC. It is seen that the second condition as enumerated above is also not satisfied.

12. This Court, therefore, is of the view that the wide discretion vested on the Court to exercise jurisdiction under Order – 18, Rule – 16 CPC, which is required to be exercised with circumspection and subject to satisfaction in a judicious manner and not just for asking of the same and the learned trial court has not done so while passing the impugned order, for which, the said order is unsustainable and the same is accordingly quashed.

13. The writ application stands allowed. All pending Misc. Cases stand disposed of. The interim order passed earlier stands vacated.

Writ petition allowed.

2013 (II) ILR - CUT- 225

M. M. DAS, J.

W.P.(C) NO. 2837 OF 2011 (Dt.08.04.2013)

SIKSHA 'O' ANUSANDHAN,
A DEEMED UNIVERSITY ……..Petitioner

.Vrs.

COUNCIL OF ARCHITECTURE
(COA) & ANR. ……..Opp.Parties

A. EDUCATION – " Deemed to be University" – Whether it requires permission to open degree course in Architecture – Held, Petitioner-University being a deemed to be University is not required to obtain prior approval for opening of degree course in Architecture.

(Para 17)

B. UNIVERSITY GRANTS COMMISSION ACT, 1956 – S.3

Petitioner-University is a "deemed to be University" – Whether it needs to obtain prior permission from COA and AICTE for opening/imparting degree course in Architecture – In the absence of any statutory provision under the Architects Act, 1972 and Rules made there under and in view of clarification made by the Govt. of India basing on its notification Dt.7.4.2006, the petitioner-University being a "deemed to be University" is not required to obtain prior approval from the council of Architecture and AICTE for opening of degree course in Architecture i.e. B. Arch. – Held, impugned letters under Annexures-4 and 6, compelling the petitioner-University to obtain prior permission to open degree course in Architecture are quashed.

(Paras 14,16,17)

For Petitioner - M/s. S.K. Padhi, Sr. Advocate,
P. Behera & B.A. Prusty.

For Opp.Parties - Mr. J.K. Mishra, Sr. Advocate,
Y. Mohanty, P.C. Behera,
S.S. Mohanty (For O.P.No.2)
M/s. Sanjit Mohanty, Sr. Advocate,
B. Mohanty, A.Tripathy &
B. Sahoo (For O.P.No.1).

M. M. DAS, J. The petitioner in this writ petition has assailed the action of the Council of Architecture (for short, 'the COA') in issuing the letters under Annexures – 4 and 6 thereby compelling the petitioner, which is a Deemed to be University, to obtain prior approval/permission from it for opening/imparting degree course in Architecture, stipulating that if prior approval/permission is not obtained, the students passing out from the petitioner-University shall not be eligible for registration as Architects. Under the notification in Annexures – 1, 2 and 3 issued by the Government of India in its Ministry of Human Resource and Development (Department of Higher Education), the petitioner – University was declared to be an institution of higher learning as 'Deemed to be University' by exercise of power under section 3 of the University Grant Commission (UGC) Act, 1956. Accordingly, as per the terms and conditions of the notification under Annexures- 1, 2 and 3, the petitioner–University was to start new courses/programmes only in accordance with the relevant norms and guidelines of the UGC, AICTE etc. The Government of India in its Ministry of Human Resource Development issued the notification dated 7.4.2006 under Annexure-7 clarifying in the public interest, that it is not a pre-requisite for an institution notified as a 'Deemed to be University', to obtain approval of the AICTE to start any new course/programme in technical/management education. However, the institution notified as 'Deemed to be University' is required to ensure maintenance of minimum standards prescribed by the AICTE for various courses that come under the jurisdiction of the said Council and it is expected that the institution thus notified shall maintain its standard of education higher than the minimum prescribed by the AICTE.

2. It is contended by the petitioner that by virtue of the notification under Annexure – 7, it is not required for the petitioner – University to obtain prior approval to start any new course in technical or management education. The COA issued the letter under Annexure-4 to the Director (Admissions) of the petitioner – University to the following effect:-

"COUNCIL OF ARCHITECTURE

To

The Director (Admissions)
Siksha O Anusandhan University,
Khandagiri Square,
Bhubaneswar- 751030 (Orissa)
Tel: 0674-2350635, 235079
Fax: 0674-2350642

Sub: Admissions in Degree Level Course in Architecture, i.e, Bachelor of Architecture (B.Arch.) - regarding.

Sir/Madam,

The Council of Architecture (COA) is established under an Act of Parliament of India i.e. the Architects Act 1972 (20 of 1972) and has been charged with the responsibility of enforcing the Act throughout the country, including registration of architects, regulating the architectural profession and architectural education. You can have copies of the Act, Rules and Regulations and Guidelines framed under the Act from the website www.coa.gov.in.

The attention of the Council is drawn towards the advertisement published in "SAMBAD", Bhubaneswar edition dated January 11, 2011 (copy enclosed) on the above subject. Upon going through the same it is noticed that your University is offering courses in different disciplines including architecture. In this regard, I have to state that the Degree Level Course in Architecture, i.e. Bachelor of Architecture (B.Arch.) advertised by your institution is not approved from the Council of Architecture (COA) for imparting recognized qualifications in architectural.

You are therefore, directed to not to issue any application form and do not admit any student in the Degree level Course in Architecture, i.e. Bachelor of Architecture (B. Arch.) till your institution is granted permission to run such a course for the purpose of the Architects Act,1972.

In case your institution had already started the Degree Level course in Architecture, then you are also directed, in public interest to bring to the knowledge of the students that the said degree course in architecture is not approved by the COA and the same is not valid/recognized for registration as "Architect" under the Architects Act, 1972 with the COA. You are further directed to issue a "Corrigendum" to the above referred advertisement in all leading dailies to this effect.

A copy of the prescribed "Application Form for Introduction of 5-Year B.Arch. Degree Course" is enclosed herewith to enable you to apply, with all necessary enclosures for starting of 5 year full-time B.Arch. degree course.

Your reply should reach in the matter as to compliance with the provisions of the Architects Act, 1972 and regulations framed there under within 15 days from the receipt of this letter".

3. In reply to the said letter, the Registrar of the petitioner – University intimated the Registrar, COA that as per notification dated 7.4.2006 of the Central Government in its Ministry of Human Resource Development Department, it is not a pre-requisite for an institution notified as a "Deemed to be University" to obtain approval of the AICTE to start any programme in technical or management education leading to an award, including degrees in disciplines covered under the AICTE Act, 1987. It was also intimated to the COA in the said letter that the petitioner – University is going to open B.Arch. Programme from the academic session 2011-12 by following norms and standards as prescribed by the statutory Council, for which, the petitioner – University published the advertisement and application for recognition of B. Arch. Programme will be made at the right time. After receipt of the said letter, the COA again issued the letter under Annexure-6 to the petitioner referring to certain decisions of the Bombay High Court to fortify its points that COA is the final authority for laying down norms and standards for architectural institutions. It was also intimated that against the judgment of the Bombay High Court, the AICTE preferred Special Leave Petition before the Hon'ble apex Court and the judgment of the Bombay High Court was not stayed by the Hon'ble apex Court. Again a reference was made to the judgment of the Delhi High Court as well as Andhra Pradesh High Court. Further, reference was made to section 17 of the Architects Act, 1972 and the COA, in view of the above, directed the petitioner – University to seek necessary approval/recognition from the Council of Architecture as to maintenance of minimum standards of architectural education for imparting Five Year B. Arch. Degree in the interest of the students adhering to the norms, standards and directions of the COA from time to time. It was also mentioned that in the event, the petitioner – University continues to start the B. Arch. Course without approval of the Council, it shall be doing so at its own cost, risk and consequences and shall remain accountable for the same to all interested persons. Being aggrieved by the aforesaid two letters, the petitioner – University has preferred the present writ petition.

4. A counter affidavit has been filed by the Council of Architecture, wherein, it has been contended that the Architects Act, 1972, being a special enactment, prevails over the AICTE Act, 1987. The provision of the Architects Act authorizes the COA to grant prior approval to the institution/University seeking for such approval, which is clear from the

readings of the provisions of the Act as a whole, and more specifically, under sections, 17, 21, 25 and 45 thereof. A further affidavit has been filed by the COA stating that it is implied that every institution seeking to impart architectural education for the purpose of awarding a recognized qualification must have the prior approval of the COA and if such regulatory measure is not enforced, it would render the principal object of the Council as a body responsible for maintaining standards of architectural profession otiose.

5. From the pleadings of the parties, the following issues emerge: -

(i) Whether in absence of any statutory provision, by implication**,** it can be construed that prior approval of COA is required before opening of a course in Architecture.

(ii) Whether right for supervision, inspection, prescribing of courses etc. by implication be construed as a right for grant of prior approval.

(iii) Whether the statute can be interpreted to give the Council power to give prior approval as foreign Universities are recognized by COA which are established without any prior approval.

(iv) Whether the statutory form prescribed and insisted upon has any sanction of Act/Rules.

(v) Whether the petitioner being a "Deemed to be University", prior approval for opening of B. Arch. Course is necessary to be obtained from the AICTE under the Scheme of the AICTE Act or the said AICTE is only to monitor the standards and the courses imparted by an institution like the petitioner and advice the Central Government for recognition or de-recognition**.**

6. The Architects Act, 1972 has been enacted by the Parliament with the object to regulate the persons working as architects by way of statutory regulations and to protect the general public from unqualified persons working as architects. This law has been enacted with a view to control the profession of architects for which a Council of Architects has been created and the Architects have to get themselves registered with the council. Norms have been laid down and punishment has been provided in case of breach of the provision.

If we consider the relevant provisions of the Architects Act, 1972, we find that it does not confer power on the Council to seek application for prior approval for imparting Architectural course. The relevant provisions in this

regard under the Architects Act, 1972 , which are required to be looked into, are as follows:-

"2. (a) to (c) xxx xxx xxx

(d) "Recognized qualification" means any qualification in architecture for the time being included in the schedule or notified under section 15.

14. (1)The qualifications include in the Schedule or notified under section 15 shall be recognized qualifications for the purposes of this Act.

(2) Any authority in India which grants an architectural qualification not included in the Schedule may apply to the Central Government to have such qualification recognized, and the Central Government, after consultation with the Council, may, by notification in the Official Gazette, amend the Schedule so as to include such qualification therein, and any such notification may also direct that an entry shall be made in the Schedule against such architectural qualification declaring that it shall be a recognized qualification only when granted after a specified date:

Provided that until the first Council is constituted, the Central Government shall, before, issuing any notification as aforesaid, consult an expert committee consisting of three members to be appointed by the Central Government by notification in the Official Gazette.

15.(1) The Central Government may, after consultation with the Council, direct, by notification in the Official Gazette, that an architectural qualification granted by any university or other institution in any country outside India in respect of which a scheme of reciprocity for the recognition of architectural qualification is not in force, shall be a recognized qualification for the purposes of this Act or, shall be so only when granted after a specified date or before a specified date:

Provided that until the first Council is constituted the Central Government shall, before issuing any notification as aforesaid, consult the expert committee set up under the proviso to sub-section (2) of section 14.

(2) The Council may enter into negotiations with the authority in any State or country outside India, which by the law of such State or country is entrusted with the maintenance of a register of architects, for settling of a scheme of reciprocity for the recognition of architectural qualifications and in pursuance of any such scheme, the Central Government may, by notification in the Official Gazette, direct that such architectural qualification as the Council has decided should be recognized, shall be deemed to be a recognized qualification for the purposes of this Act, and any such notification may also direct that such architectural qualification, shall be also recognized only when granted after a specified date or before a specified date.

16. Notwithstanding anything contained in sub-section (2) of section 14, the Central Government, after consultation with the Council, may, by notification in the Official Gazette, amend the Schedule by directing that an entry be made therein in respect of any architectural qualification.

17. Notwithstanding anything contained by any other law, but subject to the provisions of this Act, any recognized qualification shall be a sufficient qualification for enrolment in the register.

18. Every authority in India which grants a recognized qualification shall furnish such information as the Council may, from time to time, require as to the courses of study and examinations to be undergone in order to obtain such qualification, as to the ages at which such courses of study and examinations are required to be undergone and such qualification is conferred and generally as to the requisites for obtaining such qualification.

19.(1) The Executive Committee shall, subject to regulations, if any made by the Council, appoint such number of inspectors as it may deem requisite to inspect any college or institution where architectural education is given or to attend any examination held by any college or institution for the purpose of recommending to the Central Government recognition of architectural qualifications granted by that college or institution.

(2) The inspectors shall not interfere with the conduct of any training or examination, but shall report to the Executive Committee on the adequacy of the standards of architectural education including staff, equipment, accommodation; training and such other facilities as may

be prescribed by regulations for giving such education or on the sufficiency of every examination which they attend.

(3) The Executive Committee shall forward a copy of such report to the college or institution and shall also forward copies with remarks, if any, of the college or institution thereon, to the Central Government.

20.(1) When upon report by the Executive Committee it appears to the Council-

(a) that the courses of study and examination to be undergone in, or the proficiency required from the candidates at any examination held by; any college or institution, or

(b) that the staff, equipment, accommodation, training and other facilities for staff and training provided in such college or institution,

do not conform to the standards prescribed by regulations, the Council shall make a representation to that effect to the appropriate Government.

(2) After considering such representation the appropriate Government shall forward it along with such remarks as it may choose to make to the college or institution concerned, with an intimation of the period within which the college or institution, as the case may be, may submit its explanation to the appropriate Government.

(3) On receipt of the explanation or where no explanation is submitted within the period fixed, then on the expiry of that period, the State Government, in respect of the college or institution referred to in clause (b) of sub-section (5), shall make its recommendations to the Central Government.

(4) The Central Government –

(a) after making such further enquiry, if any, as it may think fit, in respect of the college or institution referred to in sub-section (3), or

(b) on receipt of the explanation from a college or institution referred to in clause (a) of sub-section (5), or where no explanation is submitted within the period fixed, then on the expiry of that period, may, by notification in the Official Gazette, direct that an entry shall

be made in the Schedule against the architectural qualifications awarded by such college or institution, as the case may be, declaring that it shall be a recognized qualification only when granted before a specified date and the Schedule shall be deemed to be amended accordingly.

(5) For the purposes of this section, "appropriate government" means-

(a) in relation to any college or institution established by an Act of Parliament or managed, controlled or financed by the Central Government, the Central Government, and

(b) in any other case, the State Government."

21. The Council may prescribe the minimum standards of architectural education required for granting recognized qualifications by colleges or institution in India.

45. (1) The Council may, with the approval of the Central Government, (by notification in the official Gazette) make regulations not inconsistent with the provisions of this Act, or the rules made thereunder to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for –

(a) the management of the property of the Council;

(b) the powers and duties of the President and the Vice President of the Council

(c) the summoning and holding of meetings of the Council and the Executive Committee or any other committee constituted under section 10, the times and places at which such meetings shall be held, the conduct of business thereat and the number of persons necessary to constitute a quorum;

(d) the functions of the Executive Committee or of any other committee constituted under section 10;

(e) the courses and periods of study and of practical training, if any, to be undertaken, the subjects of examinations and standards of proficiency therein to be obtained in any college or institution for grant of recognized qualifications;

(f) the appointment, powers and duties of inspector;

(g) the standards of staff, equipment, accommodation, training and other facilities for architectural education;

(h) the conduct of professional examinations, qualifications of examiners and the conditions of admission to such examinations;

(i) the standards of professional conduct and etiquette and code of ethics to be observed by architects;

(j) any other matter which is to be or may be provided by regulations under this Act and in respect of which no rules have been made.

(3). Every regulation made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulations shall thereafter have effect only in such modified from or be of no effect, as the case may be; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation."

7. From the aforesaid provisions, it is clear that the power is vested in the Central Government under section. 20 (4) of the Act to modify the schedule directing that an entry shall be made in the schedule against the Architectural qualifications awarded by such college or institution declaring that it shall be a recognized qualification only when granted before a specified date by notification in the Official Gazette.

8. The Bachelor Degree of Architecture awarded by every institution declared to be a University under section 3 of the University Grants Commissions Act, 1956 is the recognized qualification, as it is already included in the schedule under the Architects Act, 1972. Since the Central Government has declared the qualification granted by the University declared under Section 3 of the UGC Act, 1956 as recognized qualification, the action of the Council requiring the petitioner – University to obtain prior approval is misconceived and beyond its scope or authority.

9. The provisions under sections 17, 18, 19, 21, 25 and 45 of the Architects Act, 1972 confer the power on the Council to recommend to the Central Government for declaration of recognized qualification to be included in the schedule. For the purpose of recommendation, the council is conferred with power to prescribe the standards of education, the courses and the periods of study and the standards of proficiency to be followed by an institution for grant of recognized qualification.

The object sought to be achieved by COA under the Act is to give recommendation to the Central Government for declaring architectural qualification imparted by an institution by notifying the same in the Official Gazette.

10. No provision under the Architects Act, 1972 provides requirement of prior approval from COA for establishment of an institution and for opening of Architectural course like other enactments, i.e. The Dentist Act, 1948 and the Indian Medical Council Act, 1956 where permission for establishment of new Dental College or Medical College respectively, is mandatorily required in view of Section 10-A of the aforesaid two Acts. No such provision is there in the Architects Act, 1972. The right to establish or start a new course cannot be taken away or hampered by implication from the language employed in the Architects Act.

11. The Legislature has consciously enacted the AICTE Act, 1987, thereby conferring power u/s. 10(k) of the said Act on the All India Council of Technical Education to grant approval for establishing a new technical institution and for introduction of new courses or programme. Both the aforesaid Acts govern in their respective fields and there is no inconsistency in the provisions of the said Acts, inter se. In absence of any provision with regard to grant of approval for opening of course, under the Architects Act, 1972, the Legislature has consciously conferred power on AICTE under Section 10(k) of the AICTE Act, 1987. Since the power is conferred under AICTE Act, 1987 to grant approval for opening of new course it would be illogical and inconsistent to say that the COA is empowered by implication to grant prior approval under the provisions of Architects Act, 1972.

12. Neither the Architects Act, 1972 nor the Regulation made by COA provides prior approval for commencing an architecture course. Besides, the Council of Architecture Rules, 1973 provides standards of staff, equipment, accommodation, training and other facilities to be provided and maintained by an institution as per Appendix-A, B and C thereof.

13. The form issued by the Council of Architecture (filed along with the Additional Affidavit and marked as Annexure-8) for making application for grant of approval, is not as per any regulation or Rules. The Council of Architecture Rules, 1973 defines the 'Form' under Rule 2(b) which provides that 'Form' means a form annexed to the rules. Such form, therefore, has been issued in clear violation of the aforesaid rules. In absence of any provision in Architects Act, 1972 and Rules made thereunder or even in the regulation, the Council of Architecture cannot force the Institutions to take prior approval for opening of Architecture Course (B. Arch.).

14. It is, therefore, clear from the analysis of the facts and law that the petitioner – University is not required to obtain prior approval from the Council of Architecture for opening of degree course in Architecture, i.e., B. Arch.

15. Now coming to the further prayer of the petitioner that it is also not required to obtain prior approval from the All India Council for Technical Education (AICTE) for opening of a degree course in Architecture, as already stated above, by Notification dated 7th April, 2006, the Government of India, in its Ministry of Human Resource Development Department of Secondary and Higher Education, by exercise of its power under Section 20 (1) of University Grants Commission Act, 1956 and Section 20 (1) of the All India Council of Technical Education Act, 1987 directed the UGC and the AICTE to publicize the clarification mentioned in the said Notification for the information of the general public by appropriate means including, through their respective institutional website. The clarification made by the Government of India includes the following:-

> "It is not pre-requisite for an institution notified as a 'Deemed to be University' to obtain the approval of the AICTE, to start any programme in technical or management education leading to an award, including degrees in disciplines covered under the AICTE Act, 1987. However, institutions notified as 'Deemed to be University' are required to ensure the maintenance of the minimum standards prescribed by the AICTE for various courses that come under the jurisdiction of the said Council. It is expected that the institutions notified as 'Deemed to be University' maintain their standards of education higher than the minimum prescribed by the AICTE."

16. In view of such notification of the Government of India referred to above, the petitioner – University is also not required to obtain prior approval from the AICTE for opening of degree course in Architecture.

17. Having come to the above conclusion, this Court finds that the letter dated 13.01.2011 under Annexure – 4 and letter dated 17.01.2011under Annexure – 6 issued by the Council of Architecture are unsustainable. The said letters, therefore, stand quashed. Further, in view of the above conclusion, it is observed that the petitioner – University is not required to obtain prior approval for opening of degree course in Architecture (B. Arch.) either from the Council of Architecture (COA) or from the AICTE. But, however, the petitioner – University is required to maintain the standards of education as well as infrastructure for imparting the B. Arch. Course as per the norms prescribed in the Architects Act, Regulations and Rules framed thereunder.

18. In the result, therefore, the writ petition stands allowed with the direction and observation made above. There shall be no order as to costs.

Writ petition allowed.

2013 (II) ILR - CUT- 237

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

MATA NOS. 90, 91 & 92 OF 2011 (Dt.17.05.2013)

ABINASH SAMAL ……..Appellant

.Vrs.

GITIPUSPA SAMAL ……Respondent

HINDU MARRIAGE ACT, 1955 -. 13 (1) (ia)

Mental cruelty – Ground of divorce – No strait jacket formula for determining mental cruelty – Parties remain separate for more than six years – No feelings or emotions towards each other – Respondent-wife filed large number of cases against the appellant-husband and in one of such cases the parents of the appellant arrested and taken into custody – Such conduct of the wife proves mental torture on the husband – Since matrimonial bond between the parties ruptured there is hardly any chance of reunion – No fruitful purpose will be served by refusing a decree of divorce by dissolving the marriage between the parties – Held, impugned judgment U/s.13 of the Act is set aside –

Marriage between the parties stands dissolved and decree of divorce is passed – Order of permanent injunction against the appellant-husband injuncting him to re-marry is set aside – Award of monthly maintenance of Rs.2000/- per month be reduced to Rs.1000/- per month payable from 12.08.2009 till April, 2013 and upon passing of the decree of divorce the husband shall pay permanent alimony of Rs.3,00,000/- to the wife.

(Paras 12 to 15)

Case law Relied on:-

(2007) 4 SCC 511 : (Samar Ghosh -V- Jaya Ghosh)

Case laws Referred to:-

1.(2013) 40 SCD 84 : (K. Srinivas Rao -V- D.A. Deepa)
2.(2006) 4 SCC 558 : (Naveen Kohli -V- Neelu Kohli)

For Appellant - M/s. A.P. Bose, R.K. Mahanta, N. Hota & M. Pradhan.
For Respondent - M/s. Dibakar Bhuyan, B.N. Das, A.K. Rout & C.R.Swain.

M. M. DAS, J. The aforesaid three appeals have been filed by the appellant-husband against a common judgment dated 31.10.2011 passed by the learned Judge, Family Court, Jajpur in three Civil Proceeding Nos. 283, 445 and 446 of 2011. The appellant-husband filed C.P. No. 283 of 2011 (previously numbered as C.P. No. 10 of 2009 in the court of the Judge, Family Court, Cuttack) under section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') seeking dissolution of his marriage with the respondent – wife on the grounds stated in the said petition which will be discussed in this common judgment later. C.P. No. 445 of 2011 (previously numbered as C.P. No. 97 of 2009 in the court of Judge, Family Court, Cuttack) and C.P. No. 446 of 2011 (previously numbered as C.P. No. 679 of 2009 in the court of the Judge, Family Court, Cuttack) are filed by the respondent - wife under section 7(1) of the Family Courts Act and under section 18 of the Hindu Adoption and Maintenance Act, 1955 respectively seeking a decree for permanent injunction restraining the appellant-husband from getting married for the second time during her lifetime and subsistence of their marriage and for a direction to the appellant-husband to pay Rs. 15,000/- per month through the process of court as maintenance.

2. It appears from the impugned judgment that the learned Judge, Family Court recorded one set of evidence in all the three civil proceedings and appreciating such evidence passed the common impugned judgment.

In the application under section 13 of the Act, appellant-husband sought for dissolution of the marriage and for a decree of divorce, inter alia, pleading that the parties are Hindus governed by Mitakshyara School of Law, who got married on 7.7.2007 as per Hindu rites and customs at Binjharpur in the district of Jajpur. The appellant-husband is the only son of his parents, who belongs to a respectable family and the marriage ceremony was performed with pump and gaiety at their house at Bidanasi and the parties led their marital life in the matrimonial house at Bidanasi. The father of the appellant-husband is a retired Bank Official and the appellant-husband has some private business dealing with Paints and Hardware. The substance in the grounds taken by the appellant-husband for passing a decree of divorce upon dissolution of the marriage are that the respondent-wife due to mental disorder behaves like a child of about 10 to 12 years old, the respondent-wife refuses and restricts consummation of the marriage even from the fourth night itself, she is unable to read and write though it was claimed at the time of marriage that she was qualified. At the time of marriage, there was fraudulent suppression of the fact that the respondent – wife is mentally under developed and was suffering from epilepsy. The above allegations were refuted by the respondent – wife in her written statement and counter allegations were made by her that there was demand of dowry by the appellant-husband and his family members, non-co-operation by the appellant-husband to lead happy family life, false plea of dowry-free marriage has been taken. But it was pleaded that she developed such disorder due to torture after marriage.

3. The learned Judge, Family Court took up the application for dissolution of marriage, i.e., C.P. No. 283 of 2011 as the main petition in which evidence was lead and in the common judgment has dealt with the said pleadings and evidence first. Upon dealing with the same, the learned Judge, Family Court came to the conclusion that from the pleadings, the marriage between the parties is admitted and the respondent-wife staying in her matrimonial house for certain period is also admitted. After analyzing the evidence adduced by the parties and hearing them, the learned Judge, Family Court came to the following findings:-

(a) The petitioner (husband) has not come up with clean hands; and

(b) there is no cogent ground established by the petitioner for passing a decree of divorce.

On the above findings, the learned Judge, Family Court dismissed C.P. No. 283 of 2011. Thereupon, he proceeded to decide C.P. No. 446 of 2011 which is filed by the respondent –wife under section 18 of the Hindu

Adoption and Maintenance Act praying for a monthly maintenance of Rs. 15,000/-. Depending on the finding of non-sustainability of the grounds for passing a decree of divorce, the learned court below held that since the main civil proceeding for divorce goes against the appellant-husband, the only point to be determined in the proceeding for maintenance is as to whether the respondent-wife is entitled to get maintenance from the appellant-husband as she is having no sufficient income. The learned court below came to the conclusion that the respondent-wife is dependant on her father, who is not a service holder and having no business, but, on the contrary, the father of the appellant-husband is a retired Bank Manager having their house at Cuttack and appellant-husband is the only son, who is having a Hardware shop along with Paints business and during marriage, he was given sumptuous dowry. Considering the above aspects, the learned court below directed payment of monthly maintenance of Rs. 2,000/- per month from the date of application to the respondent-wife. With regard to the application of the respondent-wife under section 7 (1) of the Family Courts Act, i.e., C.P. No. 445 of 2011, the learned court below again relying upon the non-sustainability of the claim of the appellant-husband for a decree of divorce came to the finding that in view of the said findings, the inference would be that the appellant-husband is to take back his wife or to pay maintenance and not to marry for the second time. Thus, holding, the learned court below allowed the said Civil Proceeding filed by the wife passing the following order:-

> "The Civil Proceeding No.283/2011 (C.P. 10/2009) filed by the husband petitioner U/s 13 of H.M. Act is dismissed on contest without cost.
>
> Civil Proceeding No.446/2011 (C.P No.679/2009) filed U/s 18 of H.A & M. Act by wife petitioner against husband opposite party is allowed on contest without cast. Husband-O.P is directed to pay monthly maintenance of Rs.2000/- (two thousand) to the wife petitioner from the date of application i.e. 12.08.2009 subject to adjustment of interim maintenance if paid.
>
> Civil Proceeding no.445/2011(C.P No.97/09) filed by petitioner wife U/s 7 of Family court Act against the husband O.P is allowed on contest without cost. The husband-O.P is directed to take back his wife and he is restrained to marry for the second time".

4. During the course of hearing of these appeals, it was brought to the notice of this Court that around 21 cases have been filed by the respondent-

wife against the appellant-husband out of which some are criminal cases initiated by the respondent – wife against the appellant-husband and his parents in which the parents of the appellant-husband were also taken to custody. Even some cases have been filed, i.e., civil suits, by the respondent-wife claiming right over the property of the appellant-husband. The particulars of those cases are C.S. No. 687 of 2008, filed before the learned Civil Judge (Senior Division) Ist Court, Cuttack and Misc. Case filed in the said Civil Suit, the two civil proceedings filed before the learned Judge, Family Court, Cuttack which were ultimately transferred to the Judge, Family Court, Jajpur and Misc. Cases filed in the said Civil Proceedings, G.R. Case No. 134 of 2009 before the learned S.D.J.M., Sadar, Cuttack, Criminal Misc. Case No. 866 of 2009 also filed before the learned S.D.J.M., Sadar, Cuttack under the Domestic Violence Act as well as Criminal Misc. Case No. 618 of 2010 before the said court under sections 9 and 12 of the said Act, another Civil Suit, being T.S. No. 241 of 2010 filed before the learned Civil Judge (Senior Division), Jajpur and Misc. Cases filed therein, J.J.P. No. 94 of 2009 filed before the State Commission for Women, Case No. 1009 of 2009 filed before the State Human Rights Commission, I.C.C. No. 178 of 2010 converted to G.R. Case No. 342 of 2010 before the learned S.D.J.M., Jajpur as well as some writ petitions filed earlier before this Court.

5. Considering such nature of disputes between the appellant-husband and the respondent–wife, bereft of consideration of the evidence adduced in the Civil Proceedings in which the common impugned judgment has been passed, we are of the considered view that the marriage between the parties has become irretrievable and has broken down beyond repair.

6. We, therefore, propose to proceed in the above back-ground to analyze the law as to whether in such circumstances, the court should pass an order dissolving the marriage between the parties and passing a decree of divorce.

7. Learned counsel for the respective parties relied upon various judgments of the Hon'ble Supreme Court on the above question. Mr. Bhuyan, learned counsel for the respondent – wife contended that even if, it is held that the marriage has become irretrievable that cannot be a ground for passing a decree of divorce. On the contrary, Mr. Bose, learned counsel for the appellant-husband urged that in view of large number of cases filed by the respondent – wife against the appellant-husband and in view of the fact that in one of such cases, the parents of the appellant-husband were arrested and taken to custody and they were ultimately released on bail by

this Court, such conduct on the part of the respondent – wife amounts to mental torture and, hence, even if, the marriage cannot be dissolved on the ground of irretrievability, but the conduct of the respondent-wife clearly proves mental torture on the husband, which can be considered by this Court and on that ground, the marriage should be dissolved culminating in a decree of divorce.

8. Instead of referring to the various case laws and judgments of the Hon'ble Supreme Court on the above questions, we propose to rely upon the recent judgment of the Hon'ble Supreme Court in the case of ***K.Srinivas Rao v. D.A.Deepa,*** (2013) 40 SCD 84***,*** the Hon'ble Supreme Court has dealt with several previous judgments of the said Court.

It appears that in the said case, the appeal was filed before the Hon'ble Supreme Court by the husband against a judgment of the Andhra Pradesh High Court by which the High Court set aside the decree of divorce granted in favour of the husband. The Hon'ble Supreme Court upon discussing the facts of the said case dealt with the conclusion of the family court, which found that the respondent-wife stayed in the husband's place only for a day and the story of demand of dowry of Rs. 10.00 lakhs is false basing upon which a petition was filed by the wife against the husband and that by filing such false complaint against the appellant-husband and his family alleging offence under section 498-A IPC and by filing complaints against the appellant-husband, in the High Court, where he is working, the respondent –wife caused mental cruelty to the appellant-husband and that re-union is not possible. The Hon'ble Supreme Court took note of this direction of the family court directing the husband to return Rs. 80,000/- given by respondent-wife with interest at the rate of 8% per annum from the date of the marriage till payment. It appears from the facts of the said case that the judgment of the family court where a decree of divorce was passed was appealed against before the Andhra Pradesh High Court by the wife. The High Court, inter alia, observed that the finding of the family court with regard to lodging a complaint with the police against the appellant – husband amounts to cruelty is perverse because it is not a ground for divorce under the Hindu Marriage Act. The High Court further held that the appellant-husband and the respondent – wife did not live together for a long time and, therefore**,** the question of their treating each other with cruelty does not arise. The High Court came to the conclusion that the respondent – wife caused mental cruelty to the appellant-husband is based on presumption and assumption. In the result, the High Court set aside the decree of divorce granted by the family court.

9. The Hon'ble Supreme Court tracing out the history of the matrimonial dispute and referring to its earlier judgment in the case of ***Samar Ghosh v. Jaya Ghosh*** (2007)4 SCC 511, where illustrative cases have been stated in which inference of mental cruelty can be drawn, quoted such circumstances, which are as follows:-

"101-No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) xxx xxx xxx

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) xx xx xx

(viii) xx xx xx

(ix) xx xx xx

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) xx xx xx

(xii) xx xx xx

(xiii) xx xx xx

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to severe that tie, the law in such cases, does not serve the sanctity of marriage, on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

It is pertinent to note that in this case the husband and wife had lived separately for more than sixteen and half years. This fact was taken into consideration along with other facts as leading to the conclusion that matrimonial bond had been ruptured beyond repair because of the mental cruelty caused by the wife. Similar view was taken in Naveen Kohli"

10. In the case of Samar Ghosh (supra), the Hon'ble Supreme Court took note of the fact of the said case that the husband and wife had lived separately for sixteen and half years. Taking the said fact along with other facts into consideration, it was held that the matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the wife. A similar view was taken by the Hon'ble Supreme Court in the case of ***Naveen Kohli v. Neelu Kohli***, (2006)4 SCC 558.

11. Before referring to the aforesaid judgment, it was held by the Hon'ble Supreme Court in the case of K. Srinivas Rao (supra) in paragraph-10 thereof as follows:-

"10. Under Section 13(1)(i-a) of the Hindu Marriage Act, 1955, a marriage can be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground

> that the other party has, after solemnization of the marriage, treated the petitioner with cruelty. In a series of judgments this Court has repeatedly stated the meaning and outlined the scope of the term 'cruelty'. Cruelty is evident where one spouse has so treated the other and manifested such feelings towards her or him as to cause in her or his mind reasonable apprehension that it will be harmful or injurious to live with the other spouse. Cruelty may be physical or mental."

Different instances of mental cruelty involved in various decisions of the Hon'ble Supreme Court have been referred in the above judgment. The instance of mental cruelty given in the case of Samar Ghosh (supra) in paragraph-14, the Hon'ble apex Court has held as follows:-

> "14. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

Thereupon, the Hon'ble apex Court proceeded to apply the said order to the facts of the case before it and noted the various legal proceedings initiated by both sides against each other. Further, taking into note some statements made by the parties before the family court along with the cases filed by the wife, considered the effect of such events coupled with the fact that the parties are living separately for more than ten years, took note of the fact that pursuant to the complaint filed by the wife before the police, which was registered as a case under section 498-A IPC, the appellant-husband and his parents had to apply for anticipatory bail and noted their satisfaction that the marriage has irretrievably broken down while holding as follows:-

> "26. We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage

which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree.

27. In V. Bhagat this Court noted that divorce petition was pending for eight years and a good part of the lives of both the parties had been consumed in litigation, yet the end was not in sight. The facts were such that there was no question of reunion, the marriage having irretrievably broken down. While dissolving the marriage on the ground of mental cruelty this Court observed that irretrievable breakdown of marriage is not a ground by itself, but, while scrutinizing the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted the said circumstance can certainly be borne in mind. In Naveen Kohli, where husband and wife had been living separately for more than 10 years and a large number of criminal proceedings had been initiated by the wife against the husband, this Court observed that the marriage had been wrecked beyond the hope of salvage and public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. It is important to note that in this case this Court made a recommendation to the Union of India that the Hindu Marriage Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce.

28. In the ultimate analysis, we hold that the respondent-wife has caused by her conduct mental cruelty to the appellant-husband and the marriage has irretrievably broken down. Dissolution of marriage will relieve both sides of pain and anguish. In this Court the respondent-wife expressed that she wants to go back to the appellant-husband, but, that is not possible now. The appellant-husband is not willing to take her back. Even if we refuse decree of divorce to the appellant-husband, there are hardly any chances of the respondent-wife leading a happy life with the appellant-husband because a lot of bitterness is created by the conduct of the respondent-wife.

29. In Vijay Kumar, it was submitted that if the decree of divorce is set aside, there may be fresh avenues and scope for reconciliation between parties. This court observed that judged in the background of all surrounding circumstances, the claim appeared to be

> too desolate, merely born out of despair rather than based upon any real, concrete or genuine purpose or aim. In the facts of this case we feel the same".
>
> Thus holding, the Hon'ble apex Court proceeded to assess a just amount to be paid by the husband as permanent alimony and granted a decree of divorce.

12. Applying the ratio of the aforesaid judgment to the facts of the present case, as discussed above, we also find that the parties are remaining separately for about more than six years by now and number of cases filed by the respondent – wife are grounds for drawing an inference of mental torture caused upon the appellant – husband by the respondent-wife and the matrimonial bond between the parties has been ruptured beyond repair because of mental cruelty caused by the respondent-wife. We, therefore, find that no fruitful purpose will be served by refusing a decree of divorce by dissolving the marriage between the parties. We, accordingly, set aside the common impugned judgment of the learned Judge, Family Court, Jajpur passed so far as C.P. No. 283 of 2011 filed under section 13 of the Act is concerned and direct that the marriage between the parties stands dissolved and a decree of divorce be passed.

13. In view of the above findings, the question of restraining the appellant-husband to re-marry does not arise and, therefore, the order passing permanent injunction against the appellant-husband injuncting him from getting married for a second time in C.P. No. 445 of 2011 is set aside and the said C.P. No. 445 of 2011 stands dismissed.

14. With regard to the impugned judgment in relation to C.P. No. 446 of 2001 filed by the respondent – wife claiming monthly maintenance, in which the learned court below has directed payment of Rs. 2000/- as monthly maintenance from 12.8.2009, in view of an earlier order passed by this Court in a connected matter i.e., W.P.(C) No. 9982 of 2011 determining the monthly income of the appellant-husband as Rs. 4000/- per month, we feel it appropriate that the monthly maintenance as awarded @ Rs. 2000/- per month by the learned court below should be reduced to Rs. 1000/- per month payable from 12..8.2009 till the month of April, 2013 and direct accordingly.

15. Considering the above aspects, with regard to the earning capacity of the appellant-husband and his nature of occupation, we hold that upon passing the decree of divorce as directed above, the appellant-husband

shall pay a permanent alimony of Rs. 3,00,000/- (Rupees three lakhs), which shall be paid by him in shape of drafts in four equal installments by the end of December, 2013 before the learned court below, drawn in the name of the respondent-wife. The arrear monthly maintenance payable from 12.8.2009 till the month of April, 2013, less the monthly maintenance already paid by the appellant-husband, shall be deposited by the appellant-husband before the court below by the end of August, 2013.

16. In the result, MATA Nos. 90 and 91 of 2011 stand allowed and MATA No. 92 of 2011 stands disposed of with the modification in the impugned order as indicated above;

MATA Nos. 90, 91/11 allowed.

MATA No. 92/11 disposed of.

2013 (II) ILR - CUT- 248

SANJU PANDA, J.

W.P.(C) NO. 6849 OF 2009 (Dt.24.04.2013)

MANAGEMENT OF CUTTACK MUNICIPAL CORPORATION ……...Petitioner

.Vrs.

WORKMAN SRI SRADHAKAR MOHANTY & ANR. ……..Opp.Parties

INDUSTRIAL DISPUTES ACT, 1947 – S. 2 (oo) (bb)

Retrenchment of Workman – Non compliance of Section 25-F of the I.D. Act – Labour Court directed reinstatement and to pay 25% towards back wages – Order challenged – Held, since compensation in lieu of reinstatement is proper to a daily wager who has completed 240 days of work preceding from the date of termination and this Court in exercise of the jurisdiction under Article 227 of the Constitution of India modified the impugned award and directed the petitioner-management to pay a sum of Rs.80,000/- as compensation to the O.P. No.1-Workman in lieu of reinstatement. (Paras 5,6)

Case laws Referred to:-

1.AIR 2000 SC 43 : (Delhi Electric Supply Undertaking-V- Basanti Devi & Anr.)
2.2013 LLR 225 : (Asst. Engineer, Rajasthan Dev. Corp. & Anr.-V- Gitam Singh)

For Petitioner - M/s. Pradipta Ku. Mohanty, D.N. Mohapatra, Smt.J. Mohanty, P.K. Nayak, C.R. Nayak.
For Opp.Parties - M/s. Dhuliram Pattanayak, N.S. Panda, Niranjan Biswal, Luis Pattanayak., (for O.P. 1).

S. PANDA, J. Challenge has been made by the petitioner in this writ petition to the award dated 26.12.2008 passed by the Presiding Officer, Labour Court, Bhubaneswar in ID Case No.70 of 2004 directing the management to reinstate the workman in service and pay him 25% towards back wages.

2. Learned counsel for the petitioner-management submitted that the petitioner-management, a body previously incorporated under the Orissa Municipal Act, 1950 was subsequently brought within the purview of the Orissa Municipal Corporation Act, 2003. All its actions taken under the Orissa Municipal Act are deemed to have been validated under Sections 693 and 694 of the Orissa Municipal Corporation Act. The Government of Odisha in exercise of its power referred the dispute raised between the management and the workman to the Labour Court for adjudication. The reference is as follows:

> "Whether the termination of service of Sri Shradhakar Mohanty, Helper with effect from 1.1.02 by the Management of Cuttack Municipal Corporation is legal and/or justified. If not, what relief is the workman entitled to ?"

Opposite party no.1-workman filed his written statement pleading that he was engaged under the petitioner-management from 1.12.96 to 31.12.01. He was getting wages at the rate of 1680/- per month. He pleaded that he had completed more than 240 days of work preceding from the date of termination. He further alleged that his termination from service was without compliance of the provisions of Sections 25-F(a)(b), 25-G, 25-C and 25-H of the Industrial Disputes Act, 1947. Accordingly, he is entitled to be reinstated in service with full back wages. On receiving notice, the petitioner-management appeared and filed its written statement pleading, inter alia,

that the engagement of the workman was illegal and without due approval of the Government, i.e., after 19th May, 1997. The State Government in Housing and Urban Development Department vide order dated 15.12.2000 directed to disengage all the DLRs and NMRs who were engaged after 19.5.1997. In pursuance to the said order, since workman and other persons were engaged after cut off date and without due approval of the Government, the disengagement order was passed. As such, the procedure prescribed under the Industrial Dispute Act, 1947 was not attracted at the time of disengagement of the workman. The Orissa Municipal Corporation Act was a self-contained Act containing the provisions regarding engagement and it being subsequent legislation, it supersedes the provision of the Industrial Disputes Act. The Tribunal, considering the materials available on record and the evidence adduced by the parties, passed the impugned award which is not sustainable in law and need be set aside.

3. Learned counsel appearing for opposite party no.1-workman submitted that the Tribunal has taken into consideration the acquaintance roll filed by opposite party no.1 for the months of March, 1999, August, 1999 and his identity card issued on 24.11.2000. Since in the written statement the management nowhere has stated that the workman was not working under the management from 19.5.1997 till the date of his disengagement, the Tribunal has passed the impugned award holding that termination of the workman from service was illegal and improper and he is entitled to reinstatement with full back wages. Therefore, the impugned award does not warrant interference. In support of his contention, he has cited an unreported decision of a Division Bench of this Court in Writ Appeal No.611 of 2011 which was disposed of on 2.4.2012 (Chief Executive Officer-cum-Commissioner, Cuttack Municipal Corporation, Cuttack v. Atul Kumar Barik). It appears therefrom that a similarly placed workman who was disengaged on 1.6.2002 filed an application before the Labour Court. The Labour Court passed the order of reinstatement with 25% back wages towards compensation. The petitioner-corporation filed writ petition challenging the award of the Labour Court taking a similar plea regarding contravention of Section 73-B of the Orissa Municipal Act, 1950. The learned Single Judge confirmed the award of the Labour Court. The Division Bench of this Court taking into consideration the decision of the apex Court in the case of Delhi Electric Supply Undertaking v. Basanti Devi and another reported in AIR 2000 SC 43 while upholding the award enhanced back wages of lump sum Rs.25,000/- to 50%. Therefore, he submitted that the said decision is squarely applicable to the facts of the present case.

4. From the rival submissions of the parties and after going through the record, it appears that the workman was engaged by the petitioner-management. The service of the workman was terminated without compliance of the statutory provisions of the Industrial Disputes Act. The service of the workman was terminated as per the order of the Government to disengage the workers who were engaged after 19th May, 1997. It appears that the order of disengagement has not been passed due to misconduct or disciplinary action. Therefore, the order of disengagement is within the definition of retrenchment under Section 2(oo) of the Industrial Disputes Act. Hence, the Tribunal has rightly held that the termination of the workman from service was illegal and improper.

5. The apex Court in the case of Asstt. Engineer, Rajasthan Dev. Corp. & Anr. V. Gitam Singh reported in **2013 LLR 225** has held that when the termination of a workman is held illegal, it can be said without any fear of contradiction that the Supreme Court has not held as an absolute proposition that in cases of wrongful dismissal, the dismissed employee is entitled to reinstatement in all situations. It has always been the view of the Court that there could be circumstance(s) in a case which may make it inexpedient to order reinstatement. Hence, the normal rule that the dismissed workman is entitled to reinstatement in cases of wrongful dismissal has been held to be not without exception. The principles as relevant for granting relief of reinstatement when termination of workman is held to be illegal. Before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute. Now there is no such principle that for an illegal termination of service, the normal rule is reinstatement with back-wages, and instead the Labour Court can award compensation. The apex Court further held that the compensation, in lieu of reinstatement, should have been proper to a daily wager who has completed merely 240 days' service hence the Single Judge as well as the Division Bench of the High Court also erred in not considering that the reinstatement with back-wages is no longer a rule without exceptions. While granting a relief of reinstatement to a workman whose termination is held to be illegal, i.e., violative of Section 25F of the Industrial Disputes Act, 1947, the Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute.

6. In view of the above settled position of law, this Court modifies the impugned award dated 26.12.2008 passed by the Presiding Officer, Labour Court, Bhubaneswar in ID Case No.70 of 2004 in exercise of the jurisdiction under Article 227 of the Constitution of India. As the compensation in lieu of reinstatement is proper to a daily wager who has completed 240 days, the petitioner-management is directed to pay a sum of Rs.80,000/- (rupees eighty thousand) as compensation to opposite party no.1-workman within a period of six weeks from today. With the above direction, the writ petition is disposed of. No costs.

Writ petition disposed of.

2013 (II) ILR - CUT- 252

SANJU PANDA, J & Dr. B.R. SARANGI, J.

JCRLA NO. 21 OF 2004 (Dt.27.06.2013)

BASIL LAKRA ……..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

PENAL CODE, 1860 – S.376 (2) (f)

Rape – Appellant sentenced to R.I. for life and to pay fine of Rs.10,000/- and in default to undergo R.I. for six months – Reduction of sentence – Victim was less than 12 years and the appellant was 45 years at the time of occurrence – Both belong to Schedule Tribe community and reside in the remote back ward area of the State – Not warranted maximum sentence prescribed –This Court has also taken note of that the appellant is a poor tribal and is not in a position to pay such huge amount of fine which is also not disputed by the State– Held, sentence of life imprisonment is modified to R.I. for 10 years and the appellant is exempted from payment of fine.

(Paras 11,13)

Case laws Referred to:-

1.AIR 2012 SC 979 : (Bavo @ Manubhai Ambalal Thakore-V- State of Gujarat)
2.(2007)14 SCC 560 : (Rajendra Datta Zarekar-V- State of Goa) AIR 2008 SC 572

For Appellant - Mr. S. Chakravarty.
For Respondent - Mr. Zaffrulah, Addl.Standing Counsel.

DR. B.R.SARANGI, J. This Jail Criminal Appeal has been preferred by the appellant, who has been convicted under section 376(2)(f), I.P.C. and sentenced to imprisonment for life and to pay a fine of Rs.10,000/-, in default to undergo R.I. for six months by the Ad hoc Addl. Sessions Judge, Fast Track Court, Rourkela in S.T.Case No. 164/31/03.

2. The prosecution case as revealed from the F.I.R. is that Jasmita Lakra (P.W.3) was playing with her friends on 10.8.2002 at about 2.00 P.M. in the house of one Sunil. she came crying to her house at about 2.30 P.M. and informed her father Isdor Lakra (P.W.1) and her mother Dorathy Lakra (P.W.5) that while she was playing with the children of Sunil, Basil Lakra (accused-appellant) called her to his house and put her on his cot, removed her under garment and put his private part in her private part. Having suffered pain, when she cried, she was set free. Her parents, P.Ws.1 and 5 also found marks of blood on the undergarment of Jasmita so also in her private part. P.W.1, Isdor Lakra, father of the victim girl reported the incident to the police station on the very same day i.e. on 10.8.2002 by lodging an F.I.R. (Ext.1). On receipt of the same, police registered the case, caused investigation and filed charge-sheet against the accused appellant for commission of offence under Section 376(2)(f), IPC.

3. Plea of the accused-appellant is a complete denial. His further plea is that Jasmita, the victim girl, came to his house and asked him to have sexual intercourse with her, which he declined. Again she came to his house, bolted the door and insisted him to commit sexual intercourse with her, but he denied.

4. To bring home the charge, prosecution has examined six witnesses whereas none has been examined on behalf of the defence.

5. After a thorough scrutiny of the evidence on record, learned Ad hoc Addl. Sessions Judge, Fast Track Court, Rourkela convicted the appellant for the offence punishable under Section 376(2)(f), IPC and sentenced him to imprisonment for life and to pay a fine of Rs.10,000/-, in default to undergo R.I. for six months. Being aggrieved by the order of conviction and sentence, the appellant has preferred this appeal from jail before this Court. Entertaining the same, the appeal was admitted on 6.4.2004.

6. Mr. S.Chakravarty, learned counsel appearing for the appellant fairly states that he is not challenging the order of conviction, but questioning the quantum of sentence only. According to him, taking note of various factors including the age of the accused-appellant, who was aged about 45 years at

the time of filing of the appeal and by this time, he must have reached above 55 years and his relationship with the victim being of niece and uncle (father's brother) and he being a member of Scheduled Tribe community and staying in the remote corner of the State, awarding of life imprisonment with fine of Rs.10,000/-, in default to undergo R.I. for six months is excessive.

7. To the above contention of the learned counsel for the appellant, learned Addl. Standing Counsel appearing for the State fairly admitted that the Court is free to impose appropriate sentence in terms of Section 376(2)(f), IPC.

8. In view of the limited submission, there is no dispute regarding the findings of the courts below and the conviction under Section 376(2)(f), IPC. The only question to be considered is whether the sentence of life imprisonment and fine of Rs.10,000/- is reasonable or excessive.

9. Section 376, IPC, which speaks about the punishment for rape. Sub-section (2)(f) makes it clear that whoever commits rape on a women when she is under 12 years of age shall be punished with R.I. for a term which shall not be less than 10 years, but which may be for life and shall also be liable to fine. Proviso appended to sub-section (2) makes it clear that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term not less than 10 years. This clearly states that for the offence of rape on a girl under 12 years of age, punishment shall not be less than 10 years, but which may extend to life and also to fine. It is settled law that the Courts are obliged to respect the legislative mandate in the matter of awarding sentence in all such cases. In absence of any special adequate reasons, recourse to the provisions mentioned above cannot be applied in a casual manner.

10. In order to substantiate the contentions, learned counsel for the appellant has relied upon a decision of the Supreme Court in **Bavo alias Manubhai Ambalal Thakore v. State of Gujarat**, AIR 2012 SC 979. In the said judgment the earlier decision of the apex Court in **Rajendra Datta Zarekar v. State of Goa**, (2007) 14 SCC 560: AIR 2008 SC 572 has been considered for reduction of sentence.

11. Considering the fact that the victim in this case was less than 12 years at the time of occurrence and the accused was aged 45 years and the relationship between the victim and the accused was niece and uncle

father's brother) and in the meantime 10 years have already elapsed, the accused has reached at the age of 55 years and both the accused as well as the victim belong to Scheduled Tribe community and reside in the remote backward area of the State, ignorant about the niceties of law, award of life imprisonment, which is the maximum sentence prescribed, is not warranted.

12. In view of the provisions contained in Section 376(2)(f), IPC, we feel that ends of justice would be met by imposing R.I. for 10 years. Learned counsel for the appellant informed this Court that the appellant has already served imprisonment for a period of more than 10 years.

13. So far as the quantum of fine is concerned, learned trial Judge has imposed Rs.10,000/- in default to undergo R.I. for six months more. Learned counsel for the appellant submitted that the accused-appellant belongs to a poor tribal community and is not in a position to pay such a huge amount as fine, which is not disputed by the State. Apart from the same, it is further submitted that the accused-appellant being the brother of the father of victim girl, they are pulling on well and there is no apprehension of commission of any further offence. Therefore, taking note of the aforesaid factors, we exempt the appellant from payment of fine.

14. In view of the foregoing discussions, the conviction imposed on the appellant herein is confirmed. However, the sentence of life imprisonment is modified to R.I. for 10 years. Since in the meantime, the appellant has already served the sentence of 10 years, he be set at liberty forthwith, if his detention is not required in connection with any other case.

15. With the aforesaid modification of sentence, the appeal stands disposed of.

Appeal disposed of.

2013 (II) ILR - CUT- 255

B. N. MAHAPATRA, J.

W.P.(C) NO.11313 OF 2012 (With Batch) (Dt.06.12.2012)

SK. ZAFRULLAH & ORS. ……..Petitioners

.*Vrs.*

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

A. EDUCATION – Transfer of petitioners as Sikhya Sahayaks – Order Challenged – Right of children to Free and Compulsory Education Act, 2009 – Government to ensure maintenance of Pupil Teacher Ratio – Guidelines issued by the Government of Odisha in School and Mass Education Department Dt.15.5.2012 for rationalization of elementary teachers/Sikhya Sahayaks – Transfer Order is in contravention of such guidelines – Executive authorities are bound by the procedure they themselves framed – Policy decision of the Government has statutory force – No allegation in the transfer order – Opp.Parties can not also assign any fresh reason which has not been assigned in the order of transfer – Held, transfer of petitioners from one school to another is not permissible under law hence quashed. (Para 22,25,26)

B EDUCATION – Gana Sikhyak – They can be deployed in near by Schools – Transfer of petitioner to a place 50 kilometres from earlier place of posting – Order passed contrary to guideline and policy decision of the Government – Held, order of transfer is quashed.
(Para 23 to 26)

Case laws Referred to:-

1.(2007) 8 SCC 212 : (Chief Commercial Manager, South Central Railway-V- G. Ratnam)
2.1991 Supp (2) SCC 659 : (Shilpi Bose (Mrs.) & Ors.-V-State of Bihar & Ors.)
2.(2001)2 SCC 289 : (Addisons Paint & Chemicals Ltd.-V- Worker)
3.(2004)3 SCC 172 : (Pearlite Liners (P) Ltd.-V- Manorama Sirsi)
4.(2004) 11 SCC 402 : (State of U.P. & Ors.-V- Gobardhan Lal)
6.(2005) 7 SCC 227 : (Major General J.K. Bansal-V- Union of India).
7.(1992) 2 SCC 683 : (Pine Chemical Ltd.-V- Assessing Authority & Ors.)
8.AIR 1979 SC 1628 : (Ramana Dayaram Shetty-V- The International Airport Authority of India & Ors.)
9.AIR 1978 SC 851 : (Mohinder Singh Gill & Anr.-V- The Chief Election Commissioner, New Delhi & Ors.).

For Petitioners - M/s. Amitav Das, H.K. Mahali, Smt. S.Das & M.M.Das, (In all the cases except W.P.(C) no.11436 of 2012)
M/s. P.K.Mohapatra, S.K.Nath & S.C.Sahoo (W.P.(C)11436/2012)
For Opp.Parties - Mr. A.K. Pandey, Addl. Standing Counsel (For School & Mass Education Dept.)

B.N.MAHAPATRA, J. All the above writ petitions except W.P.(C) No.11436 of 2012 have been filed with similar prayer and ground of

challenge. In W.P.(C) No.11436 of 2012 in addition to prayer and grounds made/taken in other writ petitions, the petitioner being a Gana Sikshyak has taken some additional grounds.

2. For the purpose of convenience, case of the petitioner in W.P.(C) No.11313 of 2012 is taken for deciding the common issue involved in the above writ petitions.

This writ petition has been filed with a prayer to quash order dated 13.06.2012 (Annexure-1) passed by opposite party No.4-District Inspector of Schools, Bhadrak-II, Bhadrak by which the petitioner has been transferred from Mirzapur Primary School, Mirzapur under Basudevpur Block to Bhagabanpur Primary School under Basudevpur Block on the ground that the said transfer order passed under Annexure-1 is illegal, arbitrary and bad in the eye of law and violative of the order/guideline dated 15.05.2012 issued under Annexure-2 in Department of School and Mass Education, Government of Odisha. Further prayer of the petitioner is that opposite party No.4 as well as the Transfer Committee be directed to transfer Sikhya Sahayaks/Junior Teacher/Elementary Teacher/Z.P.Teacher/Gana Sikshyaks as per the order/guideline dated 15.05.2012.

3. The petitioner was initially appointed as Sikhya Sahayak on 02.01.2008 in Mirzapur Primary School, Mirzapur under Basudevpur Block in the district of Bhadrak and continued in the said post without any interruption for three years. After three years, the petitioner became a Junior Teacher and at present is continuing as Sikhya Sahayak (Junior Teacher). The Right of Children to Free and Compulsory Education Act, 2009 (for short, "Act, 2009") has come into force with effect from 01.04.2010. The said Act envisages that appropriate Government and local authority shall ensure maintenance of the Pupil Teacher Ratio (for short, "P.T.R.") as per the norms and standard prescribed. The Government, in the Department of School and Mass Education on 21.04.2010 issued a letter to the Collector about rationalization of Elementary Teachers/Zilla Parishad Teacher/Sikhya Sahayaks for the year 2010-2011. Similarly, the Government of Orissa, School and Mass Education Department issued a guideline for rationalization of elementary teachers/Zilla Parishad, Teacher/Sikhya Sahayaks/Gana Sikhayaks in Government Primary and Upper Primary School during the academic session 2012-2013 vide order dated 15.05.2012 (Annexure-2). In the said letter, it was stated that in order to arrive at a school wise P.T.R. of 30:01 at the Primary level and 35:01 at the Upper Primary level with minimum 2 teachers per school rationalization of all category of teachers is required to be undertaken. To ensure fulfilment of

requirement of the school-wise P.T.R. in education districts, transfer of all categories of teachers and Sikhya Sahayaks wherever necessary is required to be undertaken. So far P.T.R. of Mirzapur Primary School is concerned, in which the petitioner is continuing, the staffing pattern of the said School and the Roll strength clearly stipulate that the school is not coming within the Rationalization Scheme as much as Government guideline dated 15.05.2012. Apart from that, the petitioner is not the senior most teacher of the School. Therefore, if at all rationalization Scheme is applicable, then the petitioner is not entitled to be transferred. The purpose of making rationalization was to arrive at a School-wise P.T.R. which is based on roll strength of the School vis-à-vis existing strength of teachers. In the present case, 90 students are there in the School for whom 3 teachers are required as per rationalization Policy. Since there are three existing staff, there was no necessity to transfer any staff from Mirzapur Primary School but opposite party no.4 without any reason has transferred the petitioner.

In other connected writ petitions, there is violation of other provisions of the Guideline and therefore, it is submitted that transfer of these petitioners has been made in contravention of the Guideline dated 15.05.2012 for which the same should be quashed.

4. Mr. A.K. Pandey, learned Addl. Standing Counsel appearing on behalf of the School and Mass Education Department submitted that the impugned Notification dated 15.05.2012 is in the nature of executive instruction, which cannot be challenged by the petitioner. In support of his contention, he relied upon the judgment of the Hon'ble Supreme Court in the case of *Chief Commercial Manager, South Central Railway vs. G. Ratnam, (2007) 8 SCC 212.* Mr. Pandey further submitted that the higher authority may take action against the subordinate authorities if they have not abided by the executive instructions of the higher authority as per the impugned Guideline. The Government is yet to take a decision in the matter. Guideline dated 15.05.2012 is an interim arrangement of transfer and transfer is a condition of service. Therefore, there is no need to assign any reason in the transfer order.

5. The P.T.R. if at all is to be challenged; the same should be challenged by the pupil but not teacher of a school. Mr. Pandey further submitted that usually order of transfer should not be interfered with this Court unless the said order of transfer is passed without jurisdiction or mala fide. In support of his contention, Mr. Pandey relied upon the judgment of the Hon'ble Supreme Court in the cases of *Shilpi Bose (Mrs) and others vs. State of Bihar and others, 1991 Supp (2) SCC 659; Addisons Paint & Chemicals Ltd. vs. Worker, (2001) 2 SCC 289; Pearlite Liners (P) Ltd. vs.*

Manorama Sirsi, (2004) 3 SCC 172; State of U.P. and others vs. Gobardhan Lal, (2004) 11 SCC 402; Major General J.K. Bansal vs. Union of India, (2005) 7 SCC 227.

6. Further, referring to the counter affidavit, Mr. Pandey submitted that the Guideline dated 15.05.2012 for rationalization of the elementary teacher/SS/JTs/ZPT/GS is strictly followed and the petitioner was transferred as per the P.T.R. The strength of students in the School in question, as on the date of transfer, is 87. The petitioner was transferred on administrative ground because of the allegation received against him. Moreover, the in-charge Headmaster had observed that most of the time the petitioner was not attending the classes for which imparting education to the students adversely affected. The enquiry was also conducted against him. In order to find out quality of education, opposite parties though realized the facts, but instead of taking severe action only a lenient view has been taken by transfering him within the block against another teacher Smt. Rashmibala Das, who had already joined and performed her duties. If the petitioner is allowed to continue, he will be treated as surplus teacher and there will be inadequacy of teacher i.e. single teacher in the School to which the petitioner has been transferred.

7. In reply, Mr. A. Das, learned counsel for the petitioner submitted that the Act, 2009 was enacted pursuant to Constitution (Eighty-sixth Amendment) Act, 2002 by introducing Article 21-A of the Constitution and the Guideline dated 15.05.2012 has been issued in consonance with the Act, 2009. The judgment of the Hon'ble Supreme Court in the case of *G. Ratlam (supra),* has no application to the present case. Therefore, the petitioners have locus standi to demand for implementation of the guideline/resolution dated 15.05.2012. Mr. Das, further submitted that Sections 35(2) and 25(1) and (2) of the Act, 2009 empower the State Government to formulate policy. He further submitted that the transfer of the petitioner has been made on the basis of the Guideline and not on any allegation. Therefore, the opposite parties cannot take any such stand. Under Section 24(2) of the Act, 2009, power is vested with the authority to initiate disciplinary proceeding if any fault is committed by the teacher.

8. On the rival contentions advanced by the parties, the questions that fall for consideration by this Court are as follows:

(i) Whether the Guideline dated 15.05.2012 issued under Annexure-2 by the Principal Secretary to Government, Department of School and Mass Education addressing to all the Collectors/CEOs, Zilla Parishads with copy to Panchayati Raj Department, SPD,

OPEPA/Director, Elementary Education (O), All DPCs, SSA/All DIS/All BDOs, P.S. to Chief Minister/P.S. to Minister, S & ME/P.S. to Principal Secretary, S & ME Deptt. and Sr. Standing Counsel, S & ME Cell, Cuttack/Standing Counsel, S & ME Cell, Bhubaneswar/Law Officer/Asst. Law Officer/All Sections of S & ME Deptt./Section-I is to be followed by opposite party no.4 while transferring elementary teachers/Sikhya Sahayaks/Junior Teachers/Zilla Parishad Teachers/ Gana Sikshyaks from one School to another ?

(ii) Whether opposite parties can justify their order of transfer assigning any reason other than the reason(s) assigned in the order of transfer of the petitioner under Annexure-1?

(iii) What order ?

9. So far question No.(i) is concerned, it is not in dispute that the Principal Secretary to Government of Orissa, Department of School and

Mass Education vide letter No.I-SME-G-35/10(pt)-12644/SME dated 15.05.2012 communicated the Guideline to all the Collectors/CEOs, Zilla Parishads with copy to Panchayati Raj Department, SPD, OPEDA etc. wherein it is stated that the Government have been pleased to constitute the Transfer Committee in each Education District and the Transfer Committee will undertake the rationalization exercise strictly in accordance with the guidelines mentioned therein. For better appreciation, it is necessary to quote the relevant portions of the said Guideline:

> "In order to comply with the provisions of the Right to Children to Free and Compulsory Education Act, 2009 i.e. school-wise PTR 30:01 at the Primary level and 35:01 at the Upper Primary level with a minimum of 2(two) teachers per school, rationalization of teachers is essentially required.
>
> The matter regarding framing of detailed guidelines for undertaking the rationzliation exercise was under active consideration of the Government. Government have now been pleased to constitute the Transfer Committee in each Education District in the following manner:
>
> | | | | |
> |---|---|---|---|
> | (a) | Collector & D.M. of the District | - | Chairman |
> | (b) | President of Zilla Parishad | - | Member |
> | (c) | MLAs and MPs or their nominees | - | Member |
> | (d) | Chairperson, Urban Local Body(s) | - | Member |

(e)	Chairperson Panchayat Samiti (s) of the concerned Education District	-	Member
(f)	District Project Coordinator, SSA	-	Member
(g)	All B.D.O.s of the respective Education District	-	Member
(h)	Executive Officer, Urban Local Body(s)	-	Member
(i)	District Inspector of Schools Convenor	-	Member

The Transfer Committee will undertake the rationalization exercise strictly in accordance with the following guidelines."

10. Thus, it is amply clear that in order to comply with Act, 2009, the above Guideline has been issued by the Government in School and Mass Education Department. By virtue of Constitution 86th Amendment Act, 2002, Article 21-A was introduced in the Constitution and the Act, 2009 is enacted in pursuance of the Article 21-A. Section 35(2) of the Act, 2009 reads as follows:

> "35(2) The appropriate Government may issue guidelines and give such directions, as it deem fit, to the local Authority or the School Management Committee regarding implementation of the provisions of this Act."

Section 25(1) and (2) reads as follows:

> "25. Pupil Teacher Ration –(1) Within six months from the date of commencement of this Act, the appropriate Government and local authority shall ensure that the Pupil-Teacher Ratio, as specified in the schedule, is maintained in each School.
>
> (2) For the purpose of maintaining the Pupil-teacher Ratio under sub-section (1), no teacher posted in a School shall be made to serve, in any other School or office or deployes for any non-educational purpose, other than those specified in Section 27."

11. As per Guideline dated 15.05.2012, in order to comply with the provisions of the **Right of Children to Free and Compulsory Education Act, 2009,** i.e., School-wise PTR 30:01 at the Primary level and 35:01 at the

Upper Primary level with a minimum of 2(two) teachers per school, rationalization of teachers is essentially required. The matter regarding framing of detailed guidelines for undertaking the rationalization exercise was under active consideration of the Government. The Government have constituted the Transfer Committee in each Education District in the manner indicated in the Guideline above. Further in the said Guideline, it is specifically stated that the Transfer Committee will undertake the rationalization exercise strictly in accordance with the Guidelines dated 15.05.2012. Thus the Guideline dated 15.05.2012 (Annexure-2) is a policy decision of the Government in School and Mass Education Department. It is not the case of the State that the notification in question does not hold the field in the matter of transfer. In that background, stand of opposite parties that the petitioner cannot approach this Court, if such Guideline is not followed does not merit consideration.

12. In the Guideline dated 15.5.2012 framed by the Government of Orissa in School & Mass Education Department it is specifically stated that the said Guideline has been framed in order to comply with the provision of the Act, 2009. Section 35(2) of the Act, 2009 provides that the appropriate Government may issue Guidelines and give such direction as it deem fit to the local authority or School Management Committee regarding implementation of the provisions of the Act, 2009.

13. The Hon'ble Supreme Court in the case of ***Pine Chemical Ltd. v. Assessing Authority and others*** (1992) 2 SCC 683 held that if power to do an act or pass an order can be traced to an enabling statutory provision then even if that provision is not specifically referred to, the act or order shall be deemed to have been done or made under the enabling provision.

14. The Hon'ble Supreme Court in the case of ***Ramana Dayaram Shetty vs. The International Airport Authority of India and others,*** AIR 1979 SC 1628, held that the executive authorities are bound by the procedure which they themselves framed. The Government must adhere to the standard fixed by it.

15. In view of the above, the guideline dated 15.05.2012 under Annexure-2 issued by the Principal Secretary to Government in Department of School and Mass Education has statutory force and therefore the same is to be followed by opposite party No.4 while transferring the elementary teachers/Sikhya Sahayak etc. and any transfer made contrary to the said guideline is not sustainable in law.

16. The following decisions relied upon by Mr. Pandey are of no help to opposite parties.

In ***Shilpi Bose (Mrs) and others (supra)****,* the Hon'ble Supreme Court has held that the Court should not interfere with a transfer order which is made in public interest and for administrative reasons unless the same is made in violation of any mandatory/statutory rule or on the ground of mala fide. The Hon'ble Supreme Court further held that even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the Higher Authority in the Department.

In ***Gobardhan Lal (supra)****,* the Hon'ble Supreme Court has also held that transfer is prerogative of the authorities concerned and Court should not normally interfere therewith, except when (i) transfer order shown to be vitiated by mala fides, or (ii) in violation of the statutory provision, or (iii) having been passed by an authority not competent to pass such an order.

There is no dispute over the above legal propositions settled by the Hon'ble Supreme Court but in the present case, transfer order has been passed in violation of the policy decisions of the Government taken under Annexure-2 which has statutory force for the reasons stated above. Further, in the said judgments the Hon'ble Supreme Court has not said that the High Court would not interfere with any transfer order. This is clear from the use of the expression in the judgment in ***Shilpi Bose (Mrs) and others*** *(supra),* "the courts ordinarily should not interfere with the order".

17. The decision of the Hon'ble Supreme Court in the case of ***G. Ratnam (supra)****,* is also of no help to the present case as the Guideline under Annexure-2 has been issued in exercise of power vested under Section35(2) of the Act, 2009 in order to comply with the provisions of the said Act, and the impugned order of transfer has been passed in violation of such order.

18. In ***Addisons Paint & Chemicals Ltd. (supra)****,* the issue was what is the effect of an employee, who refused to accept the transfer order and refused to report for duty after his transfer? The facts of that case are different from the facts of present case.

19. There is no dispute over the legal proposition laid down by the Hon'ble Supreme Court, in ***Pearlite Liners (P) Ltd.(supra),*** wherein the Hon'ble Supreme Court has held that the transfer order is a normal incidence of service unless there is a term to the contrary in the contract of

service. This decision has no relevancy to the issue involved in the present case.

20. So far Question No.(ii) is concerned, it is necessary to refer to the order of transfer dated 13.06.2012 (Annexure-1) which is under challenge. Annexure-1 clearly shows that such order has been passed in pursuance of letter No.I-SME/G-35/10(pt)-12644/SME dated 15.05.2012 of the Govt. of Odisha, School & Mass Education Deptt., No.8015 dt. 22.05.2012 of the Director, Elementary Education, Odisha, Bhubaneswar and Resolution No.01 dated 05.06.2012 of the District Rationalization (transfer) Committee, Bhadrak. In the transfer order nothing has been mentioned regarding any allegation against the petitioner for which he has been transferred as contended in the counter affidavit.

21. The Hon'ble Supreme Court in ***Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors.,*** AIR 1978 SC 851, held as follows:-

> "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR 1952 SC 16) (at p. 18):
>
> Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.
>
> Orders are not like old wine becoming better as they grow older."

22. In view of the above, opposite parties cannot assign any new/fresh reason which has not been assigned in the transfer order. Moreover, Section 24(2) of the Act, 2009 gives power to the authority to initiate disciplinary proceeding against the employee for any default committed by him. The opposite parties without doing so, have transferred the petitioners from one school to another, which is not permissible under law.

23. Specific case of the petitioner in W.P.(c) No.11436 of 2012 is that he cannot be transferred from Tailamala Primary School to Talapadia Project Primary School as he is in service as a Gana Sikhyak which is not transferable.

Learned counsel for the petitioner Mr. P.K. Mohapatra submitted that similar question arose in W.P.(C) No.17336 of 2011 and the same was disposed of on 29.08.2011 with the observation that service of Gana Sikhayak is not transferable and the order of transfer is not sustainable in law. Further case of the petitioner is that the new place of posting as per Annexure-1 is 50 kilometres away from the earlier place of posting and therefore the order of transfer under Annexure-1 is violative of Rules and Guidelines of the Government regulating the transfer of Gana Sikhayak. As Gana Sikhayaks are not teachers, their job is not transferable as per office order No.1771 dated 14.06.2012 (Annexure-1).

The Additional Secretary vide order dated 16.08.2011 has modified the order of transfer of Gana Sikhayak to the extent that Gana Sikhayak can be deployed in nearby schools in view of the rationalization to perform their duties as assigned, but they cannot be transferred as teachers.

24. In view of the order of this Court dated 29.08.2011 passed in W.P.(C) No.17336 of 2011, and the order of Additional Secretary dated 16.8.2011, the petitioner being a Gana Sikhayak, he should not have been transferred to new place which is 50 km away from the existing posting.

25. In all other cases transfer orders have been passed contrary to Guideline and policy decision of the State dated 15.05.2012. This position is not disputed by Mr. Pandey. On the contrary, Mr. Pandey submitted that it is an internal arrangement and petitioners have no right to challenge their orders of transfer on the basis of such guideline. However, it is not said that the guideline in question does not hold the field.

26. In view of the above, orders of transfer in question are quashed. However, it shall be open to the authorities to pass such other order as would be permissible in law.

27. In the result, the writ petitions are allowed. No order as to costs.

Writ petition's allowed.

2013 (II) ILR - CUT- 266

B. N. MAHAPATRA, J.

CRP. NO. 49 OF 2010 (Dt.14.12.2012)

HAWKINS COOKERS LTD. & ORS. …….Petitioners

.Vrs.

SRI JAGANNATH TRADERS …….Opp.Party

A. CIVIL PROCEDURE CODE, 1908 – O-.14, R-2

Issue relating to jurisdiction of cases – Lack of territorial jurisdiction of the Court should have been decided before the parties went into trial of the suit.

In this case admittedly on 6.7.2010 the Plaintiff-O.P. filed evidence on affidavit Under Order 18, Rule 4 C.P.C. and the defendant-Petitioners cross-examined P.W.1 – Held, the petitioners have waived their right of raising objection as to territorial jurisdiction of the trial Court and to make a prayer to try that issue as preliminary issue. (Para 27)

B. CIVIL PROCEDURE CODE, 1908 – O-14, R-2(2)(a)

Issue relating to jurisdiction of cases – where two or more Courts have jurisdiction to try a suit, the parties can agree to submit themselves to the jurisdiction of one of those Courts and oust the jurisdiction of other Courts and such an agreement is not against the public policy. (Para 17)

C. CIVIL PROCEDURE CODE, 1908 – O-14, R-2 (2)

Whether the issue of jurisdiction is to be taken up as a preliminary issue – Plain reading of the provision shows that a suit can be disposed of on an issue of law as preliminary issue if that issue relates to the jurisdiction of the Court or a bar to the suit created by any law.

In this case trial Court is of the view that the issue relating to jurisdiction should not be decided as preliminary issue and it can be taken up simultaneously with other issues for effective adjudication of the lis – Held, trial Court has not committed any mistake in taking such a decision. (Para 22)

Case laws Referred to:-

1.AIR 1993 Kerala 210 (211) : (M/s. Femina Handloom of India Cannanore-V- M/s. M.R. Verma & Sons)
2.AIR 1971 SC 740 : (Hakam Singh-V- M/s.Gammon (India) Ltd.).
3.AIR 1989 SC 1247 : (Mithilesh Kumari & Anr.-V- Prem Behari Khare)
4.AIR 1995 SC 1766 : (Angile Insultations-V-M/s.Davy Ashmore India Ltd. & Anr.)

5.2012(1) OLR SC 507 : (A.V.M. Sales Corporation-V- Ms..Anuradha Chemicals Pvt. Ltd.)
6.(2004)4 SCC 677 : (New Moga Transport Co.-V- United India Insurance Co.Ltd. & Anr.)
7.AIR 2004 Delhi-374 : (M/s. Alphabetics Pvt. Ltd.-V- Lohta Jute Press)
8.AIR 1964 SC 497 : (Major S.S. Khanna-V- Brig. F.J. Dillon)
9.1996(I) OLR 89 : (Ganta Swain & Ors.-V- Kandhuni Gouduni & Ors.)
10.AIR 1991 Calcutta 237 : (Naresh Ch.Das-V- Gopal Ch.Das)
11.2010(I) OLR 214 : (State of Orissa-V- Durga Charan Routray).
121984-OLR(I) 1023 : (Paradeep Port Trust, represented by Chairman-V- Hindusthan Mercantile Transport Corpn. & Anr.).
13.AIR 2009 SC 1433 : (Vidyabai & Ors.-V- Padmalatha & Anr.)
14.AIR 1989 SC 1239 : (A.B.C.. Laminart Pvt. Ltd. & Anr.-V- A.P. Agencies, Salem)
15.48(1979) CLT 104 : (M/s. Surajmall Shibvhagawan-V- M/s. Kalinga Iron Works)
16.71(1991) CLT. 519 : (Bypothu Kssamma-V- P.Khageswar Rao Naidu (dead) & after him Shri Paddana Sivarama Deekhitula & Ors.)
17.54(1982) CLT 298 : (Bairagi Ch. Das-V- Kartik Chandra Das & Ors.)

For Petitioner - M/s. S.S.Das, K.Behera, S.Modi, P.K.Ghosh & S.S.Pradhan.
For Opp.Party - M/s. T.K. Satpathy & A.K.Mohanty.

B.N. MAHAPATRA,J. In this Civil Revision Petition challenge has been made to the order dated 10.11.2010 passed by the learned 1st. Addl. Civil Judge (Senior Division), Cuttack in Money Suit No. 114 of 2008 by which the application of the petitioners under Order 14, Rule 2(2), CPC to

decide the question of jurisdiction as the preliminary issue has been rejected.

2. Petitioners' case in a nutshell is that Opp. Party as Plaintiff filed Money Suit. No.114 of 2008 before the Civil Judge (Sr. Division) 1st Court, Cuttack which was subsequently transferred to the court of learned 1st Addl. Civil Judge (Sr. Division), Cuttack praying therein to pass a decree for Rs.1,93,316/- against defendant-petitioners along with pendente lite and future interest. As per the case of the plaintiff-opp. Party, it was appointed by the present petitioner-defendant no.1 on 01.10.2006 as an authorized wholesale dealer to deal with all the products of Hawkins in the State of Odisha on the basis of terms and conditions of the appointment letter. Further case of the plaintiff is that as per usual practice after receiving the purchase order, the defendants-petitioners shall deliver the goods within seven days to the plaintiff-opp. Party. Since the goods were delivered beyond seven days' period, the plaintiff faced financial loss amounting to Rs.98,680/-. Further case of the plaintiff-opp. Party is that on 7.4.2008 the plaintiff-opp. Party wrote a letter to defendant No.2-Petitioner regarding settlement of account, but the defendant-petitioners without looking into the same issued a cheque of Rs. 7,745/-. It is also the case of the plaintiff that as per agreement and performance credit plan dated 12.10.2006, the plaintiff was to be paid 2.5% after purchase of 880 pieces of Pressure Cookers from October, 2006 to March, 2007. Even though the plaintiff purchased 926 pieces of Pressure Cookers, it was not paid as per the performance credit plan. Due to defendant-petitioners' inability to execute the order, the plaintiff-opp. Party was compelled to purchase Pressure Cookers from various dealers amounting to Rs.29,57,440.62 and accordingly it is entitled to additional performance credit to the tune of Rs.73,936/-. In August, 2007 plaintiff- opposite party issued a letter to the defendant no.2-petitioner regarding non-supply of materials which was allegedly said to have been admitted by the defendant no.1-petitioner. Since several correspondences were made between the parties without yielding any result, the plaintiff-opp. Party issued a legal notice on 01.07.2008 to defendant No.2-petitioner demanding settlement of account and that having not been done, the aforesaid Money Suit was filed.

On 30.01.2009 the defendant-petitioners entered appearance and on 06.04.2009 filed their written statement. In their written statement, besides taking all technical objections available under law it is specifically pleaded that the plaintiff-opp. Party having offered and opted for Mumbai's jurisdiction as per Clause-15 of the letter of appointment dated 1.10.2006 and Clause-17 of the sales order, learned trial court at Cuttack ought not to entertain and

decide the suit. On 08.07.2010 the petitioners moved an application under Order 14, Rule 2(2), CPC (Annexure-3) to take up the issue of jurisdiction as preliminary issue. Thereafter, the plaintiff-opposite party filed objection to the application under Annexure-3 on the ground that the petitioners did not file the application under Annexure-3 immediately after settlement of issues.

Learned trial court after hearing both parties dismissed the said petition holding that issues relating to jurisdiction in the present case should not be decided as preliminary issue and it can be taken up simultaneously with other issues for effective adjudication of the lis. Hence, the present Civil Revision Petition.

3. Mr. S.S. Das, learned counsel appearing on behalf of the revision petitioners submitted that though the suit was presented on 15.09.2008, because of non-deposit of the court fee and non-compliance of the order of the court, the matter could not progress till 02.12.2008. After termination of the dealership, the plaintiff-opp. Party has been paid a sum of Rs.7,745/- towards full and final settlement of its account which was encashed by the plaintiff on 29.04.2008. The plaintiff-opp. Party in its letter dated 07.04.2008 stated " I received your cheque but your cheque will be presented in my Bank only after I am getting the correct accounts statement". Mr. Das further submitted that in view of such statement, the plaintiff-opp. Party is estopped from making any claim as has been done in the present suit or making any grievance about the alleged mistakes in the statement of accounts. The defendant-petitioners faced serious problem for bouncing of cheque issued by the plaintiff-opp. Party on several occasions. It is submitted that though the order No.12, dated 31.7.2009 reflects about the settlement of issues no issues were actually settled on the said date. The petitioners verily believed that till date issues have not been settled which can be seen from the records of the court below. On the next date, the plaintiff-opp. Party neither filed its list of witnesses nor its documents as directed vide order no.12, dated 31.07.2009. Thereafter the plaintiff-opposite party went on taking time on six consecutive dates, and on all these dates the petitioners had filed hazira.

4. On 06.07.2010, the plaintiff-opposite party filed the affidavit evidence of A. Bajaj and served a copy of the said affidavit on the learned counsel appearing for the petitioners on which date the petitioners prayed for time for cross-examination, but they were pressed to put a few questions for adjournments and accordingly a couple of formal questions were put in the cross-examination though in strict sense, the cross-examination has not begun as yet and the case was posted to 08.07.2010. Mr. Das submitted

that in fact no issues were settled as noted against order No.12 dated 31.7.2009.

5. Further it was submitted that neither in the plaint nor in the objection to the petition under Annexure-3, the plaintiff had ever taken a stand that the courts in Mumbai have no jurisdiction to entertain and try the dispute of the present nature. However, in the objection the plaintiff-opposite party took a stand that the issue relating to the jurisdiction is a mixed question of fact and law and the party who pleads ouster of jurisdiction of a competent court is to establish the same by independent evidence and prayed for rejection of the petition under Annexure-3. Mr. Das further submitted that at no point of time it was even contended by the petitioners that the courts in Cuttack do not have the competence/jurisdiction to try and decide the issue involved in the present suit. It is further submitted that at no point of time it was contended by any of the parties that the courts in Mumbai have no jurisdiction to try and decide the dispute of the present nature. What was contended and argued by the petitioners was that when courts in more than one place have jurisdiction to try and decide a particular dispute, the parties can confine the jurisdiction to one court as such an agreement is neither contrary to the public policy nor in any way contravenes Section 28 of the Contract Act. On the contrary, confinement of jurisdiction to one court sweeps away a ny possibility of conflict of decision of different courts. However, when confinement of jurisdiction is permissible under law, the parties cannot, by agreement, confer the jurisdiction on a court which otherwise, does not have jurisdiction to deal with the matter. When the defendants alleged that the court has no jurisdiction to try the case and issue is framed regarding jurisdiction for the convenience of the parties, the same should be tried as preliminary issue and if the court finds that it has no jurisdiction, the plaintiff can very well proceed with the litigation in the proper court. The finding regarding jurisdiction at the final stage would only cause undue hardship to the parties.

6. Mr. Das further submitted that the learned trial court did not take note of the ratio decedendi of the Hon'ble Apex Court and on placing reliance on some judgments which were not cited at the time of argument, illegally held that there is a dispute regarding the place of execution of the appointment letter and the genuineness of the appointment letter can be tested after taking evidence from both sides. But it is not proved or exhibited according to law as yet, though such a stand was never taken by any of the parties. Learned trial court is also wrong to hold that it is necessary for the parties to adduce evidence in this regard and further, whether the plaintiff having offered and opted for Mumbai jurisdiction as per Clause-15 of the

appointment letter dated 01.10.2006 and Clause 17 of the sales order and whether both parties agreed to Mumbai jurisdiction and how far the agreement and the sales order are valid is a question of fact and likewise the terms and conditions of the sales order is a question of fact. Leaned trial court, in order to vindicate its own reasoning, reflected in the order that in the meanwhile the plaintiff has examined one witness and the present question is being raised by the defendants after the examination-in-chief of P.W. 1. Since the plaintiff-opposite party himself relied upon the appointment letter dated 01.10.2006 which formed the basis of the suit, there was no question of dispute about genuineness of the said appointment letter in which as per Clause 15, it was clearly stated that the appointment is subject to Mumbai jurisdiction. If that appointment letter is not genuine, then the whole suit of the plaintiff fails and deserves to be dismissed. The learned trial court acted illegally holding that there is a dispute regarding the place of execution of the appointment letter and the genuineness of the letter can be tested after taking evidence from both sides. Learned trial court totally lost focus on the main stream to hold that the appointment letter has not been proved and executed for which evidence is to be adduced.

7. The trial court totally lost sight of the well settled principle that in terms of Order 14, Rule 2, CPC once a suit has been tried on all the issues, it is the requirement of the court to give findings on all such issues. Once the court comes to a finding that it has no jurisdiction to try the suit, it would be a futile exercise to decide other issue on merit of the case. The trial court is required to frame the preliminary issue particularly when the parties by agreement have confined the jurisdiction to the courts at Mumbai. Learned trial court should have taken into consideration the decisions relied upon by the petitioners to the extent that when the parties agreed to confine the jurisdiction to the courts at Mumbai, it is neither contrary to the public policy nor in contravention of the provisions under Section 28 of the Contract Act. When both the courts have jurisdiction, no fault can be found in the agreement between the parties in confining the jurisdiction to the courts at Mumbai. Learned trial court has illegally planted the plea of validity of agreement and sales order which is not the case of any of the parties.

8. Mr. Das further submitted that plea of jurisdiction simpliciter and confining jurisdiction to a particular court are altogether different aspects. Had there been no agreement between the parties confining the jurisdiction to a particular court and further had there been any issues conferring jurisdiction which needs adducing of oral evidence, the impugned order would have been held good. Letters were issued to Mumbai and further when the agreement dated 01.10.2006 which emanated from Mumbai

coupled with issuance of sales orders to Mumbai, a part of the cause of action admittedly arose in Mumbai and hence by agreement the parties did not confer jurisdiction on the courts at Mumbai but confined the jurisdiction which aspect was totally lost sight of by the learned trial court for which the impugned order is vitiated.

9. Mr. Das placing reliance on the judgment of the Kerala High Court in the case of *M/s. Femina Handloom of India, Cannanore v. M/s. M.,R. Verma & Sons, AIR 1993 Kerala 210 (211)* submitted that when it is contended that the court has no jurisdiction to try the case and issue is framed regarding jurisdiction for the convenience of the parties, the same should have been tried as a preliminary issue and if the court finds that it has no jurisdiction, the plaintiff can very well proceed the litigation in proper court. Further placing reliance on the decision of the Hon'ble Supreme Court in the case of *Hakam Singh v. M/s. Gammon (India) Ltd.* , AIR 1971 SC 740, Mr. Das submitted that it is not open to the parties by agreement to confer jurisdiction on a court which does not possess under the Code. But where two courts or more have jurisdiction under the CPC to try a suit or a proceeding and agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Contract Act. In support of the above contention Mr. Das further relied on the decision of the Supreme Court in the cases *of Mithilesh Kumari and another v. Prem Behari Khare, AIR 1989 SC 1247, M/s. Angile Insultations v. M/s. Davy Ashmore India Ltd. and another, AIR 1995 SC 1766, A.V.M. Sales Corporation v. Ms. Anuradha Chemicals Pvt. Ltd., 2012 (1) OLR SC 507*. Mr. Das placing reliance in the case of *New Moga Transport Co. v. United India Insurance Co. Ltd. and another, (2004) 4 SCC 677*, and the decision of the Delhi High Court in the case of *M/s. Alphabetics pvt. Ltd. v. Lohta jute Press, AIR 2004 Delhi- 374. Placing reliance on the judgment of the Supreme Court in Carona Ltd. v. Parvathy Swaminathan and Sons, (2007) 8 SCC 559*, submitted that once jurisdictional fact found to exist, the court or tribunal has power to decide the adjudicatory fact or facts in issue. Placing reliance upon the judgment of the Supreme Court in *Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497*, it was submitted that under Order 14, Rule 2(2), CPC where issues both of law and fact arises in the same suit and the court is of the opinion that the case or any part thereof may be disposed of on issue of law only and it shall try those issues first. Mr. Das also relying on the judgment of this Court in *Ganta Swain and others v. Kandhuni Gouduni and others*, 1996 (I) OLR 89 submitted that if the case is of capable of being decided on the basis of the undisputable facts emerging from the pleadings, it is the duty of court to decide the said issue as preliminary;

provisions under Order 11, Rule 22, CPC do not create an embargo for taking of issue of jurisdiction as preliminary issue.

10. Mr. T.K. Satapathy, learned counsel appearing on behalf of the plaintiff-opp. Party submitted that the plaintiff filed a Money Suit against the present petitioner-defendants on 15.09.2008 and the petitioner-defendants have filed their written statement on 06.04.2009. Learned trial court after perusal of the plaint, written statement and document has settled the issues as per the Order 14, Rule 1, CPC on 31.07.2009. Thereafter suit was posted for hearing to 06.07.2010. Opp. Party-Plaintiff filed an evidence-affidavit under Order 18, Rule-4, CPC of P.W.1. The defendant-petitioners cross-examined P.W.1 and the case was posted to 8.7.2010 for further hearing. On 8.7.2010 the defendant-petitioners filed a petition under Order 14, Rule 2(2), CPC to which the plaintiff-opp. Party filed objection. The Trial Court dismissed the petition filed under Order 14, Rule 2(2), CPC. The question of territorial jurisdiction cannot be decided as preliminary issue without going into the question whether the appointment letter dated 01.10.2006 had been executed at Cuttack or not and the defendant-petitioner no.3 is C & F Agent/Branch Office/Depot of the petitioner-company or not. Whether the goods are supplied by defendant no.1-company through defendant no.3 to the Plaintiff-Opp. Party or not is a question of fact which requires consideration of evidence to decide the case and the same is not permissible under Order 14, Rule 2(2), CPC. Therefore, the question of jurisdiction cannot be taken as preliminary issue as because the documents and records show that further evidence is necessary for the same. In support of his contention Mr. Satpathy relied on a decision of the Calcutta High Court in the case of *Naresh Ch. Das vs. Gopal Ch. Das,* AIR 1991 Calcutta -237; wherein it is held that preliminary issue on question of territorial jurisdiction of the court is a mixed question of law and fact which cannot be decided as preliminary issue. Further placing reliance on the judgment of this Court reported in *State of Orissa vs. Durga Charan Rourtray,* 2010 (I) OLR-214, Mr. Satapathy submitted that the performance of contract is a part of cause of action and a suit in respect of breach can always be filed at the place where the contract should have been performed or its performance was completed. If the contract is to be performed at the place where it is made the suit on the contract is to be filed there and no where else. Therefore, the cause of action for filing the suit arises out of letter of appointment and the sale order within the jurisdiction of the learned trial court. It is further submitted that mere existence of clause of agreement does not oust the jurisdiction of the court to try the suit. In support of this contention Mr. Satapathy relying on the judgment of this Court reported in *The Paradeep Port Trust, represented by its Chairman Vs. M/s. Hindusthan*

Mercantile Transport Corporation and another, 1984-OLR (I) 1023, submitted that after commencement of trial the petitioner-company filed petition under Order No.14, Rule-2(2), CPC before the trial court which is not maintainable as the trial has already been commenced and the Kerala High Court in the case of *G. Ayyappan Pillai V. State of Kerala and another,* reported in 2010 (28) VST-411 (Kerala) held that question of territorial jurisdiction should have been decided before the parties went into the trial . Mr. Satapathy submitted that the trial commences on the date issues were framed that is the date of first hearing. In support of the aforesaid contention he relied upon the decision of the Supreme Court in *Vidyabai & Others v.Padmalatha and Another*, AIR 2009 SC 1433. Therefore, the petition filed under Order 14, Rule 2(2), CPC after commencement of trial is not maintainable in the present case. Since the trial court after applying his judicial mind keeping in view various judgments passed by the Hon'ble Supreme Court and High Courts has rightly held that in the case at hand, the question of jurisdiction cannot be decided as preliminary issue at this stage unless and until the parties adduce evidence to that effect the present revision petition is liable to be dismissed.

11. Mr. Satpathy further submitted that the amount involved in the money suit is Rs.1,93,316/- and for this amount the petitioner is asked to go to Bombay to file the suit for realization of the said amount which will be highly prejudicial and oppressive.

12. On the rival contentions advanced by both parties, the following questions fall for consideration by this Court:

(i) Where two or more courts have jurisdiction to try a suit, whether the parties can agree to submit themselves to the jurisdiction of one of these Courts and oust the jurisdiction of other courts and if the answer is in affirmative, whether such an agreement is against the public policy?

(ii) Whether the issue of jurisdiction is to be taken up as a preliminary issue?

(iii) Whether the petitioner has waived his right to raise a contention regarding territorial jurisdiction of the trial court and to make a prayer to try that issue as preliminary issue after P.W.1 was examined by the plaintiff and cross-examined by the defendant-petitioner?

(iv) Whether despite the agreement of the parties to oust the jurisdiction of one of the two courts having jurisdiction, the Court whose

jurisdiction has been ousted, if satisfied that the stipulation would operate harshly and is oppressive in character, inequitable or unfair for ends of justice it can relieve the parties of the bargain ?

(v) Whether the impugned order dated 10.11.2010 passed by the trial court rejecting the prayer of the petitioners to hear the question of jurisdiction as preliminary issue under provisions of Order 14, Rule 2(2) CPC is legally sustainable?

(vi) What order?

13. To deal with question no.(i) it would be beneficial to refer to some of the decisions of the Hon'ble Supreme Court.

14. The Hon'ble Supreme Court in the case of ***A.B.C. Laminart Pvt. Ltd. and another v. A.P. Agencies, salem***, AIR 1989 SC 1239 has held that :

> "So long as the parties to a contract do not oust the jurisdiction of all the courts which would otherwise have jurisdiction to decide the cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the Court. If under the law
>
> several Courts would have jurisdiction and the parties have agreed to submit to one of those jurisdictions and not to other or others of them it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arisen from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand, the jurisdiction they agreed to submit to would not otherwise a proper jurisdiction to decide dispute arising out of the contract it must be declared void being against public policy. Thus, it is now a settled principle that where there may be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen there within, if the parties to the contract agreed to vest jurisdiction in one such court to try a dispute which might arise as between themselves the agreement would be valid…..From the foregoing decisions it can be reasonably deduced that whether such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific accepted norms of contract would bind the parties and unless the absence of *ad idem* can be shown the

other courts would avoid exercising jurisdiction. As regard the construction of ouster clause wherein words like 'alone' 'only' and 'exclusively', and the like have been sued there may be no difficulty. Even without such words in appropriate cases the maxim '*expressio unius est exclusion alterius'*- expression of one is exclusion of another may be applied."

15. In ***M/s. Angile Insultations v. M/s. Davy Ashmore India Ltd. and another***, AIR 1995 SC 1766, the Hon'ble Supreme Court held as under -

"So, normally that court also would have jurisdiction where the cause of action, wholly or in part, arises. But it will be subject to the terms of the contract between the parties. In this case, Clause (21) reads thus :

"This work order is issued subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, fall within the jurisdiction of the above court only."

A reading of this clause would clearly indicate that the **work order issued by the appellant** will be subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, be instituted in a Court of competent jurisdiction within the jurisdiction of High Court of Bangalore only.

xx xx xx

When parties to a contract agree as to the jurisdiction to which dispute in respect of the contract shall be subject. This is clear from S. 28 of the Contract Act. But an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void being against the public policy under S. 23 of the Contract Act. We do not find any such invalidity of Clauses (21) of the Contract pleaded in this case. On the other hand, this Court laid that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewith, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves, the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by Ss. 23 and 28 of the Contract Act. This cannot be understood as parties contracting against the statute. Mercantile law and practice permit such agreements."

16. The Supreme Court also held in the case of ***A.V.M. Sales Corporation v. Ms. Anuradha Chemicals Pvt. Ltd.***, 2012 (I) OLR (SC) 507 that:

> "Where two courts have jurisdiction consequent upon the cause of action or a part thereof arising therein, if the parties agree in clear and unambiguous term to exclude the jurisdiction of the other, the said decision could not offend the provisions of Section 23 of the Contract Act. In such a case, the suit would lie in the court to be agreed upon by the parties.
>
> xx xx xx
>
> Where part of the cause of action arises at both Delhi and Mumbai, this Court held that mutual agreement to exclude the jurisdiction to Delhi Courts to entertain the suit was not opposed to public policy was valid."

17. In view of the above settled legal position where two or more courts have jurisdiction to try a suit, the parties can agree to submit themselves to jurisdiction of one of these courts and oust the jurisdiction of other courts and such an agreement is not against the public policy.

18. Question No.(ii) is whether issue of jurisdiction can be taken up as a preliminary issue? To deal with this question, it is necessary to know what is contemplated in Sub-rule (2) of Rule 2 of Order 14, CPC, which reads as follows :-

> "Where issues both of law and of fact arise in the same suit, and court is of opinion that the case or any part thereof may be disposed of on a issue of law only, it may try that issue first if that issue relates to –
>
> (a) the jurisdiction of the Court, or
>
> (b) a bar to the suit created by any law for the time being in force; and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

19. Plain reading of Order 14 and Rule 2(2) postulates that a suit can be disposed of on an issue of law as preliminary issue if that issue relates to the jurisdiction of the court or a bar to the suit created by any law.

20. This Court in the case of ***Bypothu Kssamma Vs. P. Khageswar Rao Naidu (dead) and after him Shri Paddana Sivarama Deekhitula and others,*** 71 (1991) CLT 519 held as under:-

> "under Sub-rule (2) it is necessary for the Court to satisfy itself (a) that the issue is done of law only, that is, it requires no evidence or a title to be led, (b) the decision on the issue is sufficient for disposal of the entire case or a part of the case, (c) the issue in question relates to jurisdiction of the Court or a bar to the suit created by any law for the time being in force. Unless all these pre-conditions are satisfied the Court will not be justified in trying an issue as a preliminary one, postponing consideration of other issues. It is worth noting here that the practice of trying preliminary issue has generally been discouraged because it results in piecemeal trial and after results in remand of the case to the trial court for consideration of the remaining issues. In appealable cases the Court should, as far as possible, decide on all issues to avoid a piecemeal trial, protracted litigation and repeated appeals in the same suit. The practice of trying the suit on preliminary issue has been discouraged."

21. This Court further in the case of ***Bairagi Ch. Das V. Kartik Chandra Das and others,*** 54 (1982) CLT 298 held that :

> "It is discretionary to try preliminary issue of law relating to jurisdiction or bar of suit when it is so clear that decision will decide the suit finally once and for all without recording of any evidence. A mixed question of fact and law cannot be decided as a preliminary issue. Even in a pure question of law if the Court is of the opinion that it is more expedient to try all issues together and refuses to try preliminary issues of law referred to in sub-rule (2) (a) and (b), it commits no error touching jurisdiction."

22. In the instant case, the trial court is of the view that the issue relating to jurisdiction in the present case should not be decided as preliminary issue and it can be taken up simultaneously with other issues for effective adjudication of the lis for the reasons stated therein. In the peculiar circumstances, this Court is of the view that the trial court has not committed any mistake in taking such a decision.

23. Third question relates to as to whether the court ought to decide the issue relating to territorial jurisdiction before the commencement of the trial of the suit. The question of lack of inherent jurisdiction can be raised at any

stage of a case, but an objection as to the territorial jurisdiction could be waived which could be express or implied. An implied waiver can be gathered by the conduct of the parties.

24. In the case of ***G. Ayyappan Pillai*** (supra), the Kerala High Court held as under :-

> "That the court should have decided the issue as to the alleged lack of territorial jurisdiction before the parties went into trial of the suit. In this case the order to return the plaint for presentation in the proper court was passed after the appellant produced his evidence and part of the evidence of the respondents was recorded. This was not in accordance with the message contained in Section 21 of the Code. Unlike in a case of lack of inherent jurisdiction, an objection as to territorial jurisdiction could be waived which could be express or implied. An implied waiver can be gathered by the conduct of the person who was said to have waived the right. In this case though the respondents raised a contention regarding lack of territorial jurisdiction, they cross-examined the appellant and his witnesses and even examined their witness in part. Hence the respondents could be deemed to have waived their objection as to the territorial jurisdiction of the court. Therefore the Sub-court, Ernakulam, had jurisdiction to try the suit."

25. In the instant case, order No.12 dated 31.7.2009, passed by the learned Trial Court reveals as follows:-

> "Counsel for both parties filed their hazira and present. Perused the pleadings. Issues were settled. Call on 02.9.2009 for filing of list of witnesses and documents by the parties."

The petitioners' objection is that issues have not been settled as per Order No.12 dated 31.07.2009. Perusal of page 127 of the lower court record reveals that as many as six issues have been settled. They are as follows:

"I S S U E S

1. Whether the suit is maintainable?
2. Whether the plaintiff has cause of action to file the suit?
3. Is the suit barred by law of limitation?
4. Has this court jurisdiction to entertain the suit?

5. Whether the plaintiff is entitled to get a decree against the defendants to realize a sum of Rs.1,93,316/- along with P.I. and F.I. at the rate of 9% per annum?

6. To what relief or reliefs, if any, the parties are entitled?"

26. Be that as it may, it is not in dispute that on 6.7.2010 the plaintiff-opp. party filed an affidavit-evidence under Order 18, Rule 4, CPC and the respondents-petitioners cross-examined P.W.1. Hon'ble Supreme Court in the case of ***Vidyabai & others (supra)*** held that the trial commences on the date the issues were framed.

27. In view of the above, this Court is of the opinion that the petitioners have waived their right of raising objection as to territorial jurisdiction of trial court and to make a prayer to try that issue as preliminary issue.

28. So far as question no.(iv) is concerned, even if the parties agreed to oust the jurisdiction of one of the two courts having jurisdiction, the Court whose jurisdiction has been ousted, is satisfied that the stipulation would operate harshly and is oppressive in character, inequitable or unfair for ends of justice, it can relieve the parties of bargain.

29. This Court in the case of ***M/s Surajmall Shibvhagawan Vs. M/s Kalinga Iron Works***; 48 (1979) CLT 104 held that ouster of Court's jurisdiction should not be easily construed and cannot be assumed or presumed very easily. Ouster of jurisdiction must be provided by express words or by necessary or inevitable implications. Merely be mentioning "All subject to Calcutta jurisdiction" by one of the parties at the top of his purchase order, it cannot be said that the jurisdiction of other Courts, which can be legally approached by the other parties under the Civil Procedure Code or under any other law, is ousted by the said words.

30. This Court in the case of ***Paradeep Port Trust*** *(supra),* held as under:

> "It has now to be accepted as the settled position of law that where a suit can be filed in either of two Courts, as where a part of the cause of action arises within the jurisdiction of the both the Courts or where cause of action arises within the jurisdiction of one Court and the defendants reside in the jurisdiction of the other Court, the parties can agree that any dispute arising between them shall be tried by one of those Courts only. It is also an accepted principle that though the choice of forum made by the parties by consent is to be

respected, the enforcement of the choice by the Courts cannot be ruled as imperative in all circumstances. It depends on the facts of each case and taking them into consideration, it is open to the Court to hold that in spite of such an agreement between the parties, since the clause becomes oppressive for the plaintiff, it may not enforce the clause in a particular case. This view finds support from a recent decision of this Court reported in A.I.R. 1984 Orissa-182; 1984 (1) OLR 532- M/s. Patnaik Industries v. Kalinga Iron Works, where relying on several decisions of the Supreme Court and other high Courts, R.C. Pattnaik, J. held as follows :

"It is not open to the parties by agreement to confer jurisdiction on a Court with it does not possess under the Code; but where two Courts or more have under the Civil Procedure Code jurisdiction to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such Courts, is not contrary to public policy. Such an agreement between the parties does not oust the jurisdiction of the Court. It may operate as an estoppel against the parties but it cannot deprive the Court of its power to do justice. Ordinarily, the Court would have regard to the choice of the parties; where, however, the Court whose jurisdiction has been ousted is satisfied that the stipulation would operate harshly, is oppressive in character, inequitable or unfair, for the ends of justice, it can relieve the party of the bargain."

31. In the present case, the plaintiff-opp. party is a proprietorship concern dealing with products of defendant No.1 Hawkins Pressure Cooker Ltd. The disputed amount being Rs.1,93,316/-, asking the opposite party-plaintiff to file a suit at Mumbai will be prejudicial and oppressive.

32. For the reasons stated above, this Court does not find any infirmity or illegality in the impugned order dated 10.11.2010 passed by 1st Addl. Civil Judge (Sr. Division), Cuttack warranting any interference by this Court in exercise of extra-ordinary power under Article 226 of the Constitution of India.

33. In the result, the CRP is dismissed.

Revision dismissed.

2013 (II) ILR - CUT- 282

B. N. MAHAPATRA, J.

W.P.(C) NO. 226 OF 2007 (Dt.12.03.2013)

RANJIT RANJAN NAYAK ……..Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp.Parties

EDUCATION – Whether Diploma in Special Education (Mental Retardation) conducted by Rehabilitation Council of India is equivalent to Certified Teachers (C.T.) qualification of Board of Secondary Education, Odisha – Held, Yes. (Para 8)

For Petitioner - M/s. Banshidhar Satpathy,
T.K. Nayak & A. Ali.
For Opp.Parties - Standing Counsel
(School & Mass Education Deptt.)

B. N. MAHAPATRA, J. This writ petition has been filed with a prayer to issue a writ in the nature of mandamus commanding opposite parties, particularly opposite party No.6-Block Development Officer (for short, "B.D.O."), Balianta to allow the petitioner to join in Bodakhandi Melak Project Primary School, Balianta treating his qualification Diploma in Special Education (Mental Retardation) equivalent to C.T. qualification.

2. Petitioner's case in a nutshell is that he applied for the post of Sikshya Sahayak in respect of Balianta Block pursuant to advertisement published in Odia Daily, "The Samaja" on 14.10.2006. His application was duly scrutinized and he was selected and engagement order was issued in his favour vide Order No.1917 dated 23.12.2006 by the Collector-Cum-Chief Executive Officer, Zilla Parishad, Khurda. Even though the petitioner has been appointed as Sikshya Sahayak and posted in Badakhandi Melak Project Primary School, the B.D.O., Balianta has not allowed him to join in his service on the ground that the certificate produced by the petitioner is Diploma in Special Education (Mental Retardation) which is not equivalent to C.T. qualification of Board of Secondary Education, Odisha. Being aggrieved, the petitioner approached Opp. Party No.1-Commissioner-Cum-Secretary, School and Mass Education Department, Odisha and opposite party No.3-Collector, Khurda by filing representation for issuance of order to the B.D.O., Balianta to allow him to join in the place of posting. Since no

action was taken on such representation, the petitioner has filed this writ petition.

3. Mr. B. Satpathy, learned counsel appearing for the petitioner submitted that the petitioner passed Matriculation in 2nd Division in the year 1993. He passed +2 Science in 1996 and +3 Science in 1999. He passed Diploma in Special Education (Mental Retardation) conducted by Rehabilitation Council of India, Ministry of Social Justice and Employment, Government of India in 2006. According to Mr. Satpathy, such qualification is equivalent to C.T. qualification of the Board of Secondary Education, Odisha.

It was submitted that the Diploma in Special Education (Mental Retardation) has been recognized by the Directorate of Teachers Education and SCERT, Odisha, Bhubaneswar vide order dated 18.06.2005 and treated the same as equivalent to Certified Teachers (C.T.) offered by the Board of Secondary Education, Odisha. The Government of Odisha in Women and Child Development Department vide order No.5203 dated 7.3.2005 directed all the Collectors of the districts to treat the Diploma course in Special Education as equivalent to Certified Teachers (C.T.) qualification recognized by the Education Department. Since the opposite parties have accepted application filed by the petitioner and after scrutinizing the same, issued the order of engagement to the petitioner, they are estopped from saying that qualification possessed by the petitioner is not equivalent to C.T.

4. Mr. Satpathy further submitted that the Hon'ble High Court in the case of Prakash Kumar Rout and others vrs. State of Odisha and others in W.P.(c) No.16637 of 2006 disposed of on 08.08.2008 has categorically held that Diploma in Special Education is equivalent to Certified Teachers Course of Board of Secondary Education. Further Board of Secondary Education vide Notification No.1258 dated 25.10.2011 declared that the Diploma in Special Education is equivalent to C.T. Course of B.S.E.(Odisha).

In W.P.(C) No.17820 of 2009 and batch of cases this Court has held that Diploma in Special Education provided by Rehabilitation Council of India is equivalent to C.T. Course of Board of Secondary Education, Odisha inasmuch as the same has already been declared by the Government of Odisha in C.D. & R.R. Department and Women and Child Development Department. Therefore, there is no bar or any impediment in giving posting order in favour of the petitioner giving him engagement with retrospective effect with all other consequential benefits. Concluding his argument, Mr. Satpathy submitted to allow the prayer made in the writ petition.

5. On the contrary, Mr. B.P. Tripathy, learned Standing Counsel appearing on behalf of opp. parties submitted that the petitioner belongs to the General Category with +3 Science and Diploma in Special Education (D.S.E.) qualification. The equivalency of Diploma in Special Education with C.T. so far has not been clarified by the School and Mass Education Department, though the equivalency has been accepted by Women & Child Development Department. When the selection process was going on, the Government in School and Mass Education Department vide letter No. 20300 dated 18.10.2006 questioned the equivalency of Diploma in Special Education with C.T. course. In view of the said letter dated 18.10.2006, it could not be concluded that the candidates with Diploma in Special

Education will be engaged treating the Diploma in Special Education as equivalent to C.T. Further, another reference has been made to Government vide letter No.48 dated 6.1.2007 for clarification in the matter. According to the decision of the District Selection Committee, candidature of the applicants having Diploma in Special Education was not cancelled and they were allowed to remain in the panel. The present petitioner is among such empanelled applicants. Because of the ambiguity in Diploma in Special Education qualification, the B.D.O. was advised not to entertain the order of engagement issued to the petitioner. Though there are other selected andidates with Diploma in Special Education qualification, no candidate has so far been engaged in 2006-07 Recruitment Year in Khurda District. Unless clarification from the Government in School & Mass Education Department is received, the prayer of the petitioner cannot be singularly considered as it relates to a policy decision of the Government having State wide common applicability. Therefore, the petitioner has to wait till a final decision is taken by the Government in the matter.

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

(i) Whether qualification of Diploma in Special Education (Mental Retardation) conducted by the Rehabilitation Council of India (C.R.C.I.), Ministry of Social Justice and Employment, Government of India is equivalent to Certified Teachers(C.T.) offered by the Board of Secondary Education, Odisha ?

(ii) Whether the petitioner having qualification of Diploma in Special Education (Mental Retardation) is entitled to be engaged as Sikshya Sahayak in Balianta Block pursuant to the engagement

order No.1917 dated 23.12.2006 issued by the Collector-cum-Chief Executive Officer, Zilla Parishad, Khurda ?

7. To decide question no.(i) as to whether the Diploma in Special Education (Mental Retardation) conducted by Rehabilitation Council of India, Ministry of Social Justice and Employment, Government of India is equivalent to C.T. qualification offered by the Board of Secondary Education, Odisha, I need not retain myself for any longer period. In the case of Prakash Kumar Rout and others vrs. State of Odisha and others in W.P.(C) No.16637 of 2006 disposed of on 8.8.2008 this Court has held that Diploma in Special Education is equivalent to Certified Teachers Course of Board of Secondary Education. The Board of Secondary Education, Odisha itself vide Notification No.1258/ 25.10.2011 has clarified that Diploma in Special Education is equivalent to C.T. Course of Board of Secondary Education, Odisha. Moreover, persons having qualification of Diploma in Special Education, who were engaged as Sikshya Sahayaks under the Collector-Cum-Chief Executive Officer, Zilla Parishad, Khurda have approached this Court in W.P.(C) No.11115 of 2010 apprehending their disengagement challenging the decision of Board of Secondary Education, Odisha relating to rejection of equivalency of Diploma in Special Education course with that of the C.T. course. In that case, this Court placing reliance on the letter/notification No.1258 dated 25.10.2011 held that since the Board of Secondary Education, Odisha has clarified that Diploma in Special Education is equivalent to C.T. Course of Board of Secondary Education, there is nothing left for adjudication of the petitioner's case which became infructuous. Further, this Court vide judgment dated 18th January, 2012 passed in W.P.(c) No.17820 of 2009 and batch of cases held that Diploma in Special Education provided by Rehabilitation Council of India is equivalent to C.T. qualification offered by the Board of Secondary Education, Odisha. It is not the case of opp. parties that they have challenged the judgments of this Court cited above before the Hon'ble Supreme Court. Thus, the said judgments have attained the finality.

8. In view of the above, this Court is of the opinion that Diploma in Special Education is equivalent to C.T. qualification of Board of Secondary Education, Odisha.

9. Question no.(ii) is with regard to the petitioner's entitlement to be engaged as Sikshya Sahayak having qualification of Diploma in Special Education. Undisputedly pursuant to the advertisement dated 14.10.2006 inviting applications from eligible candidates for the post of Sikshya Sahayak, the petitioner submitted his application. After scrutinizing the said application, the petitioner was selected and engagement order was issued in

his favour vide engagement Order No.1917 dated 23.12.2006 by the Collector-Cum-Chief Executive Officer, Zilla Parishad, Khurda, but he was not allowed to work as Sikshya Sahayak on the ground that it could not be concluded that the candidates with Diploma in Special Education will be treated as equivalent to C.T. Course. In their counter affidavit Opp. Parties stated that as per decision of the District Selection Committee, the candidature of Diploma in Special Education applicants was not cancelled and they were allowed to remain in panel and the present petitioner is one among such applicants.

10. In view of the answer to question no.(i), there is no controversy that the Diploma in Special Education is equivalent to C.T. Course of Board of Secondary Education, Odisha. Therefore, there is no impediment for opp. parties to give engagement and allow the petitioner to work as Sikshya Sahayak.

11. In view of the above, Opp. Parties are directed to give engagement to the petitioner to work as Sikshya Sahayak in Balianta Block pursuant to the appointment order No.1917 dated 23.12.2006 issued by the Collector-Cum-Chief Executive Officer, Zilla Parishad, Khurda.

12. In the result, the writ petition is allowed. No costs.

Writ petition allowed.

2013 (II) ILR - CUT- 286

B. K. PATEL, J.

W.P.(C) NO. 6739 OF 2012 (Dt.15.03.2013)

CHAKRADHAR PRADHAN & ORS. ……..Petitioners

.Vrs.

STATE OF ORISSA & ANR. ……Opp.Parties

ODISHA CONSOLIDATION OF HOLDINGS & PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Ss.37 (1) & 41(1).

Petitioners filed revision U/s. 37 (1) of the Act – Revisional Court dismissed revision solely on the ground that it has no jurisdiction to

entertain such revision after publication of notification U/s.41 (1) of the Act without considering the merits of the Case – Writ petition filed – Held, the Commissioner, consolidation has the jurisdiction to entertain a revision after the final notification U/s.41 (1) of the Act – Hence, the impugned order is quashed – The matter is remitted back to the Commissioner, Consolidation, Odisha, Bhubaneswar for fresh consideration.

Case laws Referred to:-

1.2010 (II) OLR 76 : (Shri Raj Kishore Subudhi @ Barik-V- State of Orissa & Ors.)
2.76(1993) CLT 161 : (Gulzar Khan-V- Commissioner of Consolidation & Ors.)

For Petitioner - Mr. Sangramjit Panda
For Opp.Parties - Addl.Govt. Adovocate

Heard learned counsel for the petitioners and learned counsel for the State appearing for opposite party no.1.

In view of the nature of order which the Court intends to pass, it is not felt necessary to issue notice to opposite party no.2.

In this writ petition, petitioners have assailed the legality of order dated 30.4.2008 passed by learned Commissioner, Consolidation, Orissa, Bhubaneswar dismissing Revision Case No.677 of 2006 (Bhubaneswar).

Petitioners filed revision case under Section 37 (1) of the O.C.H. & P.F.L. Act, 1972 (for short 'the Act') contending that final records of chaka plots have been correctly prepared in favour of the petitioners as per their previous records. However, final map of the respective chaka plots have been wrongly plotted and about Ac.0.04 decimals of land has been amalgamated with the adjoining final chaka plot nos. 2104,2099 and 2098 of the opposite party no.2. Prayer was, therefore, made for rectification of map of the plots belonging to the petitioners and opposite party no.2 as per the final Record of Rights.

It is contended that the revisional court without entering into the merits of the claim of the petitioners dismissed the revision case solely on the ground that the revisional Court has no jurisdiction after publication of notification under Section 41 (1) of the Act. It is strenuously ***Shri Raj Kishore Subudhi alias Barik –vrs.- State of Orissa and others*** : 2010 (II) OLR 76.

Having perused the decision cited by the learned counsel for the petitioners which has been rendered by placing reliance on the Full Bench decision of this Court in ***Gulzar Khan –vrs.- Commissioner of Consolidation and others*** : 76 (1993) CLT 161, it is found that contentions raised on behalf of the petitioners are not unfounded. The revisional authority does not appear to have taken note of the principles indicated in the above cited decisions. In such circumstances, the matter is required to be remitted back to the revisional court for reconsideration of the revision on merit and passing order afresh after taking note of the principles indicated in the above cited decisions.

Accordingly, the writ petition is allowed. The impugned order is quashed. The matter is remitted to the Commissioner, Consolidation, Orissa, Bhubaneswar back with a direction that the revision petition shall be heard afresh after giving opportunity of being heard to the parties and order shall be passed afresh after taking note of the principles indicated in the above cited decisions.

Accordingly, the writ petition is disposed of.

Requisites for communication of a copy of this order along with a copy of the writ petition to the Commissioner, Consolidation, Orissa, Bhubaneswar be filed within a week.

Writ petition disposed of.

2013 (II) ILR - CUT- 288

B. K. PATEL, J.

W.P.(C) NO. 24781 OF 2012 (Dt.25.04.2013)

MANOJ KU. NAYAK & ANR. .....Petitioners

.*Vrs.*

GUNA MOHANTY & ORS. .....Opp.Parties

A. CIVIL PROCEDURE CODE, 1908 – O-39, R-1 & 2

Interim injunction – Court is required to consider prima facie case, balance of convenience and in convenience, irreparable loss so also the conduct of the party while considering interim order of injunction.

In this Case defendant Nos.4 and 5 claim title and possession over Lot No.11 property which were executed on 4.2.1986, 17.2.1997 and 7.3.2001 – In the mean time multi-storied buildings have been constructed on a part of the suit land and apartments of the building have been sold to a number of persons who are in possession – So in view of the sale made long back and entries made in the ROR and lands having been converted in OLR proceedings it cannot be held that the plaintiff has established a prima facie case – The entries in the ROR and construction of multistoried buildings have titled balance of convenience in favour of defendant Nos.4 and 5 – Any interference with such balance shall result inconvenience and irreparable loss to the defendants 4 & 5 – Moreover the plaintiff has slept over her right for a long period and filed the suit in the year 2012 so her conduct does not permit any equitable relief in her favour – Held, the impugned order of status quo relating to the lands under suit Schedule Lot No.11 is not sustainable – Order passed by both the Courts below so far it relates to maintenance of status quo over the lands under suit Schedule Lot No.11 is set aside. (Paras 12,13,14)

B. HINDU LAW – Joint family – Sale of undivided share in joint family property by a Coparcener – Right of the purchaser – It is well settled that transfer by one of the Co-owners remains valid to the extent of the share of the transferor – The Co-owner can transfer his undivided interest in a joint property and the transferee acquires right to enforce the sale. (Para 11)

Case laws Referred to :-

1.2010 (I) CLR (SC) 305 : (Kishorsinh Ratansinh Jadeja-V- Maruit Corp. & Ors.)
2.34(1992) OJD 137 : (Gourhari Das-V- Kalpataru Das & Ors.)
3.(2008)7 SCC 46 : (Hardeo Rai-V- Sankutala Devi & Ors.)
4.106 (2008) CLT 330 : (Smt. Bina Sukla-V- Smt. Meena Devi Panch & Ors.)
5.2009 (1) CLR 560 : (Harekrushna Mahakud-V- Rathanath Mahakud & Ors.).

For Petitioners - Sri Shyamananda Mohapatra, Sr. Advocate,

M/s. Bibekananda Bhuyan, B.N. Das, R. Ray, A.K. Rout & B. N. Mishra.

For Opp.Parties - M/s. P. N. Mohapatra, A.K. Rath, S.P. Das, (Caveator)

B.K. PATEL, J. In this writ petition, petitioners have assailed legality of order dated 24.11.2012 passed by learned District Judge, Khurda at Bhubaneswar dismissing FAO No.111 of 2012 and confirming the order dated 27.8.2012 passed by learned Civil Judge (Senior Division), Bhubaneswar in I.A. No.391 of 2012, a proceeding for temporary injunction under Order 39 Rules 1 and 2 read with Section 151 of the C.P.C., arising out of C.S. No.580 of 2012 by which parties were directed to maintain *status quo* over the suit property during pendency of the suit.

2. C.S. No.580 of 2012 is a suit for partition in respect of the suit lands described in the schedule to the plaint under Lot Nos.I and II. Lot No.I relates to Plot No.557 comprising of an area of Ac.0.59 decimals whereas Lot No.II relates to Plot No.1451 comprising of an area of Ac.0.400 decimals under Khata No.161 of Mouza Patia. At present Ac.0.200 decimals of land out of Lot No.II has been recorded under Mutation Khata No.474/2447 in the name of defendant no.5 and an area of Ac.0.200 decimals of land out of Lot No.II has been recorded under Mutation Khata No.474/2021 in the name of defendant no.4.

3. Opposite party no.1 as the plaintiff has filed the suit against the petitioners as defendant nos.4 and 5 respectively, opposite party nos.2 and 3 as defendant nos.2 and 3 respectively and defendant nos.1 and 6 claiming $1/4^{th}$ share over the suit lands. The suit lands originally belonged to and was recorded in the name of late Chintamani who died leaving behind his widow late Sebati, two daughters who are the plaintiff and defendant no.1, and two sons who are defendant nos.2 and 3. On 4.2.1986 defendant no.3 and his mother late Sebati executed registered sale deed in respect of Ac.0.200 decimals of land out of Lot No.II in favour of defendant no.6 and thereafter on 17.2.1997 defendant no.6 executed registered sale deed in respect of the said land in favour of defendant no.5. Defendant no.2 was a signatory to the registered sale deed dated 4.2.1986 as a witness. Defendant no.5 got the land purchased by her mutated in her name under Khata No.474/2447 in Mutation Case No.5249/ 2003. Also she has got the status of the land purchased by her converted to the status of 'Gharabari' in OLR Case No.5674/2007. It is also not disputed that on 7.3.2001 defendant no.2 executed registered sale deed in respect of balance Ac.0.200 decimals of land out of Lot No.II in favour of defendant no.4. Defendant no.3 was a

signatory to the sale deed as a consenting party. After purchase, defendant no.4 has got the land purchased by him mutated in his name under Khata No.474/2021 in Mutation Case No.1644/2001 and has got the status of the land purchased by him converted to the status of 'Gharabari' in OLR Case No.532/2008. These facts are not in dispute.

4. Plaintiff's case is that on 19.3.2012, when she was in peaceful possession over the suit lands, defendant no.4 threatened her of dispossession on the strength of registered sale deed executed and mutation of the case land made in his favour. Thereafter only the plaintiff could learn regarding alienation of the suit lands under Lot No.II by her co-sharers under the above said registered sale deeds. Plaintiff has assailed the sale deeds as wrong, illegal, misrepresentation of fact, nullity, void and not binding on the plaintiff in any manner. It is asserted by her that there being no partition of the joint family property left behind by late Chintamani, she is entitled to 1/4th share out of the suit lands under Lot Nos.I and II.

5. In her application under Order 39, Rules 1 and 2 read with Section 151 of the C.P.C. for temporary injunction, presented along with the plaint, plaintiff, in the backdrop of her claim to be a co-sharer in respect of the joint family property, alleged that not only defendant no.4 threatened her of dispossession from the suit property over which she is in peaceful possession but also defendant no.4 stacked raw materials to construct permanent structure. Also she could come to learn that defendant nos.2 and 3 were negotiating with outsiders to alienate land under Lot No.I. Under these assertions, prayer was made for grant of injunction against defendant nos.2 to 5 to restrain from alienating as well as from making construction of permanent structure over the suit land.

6. Defendant no.3 did not file any objection in the proceeding for temporary injunction.

7. Defendant nos.4 and 5 filed joint objection resisting the claim of temporary injunction. It is pleaded that after death of late Cintamani there was division in the family in course of which plaintiff and defendant no.1 took money value of their share of the joint property and specifically agreed not to claim any share by executing agreement dated 21.9.1999. As per amicable partition, eastern portion of the land under Lot No.II was allotted to defendant no.2 and western portion was allotted to defendant no.3. Defendant no.3 along with his mother late Sebati, for legal necessity, sold his share under Lot No.II to defendant no.6 for consideration through registered sale deed dated 3.2.1986 with the consent of defendant no.2 and delivered possession of the land to the vendee. Defendant no.6 while in

exclusive peaceful possession over his purchased land sold the same to defendant no.5 by registered sale deed dated 17.2.1997 for a consideration and delivered possession thereof. It is further pleaded that similarly defendant no.2 by registered sale deed dated 7.3.2001 sold his share out of the land under Lot No.II to defendant no.4 for consideration and delivered possession thereof with the consent of defendant no.3. Defendant nos. 4 and 5 claim to be in possession over the lands purchased by them. It is also pleaded that defendant no.5 has executed registered General Power of Attorney dated 24.2.2010 in respect of her purchased land in favour of M/s Uprise Constructions Pvt. Ltd. for construction of a residential multistoried complex in the name and style of 'SOURYA'. Accordingly after completion of construction work individual apartments have been transferred to different purchasers who are in peaceful possession of their respective purchased area. Plaintiff having not impleaded said purchasers in the suit for partition, the suit is liable to be dismissed. Claim of plaintiff to be in possession over the suit land is stoutly denied by these defendants.

8. Defendant no.2 in his objection has supported the case of defendant nos.4 and 5 and plead that late Chintamani, during his life time got his daughters, the plaintiff and defendant no.1, married by taking assistance from defendant no.2. After death of late Chintamani, the plaintiff and defendant no.1 voluntarily executed deed of relinquishment dated 21.9.1999 in the form of agreement in respect of the suit property. Consequently, defendant nos.2 and 3 became absolute owners of the suit lands. There was partition between defendant nos.2 and 3 on 15.2.2002 and they have disposed of the lands which fell to their shares to different persons and also gave delivery of possession of lands sold by them. Possession of the plaintiff has also been denied.

9. It was contended by the learned counsel for the petitioners that in passing the blanket order directing the parties to maintain *status quo* over the entire suit lands, including the lands under Lot No.II also, both the courts below utterly failed to appreciate the facts of the case as well as the legal ramification thereof. In arriving at their conclusion that the plaintiff has established existence of all the three ingredients, i.e., *prima facie* case, balance of convenience and irreparable loss, to be entitled to an order of temporary injunction, both the courts below have relied solely on 1973 Settlement ROR in which entire suit lands stood recorded in the name of late Chintamani. However, it is not disputed that subsequently the suit lands under Lot No.II have been mutated and recorded in the names of defendant nos.4 and 5. Execution of sale deeds by defendant no.3 and late Sebati in favour of defendant no.6, by defendant no.6 in favour of defendant no.5 and

by defendant no.2 in favour of defendant no.4 is not disputed. That apart, defendant nos.4 and 5 got the kissam of lands under Lot No.II converted to 'Gharabari' in OLR proceedings. Neither of the court below has taken note of all these transactions which remain undisputed. Presumptive value of possession, if any, arising out of the entries in the 1973 Settlement ROR in favour of all the legal heirs of late Chintamani stands rebutted by the entries made in the subsequent mutation records of right. That apart, it is also pertinent to note that the plaintiff has not made any prayer in the suit for setting aside any of the sale deeds. Placing reliance on the decision of the Hon'ble Supreme Court in **Kishorsinh Ratansinh Jadeja –vrs.- Maruti Corp. & Ors.** : 2010 (I) CLR (SC) 305, it was also contended that apart from *prima facie* case, balance of convenience and irreparable loss, in considering the application for temporary injunction under Order 39, Rules 1 and 2 of the C.P.C. the Court is required to consider also the conduct of the parties prior to institution of the suit. In the present case, the suit lands under Lot No.II were sold by the co-sharers of the plaintiff way back on 17.2.1997 and 7.3.2001. In the meanwhile, by virtue of General Power of Attorney dated 24.2.2010 executed by defendant no.5 not only multistoried complex has been constructed by third party builder but also apartments constructed thereon have been transferred to different purchasers who are in possession. Plaintiff claimed that each of the legal heirs of late Chintamani is entitled to $1/4^{th}$ share only out of the entire suit properties. Admittedly, neither defendant no.2 nor defendant no.3 has sold more than the extent of his share over the suit lands. Rather, Lot No.I comprises of an area of Ac.0.59 decimals which is more than the extent of share which the plaintiff and her sister defendant no.1 may be entitled to. In such circumstances, the impugned order of restraint so far as it relates to the lands under Lot No.II is not sustainable in law.

10. In reply learned counsel for the contesting opposite party no.1 supported and defended the impugned orders. It was contended that admittedly the entire suit lands belong to late Chintamani. There has been no partition of the suit lands between the plaintiff and her co-sharers. None of the co-sharers is entitled to transfer the joint property even to the extent of his/her undivided interested therein. In such circumstances, the court below rightly directed the parties to maintain *status quo* over the suit property until adjudication of plaintiff's claim of purchase.

11. It has been rightly pointed out by the learned counsel for the petitioners that both the courts below have referred only to the fact of recording of the suit lands in the name late Chintamani as the basis for coming to the conclusion that the plaintiff has established existence of *prima*

facie case, balance of convenience and irreparable loss in her favour. Neither the plaintiff nor the defendant nos.1,2 and 3 dispute execution of sale deeds by defendant no.3 and his late mother with the consent of the defendant no.2 in favour of defendant no.6, by defendant no.6 in favour of defendant no.5 and defendant no.2 with the consent of defendant no.3 in favour of defendant no.4 so far as suit schedule Lot No.II lands are concerned. After purchase of lands mutation Records-of-Right have been issued in favour of defendants 4 and 5 and also defendants 4 and 5 have got kissam of lands under Lot No.II converted to homestead. Orders in the mutation cases as well as conversion proceedings under the Orissa Land Reforms Act have to be presumed to have passed after due enquiry. Mutation Records-of-Right in favour of defendants 4 and 5 having been issued much later than publication of 1973 Settlement R.O.R., entries in mutation Records-of-Right have more presumptive value than the entries in the earlier Record-of-Right. In such circumstances, plaintiff could not have been held to have satisfied regarding existence of a *prima facie* case in her favour on the basis of entries in 1973 Settlement R.O.R. only. That apart, not only the defendants 4 and 5 but also plaintiff's co-sharer defendant no.2 have pleaded that there was partition of the joint family property. Specific case of defendant no.2 is that plaintiff and defendant no.1 voluntarily executed relinquishment deed dated 21.9.1999 in respect of the entire suit lands in favour of their brothers. Plaintiff has not prayed for relief of declaration that the three sale deeds on the basis of which defendants 4 and 5 claim title and possession are void documents. There is no prayer in the suit to set aside the sale deeds. Moreover, plaintiff does not dispute entitlements of each of defendants 2 and 3 to $1/4^{th}$ share out of the entire suit lands and the extent of lands out of Lot No.II by each of defendant nos. 2 and 3 does not exceed the latent of his share. It is well settled that transfer by one of the co-owners remains valid to the extent of the share of the transferor. The co-owner can transfer his undivided interest in a joint property and the transferee acquires right to enforce the sale. Reference in this connection may be made to the decisions in **Gourhari Das –vs- Kalpataru Das and others** : 34 (1992) OJD 137; **Hardeo Rai –vs- Sankutala Devi and others**: (2008) 7 SCC 46; **Smt. Bina Sukla –vs- Smt. Meena Devi Panch and others**: 106(2008) CLT 330 and **Harekrushna Mahakud –vs- Rathanath Mahakud & Ors**: 2009(1) CLR 560.

12. The three sale deeds on the basis of which defendants 4 and 5 claim title and possession over Lot No.II property were executed on 4.2.1986, 17.2.1997 and 7.3.2001. In the meanwhile, multi-storied building is asserted to have been constructed on a part thereof. It is also asserted that apartments of the building have been sold to a number of persons who are

in possession. Plaintiff has all along remained silent till filing of the present suit in the year 2012. Therefore the conduct of the plaintiff also comes on the way of granting equitable relief of temporary injunction in her favour. In **Kishorsinh Ratansinh Jadeja –vrs.- Maruti Corp. & Ors.**(supra) the Supreme Court having point out that Court is required to consider principles of *prima facie* case, balance of convenience and inconvenience, and irreparable loss and injury in passing interim order of injunction, further held that the Court is required to consider also conduct of the party. It was held as follows:

> "the question of conduct of the Respondent No.1 also becomes relevant, inasmuch as, having slept over its rights for more than 19 years, it will be inequitable on its prayer to restrain the owners of the property from dealing with the same, having particular regard to the fact that a large portion of the land has already been conveyed to as many as 280 purchasers who are in the process of erecting constructions thereupon."

13. Thus, in view of sale transactions made long back and entries made in the Records-of-Right on the basis of such transactions in mutation and OLR conversion proceedings, it cannot be held that the plaintiff has established a *prima facie* case to be entitled to grant of temporary injunction in respect of lands under suit schedule Lot No.II. The entries in the Records-of-Right and construction of multistoried building have tilted balance of convenience in favour of defendants 4 and 5. Any interference with such balance shall certainly result inconvenience and irreparable loss to the defendants 4 and 5. Therefore, the impugned order so far as it relates to lands under suit schedule Lot No.II is concerned, is not sustainable.

14. Accordingly, the order passed by the both the courts below so far as it relates to maintenance of *status quo* over the lands under suit schedule Lot No.II is concerned, is set aside. The writ petition is accordingly disposed of.

Writ petition disposed of.

2013 (II) ILR - CUT- 295

B. K. NAYAK, J.

CRLREV. NO. 733 OF 2011 (Dt.01.03.2013)

KONAPALU SURYA NARAYANA ……Petitioner

.Vrs.

STATE OF ORISSA .....Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.228

Framing of charge – Stage of –Duty of Court – Court has power to shift and weigh the evidence to find out whether a prima facie case against the accused has been made out.

In this case even if the petitioner had not touched the tainted currency notes kept on his table but the statement of witnesses clearly reveal the factum of demand and acceptance of bribe – Held, framing of charges against the petitioner U/s.7, 13 (2) read with Section 13 (1) (d), P.C. Act by the impugned order cannot be faulted with.

(Paras 7, 8)

Case laws Referred to:-

1.AIR 1990 SC 1962 : (Niranjan Singh Karam Singh Punjabi-V- Jitendra Bhimraj Bijja & Ors.)

2.AIR 1979 SC 366 : (Union of India-V- Prafulla Kumar Samal).

For Petitioner - M/s. J.R. Dash, Mrs. L.K. Dash & S.K. Ratha.
For Opp.Party - Standing Counsel (Vigilance).

B.K. NAYAK, J. This Criminal Revision has been filed by the petitioner challenging the order dated 17.8.2011 passed by the learned Special Judge (Vigilance), Jeypore in G.R Case No.8 of 2010 framing charges under Sections 13(2) read with 13(1)(d) and Section 7 of the Prevention of Corruption Act, 1988.

2. The prosecution case in a nutshell is that while the petitioner was working as Revenue Inspector, Chalkamba, one Purna Chandra Sabar filed an application before the Tahasildar, Gunupur for mutation of certain land in his favour which he had purchased on 2.5.2009. The Tahsaildar forwarded the mutation application, i.e., M.C. No.1438 of 2009 to the present petitioner for enquiry and report. Thereafter, the applicant, Purna Chandra Sabar went to the petitioner and requested him to furnish the enquiry report to the Tahasildar whereupon the petitioner demanded Rs.500/- per acre from him for furnishing the enquiry report. When Sri Sabar expressed his inability to pay the amount, the petitioner asked him that unless he pays Rs.2,000/-, the

report will not be sent. Finding no other alternative, Sri Sabar under compulsion paid Rs.500/- to the petitioner and about five days thereafter met the petitioner and expressed his inability to pay any further amount. The petitioner, however, asked him to pay Rs.1,000/- more. Finding no other alternative, Sri Sabar agreed to pay the same on 19.2.2010 at his office and reported the matter to the Vigilance Department. A trap was arranged for 19.2.2010 and accordingly, independent officials, namely, Tankadhar Jani, Senior Clerk, Office of the District Agriculture Officer, Rayagada and Sri Debi Prasad Nayak, Assistant Agriculture Officer, Kolnara, District- Rayagada were called to the office of the D.S.P., Vigilance, Rayagada on 18.2.2010 and requested to assist the vigilance officials for execution of the confidential assignment. Accordingly, ten number of hundred-rupee notes brought by the complainant were smeared with phenolphthalein powder on both sides and a solution of sodium carbonate was prepared and other formalities were done. Thereafter, on 19.2.2010, the trap party went to Chalkamba. As per the previous plan, the trap party remained at a little distance in plain clothes whereas, the informant was sent with the tainted currency notes along with Tankadhar Jani, the accompany/over-hearing witness to the office of the petitioner. While the informant entered inside the office room of the petitioner, the over-hearing witness, Tankadhar Jani stayed near the door from where both the petitioner and Sri Sabar were visible and audible. Seeing the complainant, the petitioner asked him for money and when the complainant gave him the money, the petitioner instructed him to keep the same on his table. Accordingly, the complainant kept the same on the table of the petitioner. Seeing this transaction, the over-hearing witness-Tankadhar Jani gave prearranged signal to the remaining members of the trap team whereupon the members of the trap team rushed to the office of the petitioner. The Deputy Superintendent of Police, Vigilance gave the identities of the members of the trap team, after which the face of the petitioner turned pale. Being confronted, the complainant stated that as per the instruction of the petitioner, he kept the tainted bribe money of Rs.1,000/- on the table of the petitioner. On interrogation, the petitioner denied to have demanded and accepted the bribe of Rs.1,000/- from the complainant. The left and right hand finger wash of the petitioner was taken one after another in the Sodium Carbonate Solution, but there was no change in colour. On being asked, the petitioner produced the mutation record of the complainant consisting of 18 sheets including the enquiry report of the petitioner dated 18.2.2009, The Mutation Record was seized by the Vigilance Inspector.

3. On completion of investigation, charge sheet was submitted.

4. It was submitted by the learned counsel for the petitioner that since the petitioner had not touched the tainted currency notes which was placed

by the complainant on the petitioner's table, the trap has failed and, therefore, the offence under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 cannot be said to have been made out. Therefore, no charge for those offences could have been framed against the petitioner.

5. Learned Standing Counsel for the Vigilance Department, on the other hand, submitted that even if the petitioner had not touched the tainted money of Rs.1,000/- but allegation of the complainant and statements of the witnesses, particularly, the overhearing witness, Tankadhar Jani goes to clearly show that there was a conversation between the complainant and the petitioner about the money and accordingly, the complainant offered the money to the petitioner, who asked him to keep it on the table. Therefore, merely because by the time of arrival of the vigilance sleuths, the petitioner had not touched the tainted money, it cannot be stated that no offence has been made out.

6. It has been held by the apex Court in the decision reported in **AIR 1990 SC 1962** (**Niranjan Singh Karam Singh Punjabi** v. **Jitendra Bhimraj Bijja and others**) that at the stage of framing of charge, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose shift the evidence.

The apex Court in the case of **Union of India** v. **Prafulla Kumar Samal** reported in **AIR 1979 SC 366** observed that while considering the question of framing the charges the Court has the undoubted power to shift and weigh the evidence for the limited purpose of finding out whether or not, a prima facie case against the accused has been made out. Where the materials placed before the Court disclosed grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial. The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application.

7. Considering the facts of the present case in the light of the dictum as aforesaid, it is found that admittedly, the mutation case record of the complainant had been forwarded to the petitioner for enquiry and report. The statements of the independent overhearing witness-Tankadhar Jani and that of the complainant clearly show that on seeing the complaint, the petitioner asked for the money and accordingly, the complainant offered the same and

on the direction of the petitioner, he kept the money on the table of the petitioner. Even though the petitioner did not touch the money, still then, the statements clearly reveal the factum of demand and acceptance of bribe. Even otherwise, it is the allegation of the complainant that on the demand of the petitioner he had earlier paid Rs.500/- and the balance demand was finally settled at Rs.1,000/-. Though in his statement recorded under Section 164, Cr.P.C., the witness, Tankadhar Jani did not say about the demand of the money by the petitioner and placing of the tainted money by the complainant on the table of the petitioner as per the instruction, that cannot be a ground to disregard the statement given by the witness before the Investigating Officer. In any event, both the statements recorded under Sections 161 and 164, Cr.P.C. are to be used only for contradicting the maker of the statements.

8. Considering the statements of the witnesses and entire materials of record, I am of the view that the materials disclosed grave suspicion against the petitioner in the facts and circumstances of the case and, therefore, the framing of charges against him by the impugned order cannot be faulted with. The Criminal Revision, being devoid of merit, is dismissed.

Revision dismissed.

2013 (II) ILR - CUT- 299

B. K. NAYAK, J.

CRLREV NO. 701 OF 2012 (Dt.07.02.2013)

BAIJAYANTI SWAIN & ANR. ……..Petitioners

.Vrs.

STATE OF ODISHA ……..Opp.Party

PENAL CODE, 1860 – S.120-B

Criminal Conspiracy – Offence of Criminal Conspiracy has its foundation in an agreement to commit an offence – A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means.

In the instant case there is no allegation of any understanding or agreement by the petitioners with the Vice-Chairman of CDA (co-accused) to cause a pecuniary gain either to the co-accused or to the petitioners – Held, framing of charge against the petitioners was unwarranted hence the impugned order is set aside. (Para 7)

Case laws Referred to:-

1.2012 AIR SCW 5567 : (Prataphai Hamirbhai Solanki-V- State of Gujarat & Anr.).
2.AIR 1996 SC 1568 : (Ghulam Din Buch etc. etc.-V- State of Jamu & Kashmir).

For Petitioners - M/s. Sanjib Swain, S.Ch.Panda & B.R.Rath.
For Opp.Party - Standing Counsel (Vigilance).

B.K.NAYAK, J. The petitioners along with another are accused persons in T.R. Case No.332 of 2007 pending in the court of the learned Special Judge (Vigilance), Cuttack for alleged commission of offences under Section 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act and Section 120-B of the I.P.C. The petitioners' application to discharge them having been rejected by the learned Special Judge (Vigilance), Cuttack by his order dated 03.11.2011, they have filed this criminal revision.

2. In a nutshell the prosecution case is that on the allegation that the then Vice-Chairman, Cuttack Development Authority, Cuttack (co-accused) was showing undue official favour to the petitioners' firm, M/s.Chinmayee Enterprisers and thereby causing loss to the C.D.A., an enquiry was taken up. The enquiry revealed that co-accused, who was the Vice Chairman, C.D.A. from 30.06.1999 to 16.05.2001 invited quotations vide Notice No.19056/CDA dated 30.10.2000 for purchase of 5000 number of good quality well dressed granite stone pillars of size 5" x 5"x 2' for use in different sections of Bidanasi Project Area. On the basis of the quotation call notice, three firms including the petitioners' firm offered their quotation. The other two firms, namely, M/s. Juvenile Enterprisers, Talatelenga Bazar, Cuttack and M/s. Abhisek Enterprisers, Palitpara, Cuttack offered their quotations @ Rs.111/- and 110/- whereas the petitioners' firm quoted Rs.99/- per pillar stone. It was alleged that no Tender Call Notice was given through the newspapers by the Vice Chairman of the C.D.A. for wide publicity, though the materials worth Rs.4,50,000/- were purchased in bulk, thereby violating the provisions of O.G.F. Rule-96 and O.P.W.D. Code-3-5-9. It is further

alleged that after receipt of the quotations, the Dealing Assistant and Planning Member of the C.D.A. gave office note indicating that the earlier purchase rate per pillar stone was @ Rs.38.90, but the Vice Chairman, C.D.A. made negotiation with the petitioners and ultimately supply order was placed @ Rs.90 per piece of pillar stone and an agreement was executed with the petitioners' firm. The firm supplied 5000 number of pillar stones in two phases. A sum of Rs.2,70,000/- was paid to the firm towards the cost of 3000 pillar stones supplied in 1st phase and payment for the rest 2000 number of pillar stones is yet to be made. During enquiry it was also ascertained that the pillar stones of the size 6" x 5" x 2' were purchased by the Settlement Officer, Cuttack @ Rs.35/-per piece during the relevant year. It is alleged that had there been wide publicity by the C.D.A. about the requirement they would have got the material at better competitive rates. It is thus alleged that the co-accused, Vice-Chairman of the C.D.A. conspiring with the petitioners for pecuniary gain had paid excess amount of Rs.1,65,000/- with ulterior motive in disregard of the O.G.F. Rule and O.P.W.D. Code.

It is also alleged that during the investigation, it was found that the petitioners' firm itself had supplied pillar stones in the previous year (i.e., 1999-2000) @ Rs.38.90 per piece.

3. The learned counsel for the petitioner submits that though the petitioners are being charged under Sections 120-B of the I.P.C. along with the co-accused, there is no iota of material to show that any agreement was reached between the petitioners and the Vice Chairman of the C.D.A. to cause any wrongful pecuniary gain to any body or any wrongful loss to the C.D.A. or any other wrongful act and in absence of any material with regard to such agreement or meeting of mind by the accused persons, no charge of conspiracy could be framed against the petitioners. It is his further submission that in case the Vice –Chairman of the C.D.A. failed to follow any Rule of O.P.W.D. Code or O.G.F. Rule, the petitioners could not be held liable for such violation.

4. Learned Standing Counsel for the Vigilance Department, on the other hand, submits that there cannot be any direct evidence of conspiracy in each and every case and that conspiracy can be gathered from the circumstances. It is his submission that in the instant case, the petitioners themselves having supplied similar stone pillars on the very previous year @ only Rs.38.90 per piece, it cannot be expected that within a year the price was increased to Rs.90/- per piece and that this rise in price within a short duration by itself is a circumstance to presume that the petitioners entered into a conspiracy with the co-accused-Vice Chairman.

5. Conspiracy has its foundation in an agreement to commit an offence. It consists not merely of the intention of two or more, but in the agreement of two or more persons to do an unlawful act by unlawful means. In this connection, the following observation of the Hon'ble apex Court in the case of ***Prataphai Hamirbhai Solanki v. State of Gujarat & Another : 2012 AIR SCW 5567*** is worth noting :

> "22. In Ram Narayan Popli v. Central Bureau of Investigation, while dealing with the conspiracy the majority opinion laid down that the elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to co-operate for the accomplishments of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. It has been further opined that the essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. No overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indicatable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. The two-Judge Bench proceeded to state that for an offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means."

6. As has been submitted by the learned Standing Counsel for the Vigilance Department relying on the decision of the Hon'ble apex Court in ***Ghulam Din Buch etc. etc. v. State of Jammu & Kashmir: AIR 1996 SC***

1568, there is no controversy over the proposition that the ingredients of offence of conspiracy can be inferred from circumstances drawn from materials available on record. However, without there being any acceptable material pointing to the circumstances, no inference about commission of conspiracy can be drawn.

7. In the instant case, admittedly there is no allegation of any understanding or agreement by the petitioners with the Vice Chairman of C.D.A. (co-accused) to cause a pecuniary gain either to the co-accused or to the petitioners. The only circumstance pointed out by the learned Standing Counsel for the Vigilance Department is the allegation that in the very previous year, i.e., 1999-2000, the petitioners' firm supplied granite stone pillars @ 38.90 per piece whereas in the relevant year 2000-01 the cost of stone pillar was unusually increased to Rs.90/- per piece. In support of such contention the learned Standing Counsel refers to the statements of some witnesses recorded by the Investigating Officer during investigation. The statement of one Sriniwas Mohapatra, Finance and Accounts Member of C.D.A. reveals that the previous price of Rs.38.90 per pillar was during the year 1995-1996 and not during 1999-2000. His statement does not reveal that the petitioners' firm had supplied pillar during such previous procurement. The statement of one Laxmidhar Mahalik, Senior Assistant, C.D.A, is also to the same effect. The only statement of one Dusmant Kishore Swain, Senior Accounts Assistant, C.D.A. is that the very same firm (petitioners' firm) supplied same materials in the previous year @ Rs.38.90 per piece. It is the specific assertion of the petitioners that they had not supplied any stone pillars to C.D.A. earlier or even in the previous year @ Rs.38.90 per piece. With reference to the statement of Dusmant Kishore Swain, the learned Standing Counsel vigilance Department was directed to point out from the case diary or produce documentary materials with regard to procurement of stone pillars by C.D.A. in the previous year i.e., 1999-2000 and supply of the same by petitioners firm. The learned Standing Counsel admitted that no such document has been seized by the I.O. during investigation. He also failed to produce any such document. Therefore, in view of the specific statements of two senior staffs as noted above that the previous procurement was in the year 1995-96 and that there being no document to show that the petitioners' firm supplied any material in the previous year, i.e., 1999-2000, the circumstance pointed out by the learned Standing Counsel has no basis. Apparently, the trial court without adverting to the aforesaid materials and without being alive to the ingredients of offence of conspiracy has jumped to the conclusion that the accused-Vice-Chairman, C.D.A., Cuttack entered into conspiracy with the petitioners and passed order for supply of granite stone pillars by the petitioners' firm at a

higher rate. The framing of charge against the petitioners was therefore unwarranted and hence the impugned order cannot be sustained.

Resultantly, the impugned order is set aside and the petitioners are discharged from the offences charged. The CRLREV is accordingly disposed of.

Revision disposed of.

2013 (II) ILR - CUT- 304

B. K. NAYAK, J.

CRLREV. NO. 553 OF 2012 (Dt.10.04.2013)

G. DEVENDRA RAO ……..Petitioner

.*Vrs.*

G. PUSPA PRABHA RAO @ DORA & ANR. ……..Opp.Parties

CRIMINAL PROCEDURE CODE, 1973 – S.125 (4)

Maintenance – Grant of – Divorced wife can claim maintenance, even though, a decree of divorce has been passed against the wife on the ground of desertion.

Case laws Referred to:-

1.AIR 2000 SC 952 : (Rohtash Singh-V- Smt. Ramendri & Ors.)
2.1998 CRL. L.J. 4740 : (Jashelal Agrawal @ Jain-V- Smt.Puspabati Agrawala)
3.2006(Supp.-1) OLR 575 : (Sri Debaraj Patra-V- Smt. Radha Patra).

For Petitioner - M/s. Biplab P.B. Bahali
For Opp.Parties - M/s. A. P. Bose

Heard learned counsel for the parties.

Order dated 25.08.2012 passed by the learned S.D.J.M., Bargarh in Criminal Misc.Case No.52 of 2012 directing payment of interim maintenance at the rate of Rs.1000/- and Rs.500/- respectively in favour of the opposite

party Nos. 1 and 2 under section 125 Cr.P.C. and litigation expenses of Rs.10,000/- has been challenged in this criminal revision.

The only contention raised by the learned counsel for the petitioner is that opposite party No.1, who was the wife of the petitioner was divorced by virtue of a decree of divorce dated 08.03.2007 passed by the learned Civil Judge (Senior Division), Sambalpur in Matrimonial Case No.06 of 2004 on the ground of desertion and therefore, in terms of Sub-Section(4) of Section 125 of Cr.P.C. she is not entitled to get maintenance.

Learned counsel for the petitioner submits that since as per the explanation the wife includes a divorced wife and since under sub-section (4) of Section 125 Cr.P.C. the wife who has deserted the husband and refused to live with him without sufficient reason is not entitled to maintenance, a wife "divorced" on the ground of desertion is also not entitled to get maintenance.

Law on this point has already been settled by the apex court in the decision reported in **AIR 2000 S.C. 952 (Rohtash Singh-v.-Smt.Ramendri and others.)** where delineating the various provisions of Section 125 Cr.P.C. the apex court held as under:

> "7. The second ground on which she would not be entitled to maintenance allowance is the ground of her refusal to live with her husband without any sufficient reason. This also presupposes the subsistence of marital relations between the parties. If the marriage subsists, the wife is under a legal and moral obligation 'to live with her husband and to fulfill the marital obligations. She cannot, without any sufficient reason, refuse to live with her husband. "Sufficient reasons" have been interpreted differently by the High Courts having regard to the facts of individual cases. We are not required to go into that question in the present case as admittedly the marriage between the parties came to an end on account of a decree for divorce having been passed by the Family Court. Existence of sufficient cause on the basis of which the respondent could legitimately refuse to live with the petitioner is not relevant for the present case. In this situation, the only question which survives for consideration is whether a wife against whom' a decree for divorce has been passed on account of her deserting the husband can claim maintenance allowance under section 125 Cr.P.C. and how far can the plea, of desertion be treated to be an effective plea in support of the husband's refusal to pay her the maintenance allowance.

9A.Claim for maintenance under the first part of Section 125 Cr.P.C. is based on the subsistence of marriage while claim for maintenance of a divorced wife is based on the foundation provided by Explanation (b) to; Sub-section (1) of Section 125, Cr.P.C. If the divorced wife is unable to maintain herself and if she has not remarried, she will be entitled to maintenance allowance. The Calcutta High Court had an occasion to consider an identical situation where the husband had obtained divorce on the ground of desertion by wife but she was held entitled to maintenance allowance as a divorced wife under Section 125 Cr.P.C. and the fact that she had deserted her husband and on that basis a decree for divorce was passed against her was not treated as a bar to her claim for maintenance as a divorced wife. (See : Sukumar Dhibar v. Smt. Anjali Dasi MANU/WB/0387/1982. The Allahabad High Court also, in the instant case, has taken a similar view. We approve these decisions as they represent the correct legal position."

This Court has also in the case reported in **1998 CRL.L.J.4740 (Jashelal Agrawal alias Jain-v.-Smt.Puspabati Agrawala)** has held that even if a decree of divorce has been passed against the wife on the ground of desertion, she can claim maintenance under section 125 Cr.P.C. The decision in Rohtash Singh case (supra) has also been relied upon by this Court in the decision reported in **2006 (Supp.-1)OLR 575** (**Sri Debaraj Patra –v-Smt.Radha Patra**) and grant of maintenance to a divorced wife was upheld even though the divorce was on the ground of desertion.

In view of such legal position the contention raised on behalf of the learned counsel for the petitioner has no force and the impugned order suffers from no infirmity.

CRLREV is accordingly dismissed.

Learned S.D.J.M., Bargarh is directed to dispose of the main proceeding under section 125 Cr.P.C. expeditiously preferably within a period of three months from the date of production of the copy of this order. Arrear interim maintenance shall be paid by the petitioner to the opposite parties without unreasonable delay.

Revision dismissed.

2013 (II) ILR - CUT- 307

S. K. MISHRA, J.

CIVIL REVISION NO.43 OF 2004(Dt.03.05.2013)

BISHNU CHARAN MOHANTY & ANR. ……Petitioners

.Vrs.

RAHAS BIHARI DAS & ORS. ……Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-21, R-99 & 100, r/w Section 17 & Article 128 Limitation Act, 1963

Application for restoration of suit land – Dispossession took place on 20.08.1986 and petition for restoration filed on 23.02.1987 i.e. after 30 days of the dispossession – Maintainability – Admittedly neither the plaintiff nor the defendants brought to the notice of the Court that the Opp.Parties have purchased the land in question from their predecessor in interest – Such concealment amounts to fraud on the Court – Only after she came to know about her dispossession from other source she filed application for restoration of the property in her favour – Held, the period of limitation will run from the date of her knowledge and not from the date of dispossession from the property in question – No scope for interference with the impugned orders passed by the Courts below. (Paras 10, 11)

Case laws Referred to:-

1.AIR 1938 Calcutta 192 : (Rajendra Kishore Pal Choudhury & Anr.-V- Asirrulla & Anr.)
2.AIR (39) 1952 Patna 152: (Bhukhal Tewari-V- Ramdayal Sah)
3.AIR 1973 Calcutta 144 : (Hemanta Ku. Dev -V- Taramani Devi Tibriwalla)
4.AIR 2005 SC 3460 : (Damodaran Pillai & Ors.-V- South Indian Bank Ltd.)
5.AIR 2001 SC 2763 : (Pallv Sheth-V- Custodian & Ors.).

For Petitioners - M/s. P.K. Kar, D.K. Rath, B. Padhi, A. Acharya & R.P. Dalai.
For Opp.Parties - M/s. J. Sahu, H.K. Tripathy, M.K. Rout, J.P. Patra & S.P. Nayak.

S.K.MISHRA, J. In this Civil Revision filed under Section 115 of the Code of Civil Procedure, 1908, hereinafter referred as the 'Code' for brevity,

the petitioners being the opposite parties in Misc. Case No.95 of 1987 of the court of Subordinate Judge, Bhubaneswar, has assailed the order passed by the learned Addl. District Judge, Bhubaneswar upholding the order passed by the learned Subordinate Judge in the aforesaid case, thereby directing the petitioners to put back the suit land to the possession of the opposite parties.

2. The case of the petitioners before the original court may be stated as follows:

The petitioner purchased a piece of land measuring Ac.0.189 decimals from plot no.151/1312 under Khata No. 42 and from plot no.151/1314 under Khata No.171 as per the details given in schedule of the petition under a registered sale deed dated 15.04.1958 for a consideration of Rs.470/- and was delivered with possession of the same and continued to remain in possession by constructing boundary walls and paying rent regularly. The petitioner being a Government servant and was posted at different places, she could not take appropriate steps in settlement proceeding though she was in physical possession and subsequently came to know that settlement proceeding was finalized and R.O.R. was published in the year 1962. However, the petitioner in 1964 applied for mutation of her name as the possessed area of the petitioner was included in plot no.260/1372 and 260 under Khata No.179 of mouza-Laxmisagar in 1962 Settlement. In the said mutation proceeding, the Tahasildar, Bhubaneswar after due inquiry mutated the name of this petitioner by carving out a separate Khata bearing no.313/54 out of Khata No. 179. Taking into consideration the possessed area of the petitioner, two plots were carved out bearing plot no.260/1372/1612 having an area of Ac.0.110 decimals and plot no.260/1613 having an area of Ac.0.79 decimals corresponding to Sabik plot no.151/1314 and 151/1312 respectively. The tenancy ledger and the village map were corrected accordingly and the petitioner continued to pay rent.

3. In the current settlement, the suit village was renamed as Saralanagar under Unit No.31 and the possession of the petitioner was noted and a new plot was assigned to the possessed area of the petitioner and draft record of right was published in favour of the petitioner with respect to new plot no.71 having an area of Ac.0.189 decimals. Thus, the petitioner remained in physical possession of the suit plot from the date of her purchase having a good title over the same. The petitioner retired from her service on 31.01.1987 and on 20.02.1087 she came to know that opposite parties 1 and 2 after demolishing a part of boundary wall have

trespassed into the schedule area and have cultivated the same forcibly. On enquiry it was revealed that opposite parties 1 and 2 instituted a suit before this court bearing O.S. No.32 of 1977 against opposite parties 3 to 5 for partition of certain lands including the suit land and the suit was decreed preliminarily on 14.04.1980. It was made final on 21.02.1984 confirming the report of the Commissioner and thereafter Execution Case No.18 of 1975 was initiated and the opposite parties 1 and 2 alleged to have taken possession under the execution of the said decree. The petitioner was not a party to the aforesaid litigation nor she was aware of the execution of the decree. Only after 20.02.1987, the petitioner came to know about her dispossession. The further case of the petitioner is that opposite parties 1 and 2 and their predecessors are the subsequent purchasers from the daughters of the petitioners' vendor and daughter of Bika Behera had sold land from the schedule khata when Bika Behera was alive, for which no title could be passed. However, the sale if any shall be subject to earlier sale made by Bika Behera in favour of the petitioner and the area purchased by the petitioner should not have been included as suit land in the partition. But opposite parties 1 and 2 without disclosing the true fact and their source of title have practiced fraud on the court and opposite parties 1 and 2 in order to make unlawful gain have not produced the uptodate tenancy ledger and have deliberately concealed the facts of current settlement, which is in progress since 1974 and parcha of which were made available in 1976. Opposite parties 1 and 2 while obtaining the schedule property as the holder of the decree have dispossessed the petitioner who is not a judgment-debtor nor is bound by the decree. Moreover, the schedule plot bears a different number and as per tenancy ledger the suit land has a distinct entry for which the area could not have been the subject matter of suit nor was liable to be taken possession of the suit land in execution of the decree. It is further stated by the petitioner that the petitioner was and is the lawful title holder and is in physical possession of the schedule property is not in any way bound by the decree, she is entitled to be put in possession and remain in possession over the schedule property. Hence, the Misc. Case was filed by the petitioner praying for the aforesaid relief.

4. The opposite parties challenge that the petition of the petitioner is not maintainable since the petitioner cannot legally claim her purchased land by way of adjustment from out of the land fallen to the share of the opposite parties in a duly constituted partition suit between four co-sharers. Therefore, the opposite parties, i.e. the petitioners in this revision, have prayed to dismiss it. The learned Subordinate Judge after taking into consideration the materials placed before him came to the conclusion that the suit land has been wrongly included in the schedule of the partition suit

and this fact was not known to the petitioner. Therefore, finding her to be the lawful owner of the suit plot passed an order for restoration of the land in question to her. Such order was assailed in the Misc. Appeal No.41/101 of 2002/97 and the learned Addl. District Judge, Bhubaneswar, as per judgment dated 22.03.2004 dismissed the appeal upholding the order passed by the learned Subordinate Judge. Such concurrent findings of facts have been assailed in this Civil Revision.

5. In course of hearing of the Civil Revision, in essence, two legal questions were advanced by the learned counsel for the petitioners i.e. the decree holder. Firstly, it was contended that after disposal of the execution case, a petition under Order XX1, Rule 99 or 100 is not maintainable. Secondly, it was contended that as per Article 128 of the Limitation Act, 1963, hereinafter referred as the 'Act' for brevity, the application for possession by one dispossessed of immovable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree is thirty days from the date of possession. Since the petitioner was dispossessed on 20.08.1986 and the petition under Order XXI, Rule 99 of the Code was filed on 22.01.1987, it is contended by the learned counsel for the decree-holder-petitioner in this writ application that the application is barred by limitation.

6. As far as the first question is concerned, both the courts below i.e. appellate and original have come to the finding that the petition for restoration of property delivered in an execution proceeding wrongly to another person can be restored under Order XXI, Rule 100 of the Code even after disposal of the execution case. Order XXI, Rules 99 and 100 of the Code reads as follows:

> "99. **Dispossession by decree-holder or purchaser.-** (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.
>
> (2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.
>
> 100. **Order to be passed upon application complaining of dispossession-** Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination,-

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit."

So an application for recovery of possession is to be filed under Rule 99, whereas the Court has power to order for restoration of the property to the petitioner under Rule 100. In **Rajendra Kishore Pal Chaudhury and another v. Asirrulla and another,** AIR 1938 Calcutta 192; the Calcutta High Court has held that an order under Order XXI, Rule 100 of the Code can be entertained by the court, even where dispossession had taken place after termination of execution proceedings. In **Bhukhal Tewari v. Ramdayal Sah and others,** AIR (39) 1952 Patna 152; the Patna High Court has held that the applicant was aggrieved by the delivery of possession though he came to know of it subsequently when the auction-purchaser actually went and interfered with his possession. The Court has further held that the application was maintainable under the provisions of Order XXI, Rule 100 of the Code even after disposal of the execution case. So the contention raised by the learned counsel for the petitioner-decree holder is not sustainable and the same is therefore rejected.

7. Coming to the next question of limitation, this Court takes note of the fact that it is admitted that the dispossession took place on 20.08.1986 and the petition for restoration of the suit has been filed on 23.02.1987. Thus, admittedly, the restoration petition has been filed after 30 days of the dispossession. In this connection, learned counsel for the petitioners has relied upon the reported case of **Hemanta Kumar Dev v. Taramani Devi Tibriwalla,** AIR 1973 Calcutta 144; and **Damodaran Pillai and others v. south Indian Bank Ltd.,** AIR 2005 SC 3460.

8. In the case of **Hemanta Kumar Dev v. Taramani Devi Tibriwalla** (supra), the Calcutta High Court has very clearly laid down that application under Section 5 of the Limitation Act is not applicable to any provision of the Order XXI of the Code and it is held that an application under the rule filed after thirty days period of possession from the date of dispossession is liable to be dismissed in limine.

9. In the case of **Damodaran Pillai and others v. South Indian Bank Ltd.** (supra), the Supreme Court has held that for restoration of execution application, the limitation will start from the date of order of dismissal of the

execution application and not the knowledge thereof. So the ratio decided in the aforesaid case is not applicable to the case in hand. However, the ratio decided in the case of **Hemanta Kumar Dev v. Taramani Devi Tibriwalla** (supra) is applicable to the present case. So it is to be seen whether the restoration petition under Order XXI, Rule 99 is barred by limitation or not.

10. In course of hearing, learned counsel for the opposite parties has relied upon the provision of Section 17 of the Limitation Act, which is quoted below:

> "17. **Effect of fraud or mistake.-** (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,-
>
> (a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or
>
> (b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or
>
> (c) the suit or application is for relief from the consequences of a mistake; or
>
> (d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him;
>
> the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:
>
> Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting any property which –
>
> (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transact tin in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the Court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order;

Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be."

In interpreting this provision of law, the Supreme Court in **Pallv Sheth v. Custodian and others,** AIR 2001 SC 2763; at paragraph 47 has held that

"47. Section 17 of the Limitation Act, inter alia, provides that where, in the case of any suit or application for which a period of limitation is prescribed by the Act, the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of the defendant or his agent. (Section 17(1)(b)) or where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him (Section 18(1)(d)), the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production. These provisions embody fundamental principles of justice and equity, viz., that a party should not be penalized for falling to adopt legal proceedings when the facts or material necessary for him to do so have been willfully concealed from him and also that a party who has acted fraudulently should not gain the benefit of limitation running in his favour by virtue of such fraud."

The ratio decided in the case of **Pallv Sheth v. Custodian and others** (supra) is applicable to this case. It is admitted that neither the plaintiff nor the defendants has actually brought to the notice of the Court that the opposite parties have purchased the land in question from their predecessor in interest. Such concealment amounts to fraud on the Court. Only after she came to know about her dispossession from other source, she has filed an application for restoration of the property in her favour.

11. In that view of the matter, this Court is of the opinion that the period of limitation will run from the date of her knowledge and not from the date of dispossession from the property in question. Accordingly, this Court comes to the conclusion that the learned Subordinate Judge, Bhubaneswar has not committed any error nor the Addl. District Judge has committed any error by confirming the finding recorded by the learned Subordinate Judge. There is hardly any scope to interfere with the orders passed by the original court as well as the confirmed order passed by the appellate court. The Civil Revision is accordingly dismissed. But keeping in view the fact of the case, there is no order as to costs.

Revision dismissed.

2013 (II) ILR - CUT- 314

C. R. DASH, J.

CRLMC. NO. 687/10 & 594/09 (Dt.06.05.2013)

RATNAKAR SAHU ……..Petitioner

.Vrs.

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

CRIMINAL TRIAL – Dowry death case – Trial Court dispensed with charge sheet witnesses – Order challenged by the informant – Locus standie – No provision in Cr. P.C. giving power to a trial Court to dispense with examination of charge sheet witnesses unless he/she is declared by the prosecution – Held, impugned orders set aside – Direction issued to the trial Court to take all steps to procure the attendance of the Medical officer and Investigating officer for their examination in the trial.

RATNAKAR SAHU -V- STATE OF ORISSA

For Petitioner - M/s. Khirod Ku. Panigrahi, B. Hota.
For Opp.Parties - M/s. Ramakanta Panda, J.K. Mohanty, Sujata Tripathy (for O.Ps. 2,3,4)
Addl. Govt. Advocate(for O.P.1).

CRLMC. No. 687 of 2010 & CRLMC. No. 594 of 2009

Heard learned counsel for the petitioner and learned Additional Government Advocate.

In CRLMC 594 of 2009 order dated 19.12.2008 passed by the learned Adhoc Addl. Sessions Judge (FTC), Balasore dispensing with charge sheet witnesses 10, 18, 22, 23, 24, 25, 26, 27, 28, 29, 31 and 32 is impugned. Out of them A.P.P. had declined to examine other witnesses except the Medical Officer, charge sheet witness no.32 and the Investigating Officer. However, learned trial court dispensed with examination of the Medical Officer also vide order dated 19.12.2008. Subsequent order dated 2.1.2009 dispensing with examination of the Investigating Officer is impugned in CRLMC No.687 of 2010. Both the CRLMCs have been filed not by the State, but by the informant (Shri Ratnakar Sahu).

It is submitted by learned counsel for the petitioner (Informant) that the trial having involved a case of dowry death, it was not proper on the part of the learned trial court to dispense with the evidence of the medical officer and the Investigating Officer, vide order dated 19.12.2008 and order dated 2.1.2009 respectively. It is further submitted by learned counsel for the petitioner that there is no provision in the Cr.P.C. giving power to a trial court to dispense with the examination of a witness shown in the charge sheet unless he is declined by the prosecution.

None appears for opposite parties 2 to 4 when the matter is called.

As the matter is pending since 2009 and order of stay is operative so far as the trial is concerned, the matter is taken up for final disposal in absentia of counsel appearing for the accused persons.

A question may arise regarding the locus standie of the petitioner, he being the informant, to challenge the aforesaid orders dated 19.12.2008 and 2.1.2009 in view of provisions in sub-Section (2) of Section 301 Cr.P.C.

The learned Addl. Govt. Advocate submits that the State should have filed criminal misc.case impugning the aforesaid two orders but inadvertently that has not been done by the State. Learned Addl. Govt. Advocate

substantially supports the contentions advanced by the learned counsel for the petitioner and submits that only course available to the court in case of disobedience of any summons issued by the court is action U/s.350 Cr.P.C. and learned trial Court could not have dispensed with examination of the Medical Officer and Investigating Officer especially when the trial involves and offence of dowry death.

This Court also feels that the trial Court in a hurry should not have dispensed with the examination of the Medical Officer and the Investigating Officer on the sole ground of their failure to appear in obedience to summons/summonses. The trial Court should have taken coercive steps to compel appearance of the concerned Medical Officer and the Investigating Officer before resorting to the drastic step of dispensing with the examination of them.

Regard being had to the aforesaid facts and submissions, both the orders dated 19.12.2008 and 2.1.2009 are set aside and the trial Court is directed to take all steps to procure the attendance of the Medical Officer and the Investigating Officer for their examination is the trial, If they are not found or their attendance can not be procured, steps in accordance with law may only be taken after hearing learned public prosecutor and learned counsel for the defence.Both the CRLMCs are accordingly disposed of. Applications disposed of.

Applications disposed of.

2013 (II) ILR - CUT- 316

C. R. DASH, J.

W.P.(C) NO.18522 OF 2012 (With Batch) (Dt.24.04.2013)

KAMALA BISWAL & ORS. .....Petitioners

.Vrs.

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

ODISHA PUBLIC DISTRIBUTION SYSTEM (CONTROL) ORDER, 2008 – CLAUSES 6, 7

Petitioners are sub-wholesalers of Kerosene – Government issued instructions not to extend their licence period – Action challenged – Government took the policy decision to change the three tier system of distribution i.e. wholesaler, sub-wholesaler and fair price shop retailer – In order to provide superior quality of Kerosene at a lower price Government decided to abolish the intermediary tier of sub-wholesalership - So it cannot be said that the Government creates a class amongst class – In the other hand appointment of sub-wholesaler is not a mandatory requirement under the O.P.D.S. (Control) Order 2008 – Held, in the absence of materials of mala fides this Court cannot interfere with the policy decision of the Government and the action of the Government cannot be held to be violative of Article 19 (1) (g) of the Constitution of India – Impugned decision of the Government is neither unreasonable nor arbitrary nor discriminatory – Writ petition is devoid of merit hence dismissed. (Paras 22,26,27,30,31)

Case laws Referred to:-

1.AIR 1997 SC 128 : (Krishnan Kakkanth-V- Government of Kerala)
2.AIR 1986 SC 180 : (Olga Tellis & Ors.-V- Bombay Municipal Corpn. & Ors.)
3.(2001)3 SCC 635 : (Ugar Sugar Works Ltd.-V- Delhi Administration & Ors.)
4.AIR 2002 SC 350 : (Balco Employees Union (Regd.)-V- Union of India & Ors.)
5.(2003)4 SCC 289 : (Federation of Railway Officers Association-V- Union of India)

For Petitioners : M/s. Sumit Lal, S. Lal, M. Agarwal, Laxmidhar Dash ,R.K. Dash, Kishore K. Jena, K. Mohapatra S.N. Dash,Deepak R. Parida, Manaranjan Mishra, R. B. Sinha, S. Kar, P.J. Nanda. Rajesh Panda, C.Panda, G.K. Jena C.R. Das Anand Das B. Panigrahi, S.S. Mohanty S.B. Das Sarada P. Sarangi, P.P. Mohanty P.K. Dash.Mahendra K. Das, S. Mallick,S.K. Das, I. Nayak Anjan Kumar Biswal, P.K. Rout D.R. Das, Sushant Kumar Pradhan-2 , G.S. Muduli, Milan Kanungo, S. N. Das, Y.S.P. Babu, Y. Mohanty, S.K.

Mishra, D. Pradhan, L.Kanungo P.S. Acharya.,Radheshyam Chimanka J. Singh, Debabrata Rath, D.S. Ray.P.K. Parhi, G. Mohanty, S.B. Jena, Sidheswar Mallick, S. Mallick, S.K. Das and J. Nayak,Upendra Ku. Samal, C.D.Sahoo, S.P. Patra S. Naik, M/s. S.K. Nanda, N. Moharana , S. Lall, A.K. Choudhury and K.K. Das,

For Opp. Parties : Mr. Bikram Senapati, Addl. Government Advocate (In all cases)

C.R. DASH, J. All these writ petitions having involved common facts and questions of law, they are taken up together for disposal by this common judgment.

2. The petitioners are Kerosene sub-wholesalers of Balasore, Boudh, Jajpur, Jagatsinghpur and Sonepur districts under the public distribution system ('P.D.S.' for short). They have been continuing as Kerosene sub-wholesalers for quite some years on the basis of licence issued on year to year basis. The licence period is for one year from 1st April of the year to 31st March of the succeeding year. Without any break of any sort, the petitioners were continuing as such Kerosene sub-wholesalers till 31.03.2012.

3. So far as the licensing year 2012-13 is concerned, petitioners' licences should have been renewed with effect from 01.04.2012 with currency till 31.03.2013. The Government of Orissa in Food Supplies and Consumer Welfare Department vide letter No. 09-17-10-5/12- 5702/FS & CW., dated 28.03.2012 issued direction to all the District Collectors of the State for renewal of licence of the sub-wholesalers of Kerosene oil for a period of six months with effect from 01.04.2012. In view of such direction of the Government dated 28.03.2012 licences of all the sub-wholesalers of Kerosene oil whose licences expired on 31.03.2012 were renewed for a period of six months with effect from 01.04.2012 up to 30.09.2012 though they were ready and willing to deposit the licence fees for whole of the year and were desirous of obtaining the licences as per the Orissa Public Distribution System (Control) Order, 2008 ("O.P.D.S. (Control) Order, 2008" for short) for the whole year.

4. In continuation of Letter No.5702 dated 28.03.2012 referred supra Government of Orissa in Food Supplies and Consumer Welfare Department issued letters to all Collectors except Collectors of Balasore, Boudh, Jajpur, Jagatsinghpur and Sonepur vide Letter No.15453 dated 25.09.2012 which reads as follows :-

> "Sir,
>
> In continuation to this Department instructions contained in Letter No.5702 dt.28.03.2012, I am directed to say that renewal of licence of sub-wholesaler of Kerosene under P.D.S. whose licence is due to expire on 30.09.2012 under OPDS (Control) order, 2008 may be extended for a period of six months, i.e., up to 31.03.2013, excepting the sub-wholesalers of Balasore, Boudh, Jajpur, Jagatsinghpur & Sonepur district.
>
> All instructions and conditions laid down in OPDS (Control) order 2008 should be followed scrupulously while renewing licence of the S.K. Oil sub-wholesalers of PDS.
>
> Yours faithfully,
> Sd/-
> DCA-cum-Additional Secretary to Government".

5. The petitioners being the sub-wholesalers of Kerosene oil belonging to the aforesaid five districts, namely, Balasore, Boudh, Jajpur, Jagatsinghpur and Sonepur have filed these writ petitions impugning the instructions of the Government of Orissa in Food Supplies and Consumer Welfare Department Letter No.5702 dated 28.03.2012 renewing their licences for a part of the year and have further impugned the Letter No.15453 dated 25.09.2012 deciding not to extend the licence period of sub-wholesalers of Kerosene oil in the aforesaid five districts, namely, Balasore, Boudh, Jajpur, Jagatsinghpur and Sonepur beyond 30.09.2012.

6. The State has filed counter affidavit. The gist of the counter affidavit is to the effect that intermediary tiers in the distribution chain increase possibility of diversion of P.D.S. Kerosene and there is also increase in price of the same. On the basis of recommendation of "**Wadhwa Committee**" the State having abolished the system of "storage agent" at the intermediary level, the State has taken further steps to abolish in phase manner the intermediary tier of sub-wholesalers, so far as the distribution of P.D.S. Kerosene is concerned. On being guided by such State policy, the districts of

Balasore, Boudh, Jajpur, Jagatsinghpur and Sonepur having been taken as pilot project for abolition of the intermediary sub-wholesalership of Kerosene oil, the writ petitions are devoid of any merit.

7. The petitioners are primarily aggrieved by the action of the Government vide Letter No.5702, dated 28.03.2012 in confining the licence period to six months from 01.04.2012 to 30.09.2012, though all the petitioners had made applications for renewal of licence in Form-A of the O.P.D.S. (Control) Order, 2008 for the whole year and some of the petitioners had deposited the licence fees for the whole year. The grievance is asserted to be justified on the ground that the petitioners having applied in Form-A, they should have been issued with licence in Form-B. It is further asserted that in view of Clause 7 of the O.P.D.S. (Control) Order 2008, which has been enacted with clear intention to grant licence for one year commencing from 1st April of that year with currency till 31st March of the succeeding year, the action of the Government in confining the period of licence to six months from 01.04.2012 to 30.09.2012 is violative of the Clause (Clause 7 of the Control Order).

8. It is further submitted that, no doubt, Clause 20 of the P.D.S. (Control) Order, 2008 authorizes the Government to issue guidelines or instructions for improving the efficiency of the public distribution system, but such an authority does not partake the nature of an arbitrary power on the part of the Government to over-ride, abrogate, abridge or bypass the express provisions of the O.P.D.S. (Control) Order, 2008. Spear-heading the argument on behalf of the petitioners on this point, Mr. S.C. Lal, learned senior counsel submits that Letter No.5702, dated 28.03.2012 though may be submitted to have been issued in the nature of a guideline under Clause 20 of the O.P.D.S. (Control) Order, 2008 the same cannot have the authority to over-ride, abrogate, abridge or bypass the express provision in Clause 7 of the said order.

9. Mr. Bikram Senapati, learned Addl. Govt. Advocate on the other hand submits that Clause-7 of the O.P.D.S. (Control) Order, 2008 having authorized the licensing authority to grant licence under the order for a period of one year or a part of a year, unless revoked or expired earlier, no fault can be found so far as Letter No.5702 dated 28.03.2012 is concerned, which has confined the period of licence to six months from 01.04.2012 to 30.09.2012.

10. Clause 6 of the O.P.D.S. (Control) Order, 2008 deals with issue of licence. Clause 6 (4) deals with renewal of licence. Proviso to Sub-clause (4) of Clause 6 shows about deemed renewal of licence unless rejected or

returned after making of an application in Form-A by the applicant by depositing necessary fees. Clause-7 speaks of the period of licence, i.e., **to be valid for one year or part of a year unless revoked or expired earlier.**

11. On conjoint reading of the proviso to Sub-clause (4) of Clause 6, explanation to Sub-clause (1) of Clause-7, Clause 7 of the O.P.D.S.(Control) Order, 2008 and contents of Form-B, para-12 providing for validity of the licence up to 31st March, Mr. S.C. Lal, learned senior counsel arguing for the petitioners, tries to impress that the aforementioned provisions are unequivocal to the effect that the intention of the control order is to grant licence for one year commencing from 1st April of the year with currency till 31st March of the succeeding year. The expression "part of the year" occurring in Clause 7 is only intended to cover licence where an application has been made in the middle of the year. The provisions cannot be read to mean discretion on the part of the licensing authority to restrict the licence arbitrarily to a part of the year.

12. Relying on the case of **Nasir Ahmmed *vs.* King Emperror,** A.I.R. 1936 Privy Council 253, it is submitted by Mr. Lal, learned senior counsel that where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all; other methods of performance are necessarily forbidden. Mr. Lal also relies on the case of **Pravakar Padhi *vs.* State of Orissa,** an unreported case, i.e., W.P.(C) No.11597 of 2005 (disposed of on 13.04.2006), where this Court has held thus :-

> "We have passed this order solely on the basis that so long as the P.D.S. (Control) Order 2002 is in operation, renewal of licence should be done in terms of the provisions contained therein, and any guideline issued by the concerned Department of the State Government contrary to the provisions contained in the P.D.S. Control Order 2002 cannot be followed for the purpose of renewal of licence."

Summing up his argument on the point Mr. Lal, learned senior counsel submits that in view of the provisions contained in the O.P.D.S. (Control) Order, 2008, the instructions of the Government in concerned department Letter No.5702, dated 28.03.2012 should not have been followed as it runs contrary to the provisions of the control order, so far as period of licence is concerned.

13. Mr. Senapati, learned Addl. Govt. Advocate submits that, Government took a policy decision to restructure the distribution chain of P.D.S. kerosene and for gaining time to restructure the same in the manner

the Government wanted, licence of the sub-wholesalers of Kerosene was renewed for a period of six months from 01.04.2012 to 30.09.2012 and such an action is not violative of O.P.D.S. (Control) Order, 2008.

14. Clause-7 of the OPDS (Control) Order, 2008 being pivotal to resolve the issue raised, relevant provision in Clause-7 which relates to grant and renewal of licence is reproduced below for ready reference :-

> **"7. Period of licence and fees chargeable –** (1) Every licence granted under this order shall, **unless revoked or expired earlier**, be valid **for a period of one year or part of a year** and may be renewed **for a period of one year or a part of a year** at a time on application.
>
> ***Explanation –*** 'Year' means the financial year commencing on the 1st day of April and ending on the 31st day of March of the succeeding year.
>
> xx xx xx xx xx xx"
>
> (Emphasis supplied)

Cursory reading of the above provision makes it clear that it contains two parts. The first part speaks of grant of licence (which obviously means grant of fresh licence) to be valid for a period of one year or part of a year **unless revoked or expired earlier**. Part-II speaks of renewal of licence **for a period of one year or a part of a year** at a time on application. The provision further makes it clear that a licence is to be valid for a period of one year or part of a year unless revoked or expired earlier. So far as grant of fresh licence is concerned, provisions of Clause-7 is to be read with Clause-4 of the O.P.D.S. Control Order which deals with appointment of dealers and grant of licence. So far as renewal of licence is concerned, provisions of Clause-7 is to be read with Clause-6 of the said order which relates to issue of licence and essentially to renewal of licence. The explanation to Sub-clause (1) of Clause-7 defines a licensing year which according to the explanation is coterminous with the "financial year" which starts on the 1st day of April with currency till 31st of March of the succeeding year. It seems, Mr. Lal, learned senior counsel has taken a clue from the aforesaid explanation to base his contention to the effect that the statute intends for renewal of licence for the whole year and not a part of a year. He tries to impress upon to the extent that the expression "part of a year" covers only the licence which has been granted in the middle of the year.

15. In these writ petitions the Court is not concerned with grant of fresh licence as all the petitioners are stated to have continued as sub-wholesalers of Kerosene oil for quite some years and their licences were valid up to 30.09.2012 on being renewed with effect from 1st April, 2012. As held by me earlier, the question of renewal having been dealt with in Clause-6 of the O.P.D.S. (Control) Order, 2008, the provisions of Clause-7 is to be read with Clause-6 of the Control Order. Sub-clause (1) of Clause-6 provides that every application for licence or for renewal thereof or for duplicate copy thereof shall be made to the licensing authority in Form-A. Sub-clause (3) of Clause-6 provides that every application for renewal shall be made along with the original copy of the licence at least 45 days before the date of expiry of such licence. If we understand the word "year" according to the explanation occurring in Sub-clause (1) of Clause-7 then the application for renewal of licence has to be made 45 days before the expiry of the licence on 31st of March of the year. If we read the dictum of **Nasir Ahmmed *vrs.* King Emperror,** referred supra, into our discussion, then the application shall have to be made at least 45 days before the date of expiry of the licence and the renewal shall have to be granted so that the renewed licence can be effective from 1st of April of the year. The processing of the renewal application has to be done within 45 days and that is to be done in the way provided in the statute. If Clause-7 is read with Sub-clause (3) of Clause-6, then I do not find any scope for application for renewal of licence in the middle of the year, so as to concur with the contention of Mr. Lal, learned senior counsel to the effect that the words "part of a year" occurring in Clause-7 covers a licence which has been renewed in the middle of the year. Further, the words "one year or a part of a year" occur twice in Clause-7 both in Part-I which relates to grant of fresh licence and in part-II which relates to renewal of licence. The word "or" has been conspicuously used as a disjunctive in the provisions in between "one year" and "part of a year". The verbs "renewed" and "granted" occurring in the clause qualifies both the expressions, i.e., "one year" and "part of a year" equally giving equal weightage to both in view of the disjunctive "or" occurring in between them. The reading of the Clause as a whole further makes it clear that a licence has to be valid for one year or part of a year if not revoked or expired earlier. That means there is also occasion as recognized by the statute for expiry of the licence before end of one year. In common parlance, we have to understand that expiry of a licence comes, when it has spent its force. Paragraph-12 of Form – B provides for validity of a licence up to 31st March. The Form speaks of the contents, which a licence should contain. The date 31st March is the space provided for the date up to which the licence shall be valid. The contents of Form-B however have no effect of control over the text of Clause – 7. In other words, it cannot have the effect of controlling the

real content of the Clause-7 nor has it the effect of modifying the language of the said clause which alone forms the enactment. Discretion therefore lies with the authority concerned to renew the licence for the whole year or a part of a year whichever is felt proper and workable in a particular situation. Such a discretion which oscillates between "a year" and "a part of a year" cannot be said to be arbitrary in any manner as there may be many occasions of individual cases where licence has to be renewed for a part of a year in administrative wisdom and exigencies either from the beginning of the year or from the mid year as the case may be. I do not however want to list the occasions to be illustrative for the sake of brevity.

16. In view of my discussion supra, the Letter No.5702 dated 28.03.2012 issued by the Government of Orissa in Food Supplies and Consumer Welfare Department cannot be said to be violative of the provisions contained in O.P.D.S. (Control) Order, 2008. The discussion supra further shows that the authority concerned, has the necessary power to confine the period of licence to even a part of a year which has been done in the present case vide the aforesaid letter.

17. The word 'dealer' has been defined in Clause 2 (h) of the O.P.D.S. (Control) Order, 2008. It has been specifically provided in the aforesaid provisions that the term 'dealer' includes wholesaler / sub-wholesaler / retailer and storage agents. Taking the clue from the aforesaid definition, Mr. S.C. Lal, learned senior counsel arguing on behalf of the petitioners raised the following points :-

(I) The Government in Food Supplies & Consumer Welfare Department having issued Letter No.5702 dated 28.03.2012, singling out the kerosene sub-wholesalers as a class for renewal of their licence for the part of a year, i.e., six months w.e.f. 01.04.2012, such action is discriminatory and violative of Article 14 of the Constitution of India.

(II) Such a move by the Government vide the aforesaid letter dated 28.03.2012 creates class amongst class and is actuated by mala fide.

(III) Letter No.15453 dated 25.09.2012 issued by the Government in Food Supplies & Consumer Welfare Department allowing extension of further period of six months so far as the licence of kerosene sub-wholesalers of other districts of the State excepting sub-wholesalers especially of Balasore, Boudh, Jajpur, Jagatsinghpur and Sonepur districts are concerned is violative of Article 19 (1) (g) of the

Constitution of India, in as much as the State cannot single out the aforesaid five districts in the name of 'pilot projects' for experimenting the effect of abolition of intermediary tier of sub-wholesalership of kerosene.

(IV) Abolition of sub-wholesalership of kerosene has the effect of depriving the means of livelihood so far as the petitioners belonging to the districts of Balasore, Boudh, Jajpur, Jagatsinghpur and Sonepur are concerned, and such a move by the State is violative of Article 21 of the Constitution of India.

(V) The petitioners having already made investment in establishing and running their sub-wholesalership of kerosene, the decision of the State shall cause financial loss and loss of employment to the staff employed by the petitioners.

(VI) Relying on the unreported decision of this Court in the case of **Pravakar Padhi *vrs.* State of Orissa** (in W.P.(C) No.11597 of 2005) referred to supra, it is submitted that without amending the O.P.D.S. (Control) Order, 2008, the system of sub-wholesalership of kerosene oil cannot be abolished.

18. Mr. Senapati, learned Addl. Govt. Advocate on the other hand supports the instruction of the Government in Letter No.5702 dated 28.03.2012 and Letter No.15453 dated 25.09.2012, and submits that in order to check diversion of Kerosene oil and also with a view to check increase in the price of the same, the State has taken a policy decision to abolish the intermediary tier of sub-wholesalership in phased manner, and the five districts of Balasore, Boudh, Jajpur, Jagatsinghpur and Sonepur have been adopted as Pilot Projects to see the efficacy of such abolition and implementation of the policy of the Government so that the entire State may be brought under the policy decision in phased manner.

19. Sub-clause (h) of Clause (2) of the O.P.D.S. (Control) Order 2008 defines "Dealer" as follows :-

"(h) **"Dealer"** means any person, firm, association of persons, company, Panchayati Raj Institution, Urban Local Body, Co-operative Society, Women Self Help Group, Forest Protection Committee, Self Help Group or any other institution carrying on business on wholesale or retail basis in the purchase, storage, sale and/or distribution of essential commodities meant for distribution

> under the Public Distribution System. **The term "Dealer" includes wholesaler/sub-wholesaler/retailer and storage agents."**
>
> (Emphasis supplied)

On the basis of the aforesaid definition, Mr. S.C. Lal, learned senior counsel arguing for the petitioners, submits that wholesaler, sub-wholesaler, retailer and storage agent all taken together constitute a class. It is further submitted that the Government in Food Supplies & Consumer Welfare Department could not have picked sub-wholesaler of kerosene as a class to confine their licence to a period of six months w.e.f. 01.04.2012, that is up to 30.09.2012 while renewing the licence of retailers and wholesalers for the whole year. It is further contended that the Government in the appropriate Department could not have further extended the period of licence of the sub-wholesalers of kerosene of the entire State for the entire year excluding the sub-wholesalers of kerosene belonging to the district of Balasore, Boudh, Jagatsinghpur, Jajpur and Sonepur.

20. In Clause (2) of the O.P.D.S. (Control) Order 2008, retailer, sub-wholesaler and wholesaler have further been separately defined. I am not concerned with the storage agent, which has been abolished in the meantime and such abolition has got judicial approval in a batch of writ petitions disposed of on 19.10.2012 vide W.P.(C) No.5689 of 2012 (**Panchanan Sahu *vrs.* State of Odisha and others),** W.P. (C) No.1309 of 2012 (**Anitya Ranjan Parida *vrs.* State of Odisha and others),** W.P. (C) No.1310 of 2012 (**Pitambar Mohapatra *vrs.* State of Odisha and others).**

The word **'Retailer'** has been defined in Sub-clause (p) of Clause (2) as follows :-

> "(p) '**Retailer'** means a dealer who purchases PDS commodities from a Wholesaler and stores and sells these commodities to consumers."

The word **'Sub-wholesaler'** has been defined in Sub-clause (r) of Clause (2) as follows :-

> "(r) **'Sub-wholesaler'** in Kerosene means a dealer other than agent wholesaler of Oil company and a retailer."

The word '**Wholesaler'** has been defined in Sub-clause (s) of Clause (2) as follows :-

> "(s) **'Wholesaler'** means a dealer who stores and sells PDS commodities to another wholesaler or retailer, and includes a sub-wholesaler or a storage agent."

21. From the aforesaid definitions, it is clear that each category is defined in a manner according to their nature of work in the supply chain so far as distribution of essential commodities under the Public Distribution System is concerned. According to the nature of work, each is different from other and each has got different responsibility in streamlining the supply chain with the sole objective of maximum benefits to the ordinary beneficiaries and utmost efficacy of the distribution of the essential commodities through the supply chain. So far as the definition of "Dealer" in Clause 2(h) is concerned, the word "includes" has been used in the said Sub-clause (h) of Clause (2) to enlarge the meaning of the word "Dealer" occurring in different places in the body of the statute. When the word "includes" is so used in a definition, this word must be construed as comprehending not only such thing as it signifies according to its nature and import but also those things which the interpretation clause declares that they shall include. It seems the word "includes" has been used in Sub-clause (h) of Clause (2) to enlarge the meaning of the word "Dealer" for the purpose of Clause (3), which deals with licensing of the 'Dealers', Clause (4) which deals with Appointment of Dealers and grant of licence, Clause (5) which excludes certain class of persons from being a dealer and Clause (6) which deals with issue of licence. Sub-clause (h) of Clause (2) therefore cannot be construed to constitute a class of wholesalers, sub-wholesalers and retailers and they cannot be held to be same and also they cannot be held to have held similar position so far as the supply chain of essential commodities is concerned. As discussed by me supra, each class is different from other though each of them is a dealer for the purpose of Clause 2(h), which only enlarges the meaning for the purpose of different Sections in the body of the O.P.D.S. (Control) Order 2008.

22. Viewed in the light of the aforesaid discussion, the first contention of Mr. S.C. Lal, learned senior counsel arguing for the petitioners has to fail, as it cannot be held that the Government in the appropriate Department has issued Letter No.5702 dated 28.03.2012 to single out the kerosene sub-wholesaler only as a class by treating them apart from their other compatriots namely retailers and wholesalers. On the aforesaid analogy, it cannot be held that the move by the Government creates a class amongst class.

23. Let me now find out whether the action of the Government is violative of Article 14 of the Constitution of India on the ground of discrimination and such action is fraught by mala fide.

24. In the case of **Krishnan Kakkanth *vrs*. Government of Kerala**; AIR 1997 S.C. 128 Hon'ble Supreme Court held as follows :-

> "34. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial if a better or more comprehensive policy decision should have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionality, Court should avoid "embarking on uncharted ocean of public policy."

25. Viewed from the perspective of the aforesaid dictum, it is found from the materials on record that distribution of kerosene to the beneficiaries of the Public Distribution System of the State involves three tier system of distribution, which includes wholesaler, sub-wholesaler and fair price shop retailer. The cost of each tier like commission, transport, handling charges and loss due to leakage, etc. is passed on to the consumers, for which the number of tiers in the distribution chain increases the price and the possibility of diversion of highly subsidized PDS kerosene. The Government, therefore, in Food Supplies & Consumer Welfare Department took a policy decision to abolish the intermediary tier of sub-wholesalership in phase manner. For taking the said policy decision, the government fell back upon –

(I) the study commissioned by Government of India through N.C.A.E.R, which has estimated that nearly 51% of PDS kerosene is being diverted in the State;

(II) the recommendation of Hon'ble Justice D.P. Wadhwa Committee, the C.V.C. on Public Distribution System constituted by Hon'ble the Supreme Court, which has recommended to abolish the intermediary tier to eliminate diversion.

26. In order to supply superior kerosene oil to the consumers/ beneficiaries at a lower price and to eradicate possibilities of diversion, the Govt. of Odisha has taken the policy decision to abolish the intermediary tier of sub-wholesalership of kerosene oil from the distribution chain of superior kerosene oil in the State in phases. For the aforesaid purpose, meeting was held on 20.03.2012 where all the kerosene companies and the wholesalers were present and subsequently on 17.02.2012, 30.07.2012 and 01.09.2012 meetings were held devising a comprehensive plan to keep in place in order to take care of abolition of sub-wholesalership of kerosene from the distribution chain. It was decided by the Government to adopt the districts of Balasore, Boudh, Jagatsinghpur, Jajpur and Sonepur as Pilot Projects to start the process of abolition of intermediary tier of sub-wholesaler of kerosene.

27. The counter affidavit filed by the State shows that the Government in appropriate Department, after taking into consideration the reports submitted by expert bodies, guidelines of Hon'ble Justice Wadhwa Committee and, above all, interest of the ordinary beneficiaries, took a conscious decision after convening a number of meetings to abolish the system of sub-wholesalership of kerosene, which is the intermediary tier in the supply chain. In order to see the effect and efficacy of the abolition of intermediary tier of sub-wholesaler of kerosene, instead of bringing the entire State under the ambit of the policy decision, the Government in appropriate Department, in their wisdom, have selected five districts, namely Balasore, Boudh, Jagatsinghpur, Jajpur and Sonepur as pilot projects. When the task of implementation of a policy is Herculean and the effect of implementation of the policy is to be borne and felt by the ordinary beneficiaries, it is wise to adopt the policy in phase manner by adopting Pilot Projects. In doing so, **no arbitrariness, mala fide, unfairness** and **unreasonableness** can be found with the Government machinery, as the Government in appropriate Department have had taken a conscious decision in its administrative wisdom after taking into consideration number of premises and after holding number of meetings to adopt the aforesaid five districts as Pilot Projects. Mala fide as a ground to impugn a policy decision of the Government cannot be accepted on the face of it unless substantiated with the objectivity it requires. In the present case though there is allegation of mala fide (as canvassed in his 2nd contention by Mr. S.C. Lal) so far as the adoption of the policy in question in the five districts of Balasore, Boudh, Jajpur, Jagatsinghpur and Sonepur is concerned, I fail to find a single material to substantiate such allegation. Mala fide as a ground to impugn the policy in question must, therefore, fail. In the premises as aforesaid, the policy

decision cannot also be held to be violative of Article 14 of the Constitution of India.

28. The aforesaid policy decision of the Government is further impugned on the ground that the same is violative of Article 21 of the Constitution of India, as it affects and hurts the business interest of the petitioners, who are kerosene sub-wholesalers belonging to aforesaid five districts. It is further argued that the decision of the Government having stripped the petitioners of the means of their livelihood, the action on the part of the government is violative of Article 21 of the Constitution of India. In this regard, Mr. S.C. Lal, learned senior counsel arguing for the petitioners, relies heavily on the case of **Olga Tellis and others *vrs.* Bombay Municipal Corporation and others,** A.I.R. 1986 S.C. 180 to substantiate his contention that even if there is a procedure for such deprivation of the means of livelihood, the same has to be just and fair; if it is not just and fair, it becomes unreasonable.

29. Hon'ble Supreme Court in the case of **Olga Tellis and others** supra for the first time recognized the right to livelihood as a facet of right to life as enshrined in Article 21 of the Constitution of India. Hon'ble Supreme Court in Paragraphs-39, 40 and 44 of the judgment held thus :-

> "The procedure prescribed by law for the deprivation of the right conferred by Art.21 must be fair, just and reasonable. Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right must conform to the norms of justice and fair play. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: the action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in the performance of an act, the adoption of a procedure which is

> impermissible under the Constitutions, it would have to be struck down."
>
> (Quoted from Placitum)

Viewed from aforesaid perspective as laid down by Hon'ble Supreme Court, I have to find out whether the action of the Government, as taken vide letter no.5702 dated 28.03.2012 and letter no.15453 dated 25.09.2012, is violative of Article-21 of the Constitution of India being unfair, unjust and unreasonable.

30. At the outset, I have to find out whether the action by the Government is within the scope of the authority conferred by law. O.P.D.S. (Control) Order 2008 governs the field so far as the authority of the Government in taking the impugned action is concerned. The Government in appropriate department have taken a policy decision to abolish the intermediary tier of sub-wholesaler of kerosene. Such a policy decision aims at lowering of the price of P.D.S. kerosene so far as the ultimate beneficiaries are concerned and check to diversion of highly subsidized P.D.S. kerosene. In the preceding paragraphs I have already held that a sub-wholesaler of kerosene is a dealer in the intermediary level. Appointment of a sub-wholesaler is not a mandatory requirement according to the scheme of the O.P.D.S. (Control) Order, 2008. Clause-4 of the O.P.D.S. (Control) Order, 2008 provides thus :-

> **"Appointment of Dealers and Grant of Licence –** (1) Dealers shall be appointed by such authorities and following such procedure and in such manner as may have been and may be prescribed by the Government."

[

Cursory reading of the provision shows that appointment of Dealer is the absolute domain of the Government. Such a power authorises the Government to take up the issue of supply chain management for the benefit of the ultimate beneficiaries, and for such purpose the Government have been invested with powers under Clause-20 of the O.P.D.S. (Control) Order, 2008. In taking up the issue of supply chain management, therefore, the Government is further authorized to abolish an intermediary tier, if by such abolition the supply chain is not affected from the point of view of the ultimate beneficiaries. I have already discussed about the wisdom of the Government in taking up the issue of abolition of the intermediary tier of sub-wholesaler of kerosene. The Government have devised a comprehensive plan to put in place to take care of the abolition of sub-wholesaler of kerosene. The O.P.D.S. (Control) Order, 2008 having not made appointment of sub-wholesaler of kerosene mandatory, and the Government

having been empowered to revamp the supply chain for common benefit, the action impugned must be held to be within the scope of the authority conferred by law on the Government. I do not want to reiterate the discussion further on the point of reasonableness of the policy, as I have already held by discussion with great detail that the policy is neither unreasonable nor arbitrary nor discriminatory nor it is mala fide. Hon'ble Supreme Court in **Ugar Sugar Works Ltd. *vrs.* Delhi Administration & Ors.,** (2001) 3 SCC 635, has held that in exercise of their power of judicial review, the Courts do not ordinarily interfere with the policy decisions of the Executive unless the policy can be faulted on the ground of mala fide, unreasonableness, arbitrariness or unfairness, etc. Indeed arbitrariness, irrationality, perversity and mala fide render the policy unconstitutional. However, if the policy cannot be touched on any of these grounds, the mere fact that it may affect business interests of a party does not justify invalidating the policy. Same is the view of Hon'ble Supreme Court in the case of **Balco Employees Union (Regd.) *vrs.* Union of India and Others,** A.I.R. 2002 SC 350 and **Federation of Railway Officers Association *vrs.* Union of India,** (2003) 4 SCC 289.

31. Viewed in the perspective of the aforesaid dictum and discussion supra, the Government in appropriate department having taken a conscious policy decision after evaluating the pros and cons of the entire supply chain system operating under the PDS, no fault can be found with the Government, nor it can be held that the Government lacks the authority to take the decision without amending the O.P.D.S. (Control) Order 2008. On the same analogy and analysis as discussed supra, the action of the Government cannot also be held to be violative of Article 19 (1) (g) of the Constitution of India, in as much as licence for sub-wholesalership of kerosene cannot be held to be the vested rights of the petitioners.

32. Regard being had to the discussions, I do not find any merit in the writ petitions. Accordingly, all the writ petitions are dismissed. The Government in appropriate department is free to execute the policy decision taken subject to any order in any other writ petition / petitions / case so far as implementation of the pilot projects in the districts of Balasore, Boudh, Jagatsinghpur, Jajpur and Sonepur is concerned.

Writ petitions dismissed.

2013 (II) ILR - CUT- 333

B. K. MISRA, J.

JCRLA NO.187 & CRLA NOS.140, 142 OF 1993 (Dt. 19.03.2013)

GULGULA @ GULAP KHAN & ORS. ……...Appellants

.Vrs.

STATE OF ORISSA ……Respondent

A. PENAL CODE, 1860 – S.366

Ingredients of offence punishable U/s.306 I.P.C. – If the accused Kidnapped or abducted the woman with necessary intent the offence is complete whether or not the accused succeeded in effecting his purpose.

In this case the appellants forcibly took the victim in an Auto Rickshaw in a village path way and the victim was forcibly lifted to a paddy field beyond a hillock proves unerringly that the victim girl was kidnapped by the appellants with the intention or knowledge that the prosecutrix would be forced to have illicit intercourse – Held, appellants found guilty of the offence U/s.366 read with Section 34 I.P.C. and were rightly convicted by the learned Addl. Sessions Judge.

(Para-15)

B. CRIMINAL TRIAL – Once an accused acquitted of the offences of higher degree, he may still be convicted for lesser offences, depending on actual evidence on record.

In this case since there is ample evidence for conviction of the appellants U/s.366 I.P.C., the argument of the appellants that since allegation of rape has been disbelieved by the trial Court it is to be held that the charge U/s.366 I.P.C.is not established has no force.

Case laws Referred to:-

1.(2013) 54 OCR (SC) 473 : (Sahabuddin & Anr.-V- State of Assam)
2.(2013) 54 OCR (SC) 341 : (N.V. Subba Rao-V- State, through Inspector ofPolice, C.B.I/S.P.E., Visakhapatnam, A.P.)
3.(2003)1 SCC 217 : (K. Prema S. Rao & Anr.-V- Yadla Srinivasa Rao & Ors.).

For Appellant - M/s. H. S. Mishra.
For Respondent - M/s. D.K. Misra, Addl. Govt. Advocate.
For Appellant - M/s. A.K. Rath, S.P.Choudhury, H. S. Mishra.

For Appellant - M/s. D. P. Dhal, A.K. Acharya, R.B. Mishra, N.N. Mohapatra.

B.K. MISRA, J. All these three appeals were heard together and are being disposed of by this common judgment as all the three accused-appellants faced their trial together in S.T. Case No.78-29 of 1992 for the offence under Section 376 (2)(g) and under Section 366 of the Indian Penal Code (for short the 'I.P.C.) and the learned Additional Sessions Judge in his judgment dated 16.4.1993 though acquitted all the appellants of the charge under Section 376 (2)(g) (for short the 'I.P.C.), but convicted them for the offence under Section 366 read with Section 34 of the I.P.C. and sentenced each of the appellant to undergo rigorous imprisonment for five years. The appellants being aggrieved with the said order of conviction and the sentence had filed three separate appeals.

2. The case of the prosecution is that on 24.12.1991 the victim informant (P.W.6) along with her mother Padma Guru (P.W.9) in order to go to the house of her eldest sister boarded a bus from Jharsuguda to Sambalpur. The victim as well as her mother arrived at Sambalpur around 11.00 A.M. and while proceeding to the bus stand for catching the bus to Jamankira, near the taxi stand three boys around 12 Noon came in an Auto Rickshaw and forcibly made them to sit in that Auto Rickshaw with an assurance that they would drop them at Padiabahal. The driver of the Auto Rickshaw made P.Ws.6 and 9 to understand that the two other persons in the Auto Rickshaw would also go to Padiabahal and therefore believing the driver, P.Ws.6 and 9 agreed to travel in that Auto Rickshaw to Padiabahal. The F.I.R. further reveals that around 1.00 P.M. after crossing "Ken Ghati", the aforesaid three youths forcibly alighted P.W.9 from the Auto Rickshaw and thereafter took the Auto Rickshaw in a footpath and on seeing that P.W.6 when attempted to jump from the Auto Rickshaw, she was forcibly made to sit in that Auto Rickshaw and after a while those three persons stopped the Auto Rickshaw and forcibly carried P.W.6 to the paddy field where they removed her pant and she was made to lie on the paddy field and three miscreants one after the other forcibly ravished her. Whil ravishing P.W.6, those persons threatened her not to shout and if she does so she would be stabbed with knife for which the victim girl out of fear could not raise hullah. The F.I.R. further reveals that after she was sexually ravished by two youths and when the third person was having sexual intercourse with her, Police and villagers arrived there and on seeing them all the three miscreants while escaping from the spot, were chased by police and the villagers and in the process accused Md.Nisar and Ashis Kumar Kunar were nabbed but the third man, namely, accused Gulgula of Kumbharpada

managed to flee. The informant narrated the incident before the O.I.C. Sadar Police Station, Satyanarayan Panda (P.W.12) at the spot orally, which P.W.12 reduced into writing and after returning to the police station formally registered the case. Investigation was taken up in right earnest. After receipt of the F.I.R. (Ext.11) the victim and the appellants were sent for medical examination, witnesses were examined and on completion of investigation getting prima facie materials against the appellants, charge sheet was placed against the three appellants to stand their trial.

3. The plea of the three appellants was that of a complete denial of the occurrence and it is their further plea that they have been falsely entangled in this case. It is also the plea of the appellant Ashis Kumar Kunar that when he was acquitted in a case under Section 307, I.P.C.,police entangled him in this false case. It is the further plea of accused Md.Nishar that the victim and her mother wanted to go to Jamankira when he was at Sambalpur Bus Stand and they agreed to pay Rs.80 towards hiring the Auto Rickshaw. It is also his plea that on their way near Kenghati his Auto Rickshaw ran out of petrol for which he proceeded with a jerrican for bringing petrol and when petrol was not available, his friend proceeded in a scooter to bring petrol and when he returned back to his Auto Rickshaw found 8-10 persons to have assembled there and charged him saying as to how he had come without petrol and thereafter, police arrived at the spot and brought him to the police station. It is also his plea that at the spot he was assaulted by public for which he was sent to the hospital.

4. The prosecution in order to bring home the guilt of the appellants, had examined 12 witnesses in all and of them, P.W.6 is the victim, P.W.9 is the mother of the victim with whom P.W. 6 was going to his sister's house at Jamankira on the fateful day in the Auto Rickshaw being driven by accused Md.Nishar. P.W.11 is the doctor, who had examined the victim girl on police requisition on 25.12.1991, P.Ws.3 and 7 are the two doctors of the District Headquarters Hospital, Sambalpur who had examined accused Gulgula @ Gulab Khan, Md.Nishar and Ashis Kumar Kunar on police requisition, P.W.8 is the Radiologist attached to the District Headquarters Hospital, Sambalpur to speak about the ossification test of the victim with regard to her age, P.W.12 is the I.O., P.W.10 is the Scientific Officer attached to the District Scientific Laboratory, Sambalpur, who had conducted the scientific investigation at the spot and also examined the under garments of the accused persons as well as the victim, P.W.4 was the A.S.I. of Police of Sambalpur Sadar Police Station and an eye witness to the occurrence. P.Ws.1, 2 and 5 are the three independent witnesses for the prosecution on the point of occurrence. The appellants declined to examine any witnesses in their defence.

5. Learned Addl. Sessions Judge, Sambalpur formulated two points for determination, namely,

(i) In order to prove the case under Section 366, read with Section 34, IPC whether the accused persons in furtherance of their common intention had taken the minor girl P.W.6 out of the keeping of lawful guardian or that by force compelled her to go from any place with intent that she may be forced or seduced to sexual intercourse or knowing it to be likely that she would be forced or seduced to illicit intercourse ?

(ii) In order to prove the case u/s.376(2)(g) whether any of the accused persons or all of them in furtherence of their common intention had sexual intercourse with P.W.6 against her will or without her consent or with or without her consent as she was under 16 years of age?

6. On analyzing the evidence on record, learned Addl. Sessions Judge, Sambalpur disbelieved the case of the prosecution under Section 376(2)(g) of I.P.C. and acquitted all the three appellants of the said charge. But he believed the case of the prosecution under Section 366 read with Section 34, IPC and passed the impugned sentence imposing five years rigorous imprisonment to each of the appellants, which is under challenge in these appeals. I may mention here that no appeal has been preferred by the State against the order of acquittal of the appellants from the charge under Section 376(2)(g), I.P.C. So also the informant is silent in that regard.

7. Learned counsel appearing for the appellants very strenuously contended that when the learned Addl. Sessions Judge had acquitted the appellants from a major charge of gang rape by disbelieving the evidence of the prosecution, he should have disbelieved the case of kidnapping also in view of the inconsistencies appearing in the evidence. It was also contended by the learned counsel for the appellants that when the ingredients of the offence under Section 376(2)(g), I.P.C. have not been satisfied, the order of conviction and sentence for the offence under Section 366, I.P.C. is illegal and therefore, the appeals be allowed and the order of conviction and sentence recorded against the appellants be set aside.

8. Mr.Mishra, learned Addl. Government Advocate, on the other hand, in course of his argument contended that the order of conviction and sentence does not call for any interference in view of the overwhelming evidence available on record to show that the appellants in furtherance of their common intention had kidnapped the minor girl to ravish her and merely

because the offence of committing gang rape was disbelieved by the trial court because of want of legal evidence that cannot be a ground to disturb the conviction of the appellants for the offence of kidnapping a minor girl.

9. Upon hearing the learned counsel for the appellants as well as the learned Addl. Government Advocate, I have examined the evidence as led by the prosecution in detail.

10. In this case, overwhelming materials are there on record to show that the prosecutrix was a minor girl at the time of occurrence. P.W.11 the Medical Officer who had examined the victim opined her age to be 14 years and it is his further evidence that secondary sexual characters of the victim had not been fully developed. The Radiologist attached to District Headquarters Hospital, Sambalpur who was examined as P.W.8 deposed that he had conducted the ossification test of the victim and from the X-ray findings he opined the age of the victim to be 14 to 16 and half years and he has proved his report as Ext.8. The victim while deposing before the Court stated her age to be 16. P.W.9 deposed in her evidence that her daughter P.W.6 was 14 years old at the time of occurrence. From the evidence on record there is nothing to disbelieve the case of the prosecution that the victim was a minor when the alleged incident took place.

11. The evidence of the prosecutrix namely P.W. 6 and her mother P.W.9 shows that on the alleged date of occurrence both of them had come to Sambalpur in a bus to catch a bus to Jamankira. It is also their consistent evidence that while they were proceeding to catch the bus to Jamankira, appellant Nishar came in an Auto Rickshaw and told to drop them at Jamankira and in that Auto Rickshaw the two other appellants namely Ashish and Gulgula were there and believing the words of accused appellant Nishar, P.Ws.6 and 9 got into the Auto Rickshaw and near Sindurpank village the appellants forcibly alighted P.W.9 from the Auto Rickshaw and on seeing that when P.W.6 jumped off the Auto Rickshaw and ran, she was chased by the appellants and after being overpowered she was forced to sit in the Auto Rickshaw and on seeing that when a man came and enquired about that, the appellant Nishar showed him a knife and thereafter that boy went away. It is also the consistent evidence on record that P.W.6 was forcibly taken in that Auto Rickshaw by the appellants towards the field and she was forcibly lifted to a field near a hill where she was forced to lie down and then accused Nishar removed the under garment of the victim and folded her scott and ravished her and thereafter accused Ashis and Gulgula had forcible sexual intercourse with her and at that point of time the victim was made to keep silent on the point of knife. But when police officials and

others arrived, the accused persons took to their heel but were chased and caught by police but some how accused Gulgula managed to escape but accused Ashish and Nishar were caught and P.W.6 lodged the oral report before the O.I.C. Sadar P.S., Sambalpur. P.Ws. 6 and 9 they have been cross-examined at length but nothing substantial could be elicited from their mouth to discard their evidence in examination-in-chief about the occurrence. P.W.2 is a vital witness for the prosecution who deposed that an Auto Rickshaw which was coming from Sambalpur side stopped and a old woman got down from the Auto Rickshaw followed by a young girl but immediately thereafter three occupants of that Auto Rickshaw got down and chased the girl and caught hold of her and she was forcibly made to sit in the Auto Rickshaw. In Court P.W.2 identified accused Golap was one of those miscreants and also he had identified appellant Ashis in Court as a culprit. P.W.2 further deposed that when he proceeded near to the Auto Rickshaw and enquired as to what happened, one of the miscreant showed a knife and threatened to stab him if he raises hullah and thereafter the Auto Rickshaw proceeded towards the right side of the main road to a path leaving the old woman crying and by then P.W.1 was by the side of the old woman. P.W.2 deposed that he proceed to the Police Station for reporting the matter and then he in the company of the police officer came to the spot in a motor cycle and found two of those three miscreants standing in a nearby field whereas the third man was having sexual intercourse with the girl and on seeing them all those three persons started running but they chased and caught the person who was ravishing the girl and P.W.2 identified him as appellant Ashis and out of those two persons the man who was caught by the villagers was identified to be accused Golap. P.W.1 who is another independent witness for the prosecution deposed that while he was returning to the garden of Natha Babu of village “Ken Ghati”, he found an old woman crying and on seeing that he proceeded there and at that time Anama came and told him that the old woman and a young girl were going in an Auto Rickshaw and when he found the girl trying to go away three young persons caught hold of her and when he intervened in the matter he was threatened on the point of a knife for which out of fear he came away and those young persons took away that girl in the Auto Rickshaw towards a small hill in a path way other than the road. P.W.1 deposed that the old woman informed him that her young daughter has been taken away by three persons and requested to rescue her but out of fear he refused to go but Anama proceeded to the Police Station to report the matter and some times thereafter police arrived with others and when they proceeded to the field they found the Auto Rickshaw to have been abandoned near the open thrashing floor of Laxman Seth and thereafter they all proceeded to the hill where they found two persons standing in a field where a girl was lying and

another person was having sexual intercourse with her. It is the further evidence of P.W.1 that on seeing them those three persons started running from the spot and P.W.1 identified the person who was having intercourse with the girl and started running wearing his under wear as accused Ashis. P.W.1 deposed that police chased those three persons and caught accused Ashis and Md.Nisar whom he identified in Court and he stated that the third person who escaped was one Gulgula. P.W.4 who was the A.S.I. of Police attached to Sadar Police Station, Sambalpur deposed that Anama (P.W.2) came hurriedly to the police station and reported that a girl was taken away in an Auto Rickshaw and on hearing that the O.I.C., along with P.W.2 proceeded in their motor cycle whereas he along with other police officials proceeded in a Jeep and near the garden of one B.K.Nath of village 'Ken Ghati' they found one Auto Rickshaw to have been kept and then P..W.2 and other workers of the garden and cowherd boys proceeded towards the place where the girl was taken away and they found that on a field by the side of a ridge a girl was lying naked and a person was having sexual intercourse with her and at that time two other persons who were standing there were telling the girl not to shout, but on seeing them all those three persons started running. P.W.4 deposed that they chased those three persons and the person who was having sexual intercourse with the girl while running away fell down and was overpowered and that fellow was identified as accused Ashis and another person was also caught who was accused Md. Nisar and the third person who escaped was Gulgula whose name was disclosed by accused Ashis and Md. Nisar before them. P.W.12 is the I.O. who also supported the evidence of P.Ws.1, 2 and 4 that on 24.12.1991 around 2.15 P.M. Anama Bagh came hurriedly and informed that three unknown young boys who came in an Auto Rickshaw had taken away a teen aged girl towards a nearby jungle and on the basis of that he made station diary entry and proceeded to the spot along with his staff and Anama Bagh. On arrival at the spot, they found accused Ashis was having sexual intercourse with the victim and the two other accused persons, namely, Gulgula and Md.Nisar were standing nearby. P.W.12 deposed that they caught accused Md.Nisar and Ashis when they tried to escape on seeing them, but accused Gulgula managed to escape. The learned Additional Sessions Judge in the impugned judgment has discussed the evidence of the witnesses in detail and believed the case of the prosecution under Section 366 of the I.P.C. The reasonings assigned by the learned Additional Sessions Judge are based upon sound proposition of law and appreciation of legal evidence on record. Rightly the learned Additional Sessions Judge has placed reliance on the evidence of P.Ws.1,2, 6,9,4 and 12. On perusing the evidence of P.Ws.1,2, 6 and 9 I found that they have narrated the true incident before the Court and while narrating the incident there appear no such material defect or

inconsistencies in their evidence to disbelieve them. P.Ws. 1, 2, 6 and 9 appeared to be truthful witnesses and there is nothing on record to show as to why they would be dragging innocent persons leaving the real culprits or falsely start a case inviting social stigma to an unmarried Brahmin girl. There is nothing on record to show if P.Ws.1, 2, 6, 9 and 12 had any axe to grind against the appellants. In a Criminal Trial the cardinal principle in appreciation of evidence is that every variation or discrepancy particularly which is immaterial and does not affect the root of the prosecution including minor defects in investigation would be of no consequences. It is the settled principle of law that while appreciating the evidence the Court must examine the evidence in its entirety upon reading of the statement of witnesses as a whole and if the Court finds the statement to be truthful and worthy of credence then the variation or discrepancy which does not materially affect the case of the prosecution, is of no consequence. In that context, reliance can be placed in a very recent pronouncement of the Apex Court as reported in ***(2013) 54 OCR (SC) 473, Sahabuddin and another –v- State of Assam, (2013) 54 OCR (SC) 341, N.V.Subba Rao –v- State, through Inspector of Police, C.B.I/S.P.E., Visakhapatnam, A.P.***

12. The learned Additional Sessions Judge in the impugned judgment has met all the points raised by the defence counsel during trial and I find the conclusions of the learned Additional Sessions Judge very convincing and hardly there is any scope for interference by this appellate court.

13. The main thrust of the argument of the learned counsel for the appellants is that when part of the prosecution story i.e., the allegation of rape has been disbelieved by the learned Addl. Sessions Judge, Sambalpur, the charge under Section 366 of the I.P.C. should also to have been held not established as it cannot be said that the appellants had the intention to compel the victim to sexual intercourse or that she would be seduced to intercourse. This contention of the learned counsel for the appellants is not tenable in the eye of law in view of the settled position of law enunciated by the Apex Court in ***K.Prema S. Rao and another –v- Yadla Srinivasa Rao and others, (2003) 1 SCC 217*** where the Hon'ble Apex Court held that where the accused acquitted of the offences of higher degree he may still be convicted for lesser offence depending on actual evidence on record.

14. Section 366 of the I.P.C. reads as follows:-

> "366. Kidnapping, abducting or inducing woman to compel her marriage, etc.- Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be

> compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid."

15. The essential ingredients of the offence punishable under Section 366 of the I.P.C. is that if the accused kidnapped or abducted the woman with necessary intent the offence is complete whether or not the accused succeeded in effecting his purpose. In the instant case the act of the appellants in forcibly taking the victim in a village pathway in an Auto Rickshaw and thereafter by abandoning the same the victim was forcibly lifted to a paddy field beyond a hillock proves unerringly that the victim girl was kidnapped by the appellants with the intention or knowledge that the prosecutrix would be forced to have illicit intercourse.

16. Therefore, on evaluation of the entire evidence and documents on record the appellants were found guilty of the offence under Section 366 of the Indian Penal Code read with Section 34 of the I.P.C. and were rightly convicted by the learned Addl. Sessions Judge, Sambalpur. On evaluation of the entire evidence both oral and documentary on record, in my considered view the appeals are not at all maintainable as the impugned order of conviction and sentence calls for no interference. Therefore, while dismissing the three appeals, the impugned order of conviction and sentence imposed on each of the appellant are hereby maintained.

Appeals dismissed.

2013 (II) ILR - CUT- 341

B. K. MISRA, J.

CRLA NO. 300 OF 2004 (Dt.31.05.2013)

BISWAJIT PATTNAIK ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

PREVENTION OF CORRUPTION ACT, 1988 – S.13 (2)

Recovery of tainted currency notes from the possession of the public-servant – Currency notes smeared with phenolphthalein powder – Legal presumption U/s.20 (1) of the Act could be drawn that the money recovered from the appellant was a part of the demand of gratification by him from P.W.3 to sign the agreement – Held, the accused-appellant had demanded bribe and accepted the same to sign the agreement – Conviction imposed by the learned trial Court is confirmed.

Case law Relied on:-

AIR 2012 SC 2263 : (Narendra Champaklal Trivedi-V- State of Gujarat).

Case laws Referred to:-

1.AIR 2001 SC 147 : (Madhukar Bhaskarrao Joshi-V- State of Maharashtra)
2.(2009) 3 SCC 779 : (C.M. Girish Babu-V- CBI, Cochin, High Court of Kerala)
3.(2010) 46 OCR (SC) 152 : (Banarsi Dass-V- State of Haryana)
4.(2002)22 OCR (SC) 817 : (Subash Parbat Sonvane-V- State of Gujrat)
5.(2009) 42 OCR 34 : (Arakhita Nath –V- The State of Orissa)
6.(2000) 19 OCR (SC) 94 : (Smt. Meena W/o.Balwant Hemke-V- State of Maharashtra).

For Appellant - Miss. S. Ratho, M.K. Das, D.Shit.

For Respondent - Mr. S. Mohanty, Standing Counsel Vigilance Deptt.

B.K. MISRA, J. The present appellant being aggrieved with the order of conviction and sentences imposed on him by the learned Special Judge (Vigilance), Berhampur in G.R. Case No. 45 of 1997(V) corresponding to T.R. Case No. 204 of 1998 has preferred this appeal. The learned Special Judge (Vigilance), Berhampur convicted the appellant for the offence under Section 13(1)(d) punishable under Section 13(2) of the Prevention of Corruption Act, 1988 and sentenced him to undergo rigorous imprisonment for one year. Further the appellant was found guilty of the offence under

Section 7 of the Prevention of Corruption Act (hereinafter, referred as "P.C. Act") and sentenced him to undergo rigorous imprisonment for six months and both the substantive sentences were directed to run concurrently.

2. The case of the Vigilance Organisation is that the complainant Hemanta Kumar Bisoi (P.W.3) a 'C' class contractor was entrusted with the work at an estimated cost of Rs.10,000/- orally by the appellant for maintenance and repair (grass and earth work) of flood embankment at Turley on river Sunder under Khariar Irrigation Sub-Division. It is alleged that the present accused-appellant was the Assistant Engineer of the Khariar Irrigation Sub-Division at the relevant period. As per the procedure after execution of the work for passing of the final bill the signature of the Assistant Engineer along with his recommendation on the agreement is essential and for that P.W.3 when approached the appellant and requested him to send his bill along with the agreement with his recommendation, the accused-appellant demanded Rs.3,000/-. Since there was some delay and the complainant (P.W.3) was reluctant to meet the demand of the accused-appellant, the appellant sent the agreement without his signature to the Irrigation Division at Bhawanipatna for which the final bill could not be prepared by the Division Office. When P.W.3 enquired about the same at the Division Office, he was informed that the appellant had sent the agreement without his signature and recommendation and unless it is done the bill cannot be passed. The informant thereafter with a view to facilitate the passing of the bill brought back the agreement from the Division Office on 27.8.1997 and met the appellant and requested him to recommend his case to the Division Office but again the appellant reiterated his earlier demand of Rs.3,000/- for signing the agreement. Ultimately, the appellant on 27.8.1997 told P.W.3 that if he is paid Rs.2,000/- he will sign the agreement and would make arrangement for passing of the bill. The complainant P.W.3 arranged Rs.2,000/- as per the demand of the appellant and lodged a complaint before the D.S.P. Vigilance, Jeypure who was then camping at Bhawanipatna in writing vide Ext.6. The said D.S.P., Vigilance treated the report of P.W.3 as plain paper F.I.R. under Section 13(2) read with 13(1)(d) and 7 of the P.C. Act and directed Khali Patra (P.W.11), Inspector of Vigilance, Bhawanipatna to take up investigation by laying a trap. Accordingly the trap was laid and the numbers assigned to 20 numbers of one hundred rupee G.C. notes which were produced by P.W.3 before the Vigilance D.S.P. were noted and after following the necessary procedure and in presence of the decoy witness and other independent witnesses Rs.2000/- was paid to the appellant by P.W.3 in his Office on 29.8.1997. The said tainted money of Rs.2000/- was recovered by P.W.11 from the chest pocket of the appellant which were smeared with chemicals. Hand wash of the appellant and the shirt chest pocket of the appellant were taken by

P.W.11 in presence of the witnesses and seizure of cash and other materials were effected. Investigation was taken up in right earnest by the Vigilance Organisation and after completion of investigation getting prima-facie materials against the appellant charge sheet was placed in the Court to stand trial.

3. The plea of the appellant was that of complete denial of the allegation of demand of money by him for signing of the agreement and it is his specific plea that the complainant who is a contractor on many occasion had made undue request to him for his benefit and when the appellant did not comply with his requests, bearing grudge and to harass him the false case has been filed by the complainant. It is also his further plea that the complainant forcibly put some money in his shirt pocket though he had already sent the bills to the Division Office for passing of the same by the Executive Engineer and he has been falsely entangled in this case.

4. The prosecution in order to substantiate its case against the accused-appellant had examined 12 witnesses in all and of them P.W.3 is the complainant, P.Ws.11 and 12 were the two I.Os. P.Ws. 1, 2 and 10 were the witnesses to the trap and seizure of cash of Rs.2,000/- from the person of the appellant. P.W.5, a Constable of the Vigilance Organisation speaks about smearing of the G.C. notes produced by the complainant with chemical powder and other formalities. P.W.6 was the Junior Engineer, Bolangir Irrigation Sub-Division who deposed about the submission of the agreement attached to the bill in respect of the work done by the complainant where the signature of the appellant was wanting. P.W.7 was a Senior Clerk of the Irrigation Division, Bhawanipatna who was examined to speak about the seizure of the Service Book and joining report of the appellant by Inspector of Vigilance. P.W.8 is another seizure witness to the seizure of the posting order of the accused-appellant as Assistant Engineer, Indra Irrigation Sub-Division No.1, Khariar by Inspector of Vigilance. P.W.9 was examined to speak about the entrustment of work to the complainant who was a contractor and he speaks about the measurement of the work done by the complainant and the procedure for submission of bill in duplicate along with the Measurement Book to the Executive Engineer. P.W.4 was examined to speak about the seizure of un-passed bill, M.B, K-2 Register of Irrigation Division for the year 1997-98 and also seizure of Service Book of the accused.

5. The appellant did not examine any witness in his defence.

6. The learned Special Judge, Vigilance on examining the evidence on record and taking into consideration the plea of the accused in his

examination under Section 313 of the Cr.P.C. came to a finding that since the accused was found in possession of the currency notes smeared with chemicals namely phenolphthalein powder legal presumption under Section 20(1) of the Prevention of Corruption Act, 1988 could be easily drawn and accordingly came to a conclusion that the money recovered from the appellant was a part of the demand of the gratification by the appellant as per his demand and accordingly convicted the appellant and passed the impugned sentences.

7. The learned counsel appearing for the appellant while challenging the impugned order of conviction and sentences submitted that when P.W.3 the complainant has not at all supported his own case and he has categorically stated that the appellant had never demanded any money from him and when the agreement which has been marked as Ext.13 shows that the appellant much before the alleged date of occurrence had already submitted the agreement with his recommendation since 30.7.1997, the question of demand of money Rs.3,000/- never arises and the appellant has been falsely entangled in this case by P.W.3 by thrusting money into the chest pocket of the appellant at the behest of the Vigilance Organisation when he (the appellant) failed to comply with the illegal requests of P.W.3. But those facts the learned court below failed to take into consideration and who surprisingly when the decoy witnesses have not supported the case of the department and when there are other glaring defects and discrepancies in the evidence of witnesses, the learned Special Judge having lost sight of those defects and discrepancies in the evidence convicted one innocent person. Accordingly it was prayed that the appeal be allowed and the appellant be acquitted of the charges.

8. Mr. Suraj Mohanty, the learned Standing Counsel appearing for the Vigilance Organisation very strenuously contended that there are ample materials on record including the recovery of tainted currency notes from the possession of the appellant which unerringly establish that the accused received illegal gratification from P.W.3 to sign the agreement. It was also contended that the trial court did not commit any illegality or infirmity in convicting the appellant and accordingly the impugned judgment and the order of conviction need not be disturbed by this Court.

9. I have heard the learned counsel for both the parties at length and minutely perused the record. I may mention here that overwhelming materials are available on record with regard to the recovery of Rs.2,000/- from the person of the appellant and there is no controversy over that. The appellant also in his examination under Section 313 of the Cr.P.C. admitted

about the recovery of Rs.2,000/- from his person but he has taken the plea that the complainant had forcibly put some money in his shirt pocket and when he counted the same it was found to be Rs.2,000/-. Perusal of the evidence on record about the recovery of such bribe money of Rs.2,000/- from the person of the appellant and the test carried out by the Vigilance Organisation namely, by P.W.11 in presence of the witnesses go a long way to establish that the amount of Rs.2,000/- was recovered from the possession of the accused-appellant and the numbers assigned to such notes before the trap was laid, tallied with the numbers noted by the witnesses including P.W.10 who is a responsible Government Officer. It is the settled position of law that mere recovery of the tainted money is not sufficient to record a conviction unless there is evidence that the bribe had been demanded or money was paid voluntarily as a bribe. Thus, the only issue remains to be decided is, whether there was demand of bribe and acceptance of the same. There is absolutely no controversy with regard to this settled position of law. There is also no dispute about the settled position of law that there is a statutory presumption under Section 20 of the Prevention of Corruption Act (hereinafter referred as the Act) which can be dislodged by the accused-appellant by bringing on record some evidence, either direct or circumstantial, that money was accepted by other than the motive or reward as stipulated under Section 7 of the Act. The Court is under obligation to consider the explanation offered by the accused under Section 20 of the Act and the consideration of the explanation has to be on the anvil of preponderance of probability. It is not to be proved beyond all reasonable doubt. The prosecution is bound to establish that there was an illegal offer of bribe and acceptance thereof which are to be gathered from the facts. The Hon'ble Apex Court in a recent decision in the case of ***Narendra Champaklal Trivedi V. State of Gujarat, AIR 2012 S.C. 2263*** by placing reliance in the decision as reported in AIR 2001 S.C. 318, M.Narsinga Rao V. State of Andhra Pradesh have held that:-

> "the only condition for drawing the legal presumption under Section 20 is that during trial it should be proved that the accused has accepted or agreed to accept any gratification. The section does not say that the said condition should be satisfied through direct evidence. Its only requirement is that it must be proved that the accused has accepted or agreed to accept the gratification."

10. The Apex Court also in the case of ***Madhukar Bhaskarrao Joshi V. State of Maharashtra reported in AIR 2001 S.C. 147*** quoted with approval in ***Narendra Champaklal Trivedi (supra)*** have held as follows:-

> "The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted 'as motive or reward' for doing or forbearing to do any official act. So the word 'gratification' need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like 'gratification or any valuable thing'. If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word 'gratification' must be treated in the context to mean any payment for giving satisfaction to the public servant who received it."

11. In the case at hand the tainted money was recovered from the chest pocket of the shirt of the accused appellant which he had put on at the relevant time and date. Thus, a presumption under Section 20 of the P.C. Act becomes obligatory. It is a presumption of law and casts an obligation on the Court to apply it in every case brought under Section 7 of the P.C. Act. Though the said presumption is a rebuttal one, the explanation offered by the accused-appellant that he has been falsely implicated in this case as he failed to fulfill the illegal demands of the complainant (P.W.3) and that the money was forcibly put into his pocket by P.W.3 has not been accepted by the Court below and rightly so. There is no evidence worth the name, on the basis of which it can be said that the presumption has been rebutted. Nothing has been brought on record to doubt the presence of the shadow witness P.W.2 who had given the signal after which the trapping party arrived at the scene and did the needful. The witnesses namely, P.Ws.2, 5, 6, 10 and 11 have proved the case of the prosecution to the hilt and P.W.3 the complainant also has specifically deposed that after he inserted the tainted G.C. notes, the accused S.D.O. signed the agreement which was seized by the Inspector, Vigilance under seizure list Ext.7. P.W.10, who is a responsible Government Officer has also categorically deposed before the Court that when the Vigilance Officer caught hold of both the hands of the accused and told him that he has received a bribe of Rs.2,000/- the accused denied to have received any bribe from the complainant but explained that the complainant had taken a loan of Rs.2,000/- and returned the same that day and thereafter he had given a vivid account as to the hand wash and pocket wash of the appellant which were taken in his presence and others by the Vigilance Officer. P.W.10 has also spoken about the seizure of the

agreement in question in the office of the accused appellant on production by the complainant on the date of trapping. P.W.11 the I.O. and his preparation report Ext.1 give a vivid account of the entire incident. Admittedly, the tainted currency notes were recovered from the possession of the appellant. Even if P.W.3 has given prevaricating statements at different stages but his evidence remains unshaken as to the harassment which has been caused to him by the accused appellant in not signing the agreement and recommending his case to the Executive Engineer for passing the bill for payment. Though in his cross-examination by the accused appellant he has denied about the demand of bribe by the appellant but the tenure of his evidence throws no shadow of doubt that the accused appellant had demanded bribe and accepted the same for signing the agreement Ext.13 seized by P.W.11. Ext.13/1 is the photocopy of the said agreement no.54 which does not bear the signature of the appellant and his recommendation. It is also seen that in Ext.13 the date of commencement of the work has been noted as 1.8.1997 and the date of completion noted as 10.8.1997 but there appear a signature purported to be that of the appellant recommending the case and signing the same on 30.7.1997 i.e. prior to commencement or completion of the work in question which was entrusted to P.W.3. The evidence of P.W.6 another responsible Junior Engineer-cum-Estimator of Bhawanipatna Irrigation Division shows that though the agreement was attached to the bill in respect of the work done by the complainant but the signature of the accused S.D.O. and his recommendation on the agreement were wanting for which he handed over the agreement to the complainant with instruction to obtain the signature and it is also his evidence that subsequently he heard that the accused S.D.O. has been trapped by the Vigilance department while accepting the bribe to sign the agreement. This evidence of P.W.6 has totally gone unchallenged to even though opportunity had been given to the accused appellant to cross-examine the said witnesses. Thus overwhelming materials are available on record to establish that the tainted money was recovered from the shirt pocket of the appellant which the appellant also admits as the appellant himself in his examination under Section 313 of the Cr.P.C. admits to have counted the said money which was said to have been put forcibly by P.W.3 in his pocket, I am inclined to believe the evidence of P.Ws. 1, 2, 4, 6, 10 and 11 as there is no material on record to show that they had any axe to grind against the appellant and they were got up witnesses. Thus, by analyzing the entire evidence on record there remains no room of doubt that the accused appellant had demanded bribe and accepted the same to sign the agreement Ext.13. The decisions cited by the learned counsel for the appellant reported in ***(2009) 3 SCC 779, C.M.Girish Babu –v- CBI, Cochin, High Court of Kerala, (2010) 46OCR (S.C.) 152, Banarsi Dass –v- State***

of Haryana, (2002) 22 OCR (S.C.) 817, Subash Parbat Sonvane -v- State of Gujrat and a judgment of this Court reported in ***(2009) 42 OCR 34, Arakhita Nath –v- The State of Orissa***, another decision of the Apex Court reported in ***(2000) 19 OCR (S.C.) 94, Smt. Meena W/o. Balwant Hemke –v- The State of Maharashtra*** have no application to the facts of this case.

12. I have carefully perused the aforesaid judgments of the Apex Court and of this Court but with great respect, have not been able to persuade myself to dis-believe the case of the prosecution in the instant case in view of the evidence led by the prosecution. It is the trite law that in criminal prosecution there can be no straight jacket formula as each case has to be decided on its own merit depending on the fact situation of a given case. The decision of the Apex Court rendered in Narendra ***Champaklal Trivedi (supra)*** is a direct decision on the point where the provisions of law with regard to appreciation of evidence in a Trap Case has been succinctly enunciated by the Apex Court. The facts of the said case are almost identical to the facts of this case. Therefore considering the entire gamut of evidence on record, in my considered view the conviction which has been recorded by the learned Special Judge (Vigilance), Ganjam, Berhampur does not warrant any interference as the reasonings of the learned Special Judge are based on sound appreciation of evidence and materials on record.

13. Learned counsel for the appellant in course of arguing the appeal submitted that the appellant is an Assistant Engineer and has suffered enough and when in the meanwhile long 16 years have elapsed and if the appellant would be sent to the prison for carrying out the sentences, the same would cause great hardship not only to the appellant but to his family and accordingly prayed for awarding a lesser sentence. In the impugned judgment the learned Special Judge (Vigilance), Ganjam, Berhampur while convicting the appellant for the offence under Section 13(1)(d) of the Prevention of Corruption Act punishable under Section 13(2) of the said Act directed the appellant to undergo R.I. for one year and besides that the appellant was also convicted under Section 7 of the P.C. Act and sentenced to undergo R.I. for six months. The punishment imposed under Section 13(2) of the P.C. Act is the minimum sentence provided in the statute.

14. Thus, considering the fact that the appellant having occupied a responsible post demanded and accepted bribe howsoever small the amount may be, I am not inclined to take a different view in the matter as it should be borne in mind that corruption at any level does not deserve either sympathy or leniency. In my humble view, reduction of the sentence would be adding a premium which the law does not permit. In the result, the appeal being devoid of merit stands dismissed.

Appeal dismissed.

2013 (II) ILR - CUT- 350

B. K. MISHRA, J.

W.P.(C) NO.30034 OF 2011 (Dt.31.05.2013)

LAXMI NARAYAN MOHAPATRA & ORS. ……..Petitioners

.Vrs.

ROTARY CLUB, BHADRAK & ORS. ……Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-1, R-10

Impletion of Party – A person is a necessary party if in his absence, no effective decree can be passed – He is a proper party if his presence is necessary for an effectual and complete adjudication of the lis.

In this case issues involved in the suit relates to the claim of the O.P.1 as a lessee over the suit land – The intervener-petitioners possibly have no say in such a matter – Even if their prayer would be allowed that will unnecessarily prolong the litigation – The petitioners have failed to establish if they have any direct interest in the suit property – Held, the impugned order rejecting the prayer for impletion of party calls for no interference. (Paras 7 to 10)

For Petitioners - M/s. Alok Kumar Panda, Mr. A.K. Choudhury,

For Opp.Parties - M/s. S.P.Mishra, Sr. Adv. Soumya Mishra, S.Das, S.K. Sahoo, S.K.Samantray (For O.P.No.1)
Addl. Standing Counsel, (For O.P.Nos.2,3 & 4)

B.K.MISRA, J The petitioners in this writ petition challenges the legality and propriety of the order dated 15.10.2011 passed by the learned Civil Judge (Sr.Divn.), Bhadrak in rejecting the petition by the petitioners under Order 1, Rule-10 of the Civil Procedure Code (hereinafter referred to as "C.P.C.").

2. I have heard learned counsel for the parties and also perused the record including the impugned order at Annexure-4.

3. The opposite party No.1. has filed C.S. No.606 of 2011 seeking relief to declare him as a lessee of the suit land under the opposite party No.7 as well as for permanent injunction. The suit land admittedly belongs to opposite party No. 7-Nari-Kalyan Samittee, Bhadrak. The opposite party

No.1 through a lease deed no.2064 dated 26.1.1977 obtained the suit land along with other properties to provide specialized maternity benefit by constructing a maternity ward and a child welfare centre for a period of 99 years. It is also stated that the opposite party No.1 by spending huge sum of money constructed the maternity and child welfare centre as well as purchased medical equipments for the operation theatre and general ward. They also provided other facilities for the doctors, patients, nurses and staffs. The maternity centre has started in the name and style as "Rotary Seva Sadan" with effect from 13.7.1984. The said maternity centre is functioning under the direct control of the State Government and the Government is having the direct and pervasive control over the same. However, it is alleged by opposite party No.1 that since the Government is not taking proper care of the building including the maternity centre a the major portion of the building has been damaged and the purpose of having the maternity centre has been frustrated by covering it to office, store etc.

4. The aforesaid claim of opposite party No.1 was strongly refuted by the State Government and it has been alleged on behalf of the State Government that due to dispute between the opposite party No.1 and the opposite party Nos.2 to 4, disturbances were created in the construction work by the opposite party No.1. Further, the opposite party No.1 with the help of their men did not allow the Contractor i.e., opposite party Nos.5 and 6 to construct the maternity centre as well as to repair the building.

5. While the matter stood thus and during pendency of the suit, the present petitioners claiming themselves to be the social workers/activists/ representative of the villagers filed a petition on 6.8.2011 under Order 1, Rule 10 C.P.C. praying therein to be added as defendants in the suit. The opposite party No.1 filed an objection dated 19.8.2011 to the aforesaid petition for impletion.

6. The learned court below vide order dated 15.10.2011 after careful scrutiny of the record and after hearing the parties rejected the prayer for impletion as made by the petitioners.

7. It is trite law that a person is a necessary party if in his absence, no effective decree can be passed. He is a proper party if his presence is necessary for an effectual and complete adjudication. Order 1, Rule 10 C.P.C. is very categorical in the above regard. No doubt the principle underlying the provisions of Order 1, Rule 10 of the C.P.C is to avoid multiplicity of suits and likelihood of conflict of decisions.

After giving my anxious hearing to the parties and also perusing the materials on record, I do not find any substance in the claim of the intervener petitioners to be impleaded as defendants in the suit. Therefore, none impletion in any way would hinder the Court in deciding the matter effectively.

9. Moreover, when the present petitioners claim themselves as social activists as well as representative of the villagers at best, it can be said that they are only beneficiaries of the disputed maternity centre. Since, the issues involved in the suit relates to the claim of the opposite party No.1 as a lessee over the suit land, the present petitioners can possibly have no say in such a matter. On the contrary, if their prayer for impletion would be allowed that will unnecessarily prolong the litigation. The petitioners have failed to establish if they have any direct interest in the suit property.

10. The learned court below has rightly taken note of all the contentions raised by the parties before it and by virtue of a reasoned and speaking order has negatived the prayer of the petitioners to be added as defendants to the suit. In my considered opinion, such an order in the interest of justice calls for no interference. In the result, the writ petition being devoid of merit stands dismissed. No costs.

Writ petition dismissed.

2013 (II) ILR - CUT- 352

DR. B.R.SARANGI, J.

CRLMC NO.(S) 2187 & 2188 OF 2008 (Dt.28.06.2013)

TACHHU@ KACHHU ROUT & Ors. ……..Petitioners

.Vrs.

JAYANTI BISWAL & ANR. ……Opp. Parties.

CRIMINAL PROCEDURE CODE, 1973 – S.482

Case and counter case filed by co-villagers and the matter has been amicably settled between them – The object of Penal Law is not mere punitive and one of the objects is to maintain peace and harmony in the society – Since the parties do not want to prosecute each other it

would not be in the interest of justice to continue the criminal proceedings – Held, the impugned criminal proceedings are quashed.

Case laws Referred to:-

1.(1988) AIR SC 2111 : (Mahesh Chan & Anr.-V- State of Rajasthan)
2.(1988) 1 OCR 564 : (Md.Khaliur Rahaman.-V-State of Orissa & Anr.)
3.(1994) 7 OCR 207 : (Sudam Charan Barik-V- State & Ors.)
4.(1996) 1 OLR 488 : (Hari Mohapatra & Anr.-V- State of Orissa & Ors.)
5.(2003) 25 OCR(SC) 99: (B.S.Joshi & Ors.-V- State of Haryana & Ors.)
6.(2005) (II) OCR 386 : (Kanhu Behera-V- State of Orissa)

For Petitioners - M/s. P.R.Chhatoi & A.Mohanty

For Opp. Parties. - Mr. J.Katikia & D.Rout

DR. B.R.SARANGI, J. Since both the cases are case and counter case filed by the parties, they are heard together and disposed of by this common judgment.

2. The order dated 22.10.2006 passed by the learned J.M.F.C., Banpur in G.R.Case No. 95 of 2006 taking cognizance of the offence under Sections 294,323,354,324,307/34, IPC against the petitioners is assailed in CRLMC No.2187 of 2008. Similarly, the order dated 21.11.2006 passed by the learned J.M.F.C., Banpur in G.R.Case No. 94 of 2006 taking cognizance of the offence under Sections 448, 323, 294, 354, 307, 506/34, IPC against the petitioners is assailed in CRLMC No.2188 of 2008.

3. Learned counsel for the petitioners file their respective affidavits in both the cases in Court today stating that they are co-villagers and the dispute has been amicably settled between them and they are now living peacefully and cordially in the village. Accordingly, they pray that as per the settled position of law, the proceedings initiated by the parties against one another be quashed. The affidavits be kept on record.

4. In view of the fact that the dispute between the parties has been settled amicably, it would not be in the interest of justice to further prosecute the accused persons to rake up the matter, which has been closed. The apex Court as well as this Court time and again observed that quashing of the cognizance in respect of non-compoundable offences by the High Court is permissible in appropriate cases. The apex Court have clearly observed that in exercise of jurisdictiion under Section 482, Cr.P.C., the High Court can quash the proceedings where the parties approach for compounding the

offence even in a non-compoundable offence as in such situation chance of conviction becomes bleak. See: **AIR 1988 SC 2111 (Mahesh Chan and another v. State of Rajasthan), (1988) 1 OCR 564 (Md.Khaliur Rahaman v. State of Orissa and another), (1994) 7 OCR 207 (Sudam Charan Barik v. State and others) and 1996(1) OLR 488 (Hari Mohapatra and another v. State of Orissa and others), (2003) 25 OCR (SC) 99 (B.S.Joshi and others v. State of Haryana and others) and 2005(II) OCR 386 (Kanhu Behera v. State of Orissa).**

5. It is well settled law that power under Section 482, Cr.P.C. has to be exercised sparingly depending upon the facts and circumstances of each case and no strait-jacket formula can be laid down for exercise of such power. The power under Section 482 can be exercised by the High Court to prevent abuse of the process of any Court or to secure the ends of justice.

6. In the facts of the present case, this Court feels that it is a fit case where the criminal proceeding should be quashed. The occurrence was outcome of a clash between the co-villagers and the matter has been amicably settled. Since the co-villagers have amicably settled the dispute and do not want to prosecute each other, it would not be in the interest of justice to continue the criminal proceeding. The continuance of the criminal proceeding is likely to re-open the wound. Instead of re-opening the wound by forcing the co-villagers to fight out criminal cases, a healing touch is necessary so that they can live in peace and amity. The object of penal law is not merely punitive. One of the objects is to maintain peace and harmony in the society. If peace and harmony can be brought about by amicable settlement, especially when large number of people are involved, it would not be proper to pursue a path of retributive justice. In the facts of the present case, I feel interest of justice would be better served in giving a decent burial to the unfortunate incident by quashing the criminal proceedings.

7. Accordingly, both the CRLMCs are allowed and the criminal proceedings in G.R.Case Nos. 94 of 2006 and 95 of 2006 pending in the court of learned J.M.F.C., Banpur are quashed.

Applications allowed.