V.GOPALA GOWDA, CJ & B.P.DAS, J.

W.P.(C) NO.11607 OF 2007 (With Batch) (Decided on 16.11.2010)

RAJIV PUJARI & ORS. …….. Petitioners.

.Vrs.

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

(A) CONSTITUTION OF INDIA, 1950 – ART.226 & 227.

P.I.L. – Acquisition of vast extent of lands including the land of Sri Jagannath Mahapravu Bije at Puri – Acquired lands include two rivers - Acquisition infavour of the beneficiary company in utter violation of law – Land belongs to small land holders of good number of villages who have no access to justice – Petitioners have established that they are bonafide public spirited persons, very much interested in protecting the public interest and see that the State Government discharged its responsibilities and fundamental duties towards the public keeping in view the doctrine of "public trust" upon the public property – Held, PIL is maintainable.

(Para 65 & 66)

LAND ACQUISITION ACT, 1894 (ACT NO.1 OF 1894) – SEC.3 (f) (vi), 4, 6, 40(1) (a), 44-A, 44-B r/w Secs. 3(1) (iii) & 3(1) (iv), 21, 23(1), 25, 617 of the Companies Act, 1956.

Acquisition of lands for Vedanta University – M/s. Vedanta Foundation was originally incorporated as sterlite foundation, a private limited company and subsequently changed its name to M/s. Anil Agarwal Foundation – Establishment of an University by the Foundation to promote educational activities of international standard – University has not come in to existence either under the University grants commission Act, 1956 in terms of Section 2 (f) or under the Orissa University Act – Acquisition of land by the Government treating the same as public purpose – Prior consent of the appropriate Government not taken – Misrepresentation of facts and playing fraud on the State Government – Establishment of a non-existent University by a private company can not be held to be in public purpose – Ordinance promulgated by the Government of Orissa to establish such University by the foundation is untenable.

Notification U/s.4(1) of the L.A. Act proposing to acquire lands in favour of Vedanta University is not legally permissible as the beneficiary company is not a "public limited company" in terms of Section 3(iv) of the companies Act, 1956 – The impugned notification

for acquisition of land are void abinitio and are liable to be quashed – Held, this Court quashed the impugned land acquisition proceedings including the notifications U/s.4(1) & 6 and the awards passed in the land Acquisition proceedings for acquisition of land in favour of the beneficiary company and directed that the possession of the acquired lands shall be restored to the respective land owners irrespective of the fact whether they have challenged the acquisition of their lands or not – On restoration of the possession the land owners shall refund the amount received by them as compensation or otherwise in respect of their lands – This Court also quashed the grant of Government lands in favour of the beneficiary company with a direction to the Government to resume the lands granted to the beneficiary company by way of lease.

(Para 19,20,21,54,66,67,68 & 69.)

Case law Relied on:-

AIR 1995 SC 2244 : (H.M.T. House Building Co-operative Socieity -V- Syed Khader & Ors.)

Case laws Referred to:-

1.(1981) 3 SCC 333 : (Needle Industries (India) Ltd. & Ors.-V- Needle Industries Newey (India) Holding Ltd. & Ors.).

2.AIR 1975 SC 626 : (State of Gujarat & Anr.-V-Patel Chaturbhai Narsinbhai &Ors)

3.AIR 2005 SC 3520 : (Hindustan Petroleum Corporation Ltd.-V-Darius Shapur Chenai & Ors.)

4.(2009)15 SCC 705 : (Shanti Sports Club & Anr.-V-Union of India & Ors.).

5.(2009) 14 SCC 253 : (City Montessory School -V- State of Uttar Pradesh & Ors.).

6.(2009) 3 SCC 571 : (Fomento Resorts & Hotels Ltd. & Anr.-V-Minguel Martins &Ors)

7.(2008) 1 SCC 728 : (Devinder Singh -V- State of Punjab).

8.AIR 2005 SC 1835 : (Swasthya Raksha Samiti Rati Chowk -V-Chaudhary Ram Harakh Chand & Ors.)

9.AIR 1968 SC 432 : (Abdul Hussain Tayabali & Ors.-V-The State of Gujarat & Ors.)

10.AIR 1997 SC 482 : (Municipal Corporation of Greater Bombay -V-Industrial Development Investment Co.Pvt. & Ors.)

11.AIR 2000 SC 3751 : (Narmada Bachao Andolan etc.-V- Union of India & Ors.).

12.2003 AIRSCW 5298 : (Chairman & Managing Director BPL Ltd.-V-S.P.Gururaja& Ors.).

13.2000 sc 3737 : (Delhi Administration -V- Gurdip Singh Uban & Ors.).
14.1969 (2) SCR 60 : (Vijay Cotton & Oil Mills Ltd.-V- State of Gujarat).
15.(1996) 6 SCC 445 : (State of Rajasthan -V-D.R.Laxmi & Ors.)
16.(2008) 4 SCC 695 : (Swaika Properties (P) Ltd. & Anr.-V-State of Rajasthan & Ors.)
17.AIR 1992 SC 1555 : (Smt.Shrisht Dhawan -V- Shaw Brothers)
18.AIR 1994 SC 853 : (S.P.Chengalvarya Naidu(dead) by L.Rs. -V-Jagannath (dead) by L.Rs.& Ors.).
19.(2000) 3 SCC 581 : (United India Insurance Co.Ltd.-V-Rajendra Singh & Ors.).
20.(2003) 8 SCC 319 : (Ram Chandra Singh -V- Savitri Devi & Ors.).
21.(2007) 13 SCC 186 : (Talson Real Estate (P) Ltd.-V-State of Maharashtra).
22(1976) 3 SCC 719 : (Farid Ahmed Abdul Samad -V-Nunicipal Corpn.of the City of Ahmedabad).
23.(1975) 4 SCC 298 : (Shri Mandir Sita Ramji -V- Lt.Governor of Delhi).
24.2003) 4 SCC 485 : (Tej Kaur -V- State of Punjab)
25.(2009) 10 SCC 115 : (Babu Ram & Anr.-V- State of Haryana & Anr.).
26.(1994) 4 SCC 675 : (Srinivasa Coop.House Building Society Ltd.-V-Madan Gurumurthy Sastry).
27.(1973) 1 SCC 157 : (Narinderjit Singh -V-State of U.P.)
28.(1973) 3 SCC 196 : (State of Mysore -V- Abdul Razad Sahib).
29.(1981) 2 SCC 352 : (General Govt. Servants Cooperative Housing Society Ltd.-V- Sh.Wahab Uddin & Ors.).
30.AIR 1985 SC 1622 : (The Collector (District Magistrate) & Anr.-V-Raja Ram Jaiswal).
31.(1997)9 SCC 132 : (Mohan Singh & Ors.-V- International Airport Authority of India & Ors.).
32.AIR 1999 SC 1281 : (Babu Verghese & Ors.-V-Bar Council of Kerala & Ors.).
33.(2007) 8 SCC 705 : (Indore Vikas Pradhikaran -V-Pure Industrial Coke & Chemicals Ltd. & Ors.).
34.AIR 1978 SC 597 : (Maneka Gandhi -V- Union of India)
35. (2000)8 SCC 395 : (Badrinath -V- Government of Tamil Nadu & Ors.).
36.(2004) 11 SCC 364 : (Commissioner of Customs -V- Essar Oil Ltd.).
37.AIR 1980 SC 319 : (Gurdial Singh -V- State of Punjab).
38.(1999) 6 SCC 667 : (Common Cause, A Registered Society -V- Union of India &Ors.)
39.AIR 1984 SC 802 : (Bandhua Mukti Morcha -V- Union of India).
40.AIR 1982 SC 149 : (S.P.Gupta -V- Union of India & Anr.).

41.AIR 1993 SC 892 : (Janata Dal.-V- H.S.Chowdhary).
42.(1996) 5 SCC 281 : (Indian Council for Enviro-Legal Action -V-Union of India &Ors
43.(2010) 5 SCC 402 : (State Uttaranchal -V- Balwant Singh Choufal).
44.(2004) 12 SCC 118 : (M.C.Mehta -V- Union of India)
45.(2006) 1 SCC 1 : (T.N. Godavarman Thirumulpad (87) -V- Union of India).
46.(1982) 3 SCC 235 : (People's Union for Democratic Rights -V- Union of India).

For Petitioner - Mr. R.K.Rath, Sr.Advocate
& M/s. Kousik A. Guru. A.K.Mohanty & S.K.Mohapatra.
For Opp.Parties – Mr. Asok Mohanty, Advocate General.
Mr. Sanjit Mohanty, Sr.Advocate
Mr. D.K.Samantray, Mr. H.K.Panigrahi.
For Petitioner - M/s. Subir Palit, C.Mishra, A.Mishra, A.K.Mohana & H.K.Ratsingh.
For Opp.Parties – Mr. Asok Mohanty, Advocate General.
Mr. Sanjit Mohanty, D.K.Samantray, H.K.Panigrahi, P.K.Muduli & S.Nanda.

V. GOPALA GOWDA, C.J. These petitions have been filed by the owners of the land acquired by the State Government in favour of the opposite party Anil Agarwal Foundation (hereinafter in short called as 'Foundation') for establishment of a University in exercise of its eminent domain power under the provisions of Part-VII of the Land Acquisition Act, 1894 (hereinafter called as the 'L.A. Act' in short). The public interest litigation petitions have been filed both on behalf of the land owners who have no access to justice and also on behalf of the public of the locality of the lands whose public interest is affected by violating Rule of Law in acquiring vast tract of both Government, Temple and private lands in favour of the Foundation. They were listed and heard together by consent of the learned counsel for the parties and are disposed of by this common judgment. With a view to avoid repetition of pleadings and rival legal contentions urged on behalf of the parties, we would briefly state the necessary facts and advert to the pleadings and legal submissions made on behalf of the parties while answering the points that are framed in these cases.

2. The facts stated in all these writ petitions are almost the same and the impugned notifications have been challenged on identical grounds. It is therefore not necessary to refer to the facts of all the writ petitions. We

have therefore, referred to the facts of W.P.(c) No.7163 of 2008 & W.P.(C) No.10325 of 2008.

3. Shorn of unnecessary details, the brief facts of the case are that on 23.6.2006 one Mohit Kumar Rana, Principal, A.T.Kearney Limited filed an application before the State Government stating that M/s.Vedanta Resources Limited is contemplating to set up a University in Orissa to impart education in under-graduate and post-graduate courses in Engineering, Medicine, Management, General Science and Humanities etc. It was further stated in the application that the Group had given a presentation to the Hon'ble Chief Minister, Orissa during April, 2006. Their team after visiting different sites in Orissa have selected a site on the outskirt of Puri on the Puri-Konark marine drive to be the place ideal for establishment of the University. Therefore, it was, inter alia, prayed that Government of Orissa should make available 15,000 acres of contiguous land around Nuanai, in the district of Puri in Bhubaneswar-Puri-Konark marine drive. It was further prayed that the Government of Orissa should coordinate the land acquisition process by appointment of a Special Land Acquisition Officer. The Group prayed that they require 1500 acres of land for Phase-I to be acquired by September, 2006 and the balance by December, 2006. Thereafter, a Memorandum of Understanding was signed between Government of Orissa and Vedanta Foundation on 19.7.2006 and Government of Orissa confirmed the availability of contiguous land of about 8000 acres and to make endeavour to provide an additional contiguous land and other facilities as required by the Foundation. It is the case of the petitioners that a Private Limited Company incorporated in the name and style of Sterlite Foundation changed its name to Vedanta Foundation under section 25 of the Companies Act of 1956 and accordingly fresh certificate of incorporation consequent on change of name was issued in July, 2004. After signing of the MOU, necessary steps were taken by the State Government for allotment of the land to the Foundation and the Vice President of the Vedanta Foundation was directed to deposit 20% of the estimated investment cost which was subsequently reduced to 10% without any basis and reasoning and necessary direction was issued to the Collector, Puri to obtain administrative approval of the project from the Higher Education Department and to produce the approval along with the proposal before the Government. In the meantime the opinion of the Law Department was sought on the questions (a) whether the Foundation is an educational foundation? and (b) whether the land is required to be acquired for public purpose? The Law Department opined that Sections 4, 5 and 6 of the L.A. Act provide that the Government can acquire land for any public purpose or for a Company and such company would mean as per definition contained in the Companies Act, 1956 (hereinafter called "the Act, 1956") a company

incorporated under the Companies Act, a society registered under the Societies Registration Act or a Co-operative Society. Law Department further opined that the file does not indicate that "Vedanta Foundation" is a company, or a Society under the Societies Registration Act or a Co-operative Society. With the aforesaid opinion the Law Department required the Administrative Department to find out the legal status of Vedanta Foundation and whether it comes within the purview of sub-clause (vi) of Clause (f) of Section 3 of the L.A. Act. Thereafter the Administrative Department, i.e., the Revenue and Disaster Management Department again submitted the file to the Law Department for opinion drawing its attention to the certificate of incorporation of the Foundation under the Companies Act, the amended certificate on name and the Memorandum of Association of the Company. This time the Law Department opined that land can be acquired for a private company if such acquisition comes within the purview of clause (a) of sub-section (1) of Section 40 of the Land Acquisition Act which provides that acquisition of land can be done for erection of dwelling houses for workmen employed in the Company or for the provisions of amenities directly connected therewith and considering the proposal of Vedanta with reference to the aforesaid provision, it further opined that said requirement does not fall within the purview of clause (a) of sub-section (1) of Section 40 of the L.A. Act. Law Department further observed that land can be acquired for the proposed educational scheme under the Act if the appropriate Department of the Government sponsors a Scheme to carry out that. Alternatively land can be acquired for an educational scheme sponsored by a Society but with the prior approval of the Government. So observing, Law Department opined that under the Act, land can be acquired for public purpose provided Government sponsors to carry out an educational scheme or for a registered society with prior approval of the Government. Alternatively, it also opined that the Administrative Department may verify if acquisition of land can be made under section 15 of the Orissa Industrial Infrastructural Development Corporation Act, 1980. After the aforesaid opinion was received, the administrative department was of the view that the second option to go through IDCO was not feasible and suggested to consider as to whether Higher Education Department will sponsor and own the project directly and whether it would be done through a Society to be framed by the Higher Education Department. After consideration of the above, it was decided to explore the alternative of the Private Company to be converted to a public company on which, the views of the Law Department was again sought. This time the Law Department opined that land can be acquired for a 'Public Company' under the Land Acquisition Act in accordance with Part VII. Thereafter the company is said to have changed its status from Private Company to Public Company with

the change of name as Anil Agarwal Foundation. Thereafter the State Government issued notification under section 4(1) of the Land Acquisition Act for acquisition of land on behalf of Anil Agarwal Foundation for setting up of Vedanta University. The case of the petitioners is that the proposal for acquisition of land was initially made by Vedanta Resources Limited whereas the MOU was signed by the Vedanta Foundation but, on and from 6th September, 2006 Vedanta Foundation no more existed and Anil Agarwal Foundation came into being. Even though no valid document was produced before the State Government with regard to conversion of the status of the company from 'private' to 'public', the State Government issued notifications under section 4 (1) of the Act treating the company as a public company proposing to acquire the lands in its favour to establish a University. On the complaint of some of the petitioners before the local M.L.A. that the company not being a public company has made such a claim, the MLA approached the Union Minister to know the exact status of the company who in turn sought the required information from the Registrar of Companies. By letter dated 7th May, 2008, Mr.D.K.Gupta, Registrar of Companies, Maharashtra intimated the Media Advisor to Minister of State for Rural Development, Government of India as under:

> "Kindly refer to your letter dated 7th May, 2008 regarding Anil Agarwal Foundation. In this connection, it is stated that Sterlite Foundation, a Section 25 company was incorporated on 12.5.2004. A copy of certificate of incorporation, Memorandum of Association and Articles of Association is enclosed herewith. Thereafter the company has changed its name from Sterlite Foundation to Vedanta Foundation. A copy of Fresh Certificate of Incorporation consequent upon Change of name is also enclosed herewith. Anil Agarwal Foundation had filed its latest Annual Return (Form 21A) made upto 24.9.2007 and latest Balance Sheet (Form 23AC and 23 ACA) as at 31.3.2007 which are enclosed herewith. <u>It is further mentioned that this is a Section 25 Company as per Section 25 of the Companies Act, 1956 and not a Public Limited Company</u>."
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> *(Emphasis supplied)*

4. It is alleged by the petitioners that Laxmi Narayan Agarwal, one of the Directors of Vedanta Foundation though expired on 2.4.2006, the resolution dated 23rd November, 2006 passed for the conversion of the company from 'private' to 'public' company, the said Laxmi Narayan Agarwal has been shown as one of the Directors of Anil Agarwal Foundation which demonstrates the mala fide intention of the company to obtain conversion so as to have eligibility for acquisition of land under the provisions of L.A. Act. The further allegation of the petitioners is that though the certificate from the competent authority with regard to change of status has not been produced,

yet the State has considered the Anil Agarwal Foundation as a Public Company and proceeded to acquire lands on its behalf for establishment of Vedanta University. Referring to Clause 6 of the Memorandum of Understanding, the petitioners would submit that under the said clause complete autonomy is sought to be given to the Vedanta University in the matter of administration, admission, fee structure, curriculum and faculty which is not permissible. In view of the aforesaid clause, the State Government would not have any control over the functioning of the university which may at its discretion charge such fees etc. which the students of State of Orissa can never afford. It is the further case of the petitioners that Clause 6(ix) of the MOU requires that people residing within 5 K.M. radius from the University boundary shall lose their fundamental rights relating to development of their residential houses. They shall have to obtain permission from the Company for the purpose of any development of their residential houses. The allegation of the petitioners is that the University in question has neither been sponsored by any other University of our State nor has it been formed under any scheme of the Universities Act. Though the State Government had earlier signed MOU with Vedanta Foundation, again it has signed an agreement with Anil Agarwal Foundation on 31.7.2007. Referring to the quantum of land and area of the various reputed universities in the country like Utkal University, Jawaharlal Nehru University, IITs and abroad, the petitioners contend that the requirement of land put forward by the Company in question is very much excessive. It is the case of the petitioners that the real purpose of requiring such vast extent of property cannot be said to be only for the purpose of the University; the real purpose sought to be achieved has been masked. There is some hidden agenda for the beneficiary company. Land acquisition being an ex proprietary legislation, the requirement of transparency is a paramount consideration mandated by the Statute. It is the case of the petitioners that 80% of the lands sought to be acquired is agricultural land and the owners of the land and their family members depend on the said land for their livelihood. It is contended that the Company is not at all a public company. So the declaration made by the company as well as the authorities is nothing but a colourable exercise of power with the mala fide intention to grab the agricultural properties of the land owner petitioners and other land owners. It is further contended that as per Section 3(f)(vi) of the L.A.Act land acquired for educational purposes which is a public purpose is to be sponsored by the Government or by any authority established by the Government; or with the prior approval of the appropriate Government or by the local authority; or by a society registered under the Societies Registration Act or any other corresponding law for the time being in force in a State or a co-operative society within the meaning of any law relating to

co-operative societies for the time being in force in any State. Anil Agarwal Foundation which is a company registered under the Companies Act does not fall under any of the categories of the authorities for whom a valid land acquisition process can be launched to acquire land for serving the aforesaid public purpose. Therefore, the acquisition of land for M/s. Anil Agarwal Foundation for setting up an educational institution directly falls foul of the aforesaid legal stipulations in Section 3(f)(vi) of the Act. Public purpose has been defined in Section 3(f) of the Act which says that 'public purpose' does not include acquisition of land for companies. The further contention of the petitioners is that the present acquisition of vast tract of lands has been done by the State Government under the provisions in Chapter VII of the L.A. Act which deals with acquisition of land for the Companies. The Land Acquisition Act being an ex-proprietary legislation, the provisions of Chapter VII read with Land Acquisition (Companies) Rules, 1963 is to be strictly complied with by the State Government. Section 39 of the L.A. Act provides for previous consent of appropriate Government and execution of agreement by the beneficiary Company in favour of the State Government. Section 40 of the L.A. Act mandates that such consent shall not be given unless the appropriate Government be satisfied either on the report of the Collector under Section 5-A, sub-section (2) or by an enquiry held as provided therein. Rule 4 of the Land Acquisition (Companies) Rules, 1963 mandates the procedure of enquiry. It is the case of the petitioners that admittedly no such enquiry has been conducted by the Collector under Rule 4(1) of the Land Acquisition (Companies) Rules, 1963 in absence of which issuance of notification under sections 4 and 6 of the L.A. Act is bad in law. It is contended by the petitioners that from the information furnished by the State Government under the Right to Information Act it appears that no such enquiry has been conducted under Rule 4 of the Land Acquisition (Companies) Rules, 1963 prior to issuance of the notification. Hence the notifications are liable to be struck down for non-compliance of the mandatory provisions of Chapter VII of the L.A. Act and Rules.

5. Gopabandhu Daridranarayan Seva Sangha, a society registered under the Societies Registration Act, 1860, the first petitioner in W.P.(C) No.10325 of 2008 and others have questioned the legality and validity of the acquisition notifications published under sections 4 and 6 of the L.A.Act on various grounds including the ground that acquisition of vast tract of land in favour of the Foundation, which is actually a 'private company' and subsequently claimed that it has converted to a 'public company' which falls within the definition of Section 3(1)(iv) of the Act, 1956 and its conversions is not permissible in law. It could not have been converted to a public company under section 25 and registered under section 12 of the Act. Therefore, the requisition made by the Vedanta Foundation to the State

Government to acquire land in its favour by its representation dated 23.6.2006 for establishing non-existing multi discipline University is a fraud played upon it and its registration, if any, as a public company after conversion under section 25 read with sections 2(23), 12(2)(b), 13(2) and 27(2) of the Companies Act and the regulations framed there under. A joint reading of sections 2, 3, 12, 13,21, 22, 23, 25, 27, 29, 568, 570, 573 and 617 of the Act, 1956 along with the Companies Regulations, 1956 (hereinafter referred to as 'the Regulations' in short) would indicate that the details of the objects, formation and other particulars regarding a 'Company' registered under section 25 of the Act with liabilities not limited by any share capital but limited by 'Guarantee'. The ceiling/maximum of liability of any member of the present 'Company' registered under section 25 of the Act is Rs.5000/- only. Therefore, the Foundation is not a public company as pleaded by it before the State Government for acquisition of lands in its favour for establishment of a University. The certificate under section 25 of the Act of 1956 obtained by the Foundation on the basis of Memorandum and Articles of Association attracts the mischief of fraud on public power of the State Government and it does not satisfy the mandate of section 25 read with sections 2, 3, 12(2) (b), 13(2) and 27(2) of the Act, 1956 and regulations including the statutory annexure annexed thereto. 'Sterlite Foundation' first altered its name to 'Vedanta Foundation' and still later further altered its name to 'Anil Agarwal Foundation'. The registration of the company purporting to have converted from 'private limited company' to 'public company' was and is a fraud on the Companies Act, inter alia, as the contents of the Memorandum of Association and Articles of Association were/are repugnant to the mandates of the Companies Act read with the Regulations. The Foundation having indulged in such illegalities and having fraudulently represented facts to the State Government that 'Vedanta/Anil Agarwal Foundation was a Private Limited Company under the Act (which category of company it never was and can never be), the said illegal 'body corporate' indulged in further fraud on the Act, 1956, the U.G.C. Act and the Land Acquisition Act and the Regulation by carrying out a conversion of 'Company' registered under section 25 of the Act to a so called 'public limited company', which is not legally permissible under the aforesaid Acts & Regulations. The entire exercise on the part of the Foundation and the State Government is contrary to the mandate of the law governing the field for acquisition of land. Further it is stated that the Memorandum and Articles of Association of the Foundation continued to have the same irremediable infirmities in it and do not satisfy the mandatory requirements of the aforesaid provisions of the Companies Act as its incorporation itself by less number of persons that are required to register a company under section 25 of the Act, 1956 and the stipulation regarding membership is contrary to the

provisions of the Act. The Foundation's registration as a limited company was through unusual means projecting itself as a public limited company by misrepresentation of facts in a designed way to the State Government with an ulterior motive to avail the benefit of the provisions of the L.A.Act to acquire the vast extent of lands for establishment of a non existent University, thereby it has played fraud on the State Government. A company registered under section 25 of the Act enjoys several privileges of which a private limited company does not have. Such company is partially or fully exempted from the operation of Sections 147, 160(1)(aa), 166(2), 171(1), 177, 93, 209 (4A), 219, 255, 256, 257, 259, 263, 264(1), 285, 292, 299, 301 and 303 (2) of the Act, 1956. The structure and nature of the company is pre-determined at the time of grant of license and registration under Section 25 of the Act and it is stated that no such conversion is granted in its favour as it has failed to comply with certain aspects as mentioned in the letter dated 22nd November, 2006 issued by the Regional Director of Company Affairs.

6. There is no occasion for the Foundation to get conversion of a company by guarantee under section 25 to be converted into a public limited company to come within the definition under section 3(1)(iv) of the Act,1956. In collusion with the other opposite parties, the Foundation succeeded in perpetrating the fraud and proceeded to sign an illegal, non est and void MOU dated 31.7.2007 after final notifications were published with the State of Orissa for patently illegal purposes and the same has been implemented by the State Government in gross violation of the mandatory provisions of Part VII of the L.A. Act read with Companies Rules. The impugned decision of the State Government to acquire vast extent of lands of good number of villages on the basis of the Memorandum of Understanding, the acquisition proceedings from the initial stage on the basis of the illegal agreement is wholly without any authority of law and, therefore, the impugned notifications and consequential action taken by the State Government and its offices are liable to be quashed.

7. Counter affidavit has been filed by the State Government through the Collector in each of the cases. The beneficiary company has also filed counter affidavit in each of the writ petitions traversing the petition averments.

8. In the Counter Statement filed on behalf of opposite party nos. 1 to 3, State Government in the PIL petition W.P.(C) No. 10325 of 2008, it has been stated that the public interest litigation is not maintainable in view of the judgment of this Court in W.P.(C) 8636 of 2008. Petitioner no.1 and 2, who claim that their lands have been acquired have never filed objections under Section 5-A of the Land Acquisition Act for which the writ petition is not maintainable. It is further stated that after deposit of money by the

Foundation with the Special Land Acquisition Officer, the acquisition file was opened on 18.11.2006, after which Section 4 notification was made and public notice was issued. The objections that were received were heard and disposed of. Report under Section 5-A(2) was sent indicating the number of objections received from some villages and no objections were received from the other villages. Thereafter the matter was placed before the Government. On 12.4.2007, the Government considered the report of the Collector under Section 5-A(2) and examined the matter for entering into the agreement and steps were taken for entering into an agreement in a Standard Form. The agreement was entered deleting Clause 9 and 10. The aforesaid agreement has been executed and notified on 31.7.2007. In the counter affidavit the averment made in the writ application have been denied. It is stated that allegation of collusion and fraud without any material is not admissible and therefore such allegation is denied. There was no collusion, illegality or fraud bereft of details is not admissible. The allegation about validity of agreement under Section 41 of the Land Acquisition Act and notification under Sections 4 and 6 are denied. It is further stated that land belonging to the Government can be transferred by the State Government on consideration of public interest for immense use of the public and therefore the petitioners in the PIL writ petitions have no locus standi to question the same.

9. Counter affidavit has also been filed on behalf of the State Government and the various authorities of the State, opposite party nos. 1 to 5 traversing the petitioner's averments in W.P.(C) No. 7360 of 2008. It is stated that Vedanta Resources submitted representation to the Hon'ble Chief Minister of Orissa during the month of April, 2006 for setting up a University at Puri which will have Under Graduate, Post Graduate Courses in Engineering, Medicines, Management, General Sciences and Humanity etc. Thereafter memorandum of understanding was signed between Government of Orissa and Vedanta Foundation which was later named as Anil Agarwal Foundation on 19.7.2006 for establishment of World class multi disciplinary University at Puri. It required contiguous land of 8000 acres. Accordingly, by letter dated 29.11.2006 issued by the Government of Orissa, Department of Higher Education to the Commissioner-cum Secretary to Government, Revenue and Disaster Management, administrative approval was given for acquisition of lands in 22 villages mentioned therein for the proposed Vedanta University by Anil Agarwal Foundation. Thereafter, the Foundation deposited the establishment cost and the opinion of the Law Department was obtained. The entire procedure contemplated under Chapter VII of the Land Acquisition Act and the Land Acquisition Companies Rules, 1963 have been complied with except notifying in the Official Gazette of the Committee to Advise the Government.

A Core Committee was constituted which examined the matter from time to time and is also monitoring the same. It is further stated in the Counter Affidavit that by the time the Counter was filed 2338 acres of the land pertaining to 18 villages had already been acquired and compensation to the tune of Rs. 29,10 crore had already been paid to 1234 numbers of awardees. Apart from the above, Rs. 15. 70 crores has already been disbursed as ex gratia by the Project Authority. The question of rehabilitation and resettlement of the displaced persons has been well taken care of having regard to the Rehabilitation and Resettlement policy, 2006. The Committee which has been constituted by notification dated 17.8.2006 issued by the Department of Higher Education is a Core Committee to coordinate the activities relating to lease of Government land and acquisition of private land facilitating rehabilitation of displaced families as per the policy and for other ancillary matters is consisted of; the Development Commissioner, Orissa, Principal Secretary to Government, Law Department, Commissioner- cum Secretary to Government, Higher Education Department, R.D.C., Central Division, Secretary to Government, Works Department, Special Secretary to Government, Finance Department and the Collector, Puri. The further case of the opposite party nos. 1 to 5 is that most of the lands proposed to be acquired are inferior type, completely rain fed and there is no irrigation facilities available to the said lands. The allegation of the petitioners that the lands under acquisition are good agricultural land has been denied. It is further stated that due to acquisition of land in 18 villages only 94 families are going to be displaced as per the socio economic studies conducted by the Xavier Institute of Management, Bhubaneswar. As regard acquisition of land of Sri Jagannath Mahapravu Bije at Puri is admitted in the counter affidavit. So far an amount of Rs. 8,78,94,399/- has been paid to the Administrator of Sri Jagannath Mandir Parichalana Committee for an area of 605. 87 acres in respect of ten villages and an amount of Rs. 4,09, 73,327/- has already deposited in the SBI, Puri for an area of 300.92 as per the direction of this Court. The opposite parties have stated that for the establishment of University by the Foundation an area of Ac.6`150.00 is required out of which Ac. 5488.00 is private land and Ac. 702.00 are Government Land. The aforesaid lands do not come under the purview of Balukhanda Wild Life Sanctuary. Therefore, the allegation of the petitioner that the establishment of the University will affect the environment, wild life and deprive the bread and butter of the petitioners is baseless. The further case of the opposite parties is that Vedanta University will promote the educational activities of international standard and shall impart education at par with Oxford, Standford and Cambridge University etc. and it shall be a non-profit making University, therefore, the signing of MOU for the purpose of establishment of the

University is genuine and there is no mala fide intention in it. The villages of the project area are outside the Balukhanda Konark Wild Life Sanctuary, therefore, it shall have no adverse effect on environment. The Existence of two rivers namely, Nuanai and Ciarcut inside the project area is admitted. Further a stand is taken that Anil Agarwal Foundation has changed its status from Private Company to Public Company and the procedure for land acquisition as prescribed in the Act and the Rules has been meticulously followed and the Law Department has been consulted whenever required. Notification under Section 4(1) of the Act has been issued after the Government was satisfied that the Anil Agarwal Foundation has changed its status from Private to Public Company. It is the further case of the opposite parties that the though the provision of Rule 4 of the Land Acquisition Companies Rules, 1963 have not been complied with in letters, it is deemed to have been complied with in spirit as all the step required under the said Rules have been broadly seen to be complied. It is further submitted that the land which comes under the Project Area is not sensitive to ecology, and on the basis of the letter dated 28.11.2007 of the Conservator of Forest (WL), Bhubaneswar, the opposite parties have stated that no information about area if any reserved by Government for development of eco-tourism is available in the office of the Principal CCF. Further by letter dated 11.12.2007, the Director, Tourism has informed the Joint Secretary to the Government, Revenue and Disaster Management Department that the 8000 acres of land at Puri-Konark Marine Drive as mentioned in paragraph-7 of W.P.(C) no. 11607 of 2007 has not been reserved by Tourism Department under Orissa Tourism Policy for development of eco tourism. The other side of the land between the sea and the road has not been declared as bird sanctuary under Orissa Tourism Policy. Therefore, it is submitted that the area is not coming under the purview of wild life zone or eco tourism and further stated that after Section 4(1) notification was published, there was enough scope for filing objection under Section 5A of the Act, but in response to the notification, nobody filed any objection under Section 5A of the L.A.Act. The petitioner in W.P.(C) 7360 of 2007 also did not file any objection either during the statutory period or thereafter. The stand of the opposite party nos. 1 to 5 is that the process for acquisition of land for the proposed Vedanta University was started only after the status of the Company was changed from Private to Public Company. The notifications under Section 4(1) of the Act were published in two daily newspapers and also at conspicuous places of the village and G. P. Headquarters for wide publicity. A lot of deliberation and inter-action had been made with the villagers, hence, ample opportunities has been provided to the land losers and the villagers to file objection under Section 5A of the L.A.Act. Even then,

nobody came forward to file objection. Therefore, opposite parties 1 to 5 have prayed for dismissal of the writ petition.

10. Counter affidavit has also been filed by the Collector, Puri in W.P.(C) No. 11607 of 2007 in which the prayer is for excluding the petitioner's land in mouza Beladala from the purview of acquisition. The stand of the Collector is that mouza Beladala was included in the Section 4(1) notification though initially Ac. 1052.43 decimals of land were notified for acquisition in the said village, subsequently 226.52 acres were excluded as the above land had already been acquired previously for other purposes.

11. Counter affidavit has been filed by the beneficiary companies entirely traversing the allegations made in respective writ petitions. The stand of the Company is that Anil Agarwal Foundation is a non-profit making charitable public company taking steps for the establishment of Vedanta University which is for a public purpose. The provisions of Part VII of the L.A. Act have been complied with and the State Government has given its consent under Section 39 of the Act for acquisition of the land. The agreement under Section 41 of the Act has been executed between the State Government and the Public Company containing the conditions for advance payment of the cost of acquisition and reversion of the acquired land to the State Govt. in the event Company failed to complete the work within the stipulated period. Their main thrust of argument is that the PILs are not maintainable because it is not filed bona fide but with a mala fide intention and oblique motive. The petitioners have no locus standi to maintain a PIL as only persons interested has right to object to the land acquisition proceeding in respect of their interest in the land. According to them after publication of the notification under Section 4(1) of the Act about 10 numbers of objections were filed under Section 5A which were disposed of by the competent authority and the petitioners who have filed the PIL have never made any written objections though they have the knowledge of the notifications/declarations made under Section 4 and 6 of the Act respectively. There is no document to show that the lands of the petitioner no. 2 and in W.P.(C) No. 10325 of 2008 are sought to be acquired. It is the contention of the beneficiary company that land losers cannot file writ petition in the nature of PIL in representing capacity for other land losers especially when no objections have been filed under Section 5A of the Act after issuance of notification under Section 4 of the Act. It is further stated that acquisition proceedings of 18 villages are at different stages. Out of 18 villages, in respect of 7 villages, namely, Nilakanthapada, Rahanagiria, Gaindol, Nalihana, Kantasila, Sirihana and Fanafana, and acquisitions proceedings have already been completed by making of awards, and after disbursement of compensation amount to the owners/interested persons, possession of 1871 acres was taken by the State and has already been

delivered to the beneficiary company. In respect of three villages only declaration under Section 6 of the Act has been made and in 8 villages, awards under Section 11 of the Act have been passed in respect of 868.35 acres of land and delivery of possession is awaited. It is stated that about 2700 persons have received the compensation amount from the State Government. Further case of the beneficiary company is that the PIL has been filed after more than one and half year of the publication of the notification Under Section 4(1) of the Act. Therefore, the PIL petitioners are estopped from raising allegation of violation of the provisions of the L.A. Act and non- compliance of the Rule 4 of the Land Acquisition Companies Rules, 1963 as the persons affected have acquiesced to the land acquisition proceeding pursuant to the notification under Section 4(1) of the Act. Further the land oustees/villagers on whose behalf the PIL petitioners espoused the cause have never filed objection under Section 5-A of the Act on the ground of violation of legal right nor have the PIL petitioners come forward within the stipulated period to file statutory objection alleging procedural improprieties in the land acquisition process or any illegality or irrationality in the administrative decisions. Since this Court has already declined to interfere in the land acquisition process, in W.P.(C) No. 6981 of 2008 filed by way of PIL, the subsequent PIL writ petitions for the self same cause are not maintainable in law and therefore prayed for dismissal of the same. Similar stand has also been taken in the counter affidavit filed in the connected writ petitions.

12. Having regard to the pleadings of the parties, the following points arise for consideration.

POINTS

1. Whether the Anil Agarwal Foundation, the beneficiary company, is a public company in terms of the definition under Section 3(1)(iv) of the Companies Act, 1956 and can the Private Guarantee Limited Company be converted to Public Company under Section 25 of the Companies Act ?
2. Whether the State Government can acquire the lands in question in favour of the beneficiary company in exercise of its eminent domain power for the purpose of establishment of the proposed Vedanta University (not in existence) in view of Section 44-B of the Land Acquisition Act, 1894 ?
3. Whether the State Government on the requisition of Vedanta Foundation could have initiated the acquisition proceedings in favour of the beneficiary company by issuing notifications under Section 4(1) of the L.A. Act without complying with the mandatory provisions

of Section 39, 41 and 42 of the Land Acquisition Act read with Rules 3(2) and 4 of the Land Acquisition (Companies) Rules, 1963 ?

4. (a) Whether the Collector was required to conduct an inquiry as contemplated under Section 5-A of the Land Acquisition Act even in the absence of filing objections to the show cause notice along with preliminary notification proposing to acquire the lands of the land owners/interested persons in favour of a beneficiary company?

(b) Whether the Collector was required to submit his report to the State Government in relation to certain matters as referred to under Clause (1) of Rule 4 as it is mandatory for further action under Section 6 of the Act,1894 in view of the fact that the acquisition will entail serious civil consequences of the owners of the lands ?

5. (a) Whether the owners /interested persons of the land in question have waived or acquiesced their rights for not filing objections to the preliminary notifications ?

(b) Whether there is any delay and latches in these writ petitions and for that reason they are not entitled to the relief as prayed in these writ petitions ?

6. Whether the Core Committee appointed by the State Government is in compliance with the provision under Section 40, sub-Section (2) of the Act, 1894 and it has conducted an inquiry and submitted its report to the State Government for its consideration and compliance of the above provisions of the Act can dispense with the Rules 3 & 4 of the Land Acquisition (Companies) Rules,1963 for declaring the lands required to the beneficiary company under Section 6 of the L.A. Act ?

7. Whether the State Government has complied with Rules 3(2) and 4 of the Rules, 1963 and the Collector has submitted his report to the State Government and the same is forwarded to the Committee constituted for this purpose and whether it has consulted the Committee before declaring the lands notified & published under Section 6 notifications?

8. Whether the beneficiary company has executed Memorandum of Understanding as required under Section 41 of the Land Acquisition Act with the State Government giving undertaking as provided under sub-sections (1), (2) & (3) of the said Section of the Act and the same is published in the Official Gazette as required under Section 42 thereof ?

9. Whether the Memorandum of Understanding dated 19.7.2006 executed by the beneficiary company can be construed as a valid

one agreement as provided under section 41 of the L.A.Act for acquiring the lands in question in favour of the beneficiary company.

10. Whether the notifications published under Section 6 of the Land Acquisition Act declaring the proposed lands required for establishing the proposed Vedanta University is in compliance with Rule 4 of the Rules, 1963 and the Collector has determined approximate amount of compensation to be awarded and deposited as required under the provisions and by following the procedure as provided under Sections 23 & 24 of the L.A. Act ?

11. Whether awards are passed by the Collector in compliance with Sections 9, 10, and 11 of the L.A. Act and award notices as required under Section 12(2) of the Act are issued and served upon the owners/interested persons and thereafter possession of the lands has been taken by the State Government under Section 16 of the L. A. Act and transferred in favour of the beneficiary company ?

12. (a) Whether the impugned notifications acquiring the lands in the locality is legal & valid, as certain lands of them are declared for Wildlife Sanctuary according to Gazette Notification dated 23.4.1984 and two rivers viz.-"Nuanai" & "Nala" are flowing in the lands in question according to Satellite Map issued by the Department of Forest, would it affect the ecology and environment in the locality?

(b) If so, whether it amounts to violation of provisions of Wild Life (Protection) Act ; Air (Prevention & Control of Pollution) Act as well as Water (Prevention & Control of Pollution) Act, and Environment Protection Act of 1986 and for this reason would it affect either the public interest or public injury or violation of Rule of law?

13. Whether Public Interest Petitions must succeed if the question Nos. 12(a) & (b) are answered in favour of the petitioners and for violation of any provisions of Land Acquisition Act as well as Land Acquisition (Companies) Rules ?

14. Whether the acquisition proceedings in its entirety liable to be quashed, if the petitioners have made out a case, by exercising judicial review power by this Court ? and

15. What reliefs petitioners are entitled ?

Answer to Point Nos. 1 & 2.

13. Mr. Jayant Das, learned Senior Counsel on behalf of the public interest writ petitioners in W.P.(c) No. 10325 of 2008 urged that Section 2 (23) of the Act states that 'limited company' means a company limited by shares or by guarantee. Section 2(35) defines 'private company'.

Section 2 (37) states about 'public company'. Section 3(1)(iii)(b)(i), (c) and (d) deals with private company and Clause (iv)(a)(b) and (c) of sub-section (1) of Section 3 refers to public company, which shall have a minimum paid-up capital of five lakh rupees or such higher paid up capital, as may be prescribed. However, sub-section (6) of Section 3 provides that a company registered under Section 25 of the Act, 1956 before or after the commencement of Companies (Amendment) Act, 2000 shall not be required to have minimum paid-up capital specified in the section. Public company is a residuary company.

14. Mr. Das with reference to section 2(23) and 2 (27) read with section 3(1) (III),(a)(b) and section 27(3) contends that for a public limited company there shall be seven or more shareholders but for a private company two or more persons associated for a lawful purpose. In the instant case it is a Company limited by guarantee as mentioned in the Memorandum of Association to the tune of Rs.5000.00. Shares of a company limited by guarantee is neither transferable nor convertible like public limited company. Public limited company shares cannot be allowed to travel to public company under section 3(1)(iv) of the Act. There is no provision in the Companies Act to convert from a private limited company to public limited company as the structure and guarantee to it co- terminates. He has placed strong reliance upon the affidavit of the Assistant Registrar of Companies filed in the instant case pursuant to the direction issued by this Court in these proceedings. The Assistant Registrar is also a Registrar in terms of definition of Section 2(40) of the Act,1956.

15. On the other hand, Mr. Anil Diwan, Learned Senior counsel on behalf of the Foundation placing strong reliance upon the statement of counter filed by it in W.P.(C) No. 10325 of 2008 and also the affidavit of the Assistant Registrar of Companies and Annexures-R/13 and R/14 to the affidavit and counter affidavit of opposite party no.3 of the paper book and sections 12 and 44 of the Companies Act, submits that the Foundation is not a limited share holding. He submits that the certificate has been issued by the Registrar of Companies in favour of the Foundation evidencing the fact that it is a public company. Therefore he submits that acquisition of land by the State Government in favour of the Foundation for establishing the University in the acquired lands is for a public purpose to impart world-class education institutions in various courses to the students of the country and also other foreign students. He further submits that the various legal contentions urged on behalf of the petitioners that the Foundation is not converted into a public limited company from private company is wholly untenable in law as the same is contrary to facts and law and therefore requested to reject the contention urged in this regard. Accordingly, he requests this Court to answer the point on this aspect in favour of the

Foundation and consequently the other points that would arise for consideration also in its favour as the acquisition of lands by the State Government is permissible under the provisions of Part VII of the L.A.Act and it is also for public purpose.

16. With reference to the rival legal contentions urged on behalf of the parties with regard to Point Nos. 1 and 2, our answer to the above points is against the Foundation for the following reasons. It would be necessary for us to extract the provisions of Sections 2(23), 2(27) and 3 (1)(iii) (a)(b)(c)(d) and (iv)(a)(b)(c) of the Companies Act, which read thus:

> " 2(23). "limited company" means a company limited by shares or by guarantee.
>
> 2(27) "member" in relation to a company, does not include a bearer of a share-warrant of the company issued in pursuance of section 114;
>
> 3 (1) " Definition of 'company',' existing company', 'private company' and 'public company'.- (1) In this Act, unless the context otherwise required, the expressions "company", "existing company", "private company" and "public company", shall, subject to the provisions of sub-section (2), have the meanings specified below:-
>
> xxx xxx xxx xxx
>
> (iii) "private company" means a company which has a minimum paid-up capital of one lakh rupees or such higher paid-up capital as may be prescribed, and by its articles.-
>
> (a) restricts the right to transfer its shares, if any;
>
> (b) limits the number of its members to fifty not including-
>
> (i) persons who are in the employment of the company; and
>
> (ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased; and
>
> (c) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company.

(d) Prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this definition, be treated as a single member."

(iv) "public company" means a company which-

(a) is not a private company;

(b) has a minimum paid-up capital of five lakh rupees or such higher paid-up capital, as may be prescribed;

(c) is a private company which is a subsidiary of a company which is not a private company.

17. Section 12(1) of the Act, 1956 deals with mode of forming incorporated company which provision states that any seven or more persons, or where the company to be formed will be a private company, any two or more persons associated for any lawful purpose may, by subscribing their names to a Memorandum of Association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability. Section 27 speaks of regulations required in case of unlimited company, company limited by guarantee or private company limited by shares. Sub-section (2) of the aforesaid provision provides that in the case of a company limited by guarantee, the articles shall state the number of members with which the company is to be registered. Section 37 states that in the case of a company limited by guarantee and not having a share capital and registered on or after the first day of April, 1914, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void. As could be seen from paragraph 6 of the affidavit of the Assistant Registrar of Company & Corporate Affairs on behalf of opposite party no. 13 (Regional Director) and 14 (Registrar of Companies) in W.P.(C) No.10325 of 2008, who has been authorized on behalf of the Registrar of Companies at Mumbai to file the affidavit, has filed affidavit pursuant to the direction of this Court in these proceedings stating that M/s.Vedanta Foundation was originally incorporated with the Registrar of Companies, Maharashta, Mumbai on 12.5.2004 under section 25 of the Companies Act, 1956 as Sterlite Foundation, a private limited company as defined under section 3(1)(iii) of the Act and subsequently changed its name to M/s.Vedanta

Foundation pursuant to section 21 read with Section 23(1) of the Companies Act, 1956 and again changed its name to M/s. Anil Agarwal Foundation vide fresh certificate of incorporation dated 6.9.2006 issued consequent upon the said change of its name. Further at paragraph 9 of the affidavit, it has been stated that opposite party No.13, in the said PIL writ petition considered the conversion of the status of opposite party No.6 Foundation from Private to a Public Company subject to compliance of the provisions of sections 23, 31, 189(2) and 192 of the Act but the said Foundation did not furnish to opposite party no.14 certified copy of the Memorandum and Articles of Association as required under the provisions of sub-section (2A) of Section 31 of the Act. Further the Assistant Registrar has stated at para 10 of the affidavit that change of status of the Foundation from private to public was subject to compliance of the aforesaid provisions of the Act and the same is not complied with by the beneficiary company, therefore it has not acquired the status of a 'public company'. Further the company has been promoted by four members the names and addresses of whom have been furnished at para 10(a) of the affidavit. Further at paragraph 10(b), it is stated by the Assistant Registrar that as per the Articles of Association, Sterlite Foundation has been incorporated as a company limited by guarantee and not having share capital. The above said Directors were first Directors of the Company. As per details mentioned in Form No.32 filed on 19.7.2006, one Laxminarayan Agarwal ceased to be a Director and member of the Company with effect from 2.4.2006 due to his death. Therefore, the company is presently having three Directors on its Board and **less than seven members as required for a public limited company under section 12 (b) of the Act.** As the Foundation has not produced the altered Memorandum and Articles of Association of the Company, and the same are not available in the office of the Registrar of Companies at Mumbai a letter was addressed to it for supply of the duly certified copy of the same. The said letter was returned with postal remark 'not known'. At paragraph 12 of the affidavit it is stated that opposite party No.13 considered the change of status of the Foundation from 'private' to 'public' company both on fact and in law is not legal and valid. Since the Foundation did not furnish the Memorandum and Articles of Association to opposite party No.14, the change of status of the Foundation from 'private limited' company to 'public limited' company with reference to Section 3 (1)(iii) and Section 3 (1)(iv) cannot be deemed to be a Public Company and it is not a Government Company as defined under section 617 of the Act,1956 read with the provisions of Sections 618 to 620 of the said Act till the provisions of sections 44 of the Act are complied with and also the requisite minimum number of members as required under section 12 (b) of the Act are complied with by it. The Foundation, a company incorporated under section

25 of the Act, 1956 by collusion is not a Public Company in terms of the aforesaid provisions of the Act. In view of the aforesaid statement of fact sworn to by competent officer of the Ministry of Company Affairs and having regard to the undisputed fact, it is a private company limited by guarantee. For the reasons stated supra, the submission made on behalf of the petitioners that Anil Agarwal Foundation is not a 'public limited' company for the purpose of acquisition of lands in its favour under Part VII of the Land Acquisition Act and the acquisition of land in favour of the company for educational purposes as it falls within the definition of Society in section 3(f) sub-Clause (vi) of the L.A. Act and to establish Educational Institutions is neither sponsored by the State Government or Local Authorities as required under the above provisions shall be accepted by this Court as the same is well founded. In support of the above said views in giving answer to point No.1, it would be necessary for us to refer to the decision of the apex Court hereunder.

18. In the case of **Needle Industries (India) Ltd. & Ors. Vs. Needle Industries Newey (India) Holding Ltd. & Ors., reported in (1981) 3 SCC 333,** a three Judge Bench of the Hon'ble Supreme Court examined and explained the definitions of 'private company' and a 'public company' and held as under :

> "147. In the first place, a Section 43-A company may include in its articles, as part of its structure, provisions relating to restrictions on transfer of shares, limiting the number of its members to 50, and prohibiting an invitation to the public to subscribe for shares, which are typical characteristics of a private company. A public company cannot possibly do so because, by the very definition, it is that which is not a private company, that is to say, which is not a company which by its articles contains the restrictions mentioned in Section 3(l)(*iii*). Therefore, the expression 'public company' in Section 3(1)(*iv*) cannot be equated with a 'private company which has become a public company by virtue of Section 43-A'.
>
> 148. Secondly, the number of members of a public company cannot fall below 7 without attracting the serious consequences provided for by Section 45 (personal liability of members for the company's debts) and Section 433 (*d*)(winding up in case the number of its members falls below 7). A Section 43-A company can still maintain its separate corporate identity qua debts even if the number of its members is reduced below seven and is not liable to be wound up for that reason.
>
> 149. Thirdly, a Section 43-A company can never be incorporated and registered as such under the Companies Act. It is registered as

a private company and becomes, by operation of law, a public company.

150. Fourthly, the three contingencies in which a private company becomes a public company by virtue of Section 43-A [mentioned in sub-sections (1), (1-A) and (1-B) read with the provisions of sub-section (4) of that section] show that it becomes and continues to be a public company so long as the conditions in sub-sections (1), (1-A) or (1-B) are applicable. The provisos to each of these sub-sections clarify the legislative intent that such companies may retain their registered corporate shell of a private company but will be subjected to the discipline of public companies. When the necessary conditions do not obtain, the legislative device in Section 43-A is to permit them to go back into their corporate shell and function once again as private companies, with all the privileges and exemptions applicable to private companies. The proviso to each of the sub-sections of Section 43-A clearly indicates that although the private company has become a public company by virtue of that section, it is permitted to retain the structural characteristics of its origin, its birthmarks, so to say. Any provision of the Companies Act which would endanger the corporate shell of a "proviso company" cannot be applied to it because, that would constitute an infraction of one or more of the characteristics of the "proviso company" which are statutorily allowed to be preserved and retained under each of the three provisos to the three sub-sections of Section 43-A. A right of renunciation in favour of any other person, as a statutory term of an offer of rights shares, would be repugnant to the integrity of the Company and the continued retention by it of the basic characteristics under Section 3(I)(*iii*).

151. Fifthly, Section 43-A, when introduced by Act 65 of 1960, did not adopt the language either of Section 43 or of Section 44. Under Section 43 where default is made in complying with the provisions of Section 3(1)(*iii*), a private company "shall cease to be entitled to the privileges and exemptions conferred on private companies by or under this Act, and this Act shall apply to the company as if it were not a private company". Under Section 44 of the Act, where a private company alters its articles in such a manner that they no longer include the provisions, which under Section 3(I)(*iii*), are required to be included in the articles in order to constitute it a private company, the company "shall as on the date of the alteration cease to be a private company". Neither of the expressions, namely, "this Act shall apply to the company as if it were not a private company" (Section 43) or that the company "shall

. . . cease to be a private company (Section 44) is used in Section 43-A. If a Section 43-A company were to be equated in all respects with a public company, that is a company which does not have the characteristics of a private company, Parliament would have used language similar to the one in Section 43 or Section 44, between which two sections, Section 43-A was inserted. If the intention was that the rest of the Act was to apply to a Section 43-A company "as if it were not a private company", nothing would have been easier than to adopt that language in Section 43-A; and if the intention was that a Section 43-A company would for all purposes "cease to be a private company", nothing would have been easier than to adopt that language in Section 43-A.

152. Sixthly, the fact that a private company which becomes a public company by virtue of Section 43-A does not cease to be for all purposes a "private company" becomes clear when one compares and contrasts the provisions of Section 43-A with Section 44: when the articles of a private company no longer include matters under Section 3(1)(*iii*), such a company shall as on the date of the alteration cease to be a private company [Section 44(1)(*a*)]. It has then to file with the Registrar a prospectus or a statement in lieu of prospectus under Section 44(2). A private company which becomes a public company by virtue of Section 43-A is not required to file a prospectus or a statement in lieu of a prospectus.

153. These considerations show that, after the Amending Act 65 of 1960, three distinct types of companies occupy a distinct place in the scheme of our Companies Act: (*1*) private companies (*2*) public companies and (*3*) private companies which have become public companies by virtue of Section 43-A, but which continue to include or retain the three characteristics of a private company. Sections 174 and 252 of the Companies Act which deal respectively with quorum for meetings and minimum number of directors, recognize expressly, by their parenthetical clauses, the separate existence of public companies which have become such by virtue of Section 43-A. We may also mention that while making an amendment in sub-clause (*ix*) of Rule 2(*a*) of the Companies (Acceptance of Deposits) Rules, 1975, the Amendment Rules, 1978 added the expression: "any amount received ... by a private company which has become a public company under Section 43-A of the Act and continues to include in its Articles of Association provisions relating to the matters specified in clause (*iii*) of sub-section (1) of Section 3 of the Act", in order to bring deposits received by such companies within the Rules.

> 154. The various points discussed above will facilitate a clearer perception of the position that under the Companies Act, there are three kinds of companies whose rights and obligations fall for consideration, namely, private companies, public companies and private companies which have become public companies under Section 43-A(1) but which retain, under the first proviso to that section, the three characteristics of private companies mentioned in Section 3(1)(*iii*) of the Act. Private companies enjoy certain exemptions and privileges which are peculiar to their constitution and nature. Public companies are subjected severely to the discipline of the Act. Companies of the third kind like NIIL, which become public companies but which continue to include in their articles the three matters mentioned in sub-clauses (*a*) to (*c*) of Section 3(1)(*iii*) are also, broadly and generally, subjected to the rigorous discipline of the Act. They cannot claim the privileges and exemptions to which private companies which are outside Section 43-A are entitled. And yet, there are certain provisions of the Act which would apply to public companies but not to Section 43-A companies. Is Section 81 of the Companies Act one such provision? And if so, does the whole of it not apply to a Section 43-A company or only some particular part of it? These are the questions which we have now to consider."
>
> *(emphasis added)*

19. Therefore, in view of the reasons assigned above, the reliance placed by the learned Senior Counsel Mr. Anil Diwan on behalf of the Company upon the above referred various provisions of the Companies Act and documents in support of his submission that Anil Agarwal Foundation is a 'Public Limited Company' is wholly untenable in law as the same is contrary to facts and various provisions of the Act,1956 which are adverted to above, and law laid down by the Apex Court on this aspect. Therefore, we have to hold the first point against the beneficiary company/ Foundation.

20. The second point is also required to be answered in favour of the petitioners for the following reasons. The case of the beneficiary company/Foundation is that it is a public limited company and therefore acquisition of lands by the State Government in exercise of its eminent domain power for establishment of the University is permissible in view of Section 40 of the L.A. Act. The provisions of Section 40(1) of the L.A. Act provides that consent for acquisition of land shall be given by the appropriate Government if it is satisfied either on the report of the Collector under section 5-A(2) or by an enquiry held that the purpose of the acquisition of lands is for the erection of dwelling-house for workmen employed by the company or for the provision of amenities directly

connected therewith, or that such acquisition is needed for the construction of some building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose or that such acquisition is needed for the construction of some work and that such work is likely to prove useful to the public. Section 44-B of the Act provides that notwithstanding anything contained in the L.A. Act, no land shall be acquired under Part VII except for the purpose mentioned in clause (a) of sub-section (1) of Section 40 for a private company which is not a Government company. Since we have answered the point no.1 in favour of the petitioners and against the Foundation holding that it is Private Limited Guarantee Company, acquisition of lands in favour of the beneficiary company is permissible only for the purposes mentioned in clause (a) of sub-section (1) of Section 40 of the L.A. Act, as the Foundation is neither a Government Company nor a Public Company. The acquisition of lands in favour of the beneficiary company is not permissible for any purpose other than the purposes as provided under Sections 40(1)(a) of the L.A. Act. In this view of the matter, the proposed acquisition of lands in favour of the Foundation pursuant to the impugned notifications for the purpose of establishment of a non-existent University, as rightly pointed out by the learned Senior Counsel Mr. Jayant Das for the petitioners that such University has not come into existence either Under the University Grants Commission Act,1956 in terms of section 2 (f) or under the Orissa Universities Act, and, therefore, the acquisition of lands in favour of the Foundation is illegal in the eye of law. The undisputed fact is that there is an Ordinance promulgated by the Government of Orissa at the time of initiation of the proceedings to establish a University by the Foundation. Such Ordinance is wholly untenable in law for the reason that the proposed University only can be established under the Orissa Universities Act and such University will have a status of a deemed University under the provisions of the University Grants Commission Act if it is granted under the said Act by issuing notification under Section 3 of the Act. Therefore, the Ordinance promulgated by the State Government in favour of the Foundation cannot give the legal status to the University proposed to be established in the acquired lands by the Foundation. Under the provisions of Section 44-B of the L.A. Act of Chapter VII, acquisition of lands in favour of a private company can only be made for the purposes mentioned in Clause (a) of sub-section (1) of Section 40 of the Act, which is for erection of dwelling-houses for workmen employed by the company or for the provisions of amenities directly connected therewith. The acquisition of lands for establishment of the proposed non existent University does not fall within the purposes mentioned in the clause (a) or the aforesaid provisions of section 40 and further it does not fall within the public purpose in terms of

Section 3(f) Clause (vi) of the L.A. Act for the reason that establishment of a non-existent University by a private company cannot be held as public purpose in terms of the above provisions and law laid down by the apex Court in this regard. Therefore, acquisition of lands by the State Government on the request of the Vedanta Foundation is totally impermissible in law. Hence, the impugned notifications are void ab initio in law and are liable to be quashed. Accordingly, the second point is answered against the Foundation and in favour of the petitioners.

Answer to Points 3, 4(a)(b) and 5 (a) & (b), 6,7,8,9,10 & 11

21 All these points being inter related, are taken up together and answered as hereunder.

The case of the petitioners who are land owners and public spirited persons in these cases is that the notification issued under Section 4 (1) of the L.A. Act, proposing to acquire the lands in the locality in favour of the beneficiary company for establishment of the proposed Vedanta University is not legally permissible for the reason that it is not a 'public company' in terms of the definition of Section 3 (iv) of the Companies Act as the beneficiary company is a guarantee Private Limited Company. Therefore, the proposed acquisition of lands for the purpose of establishing a University does not fall within the purpose for which the lands are proposed to be acquired as per Clause (a) or (b) of sub-section (1) of Section 40 of the L.A. Act. Therefore, it is not permissible in law for the State Government to acquire the lands in favour of the beneficiary Company and further this important legal aspect of the matter has not been properly considered by the State Government, while exercising its power under Section 4(1) of the L.A. Act to initiate the acquisition proceedings in view of Section 44-B of the L.A. Act. Further the Collector of the District where the acquired lands are situated has not conducted any enquiry, by serving individual notices upon the owners/interested persons, as required under Section 5-A (2) of the L.A.Act and/or previous enquiry under Section 40 of the Act or under Rule 4 of the Rules. Section 39 of the L.A. Act expressly states that provisions of sections 6 to 16 (both inclusive) and Sections 18 to 37 (both inclusive) shall not be put in force in order to acquire land for any company under Chapter VII unless with the previous consent of the appropriate Government and unless the company shall have executed the agreement mentioned therein in its favour. Placing strong reliance upon decision in the case of **State of Gujarat and another vs. Patel Chaturbhai Narsinbhai & Ors., reported in AIR 1975 SC 629** and also another judgment of the Supreme Court in the case of **Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and Ors., reported in AIR 2005 SC 3520**, learned Senior Counsel contended that land owners are entitled to be given opportunity of being heard by conducting an enquiry as contemplated under Section 5-A or previous enquiry under Section 40 of the L.A. Act.

22. Learned Senior Counsel Mr. Jayant Das, Mr. R.K.Rath and learned counsel Mr. Subir Palit who appeared on behalf of the petitioners both for the owners of land and the public spirited persons in the Public Interest Litigation petitions placed strong reliance upon Rule 3(2) of the Rules framed by the Union of India in exercise of its power under Section 55 of the L.A.Act. It is contended by them that in the proposed acquisition of lands in favour of the beneficiary Company in terms of the provisions of Section 40 (1) of the L.A.Act under Part VII read with Rules 3 & 4 of the Rules are applicable to the acquisition proceedings, the State Government is required to acquire the lands by following the due procedure as contemplated therein. Rule 3 of the said Rules provides for constitution of a Committee called 'Land Acquisition Committee' and the State Government shall publish the same in the Official Gazette. In the case at hand, undisputedly no such Committee was constituted by the State Government from among the persons notified under sub-rule (2) of Rule 3 and clauses (i) and (ii) of the Rules. Further they have submitted that whenever any Company makes an application to the State Government for acquisition of any land, it shall direct the Collector to submit a report on the matters provided under sub-rule (2) and clauses (i), (ii), (iii) and (iv) of the Rule 4 which are elaborately extracted in the reasoning portion and further sub-rule (2) of Rule 4 provides that the Collector should give reasonable opportunity to the Company to make representation and hold an enquiry into the matters referred to in sub-rule (1) and while conducting such an enquiry he is required to indicate in his report the aspects, which are referred to in clauses (i), (ii) and (iii) of sub-rule (2) of Rule 4. Sub-rule (4) of Rule 4 mandates that no declaration under section 6 in respect of the lands notified under Section 4 (1) of the L.A.Act shall be made unless the State Government has consulted the Committee and has considered the reports submitted by the Collector under the Rule and the report, if any submitted under Section 5A of the Act and the agreement under Section 41 of the Act has been executed by the Company and published in the Official Gazette. The above said mandatory procedure has not been complied with by the State Government and the Collector before publishing the Section 6 notifications. Therefore, the acquisition proceedings in respect of the lands covered in the notifications in favour of the beneficiary Company/Foundation are bad in law, hence the same are liable to be quashed.

23. Learned Senior Counsel appearing on behalf of the petitioners in support of the above said legal contentions placed reliance upon the following decisions of the Supreme Court, namely, **Shanti Sports Club & anr. Vs. Union of I ndia and ors., reported in (2009) 15 SCC 705 and**

City Montessory School vs. State of Uttar Pradesh & Ors., reported in (2009) 14 SCC 253. It is contended by the learned Senior Counsel Mr. R.K. Rath that the memorandum of agreement was executed by the Vedanta Foundation and not by Anil Agarwal Foundation in favour of the State Government before the initiation of the acquisition proceedings. Therefore, it is not a valid agreement as required under Section 41 of the Act. Further, certain clauses in the said agreement would clearly go to show that the State Government has pre determined the issue regarding acquisition of lands without getting the report from the Collector as required under sub-rule (4) of Rule 4 of the Rules and declaration of the acquisition of lands under Section 6 of the L.A. Act is bad in law. Therefore, he would further submit that the impugned notifications of acquiring the lands are in violation of the statutory provisions of the L.A.Act and the Rules. Learned Senior Counsel further submitted that the observance of the aforesaid statutory rules by the State Government in order to exercise its power is required to be strictly adhered to and followed as held by the Hon'ble Supreme Court in the cases of Shanti Sports Club (supra) and City Montessori School (supra).

24. Mr. Ashok Mohanty, learned Advocate General appearing on behalf of the State Government and the Collector on the basis of the record made available for our perusal submitted that the State Government has applied its mind and after being satisfied that the proposed lands were required for public purpose, published the notifications under Section 4 (1) of the Act proposing to acquire the lands as mentioned in the preliminary notifications and notified the same after receipt of the requisition made by the beneficiary Company and notices were issued to the owners/interested persons calling upon them to submit their objection statement to the proposed acquisition. None of the owners filed their objection statement except the petitioners in W.P.(C) No. 3361 of 2007. Therefore, he submits that the contention of the petitioners that notices were not served upon them as required under the aforesaid provisions of the Act and conduct of the enquiry under Section 5-A of the L.A. Act was necessary, as urged by the learned Sr. Counsel and other counsel on behalf of the petitioners, is not tenable in law. He further sought to justify the consent given by the State Government for complying with the provisions of Sections 6 to 16 and 18 to 37 of the L.A. Act both inclusive for the purpose of acquiring the lands in favour of the beneficiary Company under Section 39 of the Land Acquisition Act. Before giving such consent by the State Government issuing and publishing the notifications under Section 4(1) of the L.A. Act after the enquiry held by the Committee constituted by the State Government as provided under sub-rule (2) of Rule 3 and unless it opines that the lands

which are proposed to be acquired as notified under Section 4(1) of the L.A. Act are needed for the beneficiary Company to establish a multi discipline faculty University, which would serve the public purpose is not required in law and further he had submitted that the beneficiary Company has executed the agreement on 31.7.2007 in favour of the State Government as required under Section 41 of the L.A.Act and administrative approval was obtained on 29.11.2006. Revised administrative approval was granted on 13.12.2006 and notifications under Section 4 (1) were published on 22.12.2006 and on subsequent dates. Therefore, he would urge that the legal contentions of the petitioners that there was no previous consent of the State Government in notifying the proposed lands in the notifications is both on facts and in law are not at all correct. It is also further contended by him that on the basis of the Collector's report and the counter statement, the petitioners have not submitted their statement of objection to the notices served upon them along with Section 4(1) of notification opposing the proposed acquisition of lands by the State Government in favour of the beneficiary Company to establish a University. Hence the State Government after satisfying with the reports of the Collector and the Core Committee appointed as provided under sub-section (2) of Section 40 of the L.A.Act has issued the declaration notifications under Section 6 of the L.A. Act. He has placed strong reliance upon Clause (a) or (b) of sub-section (1) of Section 40 of the L.A. Act, in justification of the acquisition. He further contended that the acquisition of the lands covered under the impugned notifications are for the public purpose as the beneficiary Company is going to establish a University in the State which will be of international reputation and therefore the acquisition of lands are legal and valid. Further he has placed strong reliance upon the decision of the Apex Court in the case of **Fomento Resorts and Hotels Limited & Anr. Vrs. Minguel Martins & Ors., reported in (2009) 3 SCC 571** in support of his contention that public purpose as referred to in Clauses (a) or (b) of sub-section (1) of Section 40 of the Act is different from the definition of 'public purpose' as given under Section 3 (f)(vi) of the L.A. Act. Further he has contended that in **Devinder Singh v. State of Punjab,** (2008) 1 SCC 728 upon which reliance is placed by the Sr. Counsel for the petitioners in which the Apex Court has placed reliance upon the case of **State of Gujarat and another vs. Patel Chaturbhai Narsinbhai & Ors., reported in AIR 1975 SC 629** is not applicable to the facts of this case for the reason that Gujarat State Legislature has amended the provisions of section 39 by inserting Section 4 of the L.A.Act. This legal aspect is not considered by the Apex Court in **Devinder Singh's** case and the decision in the case of **M/s. Fomento Resorts and Hotels Limited &**

anr. Vrs. Gustavo Ranato Da Cruz Pinto & Ors., (supra), clearly laid down the legal principles with reference to the provisions of the L.A. Act regarding for acquisition of lands in favour of the beneficiary Company as per Clause (a) or (b) of sub-section (1) of Section 40 of the L.A.Act. Learned Advocate General has further placed strong reliance on the Three Judge Bench decision of the Apex Court in the case of **Swasthya Raksha Samiti Rati Chowk Vrs. Chaudhary Ram Harakh Chand & Ors., reported in AIR 2005 SC 1835**, but the said matter has been referred to larger Bench in view of the doubt entertained by the Division Bench about the view taken by the Bench in Gujarat case referred to supra holding that notice to land owners is mandatory having not noticed contrary observation of the Five Judge Bench in Babu Barkya Thakur v.the State of Bombay and others,1961(1) SCR 126. In Devinder Singh's case, the Constitution Bench decision referred to (supra) has not been noticed by the apex Court and therefore the said decision is not helpful to the petitioners. He further placed strong reliance upon the judgment of the Supreme Court in the case of M/s. Fomento Resorts and Hotels Limited's cases referred to supra in support of his contention, wherein it has been held by the Apex Court in those cases that no enquiry is required under Rule 4 (1) preceding the initiation of acquisition proceedings and publishing notification under Section 4 of the L.A.Act as contended by the petitioners. Further he has placed reliance upon the decision of the Supreme Court in the case of **Abdul Hussain Tayabali & Ors. Vrs. The State of Gujarat & Ors, reported in AIR 1968 SC 432** in support of his legal submission that Section 5A of the L.A. Act enquiry is administrative enquiry and report of the Collector to the State Government is recommendatory in nature and it is not binding upon the State Government, therefore non submission of enquiry report by the Collector to the State Government does not vitiate the acquisition proceedings.

25. Learned Advocate General and learned Senior Counsel Mr. Anil Divan appearing on behalf of the State Government and the beneficiary Company respectively very vehemently submitted that the petitioners and other owners of the land on whose behalf public litigation petitions are filed, have waived and acquiesced their statutory rights regarding the enquiry to be conducted by the Collector as they have not availed the opportunity given by the District Collector to them by not filing the statement of objections within thirty days from the date of service of notice upon them. Therefore, they submit that there is no need for the District Collector to conduct an enquiry under Section 5A of the Land Acquisition Act and further the acquisition is of the year 2007 and hence the same cannot be interfered with by this Court at this stage. Learned

Advocate General further contends that some of the land owners have received compensation to the tune of Rs.50 crores and some of them have sought for reference to the Jurisdictional Reference Court for enhancement of the compensation. Therefore, it is submitted that the acquisition of lands by the State Government issuing preliminary and final notifications is legal and valid. Learned Advocate General further submits that compensation amount has been received by more than 80% of the land oustees after preferring claim in the proceedings under section 11 and the Land Acquisition Officer has passed awards, compensation has been paid to the owners of the land and possession of the same has been taken over and delivered to the beneficiary company. Therefore, he submits that these are not fit cases for granting reliefs by this Court in favour of the petitioner-owners either in the petitions filed by them or in the public interest litigation petitions as there is no public interest involved, as the litigation in these cases is between the land owners and the State Government and therefore it is a private interest litigation and the substantial number of owners have not approached the Court seeking the relief of quashing the notifications. Therefore, this Court need not exercise its Judicial review power to quash the acquisition proceedings in the public interest litigation petitions and, prayed for dismissal of the petitions. In support of the aforesaid submissions, they have placed reliance upon the following decisions of the Apex Court. **(1) Municipal Corporation of Greater Bombay Vrs. Industrial Development Investment Co. Pvt. & Ors, AIR 1997 SC 482, (2) Narmada Bachao Andolan etc. vs. Union of India & Ors, AIR 2000 SC 3751; and (3) Chairman & Managing Director BPL Ltd. Vs. S.P. Gururaja & Ors., reported in 2003 AIRSCW 5298.**

26. Mr. Anil Diwan, learned Senior Counsel for the Company submitted that initiation of the acquisition proceedings by the State Government at the instance of the Anil Agarwal Foundation for establishment of the University is a balancing act due to the economic policy of the Union of India and also globalization. Since all the owners of the lands have not come up before this Court questioning the legality and validity of the impugned notifications, therefore, this Court need not exercise its extra ordinary and discretionary power to quash the impugned notifications in respect of the lands of the other owners who have not approached this Court. In the PIL writ petitions, the acquisition of the lands of the owners who have not approached this court cannot be quashed. If the petitioner owners writ petitions are allowed, it would amount to quashing the notifications partially in respect of some of the acquired lands, which will not be permissible in law. In support of this submission, he has placed reliance upon the decisions of the Supreme

Court in **Delhi Administration v. Gurdip Singh Uban and others, 2000 SC 3737**. Further, placing reliance upon another decision of the Supreme Court in the case of **Vijay Cotton & Oil Mills Ltd. Vs. State of Gujarat, 1969 (2) SCR 60,** learned Senior counsel further submits that the procedure to be followed by the District Collector under section 5-A of the L.A. Act after publishing the preliminary notifications is not mandatory in law. It is further contended that all the land owners have waived and acquiesced their rights regarding an enquiry under the above provisions of the Act as they did not file objections to the proposed acquisition of their lands though notice being served upon them, therefore he submits that the acquisition proceedings need not be quashed by this Court in exercise of its Judicial Review power. In support of the above contention, he has placed reliance upon the decisions of the Supreme Court in the cases of **State of Rajasthan v. D.R. Laxmi and others, (1996) 6 SCC 445; and Swaika Properties (P) Ltd. and another v. State of Rajasthan and others, (2008) 4 SCC 695**.

27. He has further contended that if the statement of objections regarding non-compliance of rule 4 of the Land Acquisition (Companies) Rules of 1963 were not filed by the land owners, to what extent this Court can interfere with the impugned notifications, has to be considered by this Court even assuming for the sake of argument that non-compliance of the procedure contemplated under rules 3(2) and 4 of the Companies Rules by the State Government vitiates the acquisition proceedings. Learned Senior counsel further placing reliance upon the decision in M/s. Fomento Resorts and Hotels Ltd. (supra) and Om Prakash and another v. State of Uttar Pradesh and others, AIR 1998 SC 2504 submitted that compliance of Rule 4 by the State Government is not mandatory. It is further submitted by learned Senior counsel Mr. Anil Diwan that Section 44B is not applicable to the facts of the case in view of the fact that it is not a private company. It is a public company got converted under section 25 of the Act. Acquisition of lands by the State Government for the purpose of establishment of University is a public purpose and, therefore, acquisition proceedings were initiated at the instance of the Foundation by the State Government and after applying its mind and satisfying the requirement of the lands for the beneficiary company on the basis of the requisition made by it they have issued the section 4(1) notifications.

28. The aforesaid submissions of learned Advocate General Mr. Ashok Mohanty, and learned Sr. Counsel Mr. Anil Divan have been strongly rebutted by the learned Senior Counsel Mr. Jayant Das appearing for the petitioners in the Public Interest Litigation petition contending that the beneficiary Company has played fraud upon the State Government for the reason that on the basis of representation submitted by the Vedanta

Company and the Memorandum of Understanding executed by Vedanta Company and Sterlite Company claiming that it is Public Limited Company and on that basis acquisition proceedings were initiated by the State Government and lands were acquired in its favour. The beneficiary company is not at all a public limited company and misrepresenting this fact, it has got acquired lands for establishment of a university though it is not entitled for the same. Therefore, he strongly submits that the Foundation has played fraud on the State Government and fraud vitiates everything is the well settled principles of law. In this regard, he has placed strong reliance upon the decisions of the Apex Court in the cases of **Smt. Shrisht Dhawan Vs. Shaw Brothers,** AIR 1992 SC 1555**; S.P. Chengalvarya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. & Ors,** reported in AIR 1994 SC 853**; United India Insurance Co. Ltd. Vs. Rajendra Singh & Ors,** (2000) 3 SCC 581**; Ram Chandra Singh Vs. Savitri Devi & Ors., (2003) 8 SCC 319**, and submits that there cannot be any waiver or acquiescence by the land owners, in view of the fact that there is violation of the fundamental rights and statutory rights of the owners of the lands.. Therefore, he submits that the action of the State Government is void ab-initio in law for the reason that acquisition of lands in favour of non-existing University is a continuing wrong, which can be challenged by the petitioners before this Court and this Court has to examine the rights of the parties in exercise of its Judicial review power, as the action of the State Government is a continuing wrong.

29. Learned Senior Counsel for the petitioner Mr. Jayant Das further contends that Land Acquisition (Companies) Rules, 1963 is framed pursuant to the amendment of Section 4 (1) of the Act by Act 38 of 1923 as acquisition of lands in favour of company is as provided under Chapter VII of the L.A. Act read with the above Rules. Therefore, the procedure contemplated under rule 4 should be complied with by the Collector and the State Government before publication of the notifications under section 4(1) of the L.A. Act after giving consent by the State Government to acquire the lands as required under section 39 of the Act and thereafter execution of agreement by the Company in favour of the State Government containing the terms and conditions as provided under Section 41 of the L.A. Act and publishing the same in the official Gazette as required under section 42 of the L.A. Act which is the mandatory procedure required to be followed, that is not complied with by the State Government. In the instant case, the requisition dated 23.6.2006 was submitted to the State Government by Vedanta Foundation for acquisition of vast tract of lands in the locality in question for establishment of Vedanta University in the acquired lands. There is no requisition by the Anil Agarwal Foundation which is claimed to have converted as a public company under section 25 of the Companies

Act. The document Annexure-14 obtained by the petitioners in W.P.(C) No. 10325 of 2009 under the Right to Information Act from the Special Land Acquisition Officer would clearly show that no enquiry was conducted as required under Rule 4 of the Rules by the Collector of the Puri District in respect of Anil Agarwal Foundation for the proposed establishment of Vedanta University in the acquired lands. Therefore, it is contended by him that enquiry by the Committee constituted under sub-rule (2) of Rule 3 of the Companies Rules before or after issuance of the preliminary notifications is not conducted by the Collector though it is mandatory in law as held by the apex Court in the cases of Shanti Sports Club (supra) and City Montessori School (supra).

30. Another Senior Counsel Mr.Sanjit Mohanty appearing on behalf of the Company in addition to the submissions made by Mr. Anil Diwan, submits that Section 39 of the L.A. Act consent has been given by the State Government for acquisition of lands in its favour after examining the purpose for which the lands were sought to be acquired, as requested in its requisitions and the Memorandum of the agreement as required under Section 41 of the L.A.Act was executed by it in favour of the State Government and it has also complied with the procedure required to be followed as provided under rule 4 of the Rules.

31. Mr. Mohanty, alternatively submits that there is no need for the State Government to conduct an enquiry under section 5A of the L.A. Act, in the cases on hand as there was no objection statement filed by the land owners except one petitioner and therefore there was no need for the Collector and the State Government to follow the procedure as provided under Section 5A. He further contends that there is substantial compliance of the rules 3 (2) and 4 of the Company Rules by the State Government, as the Core Committee was appointed by it as provided in sub-section (2) of Section 40 of the L.A. Act for the purpose of conducting enquiry as required under Part VII to submit its report to the State Government regarding acquisition of lands in favour of the company. In support of this contention, he has placed reliance upon the decisions of the Supreme Court in the case of **Talson Real Estate (P) Ltd. v. State of Maharashtra,** (2007) 13 SCC 186. Therefore, he has prayed for dismissal of the writ petitions of the owners contending that there is no merit in their cases. So far as the writ petitions filed by the persons claiming to be public spirited persons espousing the public cause seeking to quash the acquisition proceedings are concerned, learned Senior Counsel submits that the same are not maintainable in law for the reason that similar writ petition No. 6981 of 2008 filed earlier by nine persons, viz. Prasanna Kumar Mishra, Dwarika Mohan Mishra, Kalandi Charan Pradhan, Uma Charan Pradhan, Gagan Behari Pradhan, Aruna Chandra Pradhan, Parsuram Pradhan, Rama Pradhan & Sudarsan

Gochhayat has been dismissed by this Court vide its order dated 9.5.2008 and therefore these PIL petitions are not maintainable at all. Further it is contended that neither public interest is affected nor public injury is caused to the public at large nor Rule of Law is violated as alleged in the PIL writ petitions and therefore prayed for dismissal of the same.

32. After careful consideration of the aforesaid rival legal contentions, we are answering the points against the State Government and the beneficiary company by assigning the following reasons.

33. In **Shanti Sports Club & Anr. Vs. Union of India & Ors**., (2009) 15 SCC 705, the apex Court held as under with regard to the procedure to be followed by the State Government to exercise its eminent domain power to acquire the lands in favour of the beneficiary company :

> "38. The decision to acquire the land for a public purpose is preceded by consideration of the matter at various levels of the Government. The Revenue Authorities conduct survey for determining the location and status of the land and feasibility of its acquisition for a public purpose. The final decision taken by the competent authority is then published in the Official Gazette in the form of a notification issued under Section 4(1) of the Act. Likewise, declaration made under Section 6 of the Act is published in the Official Gazette. The publication of notifications under Section 4(1) has twofold objectives. In the first place, it enables the landowner(s) to lodge objections against the proposed acquisition. Secondly, it forewarns the owners and other interested persons not to change the character of the land and, at the same time, make them aware that if they enter into any transaction with respect to the land proposed to be acquired, they will do so at their own peril. When the land is acquired on behalf of a company, consent of the appropriate Government is a must. The company is also required to execute an agreement in terms of Section 41 of the Act which is then published in the Official Gazette in terms of Section 42 thereof. As a necessary concomitant, it must be held that the exercise of power by the Government under Section 48(1) of the Act must be made known to the public at large so that those interested in accomplishment of the public purpose for which the land is acquired or the company concerned may question such withdrawal by making representation to the higher authorities or by seeking court's intervention. If the decision of the Government to withdraw from the acquisition of land is kept secret and is not published in the Official Gazette, there is every likelihood that unscrupulous landowners, their agents and wheeler-dealers may pull strings in the power corridors and

clandestinely get the land released from acquisition and thereby defeat the public purpose for which the land is acquired. Similarly, the company on whose behalf the land is acquired may suffer incalculable harm by unpublished decision of the Government to withdraw from the acquisition."

34. **In City Montessori School v. State of U.P**.,(2009) 14 SCC 253 the apex Court held as under:

"13. The appellant is a private person. The notification under Section 4 and declaration in terms of Section 6 of the Act were issued in terms of the provisions contained in Part VII of the Act.

14. Section 40 of the Act provides for an enquiry in the manner prescribed in the Rules framed under the Act known as the Land Acquisition (Companies) Rules, 1963. The Act makes a distinction between an acquisition made for a public purpose and an acquisition made for the benefit of a company. Acquisition made at the instance of a company must be done in strict compliance with the provisions contained in the Act and the Rules framed thereunder. The Act being an exproprietory legislation and particularly when resorted to for the benefit of a private person requires scrupulous satisfaction of the statutory requirements.

15. In *Hindustan Petroleum Corpn. Ltd.* v. *Darius Shapur Chenai* it was held: (SCC p. 640, para 29)

"*29*. The Act is an expropriatory legislation. This Court in *State of M.P.* v. *Vishnu Prasad Sharma* observed that in such a case the provisions of the statute should be strictly construed as it deprives a person of his land without consent. [See also *Khub Chand* v. *State of Rajasthan* and *CCE* v. *Orient Fabrics (P) Ltd*] There cannot, therefore, be any doubt that in a case of this nature due application of mind on the part of the statutory authority was imperative."

16. In *Devinder Singh* v. *State of Punjab* it was held: (SCC p. 743, para 43)

"*43*. Expropriatory legislation, as is well known, must be strictly construed. When the properties of a citizen are being compulsorily acquired by a State in exercise of its power of eminent domain, the essential ingredients thereof, namely, existence of a public purpose and payment of compensation are principal requisites therefore. In the case of acquisition of land for a private company, existence of a public purpose being not a requisite criterion, other statutory

requirements call for strict compliance, being imperative in character.""

(Emphasis added)

35. In view of the law laid down by the Apex Court in the above referred cases, there is no substantial compliance of the provisions of the L.A.Act and Rules, as contended by the learned Advocate General and learned senior counsel Mr. Sanjit Mohanty. In the absence of the report of the District Collector as required under section 5-A of the L.A. Act or in the absence of an enquiry under the above Companies Rules, report submitted by the District Collector to the State Government without following the procedure by forwarding the report to the Committee as constituted under sub-rule (2) of Rule 3 by the State Government as mandated under rule 4 (4) of the Land Acquisition (Companies) Rules, 1963, no declaration under section 6 that the proposed lands are required for a public purpose should have been made by the State Government, as it has not consulted the Statutory committee and not submitted the report under Rule 4 to the State Government. The agreement as provided under section 41 of the L.A.Act is not executed by the Company with the State Government agreeing to pay the compensation payable to the owners/interested persons in respect of their lands sought to be acquired. For non-compliance with the said mandatory statutory legal requirement on the part of the District Collector, Puri and the State Government, the impugned notifications published under section 6 of the L.A. Act declaring that the lands proposed in the preliminary notifications are acquired in favour of the Foundation is void ab initio in law, for the reason that the State Government was required to satisfy itself that the proposed lands are in fact needed for a company. The State Government should not have made such declaration unless the compensation to be awarded to the owners of such proposed lands is to be paid by the Company and deposited with the State Government. The opinion formed by the State Government for declaration that the lands notified in the preliminary notifications are needed for the company for establishment of a University which was not in existence either under the Orissa Universities Act or the University Grant Commission Act at the time of initiation of the proceedings or at the time of publishing the declaration notifications under section 6. Therefore, the satisfaction of the State Government for acquisition of lands by issuing section 6 notifications declaring that the lands are needed for a non-existing University, has violated the human rights of thousands of land owners. Therefore the notifications are invalid and unconstitutional. Hence they are liable to be quashed.

36. Further the submission of Mr.Anil Diwan and Mr. Sanjit Mohanty, learned counsel for the company that there was no need on the part of the

State Government to conduct an enquiry under section 5A of the L.A. Act, in the cases on hand as there was no objection statement filed by the land owners and therefore the owners have waived and acquiesced their right regarding enquiry as contemplated therein is not at all acceptable for the reason that the enquiry under Section 5-A of the L.A. Act is mandatory in nature, as held by the Hon'ble Supreme Court in the case of **Farid Ahmed Abdul Samad v. Municipal Corpn. of the City of Ahmedabad, (1976) 3 SCC 719,** which reads as under**:**

> **"24.** We are clearly of opinion that Section 5-A of the Land Acquisition Act is applicable in the matter of acquisition of land in this case and since no personal hearing had been given to the appellants by the Commissioner with regard to their written objections the order of acquisition and the resultant confirmation order of the State Government with respect to the land of the appellants are invalid under the law and the same are quashed. It should be pointed out, it is not a case of failure of the Rules of natural justice as such as appeared to be the only concern of the High Court and also of the city civil court. It is a case of absolute non-compliance with a mandatory provision under Section 5-A of the Land Acquisition Act which is clearly applicable in the matter of acquisition under the Bombay Act." **(Emphasis supplied)**

37. In the case of **Shri Mandir Sita Ramji v. Lt. Governor of Delhi, (1975) 4 SCC 298, the** Supreme Court has held that **:**

> **"5.** The learned Single Judge allowed the writ petition on the basis that the appellant had no opportunity of being heard by the Collector under Section 5-A. The duty to afford such an opportunity is mandatory. A decision by the Government on the objection, when the Collector afforded no opportunity of being heard to the objector, would not be proper. The power to hear the objection under Section 5-A is that of the Collector and not of the appropriate Government. It is no doubt true that the recommendation of the Land Acquisition Collector is not binding on the Government. The Government may choose either to accept the recommendation or to reject it; but the requirement of the section is that when a person's property is proposed to be acquired, he must be given an opportunity to show cause against it. Merely because the Government may not choose to accept the recommendation of the Land Acquisition Collector, even when he makes one, it cannot be said that he need not make the recommendation at all but leave it to the Government to decide the matter. In other words, the fact that the Collector is not the authority

to decide the objection does not exonerate him from his duty to hear the objector on the objection and make the recommendation." (**emphasis supplied)**

38. In the case of **Tej Kaur v. State of Punjab, (2003) 4 SCC 485,** the Supreme Court placing reliance upon its earlier decision held as under

> **"5.** Similarly, in the decision in Shyam Nandan Prasad v. State of Bihar this Court observed that affording of opportunity of being heard to the objector during inquiry under Section 5-A is a must and that this provision embodies a just and wholesome principle that a person whose property is being, or is intended to be, acquired, should have occasion to persuade the authorities concerned that his property be not touched for acquisition."

39. The apex Court had also occasion to consider similar question in the case of **Babu Ram and another v. State of Haryana and Anr., (2009) 10 SCC 115.** It is profitable to quote what the apex Court observed in the aforesaid case which reads under :

> "30. As indicated hereinabove in the various cases cited by Mr. Pradip Ghosh and, in particular, the decision in Krishnan Lal Arneja case, in which reference has been made to the observations made by this Court in Om Prakash case, it has been emphasized that a right under Section 5-A is not merely statutory but also has the flavour of fundamental rights under Articles 14 and 19 of the Constitution. Such observations had been made in reference to an observation made in the earlier decision in Gurdial Singh case and keeping in mind the fact that right to property was no longer a fundamental right, an observation was made that even if the right to property was no longer a fundamental right, the observations relating to Article 14 would continue to apply in full force with regard to Section 5-A of the L.A. Act."
>
> (**Emphasis supplied)**

40. By non-filing of the statement of objections, the land owners have waived their right as urged by the learned Advocate General and Senior Counsel Mr. Sanjit Mohanty on behalf of the State Government and the beneficiary company respectively and their submissions are wholly untenable in law for the reason that the alleged waiver of their statutory rights would amount to violation of fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution, as the right under section 5A of the L.A.Act is not merely statutory but also has the flavour of fundamental rights and such right is elevated to the status of human rights in view of the

interpretation made by the apex Curt in the aforesaid judgment and to this effect law has been laid down in the case of **Delhi Administration v. Gurdip Singh Uban,** (2000) 7 SCC 296, the relevant paragraph from the above decision is extracted as hereunder:

> "53. Now objection under Section 5-A, if filed, can relate to the contention that (i) the purpose for which land is being acquired is not a public purpose, (ii) that even if the purpose is a public purpose, the land of the objector is not necessary, in the sense that the public purpose could be served by other land already proposed or some other land to which the objector may refer, or (iii) that in any event, even if this land is necessary for the public purpose, the special fact-situation in which the objector is placed, it is a fit case for omitting his land from the acquisition. Objection (ii) is personal to the land and Objection (iii) is personal to the objector.
>
> 54. Now in the (ii) and (iii) types of objections, thee is a personal element which has to be pleaded in Section 5-A inquiry and if objections have not been filed, the notification must be conclusive proof that the said person had 'waived' all objections which were personal and which he could have raised. <u>However, so far as Objection (i) is concerned, even in case objections are not filed, the affected party can challenge in Court that the purpose was not a public purpose."</u>
>
> (*Emphasis supplied)*

Further, for non-compliance of the statutory provisions of Sections 39, 40, 41, 42 and 44B of Part VII of the L.A. Act and Rule 4 of the Land Acquisition (Companies) Rules, 1963 by the State Government this Court has to exercise its judicial review power to quash the notifications. The MOU has been signed on behalf of Anil Agarwal Foundation by Mr.A.K.Samal, Vice President. He is not the competent person as the company must be represented by either is Principal Officer or officer specially authorized by the Board of Directors. The said memorandum of understanding is also not in compliance with sub-sections (1) to (4) and (4A) of Section 41 agreeing for the terms as provided in the aforesaid provisions. Therefore, it is not an agreement in terms of section 41 and the same is not published as required under section 42 of the L.A.Act. The Collector has also not been duly authorized by way of notification as required in law to represent the Governor on behalf of the State. No such notification is available on record in this regard and the agreement does not validate the preliminary notifications issued in between 13.12.2006 to 22.12.2006 and consequently the declaration notifications are also bad in law. Therefore, the learned Sr. Counsel on behalf of the petitioners have rightly requested this Court to

quash the notifications, as the same are published by the State Government in flagrant violation of the Statutory provisions of Chapter VII of the L.A.Act & Rules 3 & 4 of the Rules. From the perusal of the records produced by the State Government, it appears that except in respect of four land owners, the political executive passed order overruling the objections in respect of three and in respect of one person accepting the same. The files do not disclose that the political executive has applied its mind and granted approval as required under section 6 declaration notification declaring the proposed lands in favour of the beneficiary company for establishment of University.

41. In this regard it would further be appropriate for us to advert to the decision of the Supreme Court in the case of **Srinivasa Coop. House Building Society Ltd. v. Madam Gurumurthy Sastry, (1994) 4 SCC 675**, wherein the Court has held as under :

> "4. The Act recognises dichotomy, namely, acquisition for a public purpose in Chapter II and acquisition for a private purpose of a type restricted in Chapter VII. There is no provision in the Act to say that when a land is required for a company, it may also be for a public purpose. Therefore, if a company, namely a Cooperative Society registered under the Central or State Cooperative Societies Act, preceding 1984 Amendment Act, had to acquire the land it had to do so in strict compliance with Chapter VII. If the company, (Cooperative Society) requires land for any purpose other than those mentioned in Section 40, then no compulsory acquisition under the Act is possible. Part VII nowhere authorises the Government to apply the provision of that part to private acquisition. A.P. State Amendment Act expressly included acquisition for providing house sites for the poor; for the execution of any housing scheme under A.P. Housing Boards Act; godowns for a cooperative society as for public and urgent purposes. By necessary implication the acquisition for a Private Cooperative House Building Society to construct houses for its members must be a private purpose.
>
> 8. Explanation.— 'Private company' and 'Government company' shall have the meanings respectively assigned to them in the Companies Act, 1956 (1 of 1956). A plain reading of the fascicule of these provisions clearly indicates the distinction, statute has envisaged, namely, acquisition for a public purpose and acquisition for a private purpose. Even the acquisition for a company, unless utilization of the land so acquired is integrally connected with public use, resort to the compulsory acquisition under Chapter VII cannot be had. Even when Chapter VII was invoked, the requirements of Section 40 and Section 41 are mandatory and shall be strictly complied with. It is clearly

discernible from scheme of the acquisition in Chapter VII that the land can be acquired for the erection of dwelling-houses for workmen employed by the company or for the provisions of amenities directly connected therewith or needed for the construction of some building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose or is needed for the construction of some work which is likely to prove useful to the public. Notwithstanding anything contained in the Act, i.e., despite the compliance with Chapter VII, no land should be acquired under Chapter VII except for the purpose mentioned in clause (a) of sub-section (1) of Section 40, for a private company which is not a Government company and that such company shall not be entitled after the acquisition under Chapter VII to transfer the said land or any part thereof by sale, mortgage, gift, lease or otherwise except with the previous sanction of the appropriate Government. The object, therefore, appears to be that the land acquired under Chapter VII shall always remain to serve the public purpose, beneficial to the public. It is not open to the Government to waive any of the provisions in Part VII. The provisions contained therein have mandatory operation. The object of Sections 44-A and 44-B appears to be that they intend to safeguard public interest. The company acquiring the land for a public purpose in Chapter VII may, after the acquisition has become final, divert the land for private profit motive, defeating the purported public purpose for which the acquisition was made. The Government company obviously does not alienate such property for private gain since the profits merge into public fund. While the private company could get acquisition but thereafter become free to dispose of the property. Therefore, the acquisition for a private company get limited only for purposes envisaged under Section 40(1)(a) and thereby the public purposes envisaged therein get safeguarded and protected. The dominant purpose of public utility pervades the provisions in Chapter VII of the Act."

(emphasis added).

42. It is seen that issuance of section 4 (1) notifications in favour of the beneficiary company was made on the basis of the requisition made by Vedanta Foundation but not Anil Agarwal Foundation which is the beneficiary Company. It is an undisputed fact that Vedanta Company was converted into Sterlite Foundation and thereafter in the year 2006 before the acquisition proceedings were sought to be initiated, it claimed that it has converted into Anil Agarwal Foundation as a public company under section

25 of the Act, is the case sought to be made out on behalf of the beneficiary company to justify the impugned notifications. Therefore, the initiation of the proceedings by issuance of notifications under section 4 (1) of the L.A.Act was made stating that the proposed lands are needed by the company for establishment of Vedanta University which is not in existence either under the State Universities Act or the U.G.C.Act and therefore the purpose for which the proposed acquisition of lands was made by issuing preliminary notifications is bad in law. The fact of non-existence of the University is evident from the Ordinance promulgated by the State Government as on the date of initiation of the acquisition proceedings. Hence, the publication of the section 4 (1) preliminary notifications proposing to acquire the lands in question is void ab initio in law. The publication of the said notifications is also void ab initio for one more strong reason, namely, that the Company in favour of which the lands were sought for acquisition according to the State Government and the beneficiary company is a public company converted under section 25 of the Act, 1956. The acquisition of lands for establishment of University, which is for educational purpose is permissible under section 3 (f)(vi) of the Act only in respect of educational scheme sponsored by the Government, or by any authority established by Government for carrying out any such scheme, or with the prior approval of the appropriate Government, by a local authority, or a society registered under the Societies Registration Act, 1860, or under any corresponding law for the time being in force in a State or a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State. Therefore the provision of section 44-B of the L.A.Act is attracted to the facts of this case for the reason that we have already answered the point no.1 against the company by recording reasons in the judgment holding that it is not a public company and it has continued as a private limited guarantee company. The said finding is on the basis of undisputed fact that the beneficiary company does not have share capital and it was registered as a private limited guarantee company and the same cannot be converted as a public company under section 25 of the Act. Therefore, the acquisition of lands for a private company by the State Government under the provisions of the L.A. Act is not permissible except for the purpose as mentioned in clause (a) of sub-section (1) of Section 40 of the Act as stated under section 44-B of the L.A.Act. Section 40 (1) clause (a) of the L.A. Act provides for acquisition of lands in favour of the company for the erection of dwelling houses for workmen employed by the company or for the provision of amenities directly connected therewith. The acquisition of lands in favour of the beneficiary company undisputedly is not for the aforesaid purpose. Therefore, the initiation of the proceedings from the beginning by the State Government under section 4(1) of the L.A. Act, by itself is void ab initio in law as the

same is in flagrant violation of Section 44B of the L.A.Act. Further previous consent given by the State Government without complying with the mandatory requirement of Rule 4 of the Rules in not conducting an inquiry by the District Collector for the reason that according to the State Government it is not required is the legal contention urged, the same is reiterated by the beneficiary company, which contention of them is wholly untenable in law for the reason that Section 39 of the L.A.Act clearly contemplates that previous consent of the State Government is required to put the Land Acquisition Act in force in order to acquire lands for any company, i.e., including a private company before publishing Section 4(1) Notifications. Learned Senior Counsel Mr.Jayant Das on behalf of the petitioners has rightly rebutted the said legal contention by aptly placing strong reliance upon Section 4 (1) amendment of the L.A.Act by including the phrase "or for a company" which was inserted by Act 38 of 1923 under Section 2 (o) of the amendment Act. The above said contention of the learned Senior Counsel has to be accepted for the reason that the interpretation made by him by placing reliance upon the phrase "or for a company" inserted by Section 2 (o) of the Act 38 of 1923 is tenable in law. If the interpretation sought to be made by the learned Advocate General and the learned Senior Counsel appearing for the beneficiary company that Section 4 is not mentioned in Section 39 of the Act iand that the previous consent of the State Government prior to publishing the Section 4(1) notification is not required is accepted, then it would render section 39 and Part VII of the L.A.Act read with rules 3 and 4 of the Rules otiose or redundant. That is not the object of the legislature in introducing Part VII relating to procedure to be followed for acquisition of land in favour of a company. In view of the said amendment, Section 39 must be read harmoniously with Section 4 (1) of the L.A. Act read with the Company Rules to give purposeful interpretation to achieve the object of the L.A.Act. In the absence of non mention of section 4 of the Act in the said provision of Section 39 of the L.A. Act, the provisions of the Land Acquisition Act including sections 4 to 16 should be read into the said provision to put the provisions of the L.A.Act in force in order to acquire lands for any company by following the mandatory provisions of Part VII of the L.A.Act read with the Land Acquisition (Companies) Rules. The said interpretation of the provision of Section 39 of the L.A.Act would be harmonious to achieve the object and intendment of the provisions of Part VII of the L.A.Act. Further, the object of framing such rules by the Central Government in exercise of its power under section 55 of the Act is for the purpose of carrying out the purposes of the provisions of Part VII of the L.A. Act and such rules are made for the guidance of the State Government and the officers of the Central Government and of the State Government to give effect to the provisions of

the L.A.Act. As could be seen from the Rules, the sole object of framing such rules is to comply with the provisions of Part VII of the Land Acquisition Act by following strictly the procedure contemplated therein as the same is held to be mandatory by the apex Court in number of decisions viz. **Narinderjit Singh Vs. State of U.P**., (1973) 1 SCC 157; **State of Mysore Vs. Abdul Razad Sahib**, (1973) 3 SCC 196; **General Govt. Servants Cooperative Housing Society Ltd. Vs. Sh. Wahab Uddin & Ors**., (1981) 2 SCC 352; **The Collector (District Magistrate) & Anr. Vs. Raja Ram Jaiswal**, AIR 1985 SC 1622; **Mohan Singh & Ors. International Airport Authority of India & Ors**., (1997) 9 SCC 132., To acquire land in favour of company, under the Land Acquisition Act at its instance the State Government is required to find out (i) whether the company has made its best endeavour to find out lands in the locality for the purpose of acquisition, (ii) that the company has made all reasonable efforts to get such lands by negotiation with the persons interested therein on payment of reasonable price and such negotiations have failed, (iii) that the land proposed to be acquired is suitable for the purpose and (iv) that the area of land proposed to be acquired is not excessive. Sub-rule (2) of rule 4 provides that the Collector after giving reasonable opportunity to the company to make any representation hold an enquiry into the matters referred to in sub-rule (1) clauses (i) to (iv) of the Rule 4 referred to above. Further it is the duty of the Collector, if the lands proposed to be acquired are agricultural lands, to consult the Senior Agricultural Officer of the district whether or not such lands are good agricultural lands and also determine having regard to the provisions of Sections 23 and 24 of the L.A. Act the approximate amount of compensation likely to be payable in respect of the land which in the opinion of the Collector should be acquired for the company. Sub-rule (3) of Rule 4 contemplates that the Collector after holding the enquiry under sub-rule (2) of the Rule 4 shall submit the report to the State Government and a copy of the same shall be forwarded by the Government to the Committee constituted under rule 3 (2) of the Rules. Under sub-rule (4) of Rule 4 it is the bounden duty of the State Government before declaring that the proposed lands in the preliminary notifications are required for the beneficiary Company by publishing the notifications under section 6 of the L.A.Act to consult the Committee and also consider the report submitted by the District Collector under sub-rule (3) of rule 4 and the report, if any, submitted under section 5-A of the Act and that the agreement under section 41 of the Act has been executed by the Company. In the instant case undisputedly, the agreement is executed by the beneficiary company in favour of the State Government not incorporating all the terms and conditions as provided under sub-sections (1) to (5) of Section 41 of the L.A.Act and the same is not published as required under section 42 of the

Act. The State Government is required to be satisfied with the report, if any, of the Collector under Section 5-A, sub-section (2), or on the report of the officer making an enquiry under section 40 before publishing the final notifications under Section 6 of the L.A.Act that the proposed acquisition of lands is for the purposes referred to in clause (a) of sub-section (1) of Section 40 and require the company to enter into an agreement with the State Government as required under section 41 for the matters, i.e.(1) the payment to the State Government of the cost of the acquisition, (2) the transfer, on such payment, of the land to the company and (3) the terms on which the lands shall be held by the company. In the absence of such agreement published by the State Government under section 42, as soon as may be after its execution by the beneficiary company, the publication of section 6 notifications declaring that the proposed lands are required for the beneficiary Company is void ab initio in law. In this regard it is necessary for us to extract the relevant paragraphs 31 and 32 from the decision of the Apex Court in the case of **Babu Verghese & Ors Vs. Bar Council of Kerala & Ors,** reported in AIR 1999 SC 1281 in support of the legal contention that "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". The above said paragraphs are extracted in support of the conclusions and reasons assigned by us.

> "31. It is the basic principle of law long settled that if the manner of doing 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 Empero,*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."
>
> 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 U.P.* v. *Singhara Singh, AIR 1964 SC 3581964) 1 SCWR 57* and the rule laid down in *Nazir Ahmad case* was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law."

43. It is also profitable to notice what the apex Court held on the proposition of law in the case of Chairman, **Indore Vikas Pradhikaran v.**

Pure Industrial Coke & Chemicals Ltd. And others, (2007) 8 SCC 705 by referring to its earlier large number of decisions:

> "58. Expropriatory legislation, as is well-known, must be given a strict construction.
>
> 59. In *Hindustan Petroleum Corpn. Ltd.* v. *Darius Shapur Chenai,(2005) 7 SCC 627* construing Section 5-A of the Land Acquisition Act, this Court observed:
>
> "*6*. It is not in dispute that Section 5-A of the Act confers a valuable right in favour of a person whose lands are sought to be acquired. Having regard to the provisions contained in Article 300-A of the Constitution, the State in exercise of its power of 'eminent domain' may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefor must be paid.
>
> It was further stated: (SCC p. 640, para 29)
>
> "*29*. The Act is an expropriatory legislation. This Court in *State of M.P.* v. *Vishnu Prasad Sharma*[10] observed that in such a case the provisions of the statute should be strictly construed as it deprives a person of his land without consent. [See also *Khub Chand* v. *State of Rajasthan,AIRF 1967 SC 1074* and *CCE* v. *Orient Fabrics (P) Ltd.* (2004) 1 SCC 597
>
> There cannot, therefore, be any doubt that in a case of this nature due application of mind on the part of the statutory authority was imperative."
>
> In *State of Rajasthan* v. *Basant Nahata,(2005) 12 SCC 77* it was opined: (SCC p.102, para 59)
>
> "In absence of any substantive provisions contained in a parliamentary or legislative act, he cannot be refrained from dealing with his property in any manner he likes. Such statutory interdict would be opposed to one's right of property as envisaged under Article 300-A of the Constitution."
>
> In *State of U.P.* v. *Manohar, (2005) 2 SCC 126* a Constitution Bench of this Court held: (SCC p.129, paras 7-8)
>
> "*7*. Ours is a constitutional democracy and the rights available to the citizens are declared by the Constitution. Although Article 19(1)(*f*) was deleted by the Forty-fourth Amendment to the Constitution,

Article 300-A has been placed in the Constitution, which reads as follows:

'300-A. *Persons not to be deprived of property save by authority of law*.—No person shall be deprived of his property save by authority of law.'

8. This is a case where we find utter lack of legal authority for deprivation of the respondent's property by the appellants who are State authorities."

In *Jilubhai Nanbhai Khachar* v. *State of Gujarat,1995 Supp (1) SCC 596* the law is stated in the following terms: (SCC p. 622, para 34)

"*34.* The right of eminent domain is the right of the sovereign State, through its regular agencies, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the State including private property without its owner's consent on account of public exigency and for the public good. Eminent domain is the highest and most exact idea of property remaining in the Government, or in the aggregate body of the people in their sovereign capacity. It gives the right to resume possession of the property in the manner directed by the Constitution and the laws of the State, whenever the public interest requires it. The term 'expropriation' is practically synonymous with the term 'eminent domain."

It was further observed: (SCC p. 627, para 48)

"*48.* The word 'property' used in Article 300-A must be understood in the context in which the sovereign power of eminent domain is exercised by the State and property expropriated. No abstract principles could be laid. Each case must be considered in the light of its own facts and setting. The phrase 'deprivation of the property of a person' must equally be considered in the fact situation of a case. Deprivation connotes different concepts. Article 300-A gets attracted to an acquisition or taking possession of private property, by necessary implication for public purpose, in accordance with the law made by Parliament or a State Legislature, a rule or a statutory order having force of law. It is inherent in every sovereign State by exercising its power of eminent domain to expropriate private property without owner's consent. Prima facie, State would be the judge to decide whether a purpose is a public purpose. But it is not the sole judge. This will be subject to judicial review and it is the duty of the court to determine whether a particular purpose is a public

> purpose or not. Public interest has always been considered to be an essential ingredient of public purpose. But every public purpose does not fall under Article 300-A nor every exercise of eminent domain an acquisition or taking possession under Article 300-A. Generally speaking preservation of public health or prevention of damage to life and property are considered to be public purposes. Yet deprivation of property for any such purpose would not amount to acquisition or possession taken under Article 300-A. It would be by exercise of the police power of the State. In other words, Article 300-A only limits the powers of the State that no person shall be deprived of his property save by authority of law. There has to be no deprivation without any sanction of law. Deprivation by any other mode is not acquisition or taking possession under Article 300-A. In other words, if there is no law, there is no deprivation. Acquisition of mines, minerals and quarries is deprivation under Article 300-A."
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> *(Emphasis added)*

44. In view of the above legal position laid down by the Apex Court of which relevant paragraphs have been extracted by us, the legal contention urged by the learned Senior Counsel on behalf of the petitioners that after the preliminary notifications are published enquiry is necessary either under Rule 4 by the District Collector or under Section 40 sub-section (3) of the L.A. Act by the enquiry officer appointed by the State Government as provided under sub- section (2) of Section 40, and it is mandatory in law, must be accepted by this court by rejecting the submissions made by the learned Advocate General and Senior Counsel on behalf of the company.

45. The aforesaid decisions of the Apex Court which have been dealt with by us and relevant paragraphs of which are extracted upon which reliance has been rightly placed by the learned Senior Counsel on behalf of the petitioners and, therefore, the same must be accepted as the legal principles laid down in those cases aptly apply to the fact situation. For the reasons stated supra, the reliance placed by the learned Advocate General and Senior Counsel for the Company upon the decisions of the Apex Court in the case of **Vijay Cotton & Oil Mills Ltd. Vs. State of Gujarat,** reported in (1969) 2 SCR 60, in the case of **State of Rajasthan & Ors. Vrs. D.R. Laxmi & Ors.,** reported in (1996) 6 SCC 445 and in the case of **Swaika Properties (P) Ltd. & Anr. Vs. State of Rajasthan & Ors.,** reported in (2008) 4 SCC 695 stating that the procedure as contemplated under Rules 3(2) and 4 of the Company Rules to be followed by the Collector and the State Government is not mandatory is misplaced and further reliance placed upon the observations made by the three Judge Bench of the Supreme

Court in the case of **Swasthya Raksha Samiti Rati Chowk Vs. Chaudhary Ram Harakh Chand & Ors., (supra)** is also misplaced as the Apex Court has referred the matter to the larger Bench. By careful reading of paragraphs 5 and 6 of the aforesaid judgment, it is noticed that the reason for reference to larger Bench is for non-consideration of the Constitution Bench decision in Babu Barkya (supra) wherein the Constitution Bench indicated that all the requirements of Part VII of the Act especially Section 40 could be considered in Section 5A enquiry itself which would include all and any objection of the land owners including the objection in regard to acquisition in favour of a company. Having made that observation further at paragraph 6, the apex Court was of the opinion that the objections that could possibly be raised in Rule (4) enquiry can also be raised in a Section 5A enquiry and in the absence of any specific requirement in Rule (4) as to the issuance of notice to the land owners of being heard in such an enquiry hearing the land owners at the stage of Rule (4) enquiry would lead only to duplication and cause delay. Having made such observation, the said Bench referred the matter to the larger Bench. While referring to the larger Bench it has not noticed the Constitution Bench decision in the case of **State of U.P. & ors. vs. Manohar,** reported in (2005) 2 SCC 126 which was decided on 15.12.2004 and was very much available for consideration. In the said decision, the Constitution Bench clearly enunciated the law that after deletion of Article 19(1)(f) by 44th amendment to the Constitution and insertion of Article 300A, no person shall be deprived of his property save by authority of law which means that Rule (4) enquiry must be strictly adhered to and further what objections could be taken in Rule (4) enquiry can also be raised under section 5A enquiry is the observation of the Constitution Bench in Babu Barkya (supra). In the instant case no such 5-A enquiry is also held. Therefore, reliance placed upon the three Judge Bench decision in Swasthya Raksha Samiti (supra) by the learned Advocate General and senior counsel for the State Government and the beneficiary Company is misplaced. Apart from the said legal position, the apex Court in the Case of Babu Verghese & others v. Bar Council of kerala (supra) after referring to its earlier decision and Privy Council decisions at paragraphs 31 and 32 extracted earlier has clearly laid down the law that the procedure laid down in the Statute must be strictly adhered to otherwise the action is void ab initio in law. Therefore, we have to accept the legal contention urged on behalf of the petitioners as the same is well founded in view of the mandatory provisions of the L.A. Act, Rules, Principles of natural justice and the Constitution Bench decisions of the Apex Court and other decisions referred to above by us upon which reliance has rightly been placed by the learned Senior Counsel on behalf of the petitioners.

46. Since the action of the State Government entailed serious civil consequences to the land owners, the principles of natural justice should have been complied with even though the owners did not file their objections within 30 days from the date of service of notice along with the preliminary notification upon them. This view of ours is supported by the decisions of the seven Judge Constitution Bench of the Apex Court in the case of **Maneka Gandhi Vs. Union of India,** AIR 1978 SC 597 vide paragraphs 57, 58 and 61, which read as under:

> "…… although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The principle of audi alteram partem which mandates that no one shall be condemned unheard, is part of the rules of natural justice. In fact, there are two main principles in which the rules of natural justice are manifested, namely, Nemo Judex in Sua Causa and audi alteram partem….
>
> ……Natural justice is a great humanizing principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action.. The enquiry must always be: does fairness in action demand that an opportunity to be heard should be given to the person affected ? ….
>
> ……The law must now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable."

47. The action of the State Government in acquiring vast extent of lands for establishment of a University violates the human rights and fundamental rights of the land owners and the residents of the locality guaranteed under Articles 14,19 and 21 and Article 300-A of the Constitution and statutory rights conferred upon the land owners under Section 4, 5-A, 6, Sections 39,41,42 and 44B of the L.A. Act read with Rules 3 and 4 of the Company Rules.

48. Even accepting for the sake of argument the contention urged on behalf of the State and the beneficiary company that by non-filing of statement of objections the land owners whose lands have been acquired have waived and acquiesced their rights and have lost their statutory right of hearing and, therefore, there was no statutory obligation on the part of the Collector to conduct an enquiry, then the State Government was required to give its previous consent as required under section 39 in favour of the Company and got the agreement executed by the company in favour of the State Government and thereafter the mandatory procedure as provided

under rule 3(2) and rules 4 (1) to (3) was required to be complied with by the District Collector in conducting the enquiry and thereafter his report should have been submitted to the State Government who in its turn should have sent the same to the Committee seeking their views in the matter before the exercise of the statutory power by the State Government under section 6 of the L.A.Act to declare that the proposed lands are acquired for the benefit of the beneficiary company by publishing the notifications. Undisputedly, this requirement of law has not been fulfilled by the State Government as could be seen from the information furnished to one of the petitioners under the Right to Information Act. Section 6 provides for declaration by the State Government which is subject to the provisions of Part VII of the Act after the State Government is satisfied considering the report, if any, made under section 5-A sub-section (2) that the land is needed for a company is held not mandatory then that would be in contravention of the provisions of Part VII of the L.A. Act. The Central Government in exercise of the statutory power under section 55 has framed the rules called the Land Acquisition (Companies) Rules referred to supra for carrying out the purposes of Part VII of the L.A. Act giving guidance to the State Government and officers after following the procedure as provided in the second proviso to the said provision the publication of Section 6 of the L.A.Act should have been made by the State Government. The rules framed by the Central Government for the purpose of carrying out the purpose of Part VII shall be held as mandatory for the reason that the statutory rights, fundamental and constitutional rights of the land owners will be taken away by the State Government in exercise of its eminent domain power in acquiring their lands. Therefore, the seven Judge Bench in **Maneka Gandhi's** case has rightly held that if any action of the State Government or authority entails civil consequences even in the absence of the statutory provision of hearing, principles of natural justice shall be read into the statute. In this view of the matter and also for the reason stated in Section 5-A(2) and rule 4 of the Rules and the decisions of the Supreme Court with regard to conduct of enquiry and submission of report, reasonable opportunity should have been given to the land owners and the same should have been strictly followed by the State Government or its officers. Therefore, the action of the State Government in not following the mandatory procedure as provided in the statutory provisions under section 5-A(2) or the Rules 3 and 4 has rendered the action of the State Government void ab initio in law. For the aforesaid reasons, the reliance placed both by learned Senior Counsel Shri Anil Diwan and Shri Sanjit Mohanty on the observation made by the apex Court in the case of **Swasthya Raksha Samiti Rati Chowk Vs. Chaudhary Ram Harakh Chand, (supra) in** paras 5 & 6 is not applicable to the fact situation. Therefore, the contention urged on this behalf by them is liable to

be rejected. Accordingly, the same is rejectedby accepting the legal submission of the learned Sr.Counsel on behalf of the petitioners.

49. The contention urged by learned Advocate General for the State and Mr.Anil Diwan, learned counsel on behalf of the beneficiary company that by not filing the objections to the preliminary notifications proposing to acquire the lands in question, land owners have waived and acquiesced their rights to question the non-conducting of enquiry by the District Collector either under section 5-A or under rule 4 of the rules is both on facts and in law is untenable for the reasons stated hereunder. Pursuant to our direction, the learned Government Advocate made available to us the record of the acquisition proceedings in relation to the acquired lands from the stage of publication of the preliminary notification till the date of alleged taking over of possession of the acquired lands. As could be seen from the records, in fact no notice along with the preliminary notification was issued and served upon either the owners or interested persons of the acquired lands as required in laws. The order-sheet of the records maintained by the Collector would disclose that the notice by way of beat of drum was given in the villages where the lands are situated which is not in compliance with the provision of section 4 (1) which says that the Collector shall cause public notice of the substance of such notification to be given at convenient places in the locality. Section 5-A requires that any person interested in any land which has been notified under section 4 (1) within thirty days from the date of publication of the notification to object to the acquisition of the land. For this purpose notice should be served upon such person but that has not been done in the cases on hand and also in respect of the other land owners. Therefore, the question of filing of objection by the land owners/person interested did not arise. The second proviso to Section 6 provides that no declaration of the proposed lands under the said section shall be made unless the compensation to be awarded for such property is to be paid by a company. It is noticed from the proceedings recorded in the original files that the compensation to be awarded has been determined by the Collector on the basis of sale statistics secured from the District Sub-Registrar and the value of the land shown in the sale statistics has been treated as the market value and awarded the same as compensation without following the procedure contemplated under sections 9 and 10 by issuing notice to the owners of the land/persons interested calling upon them to file claim petition for determination of the compensation amount for determining the market value of the property as provided in sections 23 and 24 of the L.A.Act. Since the Collector has not complied with the mandatory requirement of issuing and serving individual notice to the land owners/interested persons, the question of waiver or acquiescence of the right of the land owners as contended by the learned Senior Counsel on behalf of the company do not

arise at all and the further enquiry is not required to be conducted as provided under section 5-A (2) or rule 4 is wholly untenable in law and therefore the said contention of the opposite parties cannot be accepted.

50. It is noticed from the original files of the State Government that without following the mandatory procedure of issuing notice under sections 9 and 10 to the owners/interested persons for filing claim statement to award compensation by determining the market value of the land under section 11, the awards are said to have been passed and proviso to Section 11 which clearly states that such award should be approved by the State Government for the purpose to constitute it a valid award. From the records it is not noticed nor shown from any other records that the draft awards passed by the Collector was approved by the State Government. Therefore, we have to say that no award in terms of section 11 is passed in respect of the acquired lands and the same has not been communicated to the land owners/interested persons as required under section 12 (2) of the L.A.Act to work out their statutory rights as provided under section 18 of the Act. In the absence of valid awards, the question of taking over possession and issuing certificate of possession to the beneficiary company by transferring the lands in its favour by the State Government also factually and legally incorrect for the reason that in the absence of valid awards the question of taking over possession of the land and handing over the same to the beneficiary company also did not arise. Except the alleged taking over possession of the land from the owners without serving the award as required under section 12 (2) and further calling upon them to deliver possession to the State Government and vesting of such land with the State Government and thereafter delivering the same in favour of the beneficiary company is also factually and legally invalid in law for the reason that to evidence the fact of taking over possession from the land owners, no Gazette Notification under Section 16 of the L.A.Act is available in the records. In the absence of such Gazette Notification, the claim made by the State Government that awards were passed, possession of the lands have been taken by the State Government and certificate of possession has been given in favour of the company after transferring possession of the lands is only a paper delivery but no physical or actual possession was either taken from the land owners or acquired lands vested with the State Government and thereafter transferred in favour of the beneficiary company.

51. There can be no dispute with regard to the settled legal proposition of law that if an order is bad in its inception, it cannot be made good subsequently. If the basis of an order falls being illegal, invalid or void the consequential order cannot be given effect to as it automatically becomes inoperative or in other words if the basic order stands vitiated, the consequential order automatically falls. It is necessary to peruse what the

apex Court said in this regard in the case of **Badrinath Vs. Government of Tamil Nadu & Ors., (2000) 8 SCC 395**, which reads as under:-

> "This flows from the general principle applicable to "consequential orders". Once the basis of a proceeding is gone, may be at a later point of time by order of a superior authority, any intermediate action taken in the meantime- like the recommendation of the State and by the UPSC and the action taken thereon- would fall to the ground. This principle of consequential orders which is applicable to judicial and quasi-judicial proceedings is equally applicable to administrative orders."

52. t is contended by the learned Senior Counsel for the petitioners that the exercise of the eminent domain power by the State Government at the request of Vedanta Foundation and issuing preliminary notifications and proceeding with the further proceedings in granting previous consent as provided under Section 39 of the L.A.Act and publication of final notifications in respect of the lands covered under the preliminary notifications declaring that those lands are required in favour of the beneficiary company to establish a University which is not permissible under the Land Acquisition Act in view of Section 44(B) read with Section 40(1)(a) of the L.A. Act and the acquisition of vast extent of lands of thousands of acres of both private owners, Temple land and lease of State Government lands at the instance of Vedanta Foundation's requisitions and Agreement executed by the Anil Agarwal Foundation in favour of the State Government after publication of preliminary notifications is nothing but fraud played by them on the State Gvernment to exercise its power. In this context, it is necessary to extract what the apex Court said in **Commissioner of Customs v. Essar Oil Ltd.*, (2004) 11 SCC 364*, at page 376** :

> 30. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See *S.P. Chengalvaraya Naidu* v. *Jagannath*.)
>
> 31. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and

injury enures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (See *Ram Chandra Singh* v. *Savitri Devi*.)

32. "Fraud" and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to "wing me into the easy-hearted man and trap him into snares". It has been defined as an act of trickery or deceit. In *Webster's Third New International Dictionary* "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In *Black's Legal Dictionary*, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In *Concise Oxford Dictionary*, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to *Halsbury's Laws of England*, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Indian Contract Act, 1872 defines "fraud" as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise, fraud arises out of deliberate active role of the representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of a fact with knowledge that it was false. In a leading English case i.e. *Derry* v. *Peek,* what constitutes "fraud" was described thus (All ER p. 22 B-C):

"[Fraud is proved when it is shown that a false representation has been made (*i*) knowingly, or (*ii*) without belief in its truth, or (*iii*) recklessly, careless whether it be true or false."

But "fraud" in public law is not the same as "fraud" in private law. Nor can the ingredients, which establish "fraud" in commercial transaction, be of assistance in determining fraud in administrative law. It has been aptly observed by Lord Bridge in *Khawaja* v. *Secy. of State for Home Deptt.*, that it is dangerous to introduce maxims of common law as to effect of fraud while determining fraud in relation to statutory law. "Fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute.

" 'If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope.' Present-day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administration law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. 'In a contract every person must look for himself and ensures that he acquires the information necessary to avoid bad bargain.' In public law the duty is not to deceive." (See *Shrisht Dhawan* v. *Shaw Bros.*, SCC p. 554, para 20.)

33. In that case it was observed as follows: (SCC p. 553, para 20)

"*20*. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In *Webster's Third New International*

Dictionary fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In *Black's Legal Dictionary*, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In *Concise Oxford Dictionary*, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to *Halsbury's Laws of England*, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act defines fraud as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English case *Derry* v. *Peek*[5] what constitutes fraud was described thus: (All ER p. 22 B-C)

> 'Fraud is proved when it is shown that a false representation has been made (*i*) knowingly, or (*ii*) without belief in its truth, or (*iii*) recklessly, careless whether it be true or false.' "

34. This aspect of the matter has been considered recently by this Court in *Roshan Deen* v. *Preeti Lal*, *Ram Preeti Yadav* v. *U.P. Board of High School and Intermediate Education*, *Ram Chandra Singh case*[4] and *Ashok Leyland Ltd.* v. *State of T.N.*

35. Suppression of a material document would also amount to a fraud on the court. (See *Gowrishankar* v. *Joshi Amba Shankar Family Trust* and *S.P. Chengalvaraya Naidu case*.)

36. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in *Ram Preeti Yadav case*.

37. In *Lazarus Estates Ltd.* v. *Beasley* Lord Denning observed at QB pp. 712 and 713: (All ER p. 345 C)

> "No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."
>
> In the same judgment Lord Parker, L.J. observed that fraud vitiates all transactions known to the law of however high a degree of solemnity (p. 722).
>
> (Emphasis made by this Court)

In **Gurdial Singh v. State of Punjab, AIR 1980 SC 319,** the apex Court held as under:

> "9. The question, then, is what is mala fides in the jurisprudence of power? Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidates the exercise of power — sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfactions — is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated: "I repeat . . . that all power is a trust — that we are accountable for its exercise — that, from the people, and for the people, all springs, and all must exist". Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to effect some object which is beyond the purpose and intent of the power, whether this be malice-laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action, mala fides or fraud on power vitiates the acquisition or other official act."
>
> (Emphasis added)

Therefore, the action of the State Government in issuing the impugned notifications is void ab initio in law on account of fraud played upon the State Government by the beneficiary company by misrepresenting the facts and made it to believe and act upon the same to exercise its powers to acquire the vast tract of lands in its favour for which they are not legally entitled to and therefore the action of the State Government in exercising its power for the purpose other than vested in it, amounts to legal mala fides as held by the Apex Court in the cases referred to supra.

53. Further as could be seen from the original records of the State Government that issuance of the preliminary notifications and obtaining agreements from the Vedanta Foundation and the beneficiary company are also bad in law for the reason that we have answered point no.1 holding that the beneficiary company is not a public company; it is a private company limited by guarantee. Further acquisition of lands in its favour is permissible only in respect of the purpose of erection of dwelling houses for workmen employed by the company or for the provision of amenities directly connected therewith.

The MOU dated 19.7.2006 executed by Vedanta Company in favour of the State Government was before publishing the preliminary notifications in respect of the acquired lands. On the basis of the said MOU preliminary notifications dated 13.12.2006 to 22.12.2006 were published. Therefore, the said agreement was not executed by the beneficiary company in favour of the State Government for publishing section 4(1) notifications by giving previous consent by it as provided under section 39 of the L.A.Act to put the provisions of sections 4 to 16 (both inclusive) and sections 18 to 37 in force. Therefore, there is no valid agreement before the State Government to exercise the statutory power and grant previous consent for publishing the preliminary notifications. For this reason, publication of the preliminary notifications on the basis of the said MOU executed by Vedanta Company does not enure to the benefit of the beneficiary company. Therefore, the said agreement is not valid as required under section 39 read with section 41 of the L.A.Act and, therefore, acquisition of lands by publishing Section 4 (1) notifications in favour of the beneficiary company is vitiated in law for the reason that before putting the provisions of sections 4 to 16 and 18 to 37 in order to acquire land in favour of the beneficiary company, no previous consent of the State Government was there and such consent also shall not be given unless the company has executed the agreement in terms of section 41 of the L.A.Act. Therefore, the agreement is not only not in conformity with sub-sections (1) to (4) and (4A) of section 41, but the same is not legal and valid for the reason that much prior to the said agreement, preliminary notifications were published and thereafter final notifications

were published which are not permissible in law. Therefore, the same is in contravention of section 39 of the Act.

54. For the above reason also the final notifications are bad in law. In view of the reasons stated supra, the submissions of Shri Ashok Mohanty, learned Advocate General and Mr. Anil Diwan, learned Senior Counsel and Mr.Sanjit Mohanty, learned Senior Counsel for the Company with reference to the original records of the State Government produced by the learned Government Advocate to justify the action of the State Government in support of the impugned notifications regarding the previous consent accorded by the State Government and thereafter Memorandum of Understanding executed by the company in favour of the State Government agreeing to certain terms and conditions as provided in section 41 of the L.A.Act and thereafter on the basis of the report of the Collector, the State Government satisfied with the requisition made by the company that the proposed lands in the preliminary notification are required for it for educational purpose to establish a multiple discpline university in the acquired lands, which will benefit the students of Orissa State and also the other States in the country, which will be more advantageous for the State Government, therefore, there is a public purpose as defined under section 3(f) (vi) of the Act, is wholly untenable in law and the reliance placed on the various decisions by them which are adverted to in the judgment portion, are not of much help to them. For the reasons stated supra, all the points from 3 to 11 are answered against the Beneficiary Company and the State Government.

Answer to Point Nos. 12(a) & (b) & 13 :

55. Learned Senior Counsel Mr. Jayant Das and Mr. Rajat Rath, on behalf of the petitioners submit that the acquisition of the lands in question in favour of the beneficiary company, is bad in law in view of the fact that by Gazette Notification dated 23.4.1984 published by the State Government, the nearby area of the acquired lands has been declared as Wildlife Sanctuary and that two rivers, namely, 'Nuanai' & 'Nala' are flowing in the acquired lands according to the satellite map issued by the Forest Department. With reference to the said map it is submitted by the learned Senior Counsel for the petitioners that if the impugned notifications for acquisition of lands in favour of the beneficiary company are not quashed, it would definitely affect the ecology and environment in the locality and public in general would be affected. The action of the State Government in acquiring lands is not only in contravention of the provisions of the Wild Life (Protection) Act but also Air (Prevention & Control of Pollution) Act as well as Water (Prevention & Control of Pollution) Act and Environmental Protection Act of 1986. The wild animals in the Sanctuary will adversely suffer and so also Water and Air pollution will be caused in that locality. On

account of establishment of educational institutions, township and other buildings as proposed by the beneficiary company in the acquired lands would come up which would affect the two rivers that are flowing on the lands in question. The same is against the doctrine of 'public trust' as held by the Apex Court in the case of **Common Cause, A Registered Society Vs. Union of India & Ors**., (1999) 6 SCC 667.

56. Mr. Jayant Das, learned Senior Counsel, rightly placed reliance upon the decision of the Apex Court in **Bandhua Mukti Morcha vrs. Union of India**, reported in AIR 1984 SC 802, which decision states that affecting the statutory and fundamental rights of the citizens would be a continuing wrong. In the name of sustainable development, acquiring vast tract of lands of the locality by the State Government would certainly affect the inter-generational equity for the people of the locality. The conversion of nature of the lands in question from agricultural to non-agricultural purpose would affect the environment and ecology at large and it would be certainly in the contravention of the aforesaid Statutory laws and violations of the fundamental duties as enumerated in Article 51A(1)(g) of Part IV of the Constitution. Further the condition imposed by the State Government that within 5 kilometers of the acquired lands no person shall be allowed to develop his properties by putting up the buildings without permission of the Development Authority also is in violation of their rights. Therefore, the public interest petitions must succeed as the impugned action of the State Government certainly not only amounts to violation of Rule of law but also affect public interest and thereby it would adversely affect the constitutional, fundamental and statutory rights of the residents of the locality. Therefore, the Public Interest Litigation writ petitions are maintainable in law for the reason that the public interest also involved in these petitions and hence the same are required to be allowed.

57. In support of their contentions, the learned Senior Counsel on behalf of the petitioners have placed strong reliance upon the decision of the Constitution Bench of the Supreme Court in the case of **S.P. Gupta Vs. Union of India & Anr**., AIR 1982 SC 149; and decisions of the Supreme Court in **Janata Dal Vs. H.S. Chowdhary**, AIR 1993 SC 892; **Indian Council for Enviro-Legal Action Vs. Union of India & Ors**., (1996) 5 SCC 281; and **State of Uttaranchal Vs. Balwant Singh Choufal**, (2010) 3 SCC 402 and requested this Court to allow the Public Interest Litigation petitions granting the reliefs.

58. The submissions was strongly refuted by the learned Advocate General and also the learned senior counsel for the beneficiary Company contending that there is neither ecology & environmental issues involved in these petitions nor is there any contravention of the laws in relation to Air, Water or Wildlife Protection or Environmental Protection Act. It is contended

by learned Senior Counsel Mr.Sanjit Mohanty that the petitioners by filing the public interest litigation petitions, have abused the process of this Court, which are not at all maintainable in law in view of the fact that earlier one writ petition being W.P.(C) No. 6981 of 2008, which was filed by nine persons was disposed of by this Court vide its order dated 9.5 2008 holding that it is not maintainable in law. This aspect of the case is elaborately referred to at para-9 in the counter statement filed by the beneficiary Company at page 270. It is also submitted by the learned Advocate General that the legal contentions urged on behalf of the petitioners that ecology and environment of the area in question will be adversely affected is contrary to the report of the Additional Secretary to the State Government, Tourism Department produced in the W.P.(C) No. 7163 of 2008. Further the learned Advocate General and the learned Senior Counsel on behalf of the beneficiary Company have urged that there is neither any wildlife sanctuary nor any forest is existing near the lands in question as contended by the learned Senior Counsel and another counsel on behalf of the petitioners, which are acquired in favour of the company and the said statement of the petitioners is a false statement of fact and in fact the lands which are existing for sanctuary is excluded from acquisition in the final notifications. Therefore, it is contended by them that there is neither public interest involved in these matters nor Rule of law is violated by the State Government for which they have requested for dismissal of the public interest writ petitions.

59. With reference to the aforesaid rival legal contentions, we have very carefully examined the above P.I.L. writ petitions with reference to the pleadings, rival legal contentions urged by the learned Senior Counsel and another counsel for the parties and records/files of the Government and after careful examination of all the documents produced by the parties, we are answering the above points in favour of the petitioners by assigning the following reasons.

60. The lands of the locality are acquired by the State Government in favour of the beneficiary company. The State Government by Notification dated 23.4.1984 published in the Gazette declared certain lands situated near the vicinity of the acquired lands as the Wildlife Sanctuary is an undisputed fact and the said notification is still in force. Further the satellite maps issued by the Department of Forest produced by the petitioners in the public interest litigation petitions, would clearly go to show that two rivers, namely, 'Nuanai' and 'Nala' are flowing in certain lands acquired in favour of the beneficiary-company. Hence, the control of the said rivers will be under the said private company if the acquisition proceedings are held to be valid in law thereby the doctrine of public trust as held by the Hon'ble Supreme Court in the case of **Common Cause, A Registered Society**

(supra) upon which strong reliance has been placed by the petitioners Senior Counsel, will be violated. In this decision the Supreme Court held that natural resources such as air, water, forest, lakes, rivers and wildlife are public properties entrusted to the Government for their safe and proper use and proper protection and the doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. Let us know what the apex Court said on the point:

> "160. The Court also appears to have invoked the "Doctrine of Public Trust" which is a doctrine of environmental law under which the natural resources such as air, water, forest, lakes, rivers and wildlife are public properties "entrusted" to the Government for their safe and proper use and proper protection. Public Trust Law recognizes that some types of natural resources are held in trust by the Government for the benefit of the public. The "Doctrine of Public Trust" has been evolved so as to prevent unfair dealing with or dissipation of all natural resources. This doctrine is an ancient and somewhat obscure creation of Roman and British law which has been discovered recently by environmental lawyers in search of theory broadly applicable to environmental litigation.
>
> 161. This doctrine was considered by this Court in its judgment in M.C.Mehta v.Kamal Nath, (1997) 1 SCC 388 to which one of us (S.Saghir Ahmad,J.) was a party. Justice Kuldip Singh, who authored the erudite judgment and has also otherwise contributed immensely to the development of environmental law, relying upon ancient Roman "Doctrine of Public Trust", as also the work of Joseph L.Sax, Professor of Law, University of Michigan and other foreign decisions, wrote out that all natural resources are held in "trust" by the Government. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes……"

Further, by acquiring the vast tract of lands in which the above two rivers are flowing and handing over the same to the beneficiary company, as alleged by the opposite parties without producing any document is definitely contrary to the doctrine of public trust. Requiring the beneficiary-company to maintain the flow of the above two rivers would also affect the residents of the locality at large. The aforesaid action of the State also will be in contravention of the provisions of Air and Water (Prevention & Control of Pollution) Act and Environmental Protection Act of 1986. Large scale construction for the establishment of the proposed university will also

adversely affect the Wildlife Sanctuary, entire Eco system and the ecological environment in the locality.

61. In **M.C. Mehta Vs. Union of India, reported in (2004) 12 SCC 118,** the Supreme Court held as under :

> "46…….The most vital necessities, namely, air, water and soil, having regard to right to life under Article 21 cannot be permitted to be misused and polluted so as to reduce the quality of life of others. Having regard to the right of the community at large it is permissible to encourage the participation of amicus curiae, the appointment of experts and the appointments of Monitory Committees. The approach of the Court has to be liberal towards ensuring social justice and protection of human rights. In *M.C. Mehta* v. *Union of India* this Court held that life, public health and ecology has priority over unemployment and loss of revenue. The definition of "sustainable development" which Brundtland gave more than 3 decades back still holds good. The phrase covers the development that meets the needs of the present without compromising the ability of the future generation to meet their own needs. In *Narmada Bachao Andolan* v. *Union of India* this Court observed that sustainable development means the type or extent of development that can take place and which can be sustained by nature/ecology with or without mitigation. In these matters, the required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a "reasonable person's" test. [See Chairman Barton: *The Status of the Precautionary Principle in Australia* (Vol. 22, 1998, Harv. Envtt. Law Review, p. 509 at p. 549-A) as referred to in para 28 in *A.P. Pollution Control Board* v. *Prof. M.V. Nayudu*.]"

In **T.N. Godavarman Thirumulpad (87) v. Union of India,(2006) 1 SCC 1,** the Supreme Court has held as under ***:***

> "48……We may only note that the basis of these valuations is the theory of sustainable development i.e. development that meets the needs of the present without compromising with the ability of future generations to meet their own needs. Despite various elaborations, definition of sustainable development, though very old, still is widely accepted the world over and has been reiterated by this Court in a catena of cases.
>
> **61.** The background under which the fund came to be created has already been noted. Noticing fast depletion of forests, the fund was *ordered to be utilised for protection of forests and environments*. The environments are not the State property and are a national asset. It is

the obligation of all to conserve the environments, and for its utilisation, it is necessary to have regard to the principles of sustainable development and intergenerational equity.

94. The submission made on behalf of the Federation of Indian Mineral Industries about calculation of NPV at the rate of 10 per cent for major mineral and 5 per cent for minor mineral as already noted cannot be accepted. The question is not of the value of the mineral or it being high value and low volume and mineral of high volume and low value, the question is about use of the forest areas and need to protect the environments in the manner abovestated. A larger public interest has to be the guiding principle and not the present interest of user agency only."

(emphasis added)

Further in **T.N. Godavarman Thirumulpad (104) v. Union of India,(2008) 2 SCC 222**, the Supreme Court observed that **:**

3. As a matter of preface, we may state that adherence to the principle of sustainable development is now a constitutional requirement. How much damage to the environment and ecology has got to be decided on the facts of each case. While applying the principle of sustainable development one must bear in mind that development which meets the needs of the present without compromising the ability of the future generations to meet their own needs is sustainable development. Therefore, courts are required to balance development needs with the protection of the environment and ecology. It is the duty of the State under our Constitution to devise and implement a coherent and coordinated programme to meet its obligation of sustainable development based on inter-generational equity (see *A.P. Pollution Control Board* v. *Prof. M.V. Nayudu*). Mining is an important revenue-generating industry. However, we cannot allow our national assets to be placed into the hands of companies without a proper mechanism in place and without ascertaining the credibility of the user agency.

62. In this view of the matter, there is violation of the provisions of the above statutory enactments. Further as could be seen from the original file produced by the learned Government Advocate in these cases, vast tract of lands belonging to the State Government including Gochar lands on the basis requisition of Vedanta Company have been de-reserved and divested from the purpose for which it was reserved and made available for grant in favour of the beneficiary company by way of lease. In the instant case, as could be seen from the proceedings maintained by the Collector, hundreds

of acres of lands of the Government has been granted in favour of the company which grant is under Rule 5 as mentioned in the records is not permissible in law for the reason that rule 5 of the Orissa Government Land Settlement Rules, 1983 provides that all applications for settlement of Government land in favour of the applicants irrespective of the purpose of lease or extent of area involved either in rural or in urban area shall be filed before the Tahasildar having jurisdiction over the area in which the land is situated and the application for settlement of land shall be filed by the applicant in Form I. On receipt of such application, the same shall be forthwith entered chronologically in a register maintained in Form II and after receipt of the applications the Tahasildar shall cause a verification to be made in respect of each application with reference to the existing record of rights and map to ascertain whether the land applied for is free from encroachment of encumbrance or not, whether lease can be granted has to be examined and whether the applicant is eligible to get the land for the purpose for which he has applied. Before grant of such land, proclamation in Form No.III shall be published inviting objections, fixing a date for hearing. Further notice in this regard must be affixed in the notice Board of the Tahasildar and a copy of the same shall also be sent to the Gram Panchayat or Notified Area Council or Municipality, as the case may be, under which the land is situated. As could be seen from the records, no such procedure appears to have been followed and the grant of lease of hundreds of acres of government land in favour of the beneficiary company has been made without following the procedure contemplated in the Business Transaction Rules framed by his Excellency the Governor in exercise of power under Article 166 (3) of the Constitution. The valuation of the property and the rent fixed has also been done without following the proper procedure and grant of such vast extent of land in favour of the company is not provided for under Rule 5 of the Rules. Therefore, grant of such land in its favour for establishment of a non-existing university is once again conferring largess upon a private company thereby public interest is affected is also one more strong reason for allowing the public interest litigation petitions.

63. For the reasons stated supra, definitely the public interest is involved in these writ petitions filed by the public spirited persons. It is profitable to know what the apex Court ruled on the point.

In **People's Union for Democratic Rights Vs. Union of India**, (1982) 3 SCC 235, the Supreme Court held as under :

> "2……...We wish to point out with all the emphasis at our command that public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of

humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and un-redressed. That would be destructive of the rule of law which forms one of the essential elements of public interest in any democratic form of Government. The rule of law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the rule of law is meant for them also, though today it exists only on paper and not in reality. If the sugar barons and the alcohol kings have the fundamental right to carry on their business and to fatten their purses by exploiting the consuming public, have the *chamars* belonging to the lowest strata of society no fundamental right to earn an honest living through their sweat and toil? The former can approach the courts with a formidable army of distinguished lawyers paid in four or five figures per day and if their right to exploit is upheld against the Government under the label of fundamental right, the courts are praised for their boldness and courage and their independence and fearlessness are applauded and acclaimed. But, if the fundamental right of the poor and helpless victims of injustice is sought to be enforced by public interest litigation, the so-called champions of human rights frown upon it as waste of time of the highest court in the land, which, according to them, should not engage itself in such small and trifling matters. Moreover, these self-styled human rights activists forget that civil and political rights, priceless and invaluable as they are for freedom and democracy, simply do not exist for the vast masses of our people. Large numbers of men, women and children who constitute the bulk of our population are today living a sub-human existence in conditions of abject poverty; utter grinding poverty has broken their back and sapped their moral fibre. They have no faith in the existing social and economic system. What civil and political rights are these

poor and deprived sections of humanity going to enforce? This was brought out forcibly by W. Paul Gormseley at the silver jubilee celebrations of the Universal Declaration of Human Rights at the Banaras Hindu University:

"Since India is one of those countries which has given a pride of place to the basic human rights and freedoms in its Constitution in its Chapter on Fundamental Rights and on the Directive Principles of State Policy and has already completed twenty-five years of independence, the question may be raised whether or not the fundamental rights enshrined in our Constitution have any meaning to the millions of our people to whom food, drinking water, timely medical facilities and relief from disease and disaster, education and job opportunities still remain unavoidable. We, in India, should on this occasion study the human rights declared and defined by the United Nations and compare them with the rights available in practice and secured by the law of our country."

The only solution for making civil and political rights meaningful to these large sections of society would be to remake the material conditions and restructure the social and economic order so that they may be able to realise the economic, social and cultural rights. There is indeed close relationship between civil and political rights on the one hand and economic, social and cultural rights on the other and this relationship is so obvious that the International Human Rights Conference in Teheran called by the General Assembly in 1968 declared in a final proclamation:

"Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."

Of course, the task of restructuring the social and economic order so that the social and economic rights become a meaningful reality for the poor and lowly sections of the community is one which legitimately belongs to the legislature and the executive, but mere initiation of social and economic rescue programmes by the executive and the legislature would not be enough and it is only through multi-dimensional strategies including public interest litigation that these social and economic rescue programmes can be made effective. Public interest litigation, as we conceive it, is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the

constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The State or public authority against whom public interest litigation is brought should be as much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the court. The State or public authority which is arrayed as a respondent in public interest litigation should, in fact, welcome it, as it would give it an opportunity to right a wrong or to redress an injustice done to the poor and weaker sections of the community whose welfare is and must be the prime concern of the State or the public authority."

In **S.P.Gupta v. Union of India and others**, AIR 1982 SC 149, the apex Court held as under:

"We would therefore hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from beach of public duty or from violatioin of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objective "Law", as pointed out by Justice Krishna Iyer in Fertilizer Corporation Kamgar Union v. Union of India, AIR 1981 SC 344," is a social auditor and this audit function can be put into action when some one with real public interest ignites the jurisdiction……. Another point which requires emphasis is that cases may arise where there is undoubtedly public injury by the act or omission of the State or public authority but such act or omission also causes a specific legal injury to an individual or to a specific class or group of individuals. In such cases, a member of the public having sufficient interest can certainly maintain an action challenging the legality of such act or omission."

In the case **of Janata Dal Vs. H.S. Chowdhary**, reported in AIR 1993 SC 892, the Supreme Court taking note of the observations made in the case of S.P. Gupta (supra) and number of its earlier decisions, held as under :

"It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not

a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the colour of PIL brought before the court for vindicating any personal grievance, deserves rejection at the threshold.

It is depressing to note that on account of such trumpery proceedings initiated before the courts, innumerable days are wasted which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we are second to none in fostering and developing the newly invented concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheared; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from the undue delay in service matters, Government or private persons awaiting the disposal of tax cases wherein huge amounts of public revenue or unauthorised collection of tax amounts are locked up, detenus expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either for themselves or as proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffling their faces by wearing the mask of public interest litigation, and get into the courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the courts and as a result of which the queue standing outside the doors of the Court never moves which piquant situation creates a frustration in the minds of the genuine litigants and resultantly they lose faith in the administration of our judicial system."

(Emphasis added)

Further in a recent decision, in the case of **State of Uttaaranchal Vs. Balwant Singh Chaufal & Ors**., reported in (2010) 3 SCC 402, the Supreme Court referring to large number of its earlier decisions held as under :

"33. The High Courts followed this Court and exercised similar jurisdiction under Article 226 of the Constitution. The Courts expanded the meaning of right to life and liberty guaranteed under Article 21 of the Constitution. The rule of locus standi was diluted and the traditional meaning of "*aggrieved person*" was broadened to provide access to justice to a very large section of the society which was otherwise not getting any benefit from the judicial system. We would like to term this as the first phase or the golden era of the public interest litigation. We would briefly deal with important cases decided by this Court in the first phase after broadening the definition of "aggrieved person".

36. Public interest litigation is not in the nature of adversarial litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The Government and its officers must welcome public interest litigation because it would provide them an occasion to examine whether the poor and the downtrodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements.

39. The origin and evolution of public interest litigation in India emanated from realisation of constitutional obligation by the Judiciary towards the vast sections of the society—the poor and the marginalised sections of the society. This jurisdiction has been created and carved out by the judicial creativity and craftsmanship.

40. In *M.C. Mehta* v. *Union of India*[1] this Court observed that Article 32 does not merely confer power on this Court to issue direction, order or writ for the enforcement of fundamental rights. Instead, it also lays a constitutional obligation on this Court to protect the fundamental rights of the people. The Court asserted that, in realisation of this constitutional obligation, "it has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights". The Court

realised that because of extreme poverty, a large number of sections of society cannot approach the court. The fundamental rights have no meaning for them and in order to preserve and protect the fundamental rights of the marginalised sections of the society by judicial innovation; the Courts by judicial innovation and creativity started giving necessary directions and passing orders in the public interest.

41. The development of public interest litigation has been an extremely significant development in the history of the Indian jurisprudence. The decisions of the Supreme Court in the 1970s loosened the strict locus standi requirements to permit filing of petitions on behalf of marginalised and deprived sections of the society by public spirited individuals, institutions and/or bodies. The higher courts exercised wide powers given to them under Articles 32 and 226 of the Constitution. The sort of remedies sought from the Courts in the public interest litigation goes beyond award of remedies to the affected individuals and groups. In suitable cases, the Courts have also given guidelines and directions. The Courts have monitored implementation of legislation and even formulated guidelines in the absence of legislation. If the cases of the decades of 70s and 80s are analysed, most of the public interest litigation cases which were entertained by the courts are pertaining to enforcement of fundamental rights of marginalised and deprived sections of the society."

64. In view of the clear pronouncement of law in the aforesaid cases by the Apex Court this Court has to interfere with the acquisition proceedings and grant of Government lands in favour of the Beneficiary Company to protect the public interest. Hence we have to answer the aforesaid points in favour of the petitioners and against the opposite parties.

65. For the reasons stated supra, the factual contentions urged by the learned Advocate General, placing reliance upon the report of the Additional Secretary of Tourism Department, is wholly contrary to the Gazette Notification of 1984 referred to supra and the Satellite Map issued by the Forest Department to the petitioners, which is produced for our perusal. Further the legal contentions urged on behalf of the Company by Mr. Sanjit Mohanty, learned Senior Counsel that the petitioners have abused the process of this Court claiming that they are public spirited persons, is also untenable in law for the reason that they have established the case that interest of the public of the locality will be affected and also there will be violation of the Rule of law if the acquisition of lands and grant of leasehold rights in respect of Government lands in favour of the beneficiary Company is held to be not legal and valid and therefore we have to hold that there is

no abuse of the process of this Court by the petitioners in approaching this Court espousing the public cause and public interest as the act of the State Government is in contravention of the Notification issued by the State Government way back in the year 1984 declaring certain lands nearby the lands acquired, as Wild life Sanctuary and the documents produced by the petitioners to prove the fact that two rivers are flowing on the acquired lands. For the reasons stated supra we are of the view that the petitioners in the PIL writ petitions have established that they are bona fide public spirited persons who are very much interested in protecting the public interest and see that the State Government discharged its responsibilities and fundamental duties towards the public of the locality keeping in view "the doctrine of public trust" upon the public properties. The disposal of the earlier writ petition filed by nine persons referred to supra upon which reliance is placed by the learned Senior Counsel on behalf of the Company in support of his contention that the writ petitioners in the PIL have abused the process of this Court is not tenable in law, as this Court has not decided the case on merits by answering the substantial issues that arose for its consideration. In the present writ petitions by urging tenable grounds they have made out a strong case for granting the reliefs. If the PIL petitions are not allowed there will be a continuing wrong of the State Government and the beneficiary Company, which would violate the human rights of the residents of the locality where the lands are acquired and land owners/interested persons. They are small holders of the lands who belong to the Marginalized sections of the society and therefore they have no access to the justice for which they have got constitutional right under Article 39A of the Constitution and hundreds acres of Government lands are granted in favour of the company in utter violation of law.

66. For the foregoing reasons, absolutely there is no substance in the contentions urged by the learned Senior counsel on behalf of the Company that there is no public interest involved in these cases of PIL writ petitions filed by the petitioners and they have abused the process of the Court is misconceived and wholly untenable in law and the said contention is required to be rejected and the public interest litigation writ petitions also have to be allowed.

Answer to Point Nos. 14 and 15 :

67. We have answered all the points framed in these petitions against the State Government and the beneficiary Company by recording our reasons and we have held that the acquisition proceedings from the stage of initiation till the date of purported awards which in fact and law not awarded and the alleged taking over of possession of the lands is in flagrant violation of the statutory provisions of Sections 4, 5A, 6, 9, 10, 11, 12 (2), 23, 24,

read with the provisions under Part-VII of the Land Acquisition Act, 1894. We have also answered the points that arose for our consideration in the Public Interest Litigation holding that the initiation of the acquisition proceedings in favour of the beneficiary company, on the requisition made by the Vedanta Foundation by misrepresenting facts and playing fraud on the State Government, has vitiated the entire acquisition proceedings. We have further answered that the public interest at large is affected and there is violation of rule of law. Therefore, we have also held that writ petitions filed by the petitioners as public interest litigation are also required to be allowed and made observation that the petitioners in those petitions, apart from public interest, they have pleaded on behalf of small land holders who have no sustenance to approach this Court to fight litigation. Therefore, the acquisition proceedings in its entirety in respect of persons who have approached this Court and even who have not approached this Court are liable to be quashed for the reason that there is flagrant violation of the aforesaid provisions of the Land Acquisition Act as observed by the Supreme Court in the case of **H.M.T. House Building Co-operative Society Vs. Syed Khader & Ors,** reported in AIR 1995 SC 2244. The Supreme Court, while answering the legal questions that arose for consideration, held that prior approval of the Government is required under Section 44-A, but as the same has not been followed, the entire acquisition proceedings was quashed. Further, the Supreme Court directed in the above referred case the State Government and the Society which was in the possession, that lands shall be restored to the respective land owners irrespective of the fact whether they had challenged the acquisition of their lands or not and at paragraph 26 of its judgment has directed as hereunder :

> " 26. We direct that as a result of quashing of the land acquisition proceedings including the notifications as aforesaid, the possession of the lands shall be restored to the respective landowners irrespective of the fact whether they had challenged the acquisition of their lands or not. On restoration of the possession to the landowners they shall refund the amounts received by them as compensation or otherwise in respect of their lands. The appellant, the respondents and the State Government including all authorities/persons concerned shall implement the aforesaid directions at an early date."

68. Applying the said decision to the facts of the case and the acquisition of lands in question, we deem it appropriate to grant reliefs in favour of the land owners irrespective of whether they have approached this Court or not.

69. In the result, we allow the writ petitions, quash the impugned land acquisition proceedings including the notifications under Sections 4(1) and 6

and the awards passed in the Land Acquisition Proceedings for acquisition of land in favour of the beneficiary company and direct that the possession of the acquired lands shall be restored to the respective land owners irrespective of the fact whether they have challenged the acquisition of their lands or not. On restoration of the possession to the land owners, they shall refund the amount received by them as compensation or otherwise in respect of their lands. We also quash the grant of Government Lands in favour of the Beneficiary Company under Rule 5 of the Government Land Settlement Rules with a direction to the State Government to resume the lands which were granted to the beneficiary company by way of lease. All concerned including the State Government, the land owners and the beneficiary company shall implement the aforesaid direction at an early date.

There would be no order as to costs.

Writ petitions allowed.

2010 (II) ILR – CUT-1086

V.GOPALA GOWDA, CJ & INDRAJIT MAHANTY, J.

W.P. (C) NO.7962 OF 2010 (Decided on 15.09.2010)

KASHINATH BEHERA @ KANDRA …… Petitioner.

.Vrs.

STATE OF ORISSA & ORS …… Opp. Parties.

NATIONAL SECURITY ACT, 1980. (ACT NO.65 OF 1980) – SEC.3(2).

Preventive detention – Detention order clearly indicates the chances of the detenu being released on bail and will indulge in prejudicial activities in the locality.

Grounds of detention shows the detenu a diehard antisocial, an iron, manganese mafia, was also booked previously under the Act in 2001 – Again he has jeopardized public tranquility by committing crimes with his gang at public places with lethal weapons disturbing the normal tempo of public life – He has also created feelings of insecurity amongst those who are likely to depose against him so also the law enforcement agencies – As a result of which the crime would go unpunished and the criminal would be encouraged and ultimately the society will suffer – Held, the activities of the petitioner squarely fall within the definition of the term "activities prejudicial to the public order" and it is necessary to detain the petitioner in order to prevent him from indulging in such activities.

(Para 15,16,17)

Case laws Referred to:-

1.AIR 1975 SC 953 : (Magan Gope -V- State of West Bengal)
2.AIR 2003 SC 4622 : (Union of India -V- Paul Manickam & Anr.).
3.2009 Cri. LJ 538 : (Subrat Kumar Naik -V- State of Orissa Ors.)
4.1992 SC 979 : (Mrs.Harpreet Kaur Harvinder Singh Bedi -V- State Of Maharashtra & Anr.)

For Petitioner - M/s. Umesh Chandra Pattnaik, J.K.Mohanty, B.Bastia, Manash Ch.Jena & Sk.Zafarulla.

For Opp.Parties – Govt. Advocate (for O.P.Nos.1 to 3)
Assistant Solicitor General (for O.P.No.4)

I.MAHANTY, J. In this writ petition, the petitioner has sought to challenge the detention order No. 83/C dated 17.04.2010 passed by the Collector and District Magistrate, Keonjhar-opposite party no.2(hereinafter referred to as the "Detaining Authority") in exercise of power under Section

3(2) of the National Security Act, 1980(hereinafter referred to as 'the Act') directing his detention in jail custody .

2. The facts and circumstances giving rise to the present writ petition are that the petitioner is facing trial in eight criminal cases registered as Joda P.S. Case Nos. 135 dated 19.09.2003, 181dated 20.11.2003, 166 dated 17.09.2008, 234 dated 19.12.2008, 17 dated 23.01. 2009, 16 dated 05.02.2010, 23 dated 14.02.2010 and 31 dated 04.3.2010 apart from two station diary entry Nos. 136 dated 06.03.2010 and 138 dated 06.03.2010.

3. Mr. U.C.Pattnaik, learned counsel appearing for the petitioner-detenu, inter alia , raised the following contentions:-

(i) That the Detaining Authority while passing the impugned order of detention dated 17.4.2010 has not recorded her subjective satisfaction with cogent material to the effect that the petitioner was likely to be released on bail in connection with Joda P.S. Case No. 23 dated 14.2.2010 while the application for bail was pending consideration before the learned Additional Sessions Judge (FTC), Champua and the bail applications in other cases had not been considered.

(ii) (a) That the Detaining Authority has not recorded her subjective satisfaction with regard to the maintenance of public order vis-à-vis the alleged criminal activities cited in the Grounds of Detention since it is contended that the same was not relevant to the maintenance of 'public order'.

(b) That in the case of **Magan Gope v.State of West Bengal**, reported in AIR 1975 SC 953, the Hon'ble Supreme Court while dealing with the case of a smuggler came to hold that the smuggling activity attributed to the detenu was not an activity which was prejudicial to the maintenance of 'public order'.

4. Mr. R.K.Mohaptra, learned Government Advocate appearing on behalf of the State on the other hand submitted that no fault can be found with the order of detention, since the said order has been confirmed by the Government of Orissa in exercise of its power under Section 12(1) of the Act on reaching a subjective finding that there was sufficient cause for detention of the petitioner, the petition is liable to be dismissed.

5. Mr. Mohapatra highlighting the facts of the criminal cases referred to in the grounds of detention, inter alia, stated that the petitioner-detenu had become a menace to the society, particularly in the district of Keonjhar and it is due to leadership given by the petitioner there were rampant illegal mining activities occurring within the State of Orissa and in particular in the district of Keonjhar and the petitioner was one of the gang leaders under whose instruction, advice and support such rampant illegal mining and transportation of ore were occurring and the people in the locality were in fear of the petitioner, who was threatening to such an extent that no one

was willing to come forward to give evidence against him. Further the activities of the petitioner and his gang men in threatening and attacking the officers of the mining department as well as the police officials led to such a situation that there were chaos and panic in the minds of the people of the district of Keonjhar and therefore there was necessity of passing of the detention order against the petitioner under the National Security Act,1980.

6. So far as first contention is concerned, we are of the considered view that clearly in the order of the detention dated 17.4.2010 the Detaining Authority has recorded her subjective satisfaction with cogent material to the effect that the petitioner was likely to be released on bail. In this respect it becomes relevant herein to take note of the finding of the Detaining Authority in the grounds of detention, which reads thus:-

> "You were arrested with much difficulty by the Police on 21.03.2010 at 7.30 P.M. in connection with Joda P.S. Case No. 23 dt. 14.02.10 U/s 379/411/427/307 IPC, 21 MMDR Act and forwarded to the court of JMFC, Barbil on 22.03.10. As per the orders of the learned JMFC, Barbil you were put into Sub-jail, Barbil i.e. the intermediate judicial custody. You tried your level best to go out on bail but the same was rejected by the Hon'ble Court. Subsequently, you have filed bail application for your release on bail in the Hon'ble Court of Addl. Sessions Judge, FTC, Champua and the Hon'ble Court has passed order for hearing bail application on 07.04.10. The Hon'ble Court is competent enough to grant him bail. There is possibility of your release on bail."

7. In the case of **Union of India v. Paul Manickam and Anr**. AIR 2003 SC 4622 the Hon'ble Supreme Court considered the question whether a person who is already in jail can be detained under the National Security Act. This issue has already been dealt with by the Hon'ble Supreme Court in various earlier judgments and after considering the same the Hon'ble Supreme Court in the aforesaid case held as under:-

> "Where detention orders are passed in relation to persons who are already in jail under some other laws, the detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the chances of release of such persons on bail. The necessity of keeping such persons in detention under the preventive detention laws has to be clearly indicated Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision in this regard must depend on the facts of the particular case....The detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order. If the detaining authority is reasonably satisfied with cogent materials that there is

likelihood of his release and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made. Where the detention order in respect of a person already in custody does not indicate that the detenu was likely to be released on bail, the order would be vitiated....The principles were set out as follows: even in the case of a person in custody, a detention order can be validly passed: (1) if the authority passing the order is aware of the fact that he is actually in custody, (2) if he has a reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his release on bail, and (b) that on being released, he would in all probability indulge in prejudicial activities; and (3) if it is felt essential to detain him to prevent him from so doing. If an order is passed after recording satisfaction in that regard, the order would valid."

8. The same proposition was dealt with by a Division Bench of this Court presided by Hon'ble Dr. B.S.Chauhan, C.J. (as his Lordship then was) in the case of **Subrat Kumar Naik v. State of Orissa and others**, reported in 2009 Cri. LJ 538 and after discussing all the various judgments of the Hon'ble Supreme Court on this issue came to conclude in Para- 27 as follows:-

"Considering the aforesaid facts, we are of the view that while passing the detention order, the Detaining Authority was fully aware of the fact that detenu was actually in custody. There was relevant material before the said Authority, on the basis of which he had reasons to believe that petitioner was likely to be released on bail or there was possibility of his being released on bail and on being released, he would indulge himself in the activities prejudicial to the public order and therefore, it was necessary to detain him in order to prevent him from indulging in such activities. Thus, passing the detention order was necessary in such circumstances"

9. Considering the aforesaid case laws and the facts emanated in the present case, we are of the view that the first contention of the petitioner stands to be rejected having no merit.

10. In so far as the second contention is concerned, vis-à-vis the distinction between 'public order' and 'law and order' it is well settled in law that both the aforesaid terms have different and distinct concepts and there are number of authorities of the Supreme Court drawing a clear distinction between the two. It would be appropriate at this stage to refer to a judgment of the Hon'ble Supreme court in the case of **Mrs. Harpreet Kaur Harvinder Singh Bedi v. State of Maharashtra and another,** reported in 1992 SC

979 . In the aforesaid judgment the Hon'ble Supreme Court while considering such a contention held that the activities of the detenu could be said to be prejudicial only to the maintenance of "law and order" and not prejudicial to the maintenance of "public order". It was stressed by the learned counsel appearing for the detenu that the activities alleged against the detenu, however, reprehensible they may be, had no impact on the general members of the community and therefore could not be said to disturb the even tempo of the society and as such his detention from acting in a manner prejudicial to 'public order' was unjustified.

11. The Hon'ble Supreme Court in the aforesaid case led by Hon'ble Justice Dr. A.S.Anand, Judge(as his Lordship the then was) discussed various judgments rendered by it by the said date and came to conclude in paragraphs 17 and 18, as follows:-

> "17. Crime is a revolt against the whole society and an attack on the civilization of the day. Order is the basic need of any organized civilized society and any attempt to disturb that order affects the society and the community. The distinction between breach of 'law and order' and disturbance of 'public order' is one of degree and the extent of reach of the activity in question upon the society. In their essential quality, the activities which affect 'law and order' and those which disturb 'public order' may not be different but in their potentiality and effect upon even tempo of the society and public tranquility there is a vast difference. In each case, therefore, the courts have to see the length, magnitude and intensity of the questionable activities of persons to find out whether his activities are prejudicial to maintenance of 'public order' or only 'law and order'.
>
> 18. There is no gainsaying that in the present state of law, a criminal can be punished only when the prosecution is able to lead evidence and prove the case against an accused person beyond a reasonable doubt. Where the prosecution is unable to lead evidence to prove its case, the case fails, though that failure does not imply that no crime had been committed. Where the prosecution case fails, because witnesses are reluctant on account of fear of retaliation to come forward to depose against an accused obviously, the crime would go un-punished and the criminal would be encouraged. In the ultimate analysis it is the society which suffers. Respect for law has to be maintained in the interest of the society and discouragement of a criminal is one of the ways to maintain it. The objectionable activities of a detenu have, therefore, to be judged in the totality of the circumstances to find out whether those activities have any prejudicial effect on the society as a whole or not. If the society, and

> not only an individual, suffers on account of the questionable activities of a person, then those activities are prejudicial to the maintenance of 'public order' and are not merely prejudicial to the maintenance of 'law and order."

After laying down the principles of law to distinguish the term 'public order' from 'law and order', their Lordships considered the facts of the said case and came to its conclusion in Para- 21. The relevant portion thereof reads as follows:-

> " ..... The evidence of these witnesses shows that the detenu was indulging in transporting of illicitly liquor and distributing the same in the locality and was keeping arms with him while transporting liquor. The activities of the detenu, therefore, were not merely "bootlegging" as was the position in Om Prakash, (AIR 1990 SC 496), Rashidmiya, (ARI 1989 SC 1703) and Piyush Kantilal Mehta's cases,(AIR 1989 SC 491)(supra) but went further to adversely affect the even tempo of the society by creating a feeling of <u>insecurity among those who were likely to depose against him as also the law enforcement agencies</u>. The fear psychosis created by the detenu in the witnesses was aimed at letting the crime go unpunished which has the potential of the society, and not merely some individual, to suffer. The activities of the detenu, therefore, squarely fall within the deeming provision enacted in the explanation of Section 2(a) of the Act and it therefore, follows as a logical consequence that the activities of the detenu were not merely prejudicial to the maintenance of 'law and order' , but were prejudicial to the maintenance of "public order". The first argument raised by the Dr. Chitale against the order of detention, therefore, fails."

12. The next contention raised by the petitioner was based placing reliance on the judgment in the case of **Magan Gope**(supra). Reliance was placed by the learned counsel for the detenu on the aforesaid judgment in order to contend that an act of smuggling by itself could at best amount to an act affecting public order but not prejudicial to the maintenance of law and order.

13. Upon perusing the judgment as stated herein above in Para- 12, the Hon'ble Supreme Court presided by Hon'ble Shri Justice R.S.Sarkaria, J. came to conclude, as follows:-

> "..... There is absolutely no mention that any scare was caused in the locality. Nor is it alleged that the detenu or his associates were armed with any deadly weapons or that their acts had caused panic and terror among the people of the locality. The incident was confined to the detenu and his associates on one hand and the

Home guards who checked them on the other. Clearly therefore, it was not an activity which was prejudicial to the maintenance of public order. At the most it could be said to be an activity affecting law and order...."

14. While arriving at the aforesaid conclusion on the facts as noted herein above, the Hon'ble Supreme Court hastened to add a warning to the following effect:-

"....We will, however, hasten to add that this broad proposition as to the distinction between an act of 'smuggling' and an act affecting the 'public order' is not an abstract or absolute proposition of law. Cases are conceivable where the act of smuggling may be accompanied by such violence and disorder that it throws out of gear the even tempo of the life of the community in the locality or disturbs public tranquility."

15. Now it becomes relevant to deal with the basic facts of this case. In the ground of detention served on the detenu, the Detaining Authority has noted the following:-

" GROUNDS OF DETENTION

It has been brought to my notice that your criminal and antisocial activities have assumed an alarming proportion due to which the public order in Joda Police Station has been adversely affected and your presence in the locality is likely to endanger the lives and property of the general public. Hence, I Debjani Chakrabarti, I.A.S., District Magistrate, Keonjhar, am satisfied on the basis of the grounds mentioned below that with a view to preventing you from acting in a manner prejudicial for maintenance of public order, it is necessary to make your detention under National Security Act, 1980 since the ordinary laws of the land are not sufficient to curb your antisocial activities.

You are a die hard anti-social and smuggler of Iron and Manganese ores from Mining areas/Reserve Forests of Keonjhar district. Earlier you have indulged yourself in a series of violent incidents to terrorize the local people in order to continue your operation in the area without any hindrance. Due to fear of life, the public did not dare to report against your illegal activities or adduce evidence against you. You have tried to establish your hegemony in the area, in order to run your illegal business by means of armed encounters. The people of the area are so panic stricken that no one dares to raise their finger against your activities or come forward to allege against you before police.

Taking advantage of the availability of iron ore abundantly on the surface of Joda area, you have organized the poor villagers who are staying in the vicinity to raise mineral ores. Over a period of time you have became a iron/manganese mafia and started physically opposing the mine owners and the security staff in order to carry on your illegal transportation of iron/manganese ores from the lease areas as well. In order to carry out your illegal mining you along with your associates are terrorizing the poor villagers, to take up hazardous works like blasting by using illegal explosives. Because of your previous antisocial and criminal activities you have taken advantage of it and became actively associated in the iron/manganese smuggling business. Due to your previous criminal record you did not come to the forefront and organized the smuggling as a mafia don.

From the year 1998 to 2001, you and your associates were involved in gang war with that of your opponent group, Sambhu Giri and his associates. To monopolize the smuggling racket you have indulged in open confrontation with your opponents armed with lethal weapons in the busy areas of the Joda town and thereby affecting public order seriously. Your activities have now reached to such a climax that you were determined to eliminate your rivals to establish your supremacy over them. However, because of timely police action, major clash involving loss of lives has been averted. But due to such violent incidents, panic and chaos has prevailed in the area. The peace loving citizens of the area have suffered immensely due to your criminal activities. In the past you have been booked in a series of criminal cases and due to continuous incidents of breach of peace, public order was completely disrupted in Joda and its neighboring areas and to curb down your criminal activities, you were booked under National Security Act, 1980 in the year 2001.

However, on being released from the detention, you again started your criminal activities of running illegal iron/manganese business by terrorizing the local people and to gain supremacy over your rivals.

Despite getting opportunity for earnings livelihood in a bonafide way, you have actively associated yourself with antisocial and goondas of Joda town and tried to earn illegally and by using unlawful means. Day by day, you have become a noted mineral smuggler in Joda and were able to earn a lot. You encircled yourself with the antisocial, minerals mafias of Joda town in a very inspired manner. There are a number of such instances in which, you have jeopardized the public tranquility in Joda town area. You pose

yourself as the "DADA" of the area and create sense of terror by your high-handedness and you are in the habits of committing crimes at public places. You have become the leader of a group of antisocial elements. Your other associates are namely, Dillip Ghose, Mata Jaiswal, Bapi Mohanty, Sailendra Jora, Ashok @ Sajan Das, Rajesh Munda and others who are also involved in various criminal cases. You possess a menacing personality and plan your acts of terror with ease great and use of arms like Bhujali, Lathi, Iron rods etc at public places to hack people quite blatantly and this has greatly disturbed the normal tempo of public life of the community and most definitely jeopardized public order and public tranquility. You are known in the area for your nefarious activities. You do not hesitate to hurt people brutally, whosoever comes on the way of your work by attacking them with an intention to eliminate the person. From the year 2003 to 2010 you were involved in as may as eight criminal cases in which three cases are subjudice in the court of law and five cases are pending for investigation. Besides, there are Station Diary Entries against you in Joda Police Station which speaks about your activities leading to serious disruption of public order."

16. From amongst various cases taken into consideration by the Detaining Authority, the cases at Serial Nos. 2, 4, 5, 6, 7 and 8 of the grounds of detention are taken into consideration. Basing on the materials available on record, it is quite evident there from that the petitioner-detenu is alleged to have been actively involved in illegal mining as well as transportation of iron ore. It also appears there from that the petitioner's activities have been increased from time to time and the same has led to gang war as well as encouragement to the people living in remote villages through out the district of Keonjhar to indulge in rampant illegal mining/extraction of iron ore and Manganese ore. Apart from the same, there have been instances that the petitioner himself has been present at the spot where illegal extraction and loading of the iron ore and Manganese ore have been made on the vehicles arranged for and/or hired by the petitioner. The record of the present case further indicates that the petitioner had no respect to the public order and also put the lives of police personnel as well as the personnel of the Mining department at great risk and that the petitioner was heavily armed while carrying out such activities. In the present case at hand the activities of the detenu were not merely illegal mining/extraction/transportation of ore, but went, further clearly adversely affected the tempo of the society by creating feeling of insecurity amongst those who are likely to depose against him as also the law enforcement agencies.

17. Considering the aforesaid facts, we are of the view that the fear psychosis created by the detenu to various witnesses is aimed at letting the crime go un-punished. Therefore, the activities of the petitioner squarely fall within the definition of the term "activities prejudicial to the public order" and therefore, we are of the considered view that it was necessary to detain him in order to prevent him from indulging in such activities. Thus, passing of the detention order was necessary in such circumstances.

18. Accordingly, the writ petition stands dismissed.

Writ petition dismissed.

2010 (II) ILR – CUT-1096

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

W.P.(Crl) NO.864 OF 2010 (Decided on 03.11.2010)

PADMABATI PRADHAN & ANR. …….. Petitioners.

.Vrs.

COMMISSIONER OF POLICE, BBSR-CUTTACK & ORS. . . …….. Opp.Parties.

ORISSA URBAN POLICE ACT, 2003 (ACT NO.8 OF 2007) – SEC.32.

Fabrication Unit in the residential area – Causing noise pollution than the permissible limit – Inhabitants of the locality can not live peacefully, enjoy their sound sleep, elderly and ailing people became deprived of their normal life, students suffer from their studies – Held, public interest is paramount and more important than the individual interest who runs the fabric unit – Impugned order passed by O.P.1 Commissioner of Police directing the petitioner to close down the fabrication unit is justified. (Para 6)

For Petitioners - M/s. Santosh K. Pattnaik, U.C.Mohanty, D.P.Das, P.K.Pattnaik, D.Pattnaik & S.K.Pattnaik.
For Opp.Parties - Government Advocate
M/s. Bibhu P.Tripathy, J.K.Parija, R.Acharya, S.Hidayatula, T.Barik & N.Barik (for Caveator)

B.N.MAHAPATRA, J This Writ Petition has been filed with a prayer to quash the order dated 03.09.2010 (Annexure-15) passed by O.P. No.1-the Commissioner of Police, Bhubaneswar-Cuttack, At/PO/Dist: Khurda in Crl. M.C. No.373/10 under Section 32 of the Orissa Urban Police Act, 2003 (for short "OUP Act") by which O.P. No.1 directed the petitioners to close down their Fabrication Unit within sixty days from the date of receipt of the impugned order and I.I.C., Lingaraj P.S. has been directed to ensure compliance of the impugned order.

2. The facts and circumstances of the case leading to the present Writ Petition in a nut shell are that the petitioner-Padmabati Pradhan, W/o Bhubanananda Pradhan has been running a large size Fabrication Unit over Plot No.1466 (part) and 396/1845, sub-plot No.A/1, Mouza: Rajarani, Unit-36, near Garage Chhak, Lewis Road, Bhubaneswar-2. The case of the private opp. parties is that the fabrication unit of the petitioner is functioning in the residential zone causing annoyance, disturbance and discomfort etc. to the private respondents residing in the vicinity. Earlier Addl. District Magistrate, Bhubaneswar heard their application and made a spot visit and

measured the sound level produced by the petitioner-Unit and found it to be higher than the permissible sound level of 55 dB for residential area. The Addl. District Magistrate, Bhubaneswar passed an interim order dated 24.06.2006 directing the petitioner to reduce the sound level. On 08.09.2006 the said authority conducted a surprise visit to the spot to verify whether the interim order was carried out or not and found that the sound level produced was 88.2 dB. Finally, the Addl. District Magistrate, Bhubaneswar passed an order directing the petitioner to restrict the sound level within the 55 dB. Being aggrieved, petitioner moved this Court vide W.P.(C) No.1492 of 2008 and this Court vide its order dated 15.09.2008 in the said writ petition upheld the order of the A.D.M. and directed the petitioner to maintain the permissible noise level by using modern techniques or to shift the Fabrication Unit from the residential area. Since the petitioner failed to comply with the order of this Court, the opp. parties filed the above Crl. Misc. Case No.373/10 before the Commissioner of Police, Bhubaneswar-Cuttack (O.P. No.1). Opp. Party No.1 directed the I.I.C., Lingaraj PS to enquire into the allegations of the opp. parties and submit a report. In his report dated 20.05.2010, I.I.C., Lingaraj PS intimated that in obedience to the order of this Court the petitioners were sensitized to reduce the noise level. O.P.No.1 also issued notice to the petitioner to show cause as to why appropriate order under O.U.P. Act would not be passed against her as she was causing annoyance, disturbance and discomfort in the locality. Pursuant to said show cause notice, the petitioner filed the reply stating therein that in view of the specific order passed by this Court in W.P.(C) No.1492 of 2008 there is no need to proceed with the instant proceeding and pursuant to the direction of this Court, the petitioner has taken steps to reduce the noise level substantially. It was further stated that the residential area is disturbed more by the sound produced on NH-203 than the sound emitted from the Fabrication Unit. The O.P. No.1 constituted a technical committee. The said Committee submitted its report. With the consent of the petitioners and the opp. parties, a meeting was held with the scientists of State Pollution Control Board (for short 'the Board') and both the petitioners and the opp. parties have attended the said meeting. O.P. No.1 after hearing the learned counsel for both the parties and analyzing the technical report as well as deliberation with the scientists of the Board came to the conclusion that the noise level of the residential area during operation of the Fabrication Unit is on the higher side and issued the above direction. Hence, this writ petition.

3. Mr. S.K.Pattnaik, learned counsel appearing for the petitioners challenges the impugned order of O.P. No.1 on various grounds. Mr. Pattnaik, basically submits that the maximum noise level presently recorded was 63.6 dB which is below 65 dB. Therefore, no case for submitting complaint is made out. Power under Section 32 of the O.U.P. Act

is not available to be exercised to enforce the order of the Addl. District Magistrate which was passed under the Rule 2(c) of the Noise Pollution (Regulation and Control) Rules, 2000 (for short, "the Rules, 2000") and the same has overriding effect on any other law in view of Section 24 of the Environmental Protection Act, 1986. Therefore, it is argued that the impugned order is without jurisdiction. O.P. No.1 has not acted in accordance with the provisions of Rules, 2000. The unit of the petitioner is a registered S.S.I. unit in Bhubaneswar which has been functioning from 1986. The petitioner has also obtained the licence and certificate for setting up of the Fabrication unit. The land of the petitioners is located in a busy commercial area of Bhubaneswar town near Garage Chhak. There were other shop rooms in the said locality. O.P. Nos.3 to 7 have no *locus standi* to initiate any proceeding seeking implementation of the order passed by the A.D.M., Bhubaneswar. One Sri Ganeswar Rout has a long standing civil dispute with the petitioners. He is trying to harass the petitioners by way of the complaint made before the A.D.M., Bhubaneswar in 2004 and filing the present Criminal Misc. Case No.373 of 2010. The measurement of the noise level of the area has not been properly made by different authorities. The sound measurement report is not correct. O.P. No.1 has not taken into consideration Rule 7 of the Rules, 2000. Mr.Pattnaik has submitted that the impugned order has been passed without jurisdiction and thus it is arbitrary, illegal, perverse and is in violation of the principles of natural justice.

Mr. B.P. Tripathy, learned counsel appearing for the private opposite parties supports the impugned order passed by opposite party No.1 under Annexure-15.

4. It is not in dispute that the petitioners are running a Fabrication unit which causes annoyance, disturbance and discomfort to the inhabitants residing in the said vicinity. Petitioners' stand that the said unit is situated in a busy commercial area is not substantiated by any material on record. On the other hand, the Secretary, Bhubaneswar Development Authority, vide order passed under Section 91(1) of the Orissa Development Authorities Act, 1982 (for short, 'the Act 1982') has declared the Fabrication Unit of the petitioners as unauthorized and directed the petitioner to remove the same. This Court in W.P.(C) No.1492 of 2008 also confirmed the order of the A.D.M., Bhuabneswar and directed the petitioner to maintain the noise level by using modern techniques or to shift the fabrication unit. While the matter was pending before the Commissioner (O.P. No.1) he took various steps to find out whether the unit of the petitioners causes annoyance, disturbance or discomfort to the inhabitants of the vicinity. He had conducted an enquiry through the I.I.C., Lingaraj P.S. A technical committee was constituted consisting of Sri Suresh Kumar Mohapatra, OPS, ACP/Zone-V, Bhubaneswar, two scientists of the State Pollution Control Board and I.I.C., Lingaraj P.S. The

Committee was entrusted with the task of monitoring the noise level in the vicinity of the industrial unit during different points of time in a day and to submit a report. The Technical Committee submitted their report to the opposite party No.1. When the objection was raised by the petitioners to the technical report stating that the measurement was not made properly, a meeting was held with the scientists of the Board which was attended by counsel for both the parties. After hearing learned counsel for the parties and after analyzing the technical report and deliberations made with the scientists of the Board, the O.P. No.1 came to the conclusion that the noise level of the petitioners' Fabrication Unit in the residential area during the period of its operation is beyond the permissible limits and therefore directed the petitioner No.1 to close down her Fabrication Unit within sixty days from the date of receipt of his order.

5. At this juncture, it is felt necessary for us to reproduce relevant portion of the impugned order.

> "Upon perusal of records, hearing the learned counsels and analyzing the technical report as well as deliberations with the scientists of State Pollution Control Board, it is evident that the noise level of the residential area, during operation of the fabrication unit, is on the higher side in spite of specific direction to the contrary of Hon'ble High Court. During the course of hearing, though the learned counsel for the OPs submitted that in pursuance of the above order, there has been substantial reduction of noise level, not a single document was placed before the Court in support of the steps taken to reduce the noise level or use of modern technique to that effect. The Technical Committee consisting of senior Police Officers and Scientists of State Pollution Control Board measured the noise level as per laid down procedure and in a professional manner in presence of both parties and found the same much beyond the permissible limit in a residential area. Notwithstanding the objections raised by the learned counsel for the OPs about correctness of the measurement, no evidence has been submitted to bring home the allegation that the measurement was not done in an appropriate and correct manner. In fact during the explanatory session held by the Court in presence of the learned counsels of the parties, the Scientists of State Pollution Control Board satisfactorily explained all queries and elaborately described the procedure followed for reaching their result. In the background of the above, the Court accepts the report of Technical Committee as procedurally correct and professional in nature. It is hence evident that the fabrication unit located at Plot No.396/1845 (Pt), Plot No.409 (Pt) and Plot No.407 (Pt) in Mouza Rajarani, PS: Lingaraj, Bhubaneswar is generating noise which is beyond the

permissible limit in a residential area. The report of Technical Committee also provides that the order of the Hon'ble High Court in WP (Crl.) No.362/07 and WP(C) No.1492/08 is yet to be complied by the OPs in letter and spirit.

In the background of the above and by virtue of powers conferred u/s 32 of Orissa Urban Police Act, 2003 (Act 8 of 2007), the undersigned is satisfied that it is necessary to issue direction to the OPs in respect of carrying of their trade or operation of the fabrication unit, which is resulting in excessive noise, thereby causing annoyance, disturbance and discomfort to the petitioners who dwell or occupy property in the vicinity.

It is hence ordered that the OPs shall close down the fabrication unit within 60 (sixty) days from the date of receipt of this order.

IIC, Lingaraj PS is directed to serve this order on both parties and ensure compliance to the order passed by this Court."

Perusal of the impugned order shows that the O.P. No.1-Commissioner in letter and spirit has followed the order of this Court dated 15.09.2008 passed in W.P.(C) No.1492 of 2008.

6. Before parting with this judgment, we have to observe that paramount public interest in this case cannot be lost sight of. In the present case, on the one hand larger interest of the inhabitants of the locality is involved and on the other hand, individual interest of the petitioners, who are running a large scale Fabrication Unit in residential area. Needless to say that due to the noise created by the petitioner's fabrication unit, the people residing in the nearby residential area cannot live peacefully, enjoy their sound sleep; students cannot properly prosecute their studies, and the senior citizens and ailing persons are deprived of passing their normal life. Ultimately, all the inhabitants of the locality are the victims of such noise pollution.

7. In view of the above, we do not find any illegality or infirmity in the impugned order passed by O.P. No.1 warranting interference by this Court.

8. In the result, the writ petition is dismissed, as the same is devoid of merit.

No order as to costs.

Writ petition dismissed.

2010 (II) ILR – CUT-1101

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

W.P.(C) NO.2024 of 2004 (Decided on 22.8.2007)

SUKANTI NAIK …….. Petitioner.

.Vrs.

REVENUE DIVISIONAL COMMISSIONER & ORS. ……..Opp.Parties.

ORISSA GOVERNMENT LAND SETTLEMENT ACT,1962 (ACT NO.33 OF 1962) – SEC.7-A (1) r/w Rule 4 of OGLS Rules 1983.

Revisional power – Irregularity in sanction of lease – According to R.D.C. the findings of the Collector regarding kissam of land is not legal and correct as the land was never reserved for settlement – Section 3-A(1) of the OGLS Act provides for de-reservation of land reserved U/s.3(1) (a) of the Act and after the process of de-reservation is over, the Tahasildar as per Rule 4 of the OGLS Rules 1983 can make necessary correction in the ROR- However the RDC has not considered the provisions of Rule 4 of the OGLS Rules while passing the impugned order – Moreover in this case character of the land has been changed as construction has been made over the said land with the permission of the appropriate authority – Held, impugned order is quashed – The matter remanded to O.P.1 (RDC) for fresh disposal keeping in view the provisions of Rule 4 of the OGLS Rules 1983.

For Petitioner - M/s. Ramakanta Mohanty & Associates
For Opp.Parties - Additional Government Advocate

B.P.DAS, J. The petitioner has filed this writ petition challenging the order dated 30.1.2004 passed by the Revenue Divisional Commissioner, Southern Division, Berhampur, O.P.1 in O.G.L.S.R.C. No.13/2002, vide Annexure-1.

2. The brief facts, as delineated in this writ petition, tend to reveal as follows :-

The petitioner, who claims to be the Proprietor of a hotel "M/s.Hotel Khusi" at Bhawanipatna, on 1.1.2001 applied to the Tahasildar, Kalahandi, O.P.3 for grant of lease of a government land measuring an area of Ac.0.500 decimals under khata no.1456 plot no.1528/5999 for running a hotel-cum-lodge. The Tahasildar on receipt of such application directed the Amin to cause a field enquiry and submit report by 3.1.2001. Pursuant to such direction of the said Tahasildar, the Amin verified the records and submitted a report indicating that the said plot was not reserved for any purpose and was also free from encumbrances. Considering the Amin's report, the

Tahasildar issued a proclamation inviting objection from public within thirty days of its publication, vide Annexure-2. A copy of the proclamation was sent to the Sub-Collector, Bhawanipatna, Executive Officer, Bhawanipatna Municipality, Block Development Officer, Bhawanipatna Sadar, for wide publication and a copy was also fixed on the notice of the Tahasil Office for information of the general public, as per Rule 5(5) of the O.G.L.S. Rules, 1983. As no objection was received from any quarter during the prescribed period, on 2.2.2001 the Tahasildar visited the spot and found that the land was free from encroachment and encumbrances and there was no mine or mineral and standing trees on the land. Thereafter, he fixed the premium and directed the petitioner to pay a sum of Rs.37,975/- towards the land value after sanction of the lease and submitted the records to the Sub-Collector, Bhawanipatna for onward transmission to the Collector, Kalahandi, O.P.2 for final order. The Sub-Collector recommended for sanction of lease of the government land in favour of the petitioner. The Collector, Kalahandi, O.P.2 by order dated 24.11.2001 sanctioned lease of the government land in question in favour of the petitioner on the terms and conditions stipulated therein, vide Annexure-5 and intimated the same to the concerned authorities.

After sanction of the lease, the petitioner deposited the full premium amount where after the lease deed was executed in her favour for a period of ninety-nine years, vide Annexure-6. The petitioner took delivery of possession of the land and after getting permission from the Special Planning Authority, Bhawanipatna, constructed the hotel building on the lease-hold plot and started her hotel business. According to the petitioner, the Tahasildar also made necessary correction in the ROR in favour of the petitioner, copy of which is Annexure-8. The allegation of the petitioner is that while she was continuing her hotel business on the said plot of land, some persons having business rivalry with her made allegation of irregularity in sanction of the lease basing upon which the Collector on 22.6.2002 called for the lease case records from the Tahasil Office, Kalahandi and filed an application before the R.D.C., O.P.1 under Section 7-A(1) of the O.G.L.S Act to revise the lease order issued vide order no.1980 dated 24.11.2001 (Annexure-5). The R.D.C. by the impugned order dated 30.1.2004 (Annexure-1) allowed the revision application by quashing the order of the Collector sanctioning lease of the disputed land in favour of the petitioner.

3. Though the revision application was filed beyond the prescribed period of limitation, the R.D.C. condoned the delay and entertained the same for adjudication. The R.D.C. in the impugned order in Annexure-1 has indicated that the land was earlier classified as 'Jalachar Kissam' under plot no.1528 of khata no.1454 of Bhawanipatna town. It was de-reserved by the Collector, Kalahandi on 25.11.1997, vide case no.1/97 and the R.O.R. was

corrected by changing the Kissam of the land from 'Jalachar' to 'Ghaspadia'. Section 3(1)(a) of the O.G.L.S. Act provides for reservation of land. Section 3-A(1) provides for de-reservation of land reserved under Section 3(1)(a). According to the R.D.C., the finding of the Collector that 'Jalachar Kissam' of land has lost its character and it is now lying vacant as 'Grass Field Kissam of land', is not correct and legal as the land was never reserved for settlement under Section 3(1)(a) of the Act. He held that the change of Kissam of the land and the correction of record of rights could have been done under the provisions of the Survey Settlement Act, and hence the change of classification of the suit land is illegal and beyond the jurisdiction of the Collector, Kalahandi.

4. Learned counsel for the petitioner draws our attention to Rule 4 of O.G.L.S. Rules, 1983, which lays down principles for de-reservation. Sub-Rule (ii) of Rule 4 of O.G.L.S. Rules, 1983 provides as follows :-

> "4(ii) In case of objections filed before the Tahasildar, he shall hear the parties on a date fixed by him and, after such hearing, shall forward his recommendation to the authorised officer for orders. On receipt of recommendation from the Tahasildar, the authorising officer may, on being satisfied with the grounds advanced by the Tahasildar for de-reservation, accept and modify to the extent, if he considers necessary or reject the same. The orders passed by the authorised officers shall be communicated to the concerned Tahasildar. When the authorised officer passes orders for de-reservation such orders shall be published in the manner prescribed in Sub-rule (5) of Rule 5. The Tahasildar shall thereafter make necessary corrections in the record-of-rights."

Learned counsel for the petitioner referring to the aforesaid proviso submits that after the process of de-reservation is over, the Tahasildar can make necessary correction in the Record of Rights.

5. The stand taken by the O.Ps.2 & 3 in the counter affidavit is similar to the stand taken by the R.D.C. in the impugned order. This plea cannot give any strength to the O.Ps.2 & 3 as the order passed by the R.D.C. fails to withstand the judicial scrutiny.

6. On a bare reading of the impugned order, we find that the R.D.C. has not kept the provisions of Rule-4 of the O.G.L.S. Rules, 1983 in view, which in our considered opinion, he ought to have done. Apart from that, it is submitted, the character of the land has been changed, inasmuch as a construction has been made over the land with the permission of the appropriate authority, and the petitioner is running her business there. In our view, it would be proper on the part of the R.D.C. to re-consider the matter taking note of the aforesaid construction as well as provisions of the O.G.L.S. Rules and pass a fresh order.

Accordingly, we quash the order dated 30.1.2004 passed in O.G.L.S.R.C. No.13/2002 by the Revenue Divisional Commissioner, Southern Division, Berhampur, O.P.1, vide Anneuxre-1 and remand the said matter to the R.D.C., O.P.1, for fresh disposal keeping the provisions of Rule-4 of the O.G.L.S. Rules, 1983 in view, without being influenced by his previous order. If in the meantime, any new Act or statute has been enacted, that may also be taken care of by the said authority.

In the result, we allow this writ petition and quash the impugned order of the R.D.C. We remand the matter to the R.D.C. for fresh disposal of the O.G.L.S.R.C. in the light of the direction/observation made above.

Writ petition allowed.

2010 (II) ILR – CUT-1105

L.MOHAPATRA, J & B.P.RAY, J.

MATA NO.2 OF 2006 (Decided on 17.9.2010)

SAGARIKA MOHANTY ……. Appellant.

.Vrs.

BHANU KISHORE BISWAL …… Respondent.

(A) HINDU MARRIAGE ACT, 1955 (ACT NO. 25 OF 1955) – S.13(1)(ia).

Cruelty – Evidence of the father, brother and mother of the respondent-husband that the behavior of the appellant-wife towards the family members of the respondent as well as the respondent was not good – On one occasion the appellant threw plates on the face of the respondent without any reason – She was also in the habit of humiliating him in public – She left for her paternal home without permission and never came back in spite of several approaches made by him – While living separately the respondent met with an accident and treated in the hospital and though she had been intimated she never turned up to see him – Held, all these materials clearly establish the allegations of the respondent that he and his family members had been subjected to mental cruelty. (Para 4)

(B) HINDU MARRIAGE ACT, 1955 (ACT NO. 25 OF 1955) – S.13(1)(ib).

Desertion – The fact that the appellant left the matrimonial home on her own is established by way of evidence – Nothing on record to show that the appellant-wife had been driven from the said home either by the respondent-husband or his family members – Held, learned Trial Court rightly allowed divorce on the ground of desertion.

(Para 4)

For Appellant - M/s. S.C.Samantray, M.K.Muduli, N.C.Sahoo, S.P.Panda, S.Pattnaik, P.K.Muduli.

For Respondent – M/s. R.Panda, P.K.Nayak, Chandana Panda.

L.MOHAPATRA, J. This appeal is directed against the judgment and order dated 23.11.2005 passed by the learned Judge, Family Court, Cuttack, in Civil Proceeding No.424 of 1999 allowing the application filed by the respondent under Section 13(i)(a) & (b) of the Hindu Marriage Act for dissolution of marriage by the decree of divorce.

2. The case of the respondent, who was the applicant before the learned Judge, Family Court, Cuttack is that the marriage between him and the appellant was performed on 14.2.1997 according to Hindu rites and after marriage both of them stayed together as husband and wife in the house of the respondent. The further case of the respondent is that the appellant did not want to bear a child and therefore, she refused cohabitation without use of contraceptive whereas the respondent wanted cohabitation for the purpose of maintaining the heredity. He also alleged that the appellant was suffering from schizophrenia and was not preparing food nor taking his care. She was always quarreling with him and his family members and on one occasion threw plates on his face without any reason. She was also in the habit of humiliating him in public and seven months after the marriage she left for her paternal home without his permission and never came back in spite of several approaches made by him. Respondent also alleged that while living separately, he met with a motor accident and was medically treated but the appellant never turned up to see him during the period of treatment. On these grounds, the application for divorce was filed alleging cruelty and desertion.

The allegations of the respondent against the appellant were denied by the appellant whereas marriage between the parties was admitted. It is the case of the appellant that the respondent never wanted to have a child and was using contraceptive in spite of her objection. There was a demand of dowry of Rs.1,00,000/- which could not be paid by her parents and non-fulfillment of the dowry demand, has led to the present situation. It was also specifically pleaded by the appellant that she was driven out from the house by the respondent and she had never deserted the respondent or behaved in a cruel manner, as alleged by the respondent.

The learned Judge, Family Court taking into consideration the pleadings of the parties and the evidence adduced before him came to a conclusion that the plea set out by the respondent with regard to demand of dowry is based on no material and on certain occasions the appellant had behaved in a cruel manner with the respondent and his family members. The court also found that the appellant was guilty of desertion and cruelty. On the above findings, the learned Judge, Family Court allowed the application but did not grant any alimony.

3. At the time of hearing of this appeal, the Court found that the parties are living separately since 1997 and there was no scope for living together. As a matter of fact, the respondent was not willing to take the appellant at all and he also expressed the very same view before the trial court when the

case was pending. The learned counsel for the appellant, therefore, argued the case on merit and also prayed for permanent alimony in the event, the appeal is dismissed.

4. We have carefully gone through the pleadings of the parties and the evidence led before the learned Judge, Family Court. The admitted facts as appear from the evidence and the pleadings are that the marriage between both the parties was solemnized on 14.2.1997 and both the husband and wife had stayed together for about five to seven months after marriage. The respondent alleged that the wife did not allow cohabitation without contraceptive whereas the wife alleged that for non-fulfillment of the dowry demand, the respondent did not allow cohabitation without use of contraceptives. Both the parties led evidence supporting their respective claims in this regard. Therefore, it is difficult to come to a conclusion as to who was guilty in not permitting other for having cohabitation without contraceptive. The trial court also could not come to any conclusion in this regard. So far as cruelty is concerned, it appears from the evidence of the witnesses such as father, brother and mother of the respondent that the behaviour of the appellant towards the family members of the respondent as well as the respondent was not good and when the respondent had met with an accident, the appellant though had been intimated about the same, did not ever care to find out the condition of the respondent. All these materials clearly establish the allegations of the respondent that he and his family members had been subjected to mental cruelty. So far as desertion is concerned, the finding of the learned Judge, Family Court that the appellant left the matrimonial home on her own is established by way of evidence and there is nothing on record to show that the appellant had been driven from the house either by the respondent or his family members. Therefore, there is hardly any scope to interfere with the impugned judgment on merits.

5. So far as alimony is concerned, the learned Judge, Family Court has not granted any permanent alimony in favour of the appellant. At the time of hearing of the appeal, the Court suggested that permanent alimony of Rs.5,00,000/- shall meet the ends of justice but the respondent expressed his inability to pay such amount as permanent alimony. Keeping in mind the status of the parties, the income of the respondent from different sources, we are of the view that permanent alimony of Rs.4,00,000/- would be just and proper in the facts and circumstances of the case.

6. We, therefore, while declining to interfere with the impugned judgment, direct the respondent to pay permanent alimony of Rs.4,00,000/-

(Rupees Four lakhs) to the appellant within a period of three months from today.

The appeal is disposed of accordingly.

Appeal disposed of.

2010 (II) ILR – CUT-1109

PRADIP MOHANTY, J.

CRLA. NO.183 OF 1990 (Decided on 22.07.2010)

E.S.I. CORPORATION …….. Appellant.

.Vrs.

BRAJAKISHORE PANIGRAHI & ANR. ……... Respondent.

EMPLOYEES STATE INSURANCE ACT, 1948 (ACT NO.34 OF 1948) – SEC.86 (3).

No Court shall take cognizance after six months from the date launching prosecution – In the present case offence U/s85 had been committed on Dt.18.06.1987 – Prosecution launched on Dt.04.01.1988 and on the same day Magistrate took cognizance – Under the statute there is no provision for condonation of delay – So launching of prosecution report and taking cognizance by the Magistrate were after expiry of six months – Sanction order was also obtained after expiry of the period of limitation.

Held, this Court is not inclined to interfere with the impugned judgment acquitting the respondents, from the charge U/s.85(g) ESI Act. (Para 7,8)

For Appellant - M/s. J.K.Tripathy, S.Mishra & B.V.B.Das.
For Respondents - M/s. S.P.Mishra, A.R.Dash, A.K.Mishra & N.N.Satpathy For R-1
M/s. S.C.Mohanty, G.K.Behera & G.R.Nayak For R-2

PRADIP MOHANTY,J. This appeal is directed against the judgment and order dated 30.01.1990 passed by the Judicial Magistrate First Class, Bhubsaneswar in 2 (C) C.C. Case No. 2 of 1988/Trl. No.791 of 1989 acquitting the respondents of the charge under Section 85(g) of the Employees State Insurance Act.

2. The case of the prosecution is that M/s Hirakhanda Engineers (P) Ltd, Rourkela was a factory as per the provision of E.S.I. Act and Code No.441838 had been allotted to it by the E.S.I. Corporation. Accused-respondent no.1 being the Managing Director and accused-respondent no.2 being the Director were the principal employers of the said factory. On 27.07.1987, the respondents failed to produce the records of the factory before the Deputy Regional Director, E.S.I. Corporation, Bhubaneswar for inspection and thus they violated the provisions of E.S.I. Act. After obtaining

necessary sanction from the competent authority, P.R. was submitted against the respondents.

3. The plea of the defence was complete denial of the demand of records by the E.S.I. authority and their specific plea was that the prosecution was barred by limitation.

4. In order to prove its case, the prosecution examined as many as three witnesses and exhibited 20 documents. P.W.1 is the Deputy Regional Director of E.S.I. Corporation, P.W.2 is the Inspector of E.S.I. and P.W.3 is the Insurance Inspector of E.S.I. On the other hand, defence examined none.

5. The learned J.M.F.C., Bhubaneswar, who tried the case vide his judgment dated 30.01.1990 acquitted the respondents of the charge under Section 85 (g) of E.S.I. Act with a finding that the prosecution was barred by limitation and the sanctioning authority had not applied his mind before according sanction.

6. Learned counsel for the appellant assailed the judgment on the following grounds:

(i) The sanction order and the prosecution report clearly stated that the respondents failed to produce the records on 27.07.1987, the limitation runs from 28.07.1987, i.e., the date on which the offence was committed. The learned Magistrate took cognizance on 04.01.1988, i.e., within six months. Therefore, the prosecution is not barred by limitation.

(ii) The sanctioning authority had applied his mind and thereafter granted sanction of Prosecution.

7. Perused the record and the provisions of the E.S.I. Act. In the instant case, P.W.1 stated that he inspected the factory on 18.06.1987 and demanded the records but the respondents did not produce the same. He proved the sanction order Ext.10. In cross-examination he admitted that on 18.06.1987, the respondents failed to produce the registers for the first time before him. He also admitted that no Inspector had visited the factory to verify the registers. P.Ws.2 and 3 also corroborated the statement of P.W.1. From the above, it is crystal clear that the offence under Section 85 of the E.S.I. Act had been committed on 18.06.1987 for which they were liable under Section 85(g) of E.S.I. Act. Since P.W.1 had visited the factory on 18.06.1987, when the respondents failed to produce the records, limitation is to be calculated from that date. Section 86(3) of the E.S.I. Act, which deals with limitation, is quoted below:

"86(3). No Court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof, within

six months of the date on which the offence is alleged to have been committed."

8. From a bare reading of the aforesaid provision, it is crystal clear that no court shall take cognizance after six months. In the instant case, prosecution was launched on 04.01.1988 and the Magistrate took cognizance on the same day, i.e., 04.01.1988. Under the statute, there is no provision for condonation of delay. Thus, launching of prosecution report and taking cognizance by the Magistrate were after expiry of six months. The sanction order (Ext.10) was also obtained after the expiry of the period of the limitation.

9. In view of the above, this Court is not inclined to interfere with the impugned judgment. Accordingly the appeal is dismissed.

Appeal dismissed.

2010 (II) ILR – CUT-1112

PRADIP MOHANTY, & S.K.MISHRA,J.
O.J.C. NO.737 OF 1993 (Decided on 01.11.2010)

JAGANNATH DAS …… Petitioner.

.Vrs.

COMMISSIONER OF ENDOWMENTS, ORISSA,BBSR&ANR. …… Opp.Parties.

ORISSA CIVIL SERVICES (C.C.A) RULES, 1962-RULE 15.

Disciplinary Inquiry – If there has been no proper inquiry and some important witnesses were not available at the time of inquiry and were not examined, the disciplinary authority may ask the inquiry officer to record further evidence but he has no power to remand the departmental proceeding to the inquiry officer for fresh inquiry.

Moreover under Clause 9 of Rule 15 the disciplinary authority has enough power to reconsider the evidence itself and come to its own conclusion - Held, action of O.P.1 in setting aside the report of the inquiring officer and remanding the case for fresh disposal is contrary to Rules hence not sustainable.

(Para 10)

Case laws Referred to:-

1.AIR 1971 SC 1447 : (1971) 2 SCC 162 : (K.R.Deb -V-The Collector of Central Excise, Shillong)
2.AIR 1994 SC 1074 : (ECIL. -V- B.Karunakar)

For Petitioner - M/s. Jayanta Das, B.S.Tripathy & Associates.
For Opp.Party No.1 - Dr.A.K.Rath.
For Opp.Party No.2 - G.Mukherji & D.D.Mohanty.

S.K.MISHRA, J. Originally this writ application has been filed challenging the legality of the order of suspension on the ground of jurisdiction. However, during pendency of the writ application the departmental proceeding initiated against the petitioner was completed and he was removed from service.

Thereafter, with the leave of the Court the writ application was amended with a prayer to quash the order of removal with all consequential service and monetary benefits.

2. The basic questions which arise for determination in this writ application are whether the disciplinary authority has the power to remand the departmental proceeding to the enquiry officer for a fresh enquiry; and whether the report of the enquiry officer, when the enquiry is not conducted by the disciplinary authority is required to be furnished to the employee to enable him to make proper representation to the disciplinary authority. All other questions raised during the course of hearing of the writ application have become infructuous in view of the final disposal of the departmental proceeding.

3. The petitioner was initially appointed as Debottar Supervisor, Nayagarh. The Commissioner of Endowments as per order no.21 dated 6.1.1979 appointed the petitioner as whole time Debottar Manager on a monthly pay of Rs.90-150/-. The petitioner claimed that the Debottar Manager is not an office holder or servant attached to any particular religious institution and he does not receive any remuneration from the funds of any religious institution, rather it is paid from the general establishment funds of Nayagarh Debottar. The petitioner claims that he has been directly appointed by the Commissioner of Endowments and his appointment can not be governed under Section 31 of the Orissa Hindu Religious Endowments Act, 1951(hereinafter referred to as the "Act" for brevity) and as such the procedure provided under Section 32 of the Act is not applicable to him. The petitioner claims that opposite party No.2 is not his appointing authority and therefore he is not competent to pass the order of suspension. Initially the petitioner was allowed to draw subsistence allowance, but subsequently opposite party No.2 intimated that he is not entitled to get any subsistence allowance. This matter was before this Court in Misc. Case No.2566 of 1995 wherein this Court ordered that the subsistence allowance to be paid to the petitioner.

4. On 20.12.1991 a departmental proceeding was initiated and charges were framed against the petitioner for alleged negligence in duty, violating the Hindu Customs and acting beyond law and jurisdiction. The petitioner submitted his explanation denying all the charges on 11.4.1992. The said proceeding was conducted by Mr. K.B.Swain, Deputy Commissioner of Endowments, Orissa, Bhubaneswar in D.P. No.2/1995. After completion of enquiry he submitted his report on 04.9.1995 inter alia holding the charges framed against the petitioner to be baseless and not proved. However, opposite party No.1, the Commissioner of Endowments, without appreciating the findings in enquiry report dated 04.9.1995 in its proper perspective, rejected the same and remitted back the matter to the Deputy Commissioner of Endowments for de novo enquiry. After remand the Deputy Commissioner of Endowments, Mr. Swain, conducted de novo enquiry and examined the Sub-Collector-Cum-Executive Officer,

Nayagarh, as P.W.1 on 23.2.1996. Thereafter, Mr. G.C.Tripathy, Deputy Commissioner of Endowments took up the enquiry and finalized the same by submitting his enquiry report on 29.7.1996, inter alia holding the charges no.1 and 3 framed against the petitioner has been proved. In the said report, the enquiry officer has suggested that since the delinquent is out of office from 3.6.1991, it is not wise to reinstate him and he should be removed from his service by treating the period of suspension as leave without pay. It is submitted that the said report of the enquiry officer was prepared at the behest of the opposite party nos.1 and 2 and the same was an outcome of personal malice and bias on part of the opposite parties.

5. On consideration of such enquiry report dated 29.7.1996, opposite party No.1 agreed with the finding of the enquiry officer and issued the second show cause notice vide its order dated 9.8.1996 requiring the petitioner to show cause by 10.9.1996 as to why he shall not be removed from his services and the period of suspension be not treated as leave without pay. It is further contended that while issuing the second show cause notice, opposite party No.1 has deliberately, intentionally and willfully not furnished a copy of the enquiry report dated 29.7.1996 of the second enquiry officer to the petitioner. In the second show cause notice the date of personal hearing was fixed to 10.9.1996. Upon receipt of the second show cause notice, the petitioner has submitted an application for deferring the personal hearing and for allowing some time to file second show cause on the ground of pendency of the present writ application. However, the petitioner was allowed time to submit second show cause reply on 21.9.1996. The petitioner filed a Misc. Case for an order restraining opposite party No.1 not to proceed with the departmental proceeding and also filed a representation before opposite party No.1 for deferring the final decision, opposite party No.1 with an ulterior motive rejected the representation. Thus under such compelling circumstances and without having a copy of the enquiry report, the petitioner hurriedly prepared the second show cause reply and filed the same on 21.8.1996. It is, however, admitted by the petitioner that he was given a certified copy of the enquiry report on his application on 5.9.1996. The petitioner also challenged that the order of punishment is harsh and disproportionate to the misconduct alleged. Therefore, the petitioner prayed that the said order of termination be quashed and he be reinstated in service.

6. Opposite party No.2 has filed his counter affidavit, inter alia, pleading that the petitioner has committed several acts of malfeasance and misfeasance and grievous charges have been framed against him, hence his continuance in the establishment of Nayagarh Debottar would be

detrimental to the interest of the Institution and he was rightly put under suspension.

Opposite party No.2 however pleaded that after merger of the estate of Nayagarh, the religious institution situated at Daspalla are being managed under the direct control of the Commissioner of Endowments in consonance with the provisions of the Act. The Commissioner has appointed the Sub-Collector of the District as the Executive Officer of the Debottar to manage the affairs of the Institution. The Executive Officer is deemed to be the Trustee. Section 31 of the Act specifically stipulates that the post of the office holders and servants of the religious institution shall be filled up by the Trustee. Section 32 of the aforesaid Act stipulates that all office-holders and servants attached to the religious institution shall, whether the office or service is hereditary or not be controlled by the trustee and the trustee may find, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of order, negligence in duty, misconduct or other sufficient cause.

Opposite party No.2 however pleaded that Debottar employees are not treated as State Government employees and are also not governed under the Orissa Service Code. Thus, the provisions of Article 311 are not directly attracted. Section 32 of the Act specifically stipulates that the trustee is empowered to suspend, remove or dismiss any of the servants of the Debottar. In view of the fact that there is a statutory provision naming the disciplinary authority the general proposition that the appointing authority shall be the disciplinary authority would not strictly be applied.

There was number of allegations against the petitioner and in spite of repeated warnings he did not amend himself and his performance continued to be detrimental to the interest of the Institution. It is pleaded that as long back as in the year 1985, twenty one charges were framed against the petitioner including the charges involving financial irregularities. In spite of the fact that the disciplinary proceeding was pending against the petitioner he again committed several malfeasance and misfeasance as a result of which the Executive Officer, who is otherwise competent and empowered to take disciplinary action, thought it just and proper to suspend the petitioner with immediate effect in view of the fact that opposite party No.2 felt that continuance of the petitioner in service would highly prejudice and affect the day to day management of the institution. The order of suspension was sent to the Commissioner of Endowments and was placed to accord post facto approval to it. On the basis of such pleadings, opposite party No.2 prayed to dismissed the writ application.

7. It is seen from the aforesaid counter affidavit that there has been no denial of the pleadings of the petitioner regarding the important questions

that have been enumerated in the second paragraph of the judgment. In order to appreciate the same, it is necessary to take note of the various provisions of the Act with regard to the appointment of office- holders and servants in religious institutions. Section 31 of the Act provides for appointment of office-holders and servants in religious institutions.

Sub-section (1) of Section 31 of the Act provides that vacancies, whether permanent or temporary, amongst the office-holders or servants or a religious institution shall be filled up by the trustee in cases where the office or service is not hereditary.

Sub-section (2) of the said section provides that in cases where the office or service is hereditary the next in the line of succession shall be entitled to succeed.

Sub-section (3) of that provision provides that where however there is a dispute respecting the right of succession, or where such vacancy cannot be filled up immediately etc., the trustee may appoint a fit person to discharge the functions of the office to perform the service, until the disability of the office-holder or servant ceases or another person succeeds to the office or service, as the case may be.

Sub-section (4) of the Act provides that any person affected by an order of the trustee under sub-section (3) may appeal against the order to the Assistant Commissioner.

Section 32 of the Act provides for punishment of office-holders and servants in religious institutions.

Sub-section (1) of the said section provides that all office-holders and servants attached to a religious institution or in receipt of any emolument or perquisite from the institution shall, whether the office or service is hereditary or not, be controlled by the trustee; and the trustee may fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience or orders, neglect of duty, misconduct or other sufficient cause.

Sub-section (2) of the said Act provides that any office-holder or servant punished by a trustee under Sub-section (1) may, within one month from the date of the communication of the order to him, appeal to the Assistant Commissioner, whose order shall be final.

Sub-section (3) provides for imposition of penalty in case of disobedience of the order passed and Sub-section (4) provides for the procedure of recovery of the penalty.

8. In this case appointment has not been made under Section 31 of the Act as it is clear from Annexure-1. The order of appointment has been passed by the Commissioner of Endowments vide Anenxure-1. Thus, Sections 31 and 32 of the Act are not applicable to this Case. Any order of suspension has to be issued by the Commissioner of Endowments. It is

seen that though Section 32 provides for punishment by the trustee, in this case punishment has not been imposed by the trustee, but by the Commissioner of Endowments. Thus keeping in view the fact, this Court comes to the conclusion that the provisions of the Orissa Civil Services (Classification, Control & Appeal) Rules, 1962(hereinafter referred to as "OCS (CCA) Rules", for brevity) shall apply.

9. Rule 15 of the "OCS (CCA) Rules" provides for procedure of imposing penalties.

Sub-section (1) provides that without prejudice to the provisions of the Public Servant (Inquiry) Act, 1950, no order imposing on a Government servant any of the penalties specified in Clauses (vi) to (ix) of Rule 13 shall be passed except after an inquiry held as far as may be in the manner thereinafter provided.

Clause (2) of the said Rule provides for framing of charges, communication in writing to the Government servants of the charges to the statement of allegations on which they are based and it also provides for written statement of defence.

Clause (3) of the said Rule provides that the Government servant is entitled to inspect and take extract from such other official records as he may specify to certain exceptions.

Clause (4) of the said Rules provides that on receipt of the written statement of defence or if no such statement is received within the time specified, the disciplinary authority may itself enquire into such of the charges as are not admitted or, if it considers it necessary so to do, appoint a board of inquiry or an enquiring officer for the purpose.

Clause (7) of the said Rule provides that at the conclusion of the enquiry, the inquiring authority shall prepare a report of the inquiry, recording its findings on each of the charges together with reasons thereof. If, in the opinion of such authority the proceedings of the inquiry establish charges different from those originally framed, it may record its findings on such charges, provided that the findings on such charges shall not be recorded, unless the Government servant has admitted the facts constituting them or has had an opportunity of defending himself against them.

Clause (9) of the said Rule provides that the disciplinary authority shall, if it is not the inquiring authority, consider the record of the inquiry and record its findings on each charge.

Clause (10) of the said Rule provides for issue of show cause notice.

10. This provision was considered by the constitutional Bench of the Supreme Court in the case of **K.R.Deb Vs. The Collector of Central Excise, Shillong**, AIR 1971 SC 1447: (1971) 2 SCC 162, wherein it was held that Rule 15 of the "OCS (CCA) Rules" on the face of it really provides

for one inquiry, but it may be possible if in a particular case there has been no proper inquiry because some serious defects have crept into the inquiry and some important witnesses were not available at the time of the inquiry and were not examined, the disciplinary authority may ask the inquiry officer to record further evidence. But there is no provision in Rule 15 of the "OCS (CCA) Rules" for completely setting aside the previous inquiries on the ground that the report of the inquiry officer or officers does not appeal to the disciplinary authority. The disciplinary authority has enough power to reconsider the evidence itself and come to its own conclusion under Rule 9 of the said Rule.

It is noted earlier that the opposite parties have not pleaded the reasons for remand of the disciplinary proceeding. So it cannot be determined whether it comes within any exceptional situation as envisaged in the reported decision. In view of clause (9) of the "OCS (CCA) Rules", the disciplinary authority should have considered the inquiry report and given his findings on each charge. He has not done so, but remanded the case for a fresh inquiry. Annexure-9 is the order passed by the disciplinary authority. He passed orders for a fresh inquiry. It is not tenable in the scheme provided under the relevant Rules. Therefore, the action of the Commissioner of Endowments in setting aside the report of the inquiring officer and remanding the case for fresh disposal is contrary to the Rules and hence unsustainable.

11. With respect to the second point which arose for consideration in this case, learned counsel for the petitioner relies in the case of **ECIL V. B.Karunakar**, AIR 1994 SC 1074: (1993) 4 SCC 727, wherein the Hon'ble Court has ruled that the delinquent employee has right to receive copy of the inquiry officer's report before the disciplinary authority arrives at its conclusion with regard to guilt or innocence of the employee with regard to the charges levelled against him. Denial of inquiry officer's report before the disciplinary authority takes its' decision on the charges is denial of reasonable opportunity to the employee to prove his innocence and is breach of the principles of natural justice.

Clause (10) (i) (a) of Rule 15 of the "OCS (CCA) Rules" provides that if the inquiring officer is not the disciplinary authority, the disciplinary authority shall furnish the delinquent Government servant a copy of the report of the inquiring officer and give him notice by registered post or otherwise calling upon him to submit within a period of fifteen days, such representation as he may wish to make against findings of the inquiring authority.

Sub-clause (b) of the said Rules provides that on receipt of the representation referred to in Sub-clause (a) the disciplinary authority

having regard to the findings on the charges, is of the opinion that any of the penalties specified in clauses (vi) to (ix) of Rule 13 should be imposed he shall furnish to the delinquent Government servant a statement of its findings along with brief reasons for disagreement, if any, with the findings of the inquiring officer and give him a notice by registered post or otherwise stating the penalty proposed to be imposed on him and calling upon him to submit within a specified time such representation as he may wish to make against the proposed penalty.

Clauses (c) and (d) of the provision has been made for passing appropriate orders in the case either obtaining the advice of the Orissa Public Service Commission or without as the case may be.

Thus, the scheme provides that immediately after receipt of the inquiry report the disciplinary authority, in a case where he has not conducted the inquiry himself, shall forthwith supply a copy of the report to the delinquent Government servant calling upon him to submit a representation against the findings of the inquiring authority. This is to enable the delinquent to raise any objection regarding the findings recorded by the inquiring officer. Only after receipt of such representation, if any, and after perusing the report submitted by the inquiring officer, the disciplinary authority has to take a decision whether the charges have been established or not.

In this case, admittedly no enquiry report was provided to the petitioner as envisaged under Clause (10) of Rule 15 of the "OCS (CCA) Rules". Though admittedly the petitioner has obtained a certified copy thereof, the time limit which was granted to him for filing of the show cause reply is so less that he has filed a written show cause reply in a hurried manner, which amounts to not giving an adequate and proper opportunity to file his objections/representations. Thus, there has been gross violation of the principles of natural justice in this case and therefore the order passed by opposite party No.1 cannot be sustained.

12. In view of the above we set aside the order of dismissal passed against the petitioner as per Annexure-14 and direct that he be reinstated in his post within two months after giving all service benefits he is entitled to. It is further made clear that since the petitioner has not worked for the entire period he shall be only entitled to 50% of the arrear wages.

The writ application is disposed of with the aforesaid directions.

The petitioner is directed to file requisites within two weeks for communication of this judgment.

The records of the Departmental Proceeding be handed over to the learned counsel appearing for the Commissioner of Endowments forthwith.

Writ petition disposed of.

2010 (II) ILR – CUT-1120

PRADIP MOHANTY, J & S.K.MISHRA, J.

W.P.(C) NO.4119 OF 2009 (Decided on 01.11.2010)

PRIYATAMA SAHOO ……. Petitioner.

.Vrs.

G.M., (P), MAHANADI COAL FIELDS LTD. & ORS. …….. Opp.Parties.

ORISSA CIVIL SERVICE (REHABILITATION ASSISTANCE) RULES,1990, RULE 5.

Rehabilitation Assistance Scheme – Petitioner applied for employment as her husband-employee expired leaving behind her and a minor daughter – Authorities insisted to furnish No Objection Affidavit from all major dependants of the deceased – Petitioner was tortured by her in laws and unable to file such affidavit – Hence the writ petition for a direction to provide her employment without "No objection Affidavit".

Clause 9.3.3. of the circular indicates that for the purpose of rehabilitation, dependants means spouse of the deceased, their daughter, son and adopted son and in their absence younger brother, widowed daughter/widowed daughter in law or son in law residing with the deceased and almost wholly dependant on the earnings of the deceased may be considered to be dependants of the deceased.

Held, in view of the above scheme the petitioner being the only major dependant of the deceased, the Opp.Parties are directed to process the rehabilitation assistance application of the petitioner without insisting upon a No Objection Affidavit.

(Para 5,6 & 7)

For Petitioner - M/s. Saswata Patnaik, L.Mishra, S.K.Singh, N.Sahoo & S.Das.

For Opp.Parties – Mr. B.M.Pattnaik (Sr.Advocate) M/s. R.Sharma, S.R.Singhsamant, P.K.Patnaik, S.Das, B.Binay.

S.K.MISHRA, J. Petitioner seeks a direction to the opposite parties to provide employment to the petitioner under the Rehabilitation Assistance Scheme without insisting on the "No Objection Affidavit".

2. The petitioner being the widow of late Hadibandhu Sahoo pleads that her husband, who was working as a Dumper Operator in Mahanadi Coalfields Ltd., Samaleswari OCP IB Valley area, Brajarajanagar, died on

13.3.2008 in road accident leaving behind the petitioner and her minor daughter. On the death of the husband of the petitioner, the opposite parties vide order with Reference No.MCL/IBV/SOCP/PER/MISC/07-08 dated 13.3.2008 of the office of the Personal Manager, Samaleswari OCP initiated a proceeding for rehabilitation of the petitioner under the Rahabilitation Scheme and intimated the petitioner to furnish a No Objection Affidavit from all major dependants of the deceased husband.

The petitioner further pleads that after the death of her husband, her in-laws along with her brother-in-law tortured her both mentally and physically and have mercilessly driven her out of their home and have deprived of her right to life and livelihood for which the petitioner has filed a Civil Suit bearing No.137/2008 demanding a share from the provident fund left by her husband. The father-in-law of the petitioner has received all the land acquisition compensation amount along with insurance benefit, death claim amount arising out of the petitioner's husband and has not given a single pie to the petitioner.

The petitioner has been deprived of her husband's share in the ancestral property including compensation etc. Her father-in-law and other relatives are bent on harassing her and hence did not cooperate with her by declining to furnish the required 'No Objection Affidavit' for employment. The father-in-law of the petitioner is a pension holder of M.C.L. and her elder brother-in-law is also an employee under the M.C.L.. Hence both them are neither major dependants nor eligible for employment under the rehabilitation scheme. More over the legal heir certificate issued by the Tahasildar, Talcher, clearly reveals that the petitioner, her daughter Jyotirmayee Sahoo and her mother-in-law Duti Sahoo as the legal heirs of the deceased husband of the petitioner late Hadibandhu Sahoo.

Being physically and mentally abused by her in-laws the petitioner was compelled to file a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 before the learned S.D.J.M., Talcher, against her father-in-law and others. Thus, on such factual facts, it has become impossible on the part of the petitioner to receive any kind of sympathetic treatment from her in-laws and therefore she is not in a position to obtain a No Objection Affidavit as demanded by the opposite parties. In view of the said facts the opposite parties need to consider her case for rehabilitation without insisting on the No Objection Affidavit. More over from the certificates filed, it is clear that there are no other major dependants of her husband except her mother-in-law and that her father-in-law is a retired M.C.L. employee.

On such pleadings the petitioner prayed that the opposite parties be directed to provide employment to her under the rehabilitation scheme without insisting on the No Objection Affidavit.

3. The opposite parties have filed their counter affidavit, inter alia, admitting that the husband of the petitioner was working as a Dumper Operator under the M.C.L. and died in a road accident on 13.3.2008 leaving behind the petitioner her daughter and the mother-in-law of the petitioner as his legal heirs. It is also admitted that the petitioner submitted an application for employment under the rehabilitation scheme with certain documents. On receipt of the said application, the opposite parties vide Letter dt.29.8.2008 asked the petitioner to submit a No Objection Affidavit from all the major dependants of the deceased, as the said affidavit and physical presence of the major dependants will be required at the time of scrutiny of the application.

The opposite parties further plead that in case of employment to the dependants under Clause 9.3.0/9.4.0/9.5.0 of the N.C.W.A.-V certain guidelines have been framed and a check list has been circulated by the Mahanadi Coald Fields Ltd. for verification of cases for employment under rehabilitation scheme. As per Clause-11 of the check list an affidavit in the form of No Objection from all major dependants of the family are required. This circular has been annexed as Annexure-A series to the counter affidavit.

The opposite parties further plead that the application of the petitioner can not be processed due to want of an affidavit in the form of No Objection which is meant to prevent any future claim of employment by other major dependants of the deceased family and it is difficult on the part of the opposite parties to dispense with non-filing of the No Objection in the form of an affidavit from all major dependants.

4. In course of hearing of the writ petition, learned counsel for the petitioner has very emphatically submitted that even the circular issued by the opposite parties does not require that No Objection Affidavit should be filed by the mother-in-law and other in-laws, who were not dependants upon the deceased employee. Learned counsel for the opposite parties, on the other hand, insisted that No Objection Affidavit should be filed by the petitioner for getting rehabilitation assistance.

5. The pivotal questions that arise in this case are that who are the major dependant of the deceased and whether it is necessary for the petitioner to file a No Objection Affidavit from those persons who are major but not dependent upon the deceased. At page-8 of Annexure-A series to the counter affidavit, the scheme of employment to dependants of an employee, who are disabled permanent or who died in service, have been provided. At Clause-9.3.3 the circular lays down the meaning of dependant for the purpose of rehabilitation scheme. It is appropriate to quote the same. It reads as follows:

> "Clause- 9.3.3. – The dependent for this purpose means the wife/husband as the case may be, unmarried daughter, son and legally adopted son. If no such direct dependant is available for employment, younger brother, widowed daughter/widowed daughter-in-law or son-in-law residing with the deceased and almost wholly dependant on the earnings of the deceased may be considered to be dependents of the deceased."

A plain reading of this clause indicates that for the purpose of rehabilitation, dependants means wife or husband as the case may be, unmarried daughter, son and legally adopted son. Only if in case no such direct dependant is available for employment, younger brother, widowed daughter/widowed daughter-in-law or son-in-law residing with the deceased and almost wholly dependant on the earnings of the deceased may be considered to be dependants of the deceased . So the spouse of the deceased, their daughter, son and adopted so have a right to be considered first for such rehabilitation assistance. Only if no such dependants are available then the question of providing rehabilitation assistance to younger brother etc. shall arise. So in the present case, the petitioner and her daughter are the only dependants of the late employee. It is worthwhile to mention here that the mother of the deceased employee does not find place in the provision quoted above. Further more, the check list (page-4, Annexure-A series) provides at Clause-11 that affidavit in the form of No Objection from all the major dependants of the family has to be filed. In this case, this Clause-11 shall be controlled by Clause-9.3.3. For the purpose of determining the major dependants of the family a cross reference has to be made to Clause-9.3.3 and as noted earlier only the spouse and the children are the dependants for the purpose of rehabilitation assistance. Only if spouse and the children are not available then the question of providing rehabilitation assistance to other relatives arise.

6. Thus from the above discussion, it is apparent and crystal clear that the circular calls for a No Objection from all major dependants which includes the spouse and the adult children of the deceased. In this case the petitioner is the only major dependant of the deceased so far as the scheme of rehabilitation assistance is concerned.

7. We, therefore, come to the conclusion that the petitioner is not required to file No Objection Affidavit from her mother-in-law, father-in-law and brother-in-law and her case should be considered without any such No Objection Affidavit. It is needless to say that her daughter being a minor is not required to file "No Objection Affidavit". In the result, the writ petition is allowed. The opposite parties are directed to process the rehabilitation assistance application of the petitioner within a period of two months from the date of communication of this judgment without insisting upon a No

Objection Affidavit as per the letter Reference No.MCL/IBV/SOCP/PER/08-09/999 dated 29.8.2008.

With the aforesaid observations, the writ application is disposed of. No costs.

The petitioner is directed to file requisites within seven days for communication of this judgment.

Writ petition disposed of.

2010 (II) ILR – CUT-1125

M.M.DAS, J.

W.P.(C) NO.9057 OF 2009 (Decided on 16.09.2010)

NUTAN KUMAR ROUT ..... Petitioner.

.Vrs.

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

ORISSA GRAMA PANCHAYAT ACT, 1964 (ACT NO.1OF 1964) – SEC.115 (1) (2), 25 (1) (g) r/w Sub-section (4) (a).

Sarpanch – Removal from office – Government can not remove him from office on mere allegation for Commission of a Criminal Offence unless he is convicted for an offence involving moral turpitude and sentenced to imprisonment for a period not less than six months.

In this case vigilance police investigating a case against the petitioner on the allegation of demand of illegal gratification – He was removed from office without considering his so cause – Violation of principles of natural justice – Held, the impugned order removing the petitioner from office is unsustainable and the same is quashed.

(Para 12,13 14)

Case laws Referred to:-

1.2006(Supp-II) OLR 842 : (B.Padma Reddy -V- State of Orissa & Ors.)
2.2006(Supp-II)OLR 939 : (Laxmidhar Tripathy -V- State of Orissa & Ors.)
3.AIR 2003 SC 2041 (Canara Bank & Ors. -V- Shri Debasis Das & Ors)

For Petitioner - M/s. P.K.Rath, P.C.Satpathy, R.N.Parija, A.K.Rout, S.K.Pattnaik.
For Opp.Parties – Addl. Standing Counsel.

M.M.DAS, J. The petitioner contested the election to the office of the Sarpanch of Dorada Grama Panchayat under Athagarh Block in the district of Cuttack and was declared elected having polled majority of valid votes in his favour. It is alleged by the petitioner that a false allegation was leveled against him about demand of bribe of Rs. 3500/- from one Akhaya Kumar Lenka, who with a pre-plan came with the vigilance officials to the petitioner on 23.1.2008 along with the amount of Rs. 3500/- and the vigilance officials prepared a detection report with the allegation that the petitioner accepted the said amount on demand from Shri Lenka for passing his bill for a contract work. According to the petitioner, the said Akhaya

Kumar Lenka is a supporter of the local M.L.A., who belongs to the rival political group of the petitioner. It has been further averred that by the date when such allegation was leveled against the petitioner, all the bills of the said Shri Lenka were already passed and the detection report was clearly motivated with mala fide to suspend the petitioner. The petitioner has been released on bail in the said vigilance case. Charge-sheet is yet to be submitted in the said case. On the basis of the detention report, the Government passed an order on 23.2.2008 suspending the petitioner from the office of the Sarpanch. The order of the Government dated 23.2.2008 as at annexure-5 was communicated to the petitioner, drawing up a proceeding initiated against him under Section 115(1) of the Orissa Grama Panchayat Act, 1964 (hereinafter referred to as 'the Act') and simultaneously placing him under suspension by exercise of power under sub-section(2) of Section 115 of the said Act, calling upon him to file a show cause. The charge leveled against the petitioner was annexed to the said order. Charge framed was as follows:

> "That Sri Nutan Kumar Rout, Sarpanch has been caught red handed and arrested by the Vigilance Officers on 23.1.2008 for demand of illegal gratification of Rs. 3500/- from the complainant, Sri Akshya Kumar Lenka S/O Bauribandhu Lenka of Village-Iswara and Sri Rout is in Jail custody from the date of arrest i.e. 23.1.2008 to 06.02.2008".

2. The petitioner challenged the said order of suspension before this Court in W.P>© No. 3275 of 2008. During course of hearing of the said writ petition, it was submitted on behalf of the petitioner that he had moved the Secretary, Panchayati Raj Department, Government of Orissa for revocation of the order of suspension on 25.2.208 vide Anenxure-3 to the said writ petition. Since there is an option for the suspending Sarpanch to move the State Government under sub-Section (3)(a) of Section 115 of the Act for revocation of the order of suspension, this Court disposed of the said writ petition directing the opposite party no. 1 to dispose of the petition said to have been filed by the petitioner as expeditiously as possible preferably within a period of two months from the date of communication of the said order, if the same has not been disposed of as yet. The petitioner also stated that he has filed a show cause reply pursuant to the notice dated 25.2.2008. Even after disposal of the said writ petition as no action was taken by the Government, the petitioner again approached this Court in W.P.(C) No. 18274 of 2008 challenging the order of suspension passed against him. This Court by order dated 28.1.2009 did not interfere with the order of suspension of the petitioner, but considering the submission that no action is being taken with regard to the proceeding initiated against him,

directed the concerned authority of the State to complete the proceeding initiated against the petitioner within a period of two months from the date of production of the certified copy of the said order before the concerned authority of the State, by the petitioner. Pursuant to the said order passed by this Court, the matter was taken up by the government, which ahs culminated in the impugned order under Annexure-1 to the writ petition, removing the petitioner from the office of the Sarpanch, which is as follows:

"Government of Orissa,
Panchayati Raj Department.

No .PRI-I(i)21/2008 16622/PR.,Dated 14/05/09

O R D E R

WHEREAS Sri Nuatan Kumar Rout, Sarapanch (Under suspension) of Dorada Grama Panchayat under Athagarh Block called upon to show cause against the charge vide P.R.Deptt. Order No. 8834/PR., dated 23.2.2008 and pursuant to the said order Sri Rout submitted his show cause reply. He was also heard in person.

AND WHEREAS after careful consideration of the show cause reply filed by Sri Rout and his statement during personal hearing and all the materials on record, the State Government are satisfied that Sri Rout willfully by abusing his power, rights and privileges vested in him had demanded illegal gratification and accepted the same. Thereby he has acted in a manner prejudicial to the interest of gram Panchayat and due to his dishonest activities, his further continuance in the office of the Sarapanch of the G.P. would be detrimental to the interest of the General Public of the G.P. as many developmental works are being executed through the G.P.

Now, therefore, in exercise of the powers conferred by the sub-section (1) of Sec. 115 of the O.G.P. Act, the State Govt. have been pleased to order that Sri Nutan Kumar Rout is hereby removed from the Office of the Sarpanch of Dorada Gram Panchayat with immediate effect.

By order of the Governor,
Sd/- 14.5.2009
Joint Secretary to Govt.

Memo No. 16623/PR., Dated 14/05/09
Copy in triplicate forwarded to the Collector, Cuttack with a request to serve one copy of the order on Sri Nutan Kumar Rout with his dated acknowledgement, the second copy be returned to the P.R. Department and the third coy thereof be retained in the Collectorate for reference.

Sd/- 14.5.2009
Joint Secretary to Govt.

Memo No. 16624/PR., Dated 14/05/09
Copy forwarded to the District Panchayat Officer, Cuttack/Sub-Collector, Athagarh/B.D.O., Athagarh/Guard file (2) space copies for information and necessary action.

Sd/- 14.5.2009
Joint Secretary to Govt.

3. The petitioner being aggrieved by the said order has approached this Court in the present writ petition for issuance of a writ of certiorari to quash to said order and for issuing other appropriate directions.

4. A counter affidavit has been filed on behalf of the opposite parties defending the impugned order and inter alia, stating that the petitioner having acted in a manner prejudicial to the interest of the inhabitants of Grama by demanding and accepting bribe from a V.L.L. and was caught red handed by the vigilance officials, there is no scope for him to deny the said allegation and therefore, the removal of the petitioner was proper and justified.

5. Mr. P.K.Rath, learned counsel for the petitioner vehemently urged that the removal order of the petitioner has not been passed within the purview and the scope of Section 115(1) of the Act. There has been no enquiry complying with the principles of natural justice, i.e., while passing the removal order, the authorities have not considered the cause shown by the petitioner with regard to the charge leveled against him and have not provided the copies of the relevant documents forming the basis of the removal order to the petitioner. The petitioner has also not been given an opportunity to examine any witness. Mr. Rath, further contended that when a criminal case is under investigation by the Vigilance Department holding the petitioner guilty of commission of such offence, which forms the basis of the order of removal, amounts to pre-judging the criminal proceeding, which is beyond the jurisdiction vested in the State under Section 115(1) of the Act and in absence of any order of conviction, no order of removal could have been passed by the Government removing the petitioner, who is an elected representative of the Grama. It was further contended that the charge framed does not form the basis of the finding that the petitioner has acted in a manner prejudicial to the interest of the inhabitants of the Grama. Form Annexure-7 to the writ petition, which is the show cause affidavit filed by the petitioner, it appears that the petitioner has stated that the above grounds along with other grounds, pleading that he should not be removed from the office of Sarpanch by exercise of power under Section 115(1) of the Act.

6. In the counter affidavit filed by the opposite parties except stating that the State Government after careful consideration of the show cause reply of the petitioner and his statement during personal hearing and all the materials on record, have been satisfied that the petitioner willfully by abusing his powers, rights and privileges vested in him had demanded illegal gratification and accepted the same thereby acting in a manner prejudicial to the interest of the Gram Panchayat for which his further continuance would be detrimental to the interest of the general public of the gram Panchayat, nothing has been stated as to what was found out during the enquiry.

7. Mr. Rath, learned counsel for the petitioner relying upon the decisions in the cases of **B.Padma Reddy –v-State of Orissa and others,** 2006 (Supp.-II) OLR 842 and **Laxmidhar Tripathy –v- State of Orissa and others,** 2006 (Supp.-II) OLR 939 in support of his contention, submitted that in the aforesaid decisions, a Division Bench of this Court on analyzing the facts of the said case **Canara Bank and others –v- Shri Debasis Das and others,** AIR 2003 SC 2041 have held that reasonable opportunity is not confined only to the reply given to the show cause or the evidence adduced in its support, but it also includes the consideration of the defence taken by a person while taking a decision by the decision making authority and that in the instant case, the statements made in the show cause reply filed by the petitioner have never been taken into consideration.

8. Section 25 of the Act prescribes the clause under which a person earns disqualification for membership of a Gram Panchayat. Sub-Section (1)(g) of Section 25 of the Act provides that a person shall be disqualified for being elected or nominated as a Sarpanch or any other member of the Gram Panchayat constituted under the Act, if he is convicted for an offence involving moral turpitude and sentenced to imprisonment of not less than six months unless a period of five years has elapsed since his release or is ordered to give security for good behaviour under Section 110 of the Code of Criminal Procedure, 1898 (5 of 1898).

9. Sub-Section (4)(a)(b) of Section 25 of the Act provides as follows:

"(4) Not withstanding anything contained in the foregoing sub-sections –
(a) the State Government may remove any one or more of the disqualifications specified in Clauses (f), (g), (k) and (l) of Sub-section (1);
(b) when a person ceases to be a Sarpanch or Naib-Sarpanch or any other member in pursuance of Clause (g) of Sub-Section (1) he shall be restored to office for such portion of the term of office as may remain unexpired on the date of such restoration, if the sentence is reversed or quashed or appear or revision or the offence is pardoned or the disqualification is removed by an order of the State Government; and any

person filing the vacancy in the interim period shall or such restoration vacate the office."

10. The power of the State Government to remove a Sarpanch or a Naib-Sarpanch or any member of the Gram Panchayat is provided under section 115 (1) of the Act which is quoted hereunder.

"115. **Suspension and removal of Sarpanch, Naib-Sarpanch and member** – (1) If the State Government, on the basis of a report of the Collector or the Project Director, District Rural Development Agency, or suo motu are of the opinion that circumstances exist to show that the Sarpanch or Naib Sarpanch of a Grama Panchayat willfully omits or refuses to carry out or violates the provisions of this Act or the rules or others made thereunder or abuses the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the inhabitants of the Grama and that the further continuance of such person in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Grama, they may after giving the person concerned a reasonable opportunity or showing cause, remove him from the office of Sarpanch or Naib-Sarpanch, as the case may be."

11. In view of the above position, two questions arise for determination in this case, i.e., whether while conducting the enquiry against the petitioner, principles of natural justice have been violated and whether in view of the nature of the charge framed, the same amounts to pre-judging the criminal allegation made against the petitioner in the case registered against him by the Vigilance Police.

12. As already indicated above, it does not transpire from the impugned order that the show cause filed by the petitioner has been considered by the Government while taking the decision to remove the petitioner form the office of the Sarpanch. No reason has also been assigned as to how the petitioner willfully abused his powers, rights and privileges vested in him. It appears from the impugned order that the allegation of demand of illegal gratification, which is the subject matter of investigation in the criminal case initiated against the petitioner, has been taken to be the sole ground to hold that the petitioner has acted in a manner prejudicial to the interest of the Grama Panchayat. It even transpires that the Government has concluded that the petitioner has acted dishonestly even though the matter is under investigation and no charge-sheet has yet been filed against the petitioner far less the trial and conviction. Nothing within the four corners of the impugned order indicate that the concerned authority of the state while passing the said order has taken into consideration the show cause filed by the petitioner. The principle of *audi alterm partem* mandates that no one shall be condemned unheard. Fair play in any action is an integral part of

the rules of natural justice which demands that before any prejudicial or adverse order is passed or action is taken against a person, he must be given an opportunity of hearing.

13. Having regard to the nature of controversy posed in the present case and on the above analysis of the impugned order, it is abundantly clear that the Government has exceeded its jurisdiction in passing the order of removal against the petitioner by enquiring into an allegation of a criminal act against the petitioner, which is under investigation by the Vigilance Police and in which, if charge-sheet is filed, the petitioner has a right to take his defence while facing the trial, it is a cardinal principle of law that there is no presumption of guilt against a person with regard to commission of a criminal offence until the same is proved against him beyond reasonable doubt, leading to recording of an order of conviction against him. In the present case, therefore, the conclusive finding that the petitioner is guilty of a criminal act solely basing on mere allegations and forming the same to be the basis of the order of removal from the office of the Sarpanch clearly amounts to pre-judging the issue, before the criminal case is tried against the petitioner (in the event a charge-sheet is submitted against him).

14. Further, considering the nature of the charge framed against the petitioner, which is purely a charge in relation to the allegation of a criminal offence being committed by the petitioner, calling upon him to show cause to the said charge also amounts to compelling him to disclose his defence, which he would take if the investigation by the Vigilance Police ends up with a charge-sheet against him and he will be required to face the trial. Such compulsion to disclose the defence by an accused in an ancillary proceeding before a criminal case is tried, is contrary to law. Section 25(1)(g) read with sub-section (4)(a) of the Act also clearly shows that the State Government may remove the Sarpanch, if he is convicted for an offence involving moral turpitude and sentenced to imprisonment for a period not less than six months. Such a contingency does not arise in the present case, Section 115(1) of the Act also does not contemplate that a mere allegation, if made against the Sarpanch with regard to commission of a criminal offence, the Government can remove him from his office. In that view of the matter, the impugned order under Annexure-1 removing the petitioner from the office of the Sarpanch of Dorada Grama Panchayat is unsustainable and the same is accordingly quashed. As a consequence, the order of suspension also stands quashed and the petitioner shall be restored to his office and shall function as Sarpanch of the said Grama Panchayat for the rest of the term, unless if charge-sheet is filed in the criminal case and the trial is culminated in an order of conviction against him sentencing him to undergo

imprisonment for six months or more as per the provisions of Section 25(1)(g) of the Act.

The writ petition is, accordingly, allowed but in the circumstances, without cost.

Writ petition allowed.

2010 (II) ILR – CUT-1133

R.N.BISWAL, J.

W.P.(C) NOS.13272 OF 2010 (With Batch) (Decided on 26.10.2010)

SILICON INSTITUTE OF TECHNOLOGY & ORS. …….. Petitioners.

.Vrs.

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

ALL INDIA COUNCIL FOR TECHNICAL EDUCATION ACT, 1987 (ACT NO. 52 OF1987) – SEC.10 (1) (k).

Education – Technical Institution – Introduction of 2nd shift B.Tech Course – Approved by AICTE – Petitioner institution applied to BPUT for affiliation – Policy planning body refused affiliation in view of large number of vacancies in single shift Technical Educational Institutions – Hence the writ petition.

U/s. 4(6) (a) Orissa Professional Educational Institution (Regulation of Admission and fixation of fees) Act, 2007, Policy planning body is to regulate the admission process fair, transparent, merit based and non-exploitative but it can not sit over the decision of the Council granting approval.

Held, impugned notification Dt.30.07.2010 is quashed – BPUT is directed to grant affiliation to the 2nd shift B.Tech Course of the petitioner-Institutions for the Academic session 2010-11 with further direction to OJEE to include the said course of the petitioner-institutions in the ensuing E-Counseling.

(Para 13 to 16)

Case law Relied on:-

(1995) 4 SCC 104 : (State of Tamil Nadu & Anr.-V-Adhiyaman Educational & Research Institute & Ors.).

Case laws Referred to:-

1.AIR 2000 SC.1614 : (Jaya Gokul Educational Trust -V- Commissioner & Secretary to Government Higher Education Department, Thiruvanantha Puram & Anr.).

2.(2008)2 SCC 672 : (Delhi Development Authority & Anr.-V-Joint Action Committee Allottee of SFS Flats & Ors.).

3.(2008) 5 SCC 550 : (State of U.P. & Ors.-V-Chaudhari Ran Been Singh & Anr.).

4.(2008) 3 SCC 432 : (Basic Education Board U.P. -V- Upendra Rai & Ors.)

5.(2007) 8 SCC 418 : (Dhampur Sugar (Kashipur) Ltd.-V-State of Uttaranchal & Ors.)
6.(2007)4 SCC 737 : (Directorate of Film Festivals & Ors.-V-Gaurav Ashwin Jain & Ors.).
7.(2000) 5 SCC 57 : (Union of India -V- ERA Educational Trust & Anr.).
8.(1998) 8 SCC 765 : (Government of A.P. -V- M.Srinivasa Reddy & Ors.).

For Petitioner - M/s. S.K.Padhi, B.K.Mishra, B.K.Barik, D.R.Swain.
For Opp.Parties – Addl.Govt. Advocate (O.P.1)
M/s. R.K.Dash, P.K.Tripathy, S.Pattnayak, A.K.Mohapatra, H.K.Ratsingh
M/s. S.Palit, A.K.Mahana, A.Mishra, A.Kejariwal & D.N.Pattanaik, M/s. S.R.Mohanty & Y.Mohanty.
For Petitioners - M/s. S.P.Sarangi, P.P.Mohanty, P.K.Das, B.P.Das,A.Patnaik.
For Opp.Parties – Addl.Govt. Advocate
M/s.A.K.Mohapatra & H.K.Ratsingh

R.N.BISWAL,J. The facts and points of law involved in the aforesaid six cases being identical, they were heard together and the following common order is passed thereon.

2. For the sake of convenience and to understand the issue, the facts in W.P.(C) No.13272 of 2010 are referred. The petitioner-institution therein was established in the year, 2001 to cater to the need of qualitative higher technical studies of students. It imparts four years B.Tech Degree course and 2 years M.C.A. course apart from other higher technical approved studies. It has been duly approved by AICTE and affiliated to Biju Pattnaik University and Technology (in short B.P.U.T.) from the year of its establishment.

3. With a view to increase the Gross Enrollment Ratio (GER) in technical education to 30% by the year 2020, the AICTE allowed the institutions already approved, established and affiliated to apply for establishing 2nd shift so that the existing infrastructure, laboratory, library etc. can be optimally utilized and cost effective education can be given to the intending students. The present GER in India is very low being 13-14%, and in the State of Orissa, it is much less than the national average. Accordingly, the AICTE in its web-site invited applications from the eligible interested existing technical, educational institutions for approval to start 2nd shift B.Tech course. Accordingly, the present petitioner duly submitted its application to AICTE with copy to the State Government and B.P.U.T. seeking approval for introduction of 2nd shift B.Tech course in its institute for the current academic session 2010-11. After thorough inspection and

scrutiny and keeping in mind the need of the State of Orissa, the AICTE accorded approval to the petitioner-institution in respect of 60 seats in each of two disciplines, viz., "Computer Science and Engineering" and "Electronic & Telecommunication" for the current academic session 2010-11 vide notification dated 30.6.2010 in its web-site. Thereafter, the petitioner-institution submitted application along with required fees to B.P.U.T. for grant of affiliation to the above 120 seats in 2nd shift B.Tech course 2010-11 along with its existing courses, but without any reason, it is sitting over the matter. The petitioner-institution vide its letter dated 30.6.2010 and 8.7.2010 apprised the fact of approval to the Orissa Joint Entrance Examination (J.E.E. in short) and State Government authorities respectively so as to enhance the seat matrix for JEE-E Counselling. However, they did not do it. Hence, the present petitioner-institution along with all other five similarly placed institutions have filed the writ petitions with substantially, the following reliefs:

"(i) to direct B.P.U.T. to grant affiliation for 2nd shift B.Tech for current academic session,
(ii) to direct the J.E.E. to include the 2nd shift B.Tech course in the ensuing counselling,
(iii) to extend the J.E.E. counseling period and
(iv) to permit the petitioner-institutions to fill up the 2nd shift seats through college level counsellling.

4. The State Government in its counter affidavits in all the writ petitions, inter alia, contended that mere obtaining of approval from the AICTE did not entitle the institutions in question to admit students and get affiliation from the B.P.U.T., particularly when neither the Policy Planning Body nor the State Government recommended for starting of 2nd shift in any of the petitioner-institutions. Further, basing on the recommendation of Policy Planning Body and consequent upon the decision taken in the Board of Governors Meeting of B.P.U.T., the Government of Orissa in Industries Department vide notification dated 30.7.2010 decided not to implement/introduce 2nd shift engineering programme in the existing private engineering colleges for the academic session 2010-11

5. In its counter, the B.P.U.T. has taken a similar stand in all the writ petitions. Further, according to it, the Policy Planning Body is the Apex Body to take decision in respect of technical educational institutions in the State of Orissa. The B.P.U.T. as well as the other Bodies like J.E.E., functions on the basis of the policy decision taken by the Policy Planning Body. In its meeting dated 28.7.2010, the Policy Planning Body decided not to allow the technical educational institutions in the State of Orissa to admit students in

the 2nd shift for the academic session 2010-11, which is binding on the B.P.U.T.

6. Opp. party Nos. 3 and 4 in their counter affidavits in all the writ petitions contended that approval of 2nd shifts accorded by the AICTE does not bind the State Government or the affiliating University. The Policy Planning Body, which is the apex policy making body in respect of admission of students in their meeting held on 27.8.2010, decided not to allow 2nd shift in any technical educational institution in the State of Orissa in view of large number of vacancy of seats in other single shift technical educational institutions. The said decision has not been challenged by any of the petitioner-institutions. Mainly basing upon the policy decision of the Policy Planning Body, the Government decided not to implement/introduce 2nd shift engineering programme in existing Private Engineering Colleges for the academic session 2010-11. It is the further case of opp.party Nos.3 and 4 that normally a policy decision of the Government cannot be subject to judicial review, unless it is unconstitutional or against the provision of any Act or Regulations, So, these opp. parties prayed to dismiss the writ petition.

7. As found from the pleadings of opp. parties, their main contention is that, since the Policy Planning Body, which is the apex policy making body concerning admission in technical educational institutions, in its meeting held on 28.7.2010 decided not to recommend 2nd shift B.Tech programme in the J.E.E. 2010-11, the Government in its Industries Department accepted the proposal and issued the notification dated 30.7.2010 and that BPUT is bound by the decision of Government.

8. Learned counsel appearing for the petitioners submitted that the Policy Planning Body is not authorized under law to take a decision not to recommend the introduction of 2nd shift engineering programme when the AICTE has already approved the same. No doubt, under Clause(a),Sub-section 6 of Section 4 of the Orissa Professional Educational Institution (Regulation of Admission and fixation of Fees) Act,2007 (in short 'Act,2007') gives power to the Policy Planning Body to regulate admission, conduct examination and to supervise and guide the process of admission in respect of technical educational institutions, but it does not empower it either to allow or disallow permission for establishment of any such institution or to extend the seats or courses in any existing institution, which are exclusively under the domain of AICTE. The Policy Planning Body being a statutory Body created under the Act, 2007 cannot traverse beyond the powers conferred upon it by the said Act. In other words, Clause-(a)to sub-clause 6 of Section 4 of the Act,2007 does not empower the Policy Planning Body to prohibit admission to an institution approved by the AICTE. In support of their submissions, learned counsel for the petitioners relied on the decisions in the case of ***State of Tamil Nadu and another v. Adhiyaman***

Educational & Research Institute and others (1995) 4 S.C.C. 104 and ***Jaya Gokul Educational Trust v. Commissioner & Secretary to Government Higher Education Department, Thiruvanantha Puram and another,*** AIR 2000 Supreme Court 1614.

9. Mr. S. Palit, learned counsel appearing for the Policy Planning Body and JEE-2010 contended that on 28.7.2010, the Policy Planning Body conveyed a meeting wherein along with other matters, the issue regarding allowing the existing Technical Educational Institutions to start 2nd shift was taken up. After due deliberation, it was decided not to recommend the introduction of 2nd shift engineering programme for the current academic session,2010-11. The said decision having not been challenged by the petitioner-institutions, they can not challenge it now. The decision of the Policy Planning Body was forwarded to the State Government which on being approved was notified in the gazette on 30.9.2010 and a copy of it was forwarded to AICTE. Under clause(a) Sub-section 6 of Section 4 of the Act, 2007, the Policy Planning Body has been authorized to regulate the admission. As a matter of policy, it decided not to recommend 2nd shift Engineering Programme for the Academic Session, 2010-11, in view of large number of vacancy of seats in various technical educational institutions in the State of Orissa in the regular single shift. Scope of interference of this court in policy matter being extremely limited this Court should not interfere with the decision taken by the Policy Planning Body. In support of his submission, he relied on the decisions in the cases of ***Delhi Development Authority and another –v- Joint Action Committee, Allottee of SFS Flats and others*** (2008)2 SCC 672, ***State of Uttar Pradesh and others –v-Chaudhari Ran Beer Singh and another*** (2008)5 SCC 550, ***Basic Education Board. U.P. –v- Upendra Rai and others*** (2008)3 SCC 432, ***Dhampur Sugar (Kashipur) Ltd., -v- State of Uttaranchal and others*** (2007)8 SCC 418, ***Directorate of Film Festivals and others –v- Gaurav Ashwin Jain and others*** (2007)4 SCC 737, ***Union of India –v- ERA Educational Trust and another*** (2000)5 SCC 57 and ***Government of A.P. –v- M.Srinivasa Reddy and others*** (1998)8 SCC 765. Mr. Palit, learned counsel further submitted that the decisions cited on behalf of the petitioners were with regard to repugnancy of the State Acts, and, as such, the same were not applicable to the present case. Furthermore, he submitted that the Act, 2007 was challenged before this court on the ground that it was hit by the Doctrine of Repugnancy under Article 254 of the constitution of India. The Act was struck down on the ground that the provisions of the said Act were repugnant to the provisions of the Central Acts like AICTE, MCI etc. In SLP filed by the State of Orissa, the Apex Court in effect stayed the judgment of this Court and kept alive all the provisions of the Act save some modifications to sections 4 and 6 in

respect of the constitution of Policy Planning Body and Fee Structure Committee. The petitioners are all members of an association named OPECA, which is one of the parties in the Civil Appeal pending before the Supreme Court. Therefore, it is not open for the petitioners to individually come up before this court in writ petitions and indirectly challenge the validity and propriety of the order of the Apex Court.

10. Mr.A.K.Mohapatra, learned counsel appearing for B.P.U.T. contended that the scheme of 2nd shift programme was introduced by AICTE in 2008 on the statistics of the students of a State: students studying in Engineering per lakh of population as an index. The objective was to promote 2nd shift in those states where the index was less than the national average of 75. At that time, the index of State of Orissa average was 57 as the number of seats available then were 19,000.But at present, the average seats available in the State of Orissa is more than national average, as per the view given by the Vice Chancellor, BPUT in the meeting held by the Policy Planning Body on 28.7.2010. So, in the State of Orissa, there is no need of introducing the 2nd shift course in the academic session 2010-11.

11. Mr. A.K. Mohapatra drawing the attention of this Court to section 44 (a) of the B.P.U.T. 1st Statute 2006 further submitted that a college must obtain AICTE approval and NOC from the Government of Orissa before applying for affiliation. In the present cases, in absence of NOC from the Govt. of Orissa, the University cannot grant affiliation to the new courses in the 2nd shift. Furthermore, Mr. Mohapatra contended that the petitioner-institutions have not produced their respective letter of approval of the AICTE before the university. Even if it is presumed that all the institutions have been approved by the AICTE, it does not lead to automatic grant of affiliation by the University.

Mr. Mohapatra again submitted that as per Clause 23.2 of the AICTE approval Process, Hand Book, approval for additional programme/course/ division in 2nd shift should be considered with views of the State Government and affiliating university. In the present case, the AICTE having not considered the views of either the State Govt. or the BPUT committed gross illegality by violating its own guidelines in granting approval of 2nd shift course in favour of the petitioner-institutions. So, the BPUT is not bound to affiliate the said course.

12. As per clause (K) Sub-Section(1) of section 10 of the AICTE Act, 1987 it is the duty of the council to grant approval for starting new technical institutions and for introduction of new courses or programme in consultation with the agencies concerned. It is the case of the petitioner-institutions that they applied for approval of 2nd shift programme to AICTE with copy to the State Govt. and the B.P.U.T. Annexure 1/1 series in W.P. (C) No.13272 of 2010 show that copies of such applications were sent to the State Govt. as

well as the BPUT. Clause 23.2 of the AICTE Approval Process of Hand Book envisages that approval for additional programme/courses/divisions in 2nd shift working shall be considered with views by State Govt./UT and affiliating university. Clause 25.4 thereof lays down that in the absence of receipt of views from the State Govt/and/or the affiliating university, the Council will proceed for completion of approval. As it appears in the cases in hand, when the Government and the university did not send their views, the Council proceeded for completion of approval and granted approval to run 2nd shift programme in the petitioner-institutions. The AICTE approval order, Annexure-2 reflects that 2nd shift programme was approved in favour of all the petitioner-institutions for the current academic year 2010-11. Mr.Ishan Mohanty, learned senior counsel appearing for AICTE, on information, submitted that 2nd shift programme in respect of all the petitioner-institutions have been approved by AICTE for the year 2010-11. So, it cannot be said that there was no lawful approval.

13. Now the question is, when the AICTE has already approved the 2nd shift programme in favour of the petitioner-institutions, whether the Policy Planning Body can refuse to recommend the introduction of such programme. As per clause (a), Sub-Section 6 of Section 4 of the Act 2007, the Policy Planning Body can regulate admission. Sub-Section 7 thereof postulates that the Policy Planning Body shall supervise and guide the entire process of admission of students to the Govt. institutions, private professional educational institutions and sponsored institutions with a view to ensuring that the process is fair, transparent, merit based and non-exploitative. But it can not sit over the decision of the Council granting approval. If the petitioner-institutions are not allowed to take admission of students in their respective institutions, because of the Policy decision of the Policy Planning Body/Govt. then the decision of granting approval by the Council would be rendered nugatory. In the case of Tamil Nadu and another (supra) the apex court held as follows:-

> "When the power to recognize or de-recognize an institution is given to a body created under the Central Act, it alone can exercise the power and on terms and conditions laid down under the Central Act. It will not be open for the body created under the State Act to exercise such power much less on terms and conditions which are inconsistent with or repugnant to those which are laid down under the Central Act."

There is nothing in Act, 2007 to show that the Policy decision of the Policy Planning Body/Govt. would override the decision of the council granting approval for running 2nd shift programme. So, the decision quoted above would be squarely applicable to the present case. The submission of Mr.

Palit, learned counsel that the said decision can not be applicable to the cases in hand can not be accepted.

14. The Policy Planning Body has no authority to sit over the decision of the AICTE so far granting approval in favour of a technical institution. As it lacks inherent jurisdiction, the petitioners were not required to challenge the decision of the Policy Planning Body earlier. So, the submission of Mr. Palit, that since the petitioners did not challenge the decision of the Policy Planning Body earlier, they can not challenge the same can not be accepted. On the same anology, the decisions cited by Mr. Palit, that scope of judicial interference in policy decision is limited can not be applicable to the present cases. The petitioners have not challenged the validity of the interim order passed by the Supreme Court in any manner. They have challenged the decision of the Policy Planning Body. So, the submission of Mr. Palit, learned counsel that indirectly they have challenged the interim order passed by the Apex Court cannot also be accepted.

15. Section 44(a) of the BPUT, 1st statute, 2006 requires that a college must obtain AICTE approval and NOC from the Government of Orissa before applying for affiliation. In the cases at hand, admittedly NOC was not obtained by any of the petitioner-institutions from the Government of Orissa. There is no provision in the Act, 2007 to grant NOC to any technical educational institution for its affiliation by the BPUT. Moreover, when the Council has already approved the 2nd shift programme in favour of the petitioner-institutions, the BPUT cannot deny granting affiliation in their favour, only on the ground that they did not produce NOCs from the Government of Orissa.

In the case of Tamil Nadu and another (supra) the apex court held:-

> "Thus, so far as these matters are concerned, in the case of the institutions imparting technical education, it is not the University Act and the University but it is the Central Act and the Council created under it which will have the jurisdiction. To that extent, after coming into operation of the Central Act, the Provisions of the University Act will be deemed to have become unenforceable in case of technical colleges like the Engineering colleges."

16. Therefore, under such premises, the Government notification in Industries Department dated 30th July, 2010 is quashed. The BPUT is directed to grant affiliation to the 2nd shift, B-Tech course of the petitioner-institutions for the Academic Session 2010-11 in an early date and the OJEE is directed to include the said course of the petitioner-institutions in the ensuing E-counseling.

Accordingly, the writ petitions stand disposed of. No cost.

Writ petition disposed of.

2010 (II) ILR – CUT-1141

SANJU PANDA, J.

W.P. (C) NO.6621 OF 2010 (Decided on 23.09.2010)

BIDYADHAR KHATUA ……Petitioner.

.Vrs.

EXECUTIVE ENGINEER (Elect.)
CITY DISTRIBUTUION DIVN.1,
CESU CTC & ANR. …… Opp. Parties

Electricity – Re-classification of consumer – The disputed period is prior to September, 1998 – When a consumer is to be re-classified, the authority has to call upon the consumer to execute a fresh agreement on the basis of the altered classification and may also revise the bills.

In the present case, neither the authorities issued show cause notice to the petitioner nor did the petitioner execute any fresh agreement – Held, the disputed period being prior to September,1998 the same shall be governed under regulation 1981 and Regulation 1995 and after 1998 the Opp.Parties may give revised bill as per the said code. (Para 7)

For Petitioner - M/s. J.K.Mohapatra.
For Opp.Parties – M/s. Bibudhendtra Dash & P.K.Mohanty.

S. PANDA, J. In this writ petition, the petitioner has challenged the order dated 20th November, 2009 passed by the Ombudsman-I in Consumer Representation Case No.OM(I) -44 of 2009.

2. The factual backdrop of the case is as follows:

The petitioner is a consumer under the opposite parties since 1976. Initially, the load of electricity supply to the premises of the petitioner was 2 KW. Due to extension of the building, the petitioner applied for enhancement of such supply of electricity from 2 KW to 6 KW stating therein that the electricity in respect of ground floor is for commercial purpose only. In the said application, he requested for preparation of bill for 2.5 KW under commercial tariff and 3.5 KW for domestic tariff. However, the authorities without following the procedure for enhancement of the load factor and change of tariff as provided under the Electricity Act and Rules prepared bill under commercial tariff on the basis of average load factor. Though the petitioner requested several times for rectification of the same and the status of the metre was OK, opposite parties did not take any step to correct the same. The further case of the petitioner is that, the building was damaged due to rioting on 9.12.1992 and there was no electric supply to the building from 9.2.1992 to 5.4.1994. Thereafter, fresh connection was given to the

premises and bills were raised on an average basis. Subsequently, on the request, a new meter was installed on 4.7.1998. However, bills were given on an average basis under commercial tariff for which the petitioner filed WPC No.2872 of 2004 which was disposed of on 12.2.2008 with an observation that the petitioner may approach the authorities created under the Indian Electricity Act for determination of the dispute. Accordingly, the petitioner approached the Grievance Redressal Forum, Cuttack (in short, "the GRF") by filing CC Case No.CDD-1/131 of 2008. In the said petition, the pet0itioner specifically prayed (a) to waive the bill for the period from 9.12.1992 to 5.2.1994 as the building was damaged due to riot; (b) revise load factor bill as per actual consumption on the basis of meter reading as the status of the meter is OK; and (c) revise the bill by changing the tariff from commercial to domestic purpose. The GRF, after hearing the petitioner and the opposite parties and taking into consideration the records filed by the petitioner, came to the finding that (i) the pleading of the petitioner regarding non-supply of power to his premises from 9.12.1992 to 5.2.1994 was disbelieved as there was no record showing that the petitioner deposited reconnection charges and accordingly, the prayer for reclassification of electricity bill during the said period had no merits; (ii) after enhancement of connected load from 2 KW to 6 KW there being no document showing that the petitioner filed application for using of electricity load up to 3.5 KW for domestic purpose and 2.5 KW for commercial purpose in respect of ground floor only, it could be believed that the load was 6 KW and the use of commercial purpose being excess of 20% of the total load to 6 KW, opposite parties did not commit any wrong in raising the bill on the basis of commercial tariff; and (iii) so far as revision of load factor bill is concerned, as per Regulation 60(2) of the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 1998 (in short, "the Code"), the bills ought to be raised on load factor basis in case of defective or lost meters and Regulation 54 of the Code provides that the power supply shall not be effected without a correct meter. Opposite parties did not follow the said Regulations though it was within their knowledge that the meter was defective or lost and no attempt was made on behalf of them to replace or install a new one. Therefore, opposite parties should revise the load factor bills as per six months consumption pattern available after installation of new meter on 10.11.2004. Accordingly, on 17th December, 2008 the GRF directed the opposite parties to issue revised bill on load factor basis as per six months consumption pattern available after installation of new meter on 10.11.2004. Being aggrieved by the said order, petitioner filed Consumer Representation Case No.OM(I) – 44 of 2009 before Ombudsman-I reiterating his plea and non-consideration of those facts by the GRF. The

Ombudsman-I dismissed the said case on 20.11.2009 confirming the finding of the GRF and observed that it is open to the petitioner to install a new meter for the purpose of domestic and commercial category in accordance with the statutory provisions. Hence this writ petition.

3. Learned counsel for the petitioner submitted that the petitioner is not a consumer under 'Kutir Jyoti Scheme' and Regulation 80 of the Code is not at all applicable to the present case as the petitioner is a consumer prior to 1998 when the Code came into force. As the petitioner applied for load of 6 KW, his consumption is not excess from the said load and he is coming under the Orissa State Electricity Board (General Conditions of Supply) Regulations, 1981 (in short, '1981 Regulation'). According to the said provision, when the classification of consumer will change from domestic to commercial category, a notice is to be issued to the consumer directing to execute a fresh agreement. In the present case, while changing the consumer classification from domestic to commercial, a fresh agreement has not been executed. As per 1981 Regulation and 1995 Regulation, if it is found by the authorities that a consumer has been classified under a particular category erroneously, or has altered the purpose of the supply as mentioned in the agreement, the Board may alter the classification, call upon the consumer to execute a fresh agreement on the basis of the altered classification and may also revise the bills. If the consumer does not take steps within the time stipulated in the notice to execute the agreement, the Engineer may issue show- cause notice covering the period of clear seven days and after considering the explanation, if any, may disconnect the supply of power. However, on introduction of Orissa Electricity Regulatory Commission Regulation 02 of 1998, the "Classification of Consumer" is provided under Regulation 80 which reveals that a licensee may classify or reclassify the consumer into various categories from time to time as may be approved by the Commission and fix different tariffs and conditions of supply for different class of consumers. A domestic consumer also includes the occupants of flats in multi-storied buildings or residential colonies receiving power at single point for domestic purposes when connected load for non-domestic load exceeds 10% of the total connected load. In case the non domestic load exceeds 10% of the total connected load, they shall be treated as commercial or general purpose consumers as applicable. This shall not cover residential colonies attached to industrial establishment where power supply is drawn through the meter of the industrial establishment (Emphasis supplied). Learned counsel for the petitioner further submitted that the said provision was introduced in the year 1998 and since the present dispute is covering prior to that period, the said provision should not be applicable to the present case and the opposite parties should not have categorized the connection of the petitioner as commercial one and both the forums below

did not consider the said aspect at all. Therefore, the impugned order is liable to be interfered with.

4. Learned counsel for the opposite parties while supporting the decision of the GRF as well as the Ombudsman-I submitted that both the forums considered the case of the petitioner in proper perspective. The petitioner did not disclose the reasons of seizure of the lodge by the local police till 5.2.1994 after riot and whether the building was vacated or not used during that period. The bill was issued on load factor for 6 KW and the petitioner paid bills without any objection and he never lodged any complaint before the appropriate authorities as provided Under Regulation 110 of the Code. From the report of the SDO (Elect.), Ranihat, it appears that the ground floor of the premises contained seven commercial shops and the balance portion as well as the entire first floor was used for lodging purpose. The averment made by the petitioner in his earlier writ petition that the ground floor was used for lodging purpose and the first floor was used for residential purpose was not correct. The fact that he converted the ground floor into five shop-rooms and applied for five separate connections with five meters for connected load of 5.5 KW each under commercial category and further applied for 3.5 KW connected load in respect of first floor for the domestic purpose, did not reveal from any supporting material or document. Therefore, the GRF rightly approved the action of the respondents. So far as the connected load of 6 KW under GPS category is concerned, since the petitioner had declared that the connected load was 6 KW as on date of installation on 12.9.2006, there was no infirmity in issuing the bills by the opposite parties. Therefore, the order passed by the GRF as well as Ombudsman-I need not be interfered with.

5. This Court heard the rival submissions of the parties and went through the records. The admitted fact that the petitioner applied for supply of electricity i.e., 2.5 KW for commercial purpose and 3.5 KW for domestic purpose and no agreement was executed by the consumer. There is no dispute that the supply of electricity to the premises of the petitioner was disconnected at certain point of time and there was no reconnection of electric supply after alleged disconnection. The petitioner did not pay any reconnection charges. Therefore, it can be presumed that there was no electric connection to the petitioner's premises. Admittedly, petitioner is a consumer under the opposite parties since 1976. The 1998 Code was modified on 7th September, 1998. Hence, the said provision is applicable from that date. Prior to that, the petitioner is governed by 1981 and 1995 Regulations. Under both the Regulations, reclassification of the consumer can be made by the authorities after calling upon the consumer to execute a fresh agreement. There is no provision for enhancement of any power load.

6. For better appreciation, clause-38 of Regulation 1981 and clause-41 of Regulation 1995 are quoted below:

Regulation 38 of the Orissa State Electricity Board (General Conditions of Supply) Regulations, 1981.

"**38. Re-classification of consumer**: If it is found that a consumer has been classified under particular category erroneously, or has altered the purpose of the supply as mentioned in the agreement, the Board may alter the classification, call upon the consumer to execute fresh agreement on the basis of the altered classification and may also revise the bills.

Regulation 41 of the Orissa State Electricity Board (General Conditions of Supply) Regulations, 1995

41. Re-classification of consumers- If it is found that a consumer has been classified in a particular category erroneously or has changed the purpose of the supply as mentioned in the agreement or has enhanced the consumption of power so as to exceed the limit of that category or has obtained order of reduction or enhancement of contract demand, the Engineer may re-classify him under appropriate category and issue notice to him to execute a fresh agreement on the basis of altered classification and/or modified contract demand. If the consumer does not take steps within the time indicated in the notice to execute the fresh agreement, the Engineer may, after issuing the show cause notice covering the period of clear seven days and after considering his explanation, if any, may disconnect the supply of power.

7. From a conjoint reading of the above provisions, it appears that when a consumer is to be re-classified, the authority has to call upon the consumer to execute a fresh agreement on the basis of the altered classification and may also revise the bills. In the present case, neither the authorities issued show cause notice to the petitioner nor did the petitioner execute any fresh agreement. Therefore, while determining the revised bill, the opposite parties should have taken note of the same instead of categorising the petitioner as "commercial consumer" and by applying 1998 Regulation calculating the bill taking into consideration the 1980 Regulation and making enhancement of 10% of the power supply and submitting the bill. The disputed period is prior to September, 1998 and the same shall be governed under Regulation 1981 and Regulation 1995 and after 1998 the opposite parties may give revised bill as per the said Code.

With the above modification of the impugned order, the writ petition is disposed of.

Writ petition disposed of.

2010 (II) ILR – CUT-1146

B.P.RAY, J.

W.P.(C) NO.7196 OF 2004 (Decided on 30.8.2010)

NAYEEM MD. LATIF ……. Petitioner.

.Vrs.

THE INDUSTRIAL DEVELOPMENT CORPN. OF ORISSA LTD. & ANR. ……. Opp.Parties.

INDUSTRIAL DISPUTES ACT,1947-(ACT NO.14 OF1947) SEC 25-FF

Transfer of Industrial Unit – It is settled that the transferee is the "Successor-in-interest" of the transferor and the employees of the business shall continue to entitle to all rights and privileges acquired by them by reasons of past services even after the transfer if there is continuity of service and identity of business.

In the present case the ACC Ltd. Being the Successor-in-interest of the IDC/IDCOL has taken over all the liabilities – It has carried out the same business of the previous owner and there is no break or charge of business. The ACC Ltd. has not only purchased the Industrial Unit but also purchased the good will and services of the petitioner and he was allowed to continue till his superannuation – Held, Opp.Parties are directed to pay the arrears of the petitioner after calculating his pay at revised scale of pay w.e.f. Dt.01.04.1998 along with interest.

(Para 9)

Case law Referred to:-

(1962-II LLJ 621 (SC) : (Ankpall Co-operative Agricultural & Industrial Society -V- Its Workmen).

For Petitioner - M/s. Sisir Das, P.K.Rath, A.K.Mohanty-B, A.K.Tandi, A.Das, S.R.Mohapatra.

For Opp.Parties - M/s. Girish Ch. Mohapatra, M.Mohapatra, P.Samal & S.Panda.

B.P.RAY,J In this writ application under Articles 226 & 227 of the Constitution of India, the petitioner Prays for a direction to the opp.parties to pay him the revised scale of pay with effect from 1.4.1998 along with the cumulative benefits and the arrear salary within a stipulated time.

2. The brief fact of the case is that the petitioner was appointed as a Typist-cum-clerk under the Industrial Development Corporation, Orissa (in

short, "I.D.C.") and joined at SAIL office of Hira Cement, a unit of I.D.C. on 6.6.1973 on 1.9.1974 the petitioner was transferred to the Head Office of I.D.C. at Kolkatta by Office Order Annexure-1. On promotion to the post of Supervisor, the petitioner was again transferred to Ferro Chrome Plant, a unit of I.D.C. on 9.1.1981 by order under Annexure-2. On 10.10.1984, under Annexure-3, the petitioner was again transferred to East Cost Beverage Ltd. Which is also a unit of IDC. On 3.10.1988 the petitioner was transferred to Hira Cement Works at Bargarh under Annexure-5 and thereafter on 13.10.1988 he was again transferred to Hira Cement Works, Kolkatta (Annexure-6). The petitioner's scale of pay was revised on 29.1.1996 w.e.f. 1.4.1990 under Annexure-7. On 31.12.1998 (Annexure-8) the petitioner was promoted to the post of Junior Officer and his scale of pay was revised w.e.f. 1.4.1998 meant for the Junior Officer of I.D.C. Thereafter the petitioner was asked under Annexure-9 to give his option whether he intends to enjoy the ICL pay structure, but the petitioner did not give any option. While the matter stood thus, the revised scale of pay, under Annexure-10, came into force. The petitioner made representation on 6.4.2001 under Annexure-11 praying therein to revise his scale of pay. When no action was taken by the opp.parties the petitioner filed a writ application vide W.P.(C) No. 11468 of 2003. During pendency of that writ petition on 29.1.2004 the name "ICL" was changed and was renamed as "Bargarh Cement Ltd." (in short, "BCL") under Annexure-12. On 15.3.2004 the aforesaid writ application was disposed of directing the petitioner to file a representation before the New Management and opp.parties were directed to take a decision within a period of three months. Accordingly, the petitioner made a representation to the BCL (Annexure-13) on 1.4.2004. But the BCL on 10.5.2004 requested the IDC to axamine the case of the petitioner. On 23.6.2004 under Annexure-15 the BCL refused to pay the revised scale of pay and advised the petitioner to approach the IDC. On 28.6.2004 (Annexure-16) finally the BCL rejected the representation of the petitioner. On the other hand, the IDC vide its letter dated 24.6.2004 (Annexure-17), directed the petitioner to take the matter to the BCL on the ground that the petitioner is not the employee of IDC. Hence, the petitioner has approached this Court by the present writ application.

3. On receipt of notice the opp.party no.1-IDC and the opp.party no.2 BCL filed their respective counter affidavits. The opp.party no.1 in their counter affidavit stated that the IDCOL Cement Ltd./ BCL was transferred since 31.3.1993 in due compliance of the provision of Sec. 25 FF of the I.D. Act, 1947. So the petitioner is not an employee of IDC. Their further case is that since the company converted into a separate company, namely; IDCOL Cement Ltd. W.e.f. 1.4.1993, all the assets and liabilities were transferred. Since the petitioner is primarily an employee of IDCOL Cement Ltd., he is

ceased to claim any benefit as an employee of IDC. The opp.party no.1 further stated that since now the petitioner is an employee of BCL, the grievance of the petitioner should be considered by the BCL. It is worthwhile to mention here that the petitioner is paragraph 6 of his writ petition has alleged that some of the junior officers, like one Goutam Mukherji, who were working with the petitioner, have been paid the revised scale of pay w.e.f. 1.4.1998.

4. The opp.party no.2 BCL in their counter affidavit has raised a question of maintainability of the writ application. Their further case is that since the petitioner has not given any option as asked by opp.party no.2, he is not eligible to get the revised scale of pay.

5. During the course of hearing an additional affidavit was filed on behalf of opp.party no.1 by one Padma Lochan Mahanta, working as Head (HRD), IDC wherein they have annexed a letter dated 26.6.2004 issued to the BCL in which the IDC had requested to consider the case of the petitioner. On further direction of this Court opp.party no.1 filed another affidavit indicating that since the ACC has purchased the shares of the ICL together with all rights and benefits, liabilities and obligations, they are liable to pay the claim of the petitioner. They have also annexed a judgment of this Court passed in O.J.C. No.5391 of 1997 (Narendra Nath Biswal V. State of Orissa and others) wherein this Court held that since the ACC has purchased the shares, the ACC is required to retain the services of all permanent employees, who were in employment of the Company as on the closing date.

6. It is the admitted case of the parties that during the continuance of the service of the petitioner, the scale of pay of the Junior Officer was revised. Though the petitioner has rendered his service he was not allowed to get the revised scale and was paid the old scale of pay till his retirement. Further, none of the opp.parties has stated that the petitioner is not liable to get his higher scale. They are only shifting their responsibility to each other.

7. The petitioner has retired from his service w.e.f. 31.12.2004 on attaining the age of superannuation. The petitioner is running from pillar to post to get his legitimate claim since 1998. Learned Counsel for the petitioner submits that the petitioner is suffering from heart disease and to meet the medical expenses he needs money.

8. It is the admitted fact that the IDC was the owner of the Industrial Unit and the petitioner was appointed by the IDC. Subsequently, the cement factory in question was renamed as “IDCOL Ltd.,” but it continued to be a unit of IDC and the petitioner was allowed to continue as an employee of

IDCOL being the employee of IDC. While continuing as such the petitioner filed a writ petition against IDC & IDCOL for revised scale of pay. While the petitioner was sub-judice before his Court the IDC sold and transferred the unit to BCL and the petitioner was allowed to continue as such under the Management of BCL which was subsequently named as ACC Ltd. In view of the above facts, the ACC is the successor-in-interest of IDC and has taken over all the assets and liabilities of the IDC/IDCOL as per the agreement made between the parties. In the case of **Ankpall Co-operative Agricultural & Industrial Society V. Its Workmen** (1962-II LLJ 621 (SC)) the Hon'ble Apex Court has categorically held that the subsequent purchaser of an industrial unit is the "successor-in-interest" of the previous owner and liable to take over the assets and liabilities and also liable to pay the service benefits to the employees of the previous owner.

9. It has been settled by various judicial pronouncements that the transferee is the 'successor-in-interest' of the transferor and the employees of the business shall continue to entitle to all the rights and privileges acquired by them by reasons of past services even after the transfer if there is continuity of service and there is identity of business. In the present case the petitioner was allowed to continue till his superannuation under the present management is continuing the business of the previous management. Hence, the present management is liable to pay the arrear salary of the petitioner at the revised scale of pay.

10. This Court in the case of Narendra Nath Biswal (supra) decided the similar matter like that of the petitioner and held that the ACC Ltd. Is the successor-in-interest of IDC/IDCOL and the petitioner is entitled to get the service benefits from the ACC Ltd. Being an employee of IDCOL.

In view of the decision of this Court as well the apex Court, it is clear that the ACC Ltd. Being the successor-in-interest of the IDC/IDCOL has taken over all the liabilities. It has carried out the same business of the previous owner and there is no break or change of business. The ACC Ltd. Has not only purchased the industrial unit, but also purchased the good will and the services of the petitioner were also taken over by the ACC and he was allowed to continue till his superannuation.

11. Considering the facts and circumstances of the case and in view of the discussions made above, the writ application is allowed. The opp.parties are directed to pay the arrears of the petitioner after calculating his pay at revised scale of pay w.e.f. 1.4.1998 along with interest.

Writ petition allowed.

2010 (II) ILR – CUT-1150

B.P.RAY, J.

CRL.A. NOS. 184/2000 & 185/2000 (Decided on 27.8.2010)

DHANESWAR PAIKRAY & ANR. ……. Appellant.

.Vrs..

STATE OF ORISSA ……. Respondent.

PREVENTION OF CORRUPTION ACT, 1947 (ACT NO. 2 OF 1947) – SEC.13 (1) (c).

Appellants were entrusted with renovation of tank – Allegation of misappropriation of funds – Re-measurement of the work done – Admitedly accused persons are not present when re-measurement was taken by P.W.19 – Original measurement book not proved by the prosecution – P.W.19 has not compared the entries of the earlier measurement with his measurement – In the absence of comparison between the two measurements quantification and valuation of the differential work is sheer guess work which can not form the basis for recording an order of conviction.

Held, prosecution has not brought the charges of misappropriation U/s.13 (1)(c) of the P.C.Act so also the accusation U/s.409 I.P.C.

(Para 15 & 16)

For Appellant - M/s.S.K.Mund & Associates.
For Respondent - Mr. S.Das (Standing Counsel for Vigilance Department)

B.P. RAY, J. These two appeals are analogous to each other and since they arise out of one common judgment, they are taken together for hearing and are disposed of by the following common judgment.

2. During the year 1984-85 appellant Debendra Narayan Giri (appellant in Criminal Appeal No.185 of 2000) was the B.D.O., appellant-Dhaneswar Paikray (in Criminal Appeal No.184 of 2000) was the Junior Engineer and appellant-Surendra Kumar Satapathy (in Criminal Appeal No.185 of 2000) was the Fishery Extension Officer of Naktideul Block in the district of Sambalpur. They were put to trial for commission of criminal misconduct as defined U/s. 5(1)(c) of the Prevention of Corruption Act, 1947, criminal breach of trust U/s. 409, I.P.C. in respect of Rs.1,21,297.50 and falsification of account as set out in Section 477-A, I.P.C. in furtherance of their common intention.

3. The accusations led to the trial briefly stated are that in the year 1980 the Government of Orissa launched ERRP programme for up-liftment of

financial condition of the rural people, which includes tank fishery programme. It was decided to take up 25 numbers of tanks in the entire Naktideul Block under the scheme and to select the beneficiaries for the purpose through village committee. In order to implement this scheme, the B.D.O., Debendra Narayan Giri directed the Junior Engineer, Dhaneswar Paikray to prepare the plan and estimate for renovation of tanks and put the same before him. Accordingly, the Junior Engineer prepared the estimates in respect of 25 tanks of the block and placed before the B.D.O. who approved the same and directed the Fishery Extension Officer for its execution.

4. It is further alleged that the Fishery Extension Officer, who was entrusted with the work moved for release of advance and accordingly a sum of Rs.90,000/- was made over. The renovation work in all the 25 tanks was completed in June, 1984. The Junior Engineer took the measurement and recorded the same in the Measurement Book No. 114. The B.D.O. check measured all the above measurement and directed the Head Clerk for preparation of final bills. The final bills after adjustment of the advance money were prepared and were placed before the Chairman for his counter signature. The Chairman, however, refused to countersign the final bills and returned the files. The Fishery Extension Officer, Sri Satapathy put up the files before the B.D.O. requesting for release of the bills early as those were long pending. Despite the refusal by the Chairman, the B.D.O. ordered for payment.

5. After the payment, there was large scale of resentment by the general public as a consequence thereof an enquiry was caused by the Sub-Collector, Rairakhol, who deputed technical persons for spot verification and measurement. The Assistant Engineer and the Junior Engineer, who re-measured the renovated tanks gave their findings that some works in respect of 20 tanks have been done and the estimated cost of the said work would be Rs.35,991.60 only against Rs.1,66,287.00 already paid. Since one monsoon has passed in the meanwhile looking to the field situation an allowance of 25% was given. Taking into consideration the extent of work and the allowances given, the total amount was calculated at Rs.44,989.50. During the enquiry, it was ascertained that in respect of 5 tanks absolutely no work had been done and false measurements and check measurements have been recorded by the Junior Engineer and the B.D.O. Thus, the accused persons have misappropriated Rs.1,21,298.50 by committing falsification of accounts in furtherance of their common intention and thereby they have mis-conducted themselves.

6. When all these discrepancies came to light on 9.6.1986 the Inspector of Police, Vigilance, Sambalpur lodged an F.I.R. Accordingly, Sambalpur Vigilance P.S. Case No. 20 of 1986 was registered, investigation was taken up. On completion of the same, charge sheet was submitted against all the

accused persons U/s. 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act, 1947 and U/ss. 409/477-A/34 I.P.C.

7. The plea of the accused-appellants is of complete denial. They have further pleaded that the work in question had been duly executed and there was no irregularity whatsoever. The so called enquiry caused by the Sub-Collector and the measurement stated to have been taken after lapse of one year during which one rainy season has passed, can not be held to the basis for arriving at the conclusion that no work had been done.

8. Prosecution has examined as many as 23 witnesses to bring home the charges. The accused persons have also examined 4 witnesses in their defence.

9. The gravamen of the charges are as to whether the accused persons in their capacity as public servants in furtherance of their common intention have mis-conducted themselves and dishonestly and fraudulently misappropriated Rs.1,21,298.50 and with intent to defraud the Government by falsifying the measurement books, bills etc.

10. The learned trial court recorded its finding on the basis of the evidence of P.W.19., Assistant Engineer, who conducted enquiry submitted the measurement under Ext. 34 and the report under Ext. 35.

11. It is contended by the appellants that the conclusion arrived at by the learned Special Judge, Vigilance is thoroughly misconceived and baseless. The finding that the accused persons have misappropriated the amount meant for renovation of tank is not supported by any legal evidence. On the other hand, there are copious materials both oral and documentary which unerringly prove the execution of work, therefore, their convictions need to be set aside.

12. Before adverting the evidence of P.W.19 the sworn testimonies of the other witnesses need to be scrutinized carefully. P.Ws.3,6,13,15 and 16 are the Sarpanchs of different Gram Panchayats of Naktideul Block where the tank renovation work was undertaken. All the witnesses have categorically deposed that renovation work was done. Similarly P.W.7, the Ward Member, P.W.8, a Priest and P.W.17, a School Teacher unequivocally stated in their evidence that the tanks of their village were renovated. Besides the above witnesses, some local residents/cultivators namely, P.Ws.6,9,10,11,12 and 18 have also been examined by the prosecution. Their evidence disclose that during the year 1984-85 tank renovation was carried out under the ERRP Scheme and the Muster Rolls were being maintained. On combined reading of the evidence of all those witnesses, it can be safely deduced that the renovation of tanks in the block was undertaken by the authorities and the same was also executed. In this regard, the evidence of P.W.23 the

investigating officer clinches the issue. In his evidence he has deposed that during the course of investigation, he examined some of the labourers with reference to the Muster Roll to find out if they had worked and received their remuneration. In view of this evidence, there is hardly any scope to harbour any kind of doubt regarding execution of the work.

13. Much emphasis and weight have been attached to non-seizure of Muster Roll by the investigating officer. Almost all the witnesses examined by the prosecution have deposed that the Muster Rolls were being maintained and the labourers were being paid their remuneration/wages. The investigating officer has also fully corroborated the said fact that he examined the labourers with reference to the Muster Roll. The case records were seized from the Head Clerk. He could not be examined as he was dead. No other person has been examined to prove that the case record did not contain the Muster Roll. Merely because, the investigating officer did not mention in the seizure list the same would not be sufficient to hold that there was no Muster Roll particularly when he himself has examined the witnesses with reference to the same. The evidence of other investigating officer, P.W.21, also lends corroboration to the existence of Muster Roll. In cross-examination while answering a question he has deposed that he had not examined the labourers whose names find place in the Muster Roll. The combined reading of the above evidence lead to irresistible conclusion that Muster Roll was being maintained by the Block authorities and the labourers engaged for tank renovation work were being paid their wages through it.

14. The next question comes for consideration is as to whether the work of renovation of tank has been executed or not. Admittedly, the tanks were renovated during May 1984-85. Accordingly, the same were measured and check measured by the Junior Engineer and B.D.O. The works in question were re-measured by the Asst. Engineer P.W. 19, pursuant to an enquiry ordered by the Sub-Collector. P.W. 19 re-measured the tank on 25.05.1985 and 28.5.1985 i.e. almost a year after. During the said period one rainy season has already passed through. In course of renovation of tanks the mud and silt were removed from the tanks and are put on the embankment. During rain the mud and silt have flown down to the tanks and got deposited inside the tanks. Exactly the same has been found by P.W. 19. He, in his evidence, has deposed that at the time of taking measurement the pits were filled up partly with the mud and sand. The works were executed in the month of May, 1984. The rainy season has set in soon after the renovation. In such circumstances, it was not possible to opine conclusively that work was not done. P.W. 19 in his cross-examination has further stated that the earth removed from the tanks was put on the embankment and he has not measured the mud removed from the tanks and put on embankment. Had he

measured the same, it would have given some indication regarding the extent of excavation done in the tanks.

15. Admittedly, the accused persons are not present when re-measurement was taken by P.W. 19. The enquiry and measurement have been conducted behind their back. Therefore, suspicion is raised regarding the authenticity and correctness of the report. The original measurement books have not been proved by the prosecution. P.W. 19 candidly has admitted that he has not compared the entries of the earlier measurement with his measurement. In absence of this comparison between the two measurements, quantification and valuation of the differential work is sheer guess work, which cannot form the basis for recording an order of conviction.

16. Considering the evidence available on record and viewing from different perspective, it can safely be concluded that the prosecution has not brought the charges of misappropriation u/s. 13(1)(c) of the P.C. Act and Section 409, I.P.C. home , therefore, the same fails. As regards the charge u/s.477-A, IPC, there is no evidence to constitute the said offence. Since the works have been done and payments have been made in execution of the same, the accusation of falsification of accounts must also fail.

17. In the result, both the appeals are allowed. No cost.

Appeal allowed.

2010 (II) ILR – CUT-1155

B.K.PATEL, J.

W.P.(C) NO.13080 OF 2008 (Decided on 19.11.2010)

MANIKESWARI PRASAD DEV
@MANIKESWARI PRASAD DEB …… Petitioner.

.Vrs.

KISHORE PRASAD DEB ……Opp.Party

CIVIL PROCEDURE CODE, 1908 (ACT NO. 5 OF 1908) – ORDER 6 Rule 17.

Amendment of written statement – After commencement of trial – Proposed amendment relates to description of the suit property and it does not seek to with draw any admission made in the written statement – Reasons assigned by the trial Court in refusing amendment of written statement are not sustainable – Held, impugned order is set aside – Direction issued to the Court below to allow amendment subject to payment of cost of Rs.1000/-.

(Para 13,14)

Case laws Referred to:-

1.2007 (Ii) OLR (SC) 544 : (Andhra Bank -V- ABN Amro Bank N.V. & Ors.)
2.1997 (4) CCC 141 (SC) : (Heeralal -V- Kalyan Mal & Ors.).
3.2009(1) OLR (SC) 608 : (South Konkan Distilleries & Anr.-V-Prabhakar Gajanan Naik & Ors.).
4.1991 (II) OLR 456 : (Smt.Sulochana dei @Swain & Anr.-V-Indramani Swain).
5.1991(II) OLR 456 : (The Nayabadi & Ors.-V- Smt.Sanghamitra Sahoo & Anr.).
6.1998(II) OLR 127 : (Paradip Port Trust & anr.-V-M/s. Pearl Fish Enterprises & Ors.).
7.1985(I) OLR 256 : (Shri Shri Kashi Biswanath Dev represented by Laxmidhar @ Lakhan Jena –V-Paramananda Routrai & Ors.).

For Petitioner - M/s. B.Sahoo, A.Tripathy, B.Mohanty & C.Pattanaik.
For Opp.Party - M/s. S.K. Pradhan.

B.K. PATEL, J. Legality of the order dated 4.9.2008 passed by learned Civil Judge (Jr. Divn.), Berhampur in T.S. Case No.134 of 1996 rejecting petitioner's application under Order 6 Rule 17 of the C.P.C. for amendment of written statement has been assailed in this writ petition.

2. Opposite party is the plaintiff and petitioner is the defendant in the suit. Plaintiff and defendant are brothers. In terms of compromise decree passed in T.S. No.26 of 1972, plaintiff, defendant and their five co-sharers were allotted and are in occupation of different portions of share land as per the suit plan. Plaintiff is the owner in possession over plots C_1 and C_2 situated adjacent to plots B_1 and B_2 allotted to the defendant. Plaintiff's share land has been recorded separately under Khata No.989/19 of village Paramahansapur in Mutation Case No.8899 of 1995 in accordance with the compromise decree. It is alleged by the plaintiff that defendant has broken a portion of wall on the Western boundary of plots C_1 and C_2 and has raised construction thereon. On the basis of such allegation, plaintiff has filed the suit for mandatory injunction to direct the defendant to remove the construction raised by him by breaking the wall and to restore the suit wall to its original condition. Defendant has filed written statement denying the allegation to have broken any wall. It is pleaded that as per the partition in terms of compromise decree there is no wall in existence as claimed by the plaintiff. It is categorically pleaded that parties are in possession and enjoyment of land allotted to them as per the plan attached to the compromise decree in T.S. No.26 of 1972. It was also categorically alleged that plan annexed to the plaint is inadequate and does not give a correct state of affairs.

3. In the application under Order 6 Rule 17 of the C.P.C. filed by the defendant it is averred that as the crucial question to be determined in the suit is as to whether the suit property belongs to plaintiff or defendant, written statement is required to be amended to supply some relevant informations which were inadvertently left out. The proposed amendment seeks to incorporate the following two paragraphs in the written statement:

> "9(a) That the Plaintiff's share is marked as "C_1 & C_2", where the share of the Defendant is marked as "B_1 & B_2" in the partition decree passed in T.S. 26/1972 by the Subordinate Judge, Berhampur, Ganjam. The Plot 'B_1' measures 89 link (eighty nine) in width to the North and 120 link (one hundred twenty) to the South. Similarly the width of the Plot 'C_1' to the North is 85 link (eighty five) and 71 link (seventy one) to the South. The width of 'D_1' to North is 85 link (eighty five) and 65 (sixty five) to the South. Plot 'E_1' measures 100 link (one hundred) to the North and 98 link (ninety eight) to the South. Plot 'F_1' measures 105 link (one hundred five) to the North and 87 link (eighty seven) to the South. Plot 'G_1' measures 75 link (seventy five) to the North and 85 link (eighty five) to the South and Plot 'A_1' measures 95 link (ninety five) to the North and 95 link (ninety five) to the South.

> 9(b) That the boundary line between the Plaintiff (Plot C_1) and Defendant Plot B_1) has been shown as 'Q' & 'K' as per the plan attached to the written statement and forms part of the same. Moreover the measurement between 'P' & 'S' is 401 link in length. The area between 'P' & 'Q' is 20 link in width and 'S' & 'R' is 20 link in width."

4. In rejecting the application for amendment it was observed by the learned trial court that the proposed amendment which seeks to specify the length and width of the share in the partition decree passed in T.S. No.26 of 1972 is not required for just decision of the case. It was also held that the amendment would introduce a new case after commencement of hearing of the suit.

5. Learned counsel for the petitioner contended that parties are not in dispute regarding compromise decree passed in T.S. No.26 of 1972. In the said decree share of each of the co-sharers was clearly defined. As the plaint and the written statement do not adequately describes respective share land of the parties, defendant simply wants to provide better description of suit property in the written statement by way of amendment. Defendant does not claim any relief on the basis of proposed amendment. Defendant also seeks neither to withdraw any admission nor to make any new denial. Insertion of better particulars of the suit property into the written statement shall be in the interest of just adjudication of dispute between the parties by bringing in clarity and removing confusion. In support of his contentions learned counsel for the petitioner relied upon decision in **Andhra Bank -vrs.- ABN Amro Bank N.V. and others** : 2007 (II) OLR (SC) 544

6. In reply, learned counsel for the opposite party contended that learned court below has rightly rejected the application for amendment of written statement filed at the belated stage after commencement of hearing of the suit. According to him, proposed amendment will not only change the nature and constitution of the suit but also is not necessary. Reliance was placed by the learned counsel for the opposite party on the decisions in **Heeralal –vrs.- Kalyan Mal & Ors**.: 1997 (4) CCC 141 (SC) and **South Konkan Distilleries and another –vrs.- Prabhakar Gajanan Naik and others** : 2009(I) OLR (SC) 608.

7. As has been reiterated in **Smt. Sulochana Dei @ Swain and another –v- Indramani Swain** : 1991(II) OLR 456, powers of amendment vested in Court in terms of Order 6, Rule 17 of the Code of Civil Procedure,1908 (in short, 'the Code') are very wide. It is the duty of concerned Court to allow amendment of pleading when same is necessary for facilitating determination of real questions in controversy. Main considerations to be

borne in mind while dealing with prayer for amendment are advancement of interest of substantial justice, and avoidance of multiplicity of litigation. A liberal approach is intended since Courts exist to decide rights of the parties and not to punish them for mistakes they make in conduct of their cases. There are, however, two limitations on power of Court to allow amendment. It should not be allowed where it has effect of substituting one cause of action for another, or changing the subject matter of dispute. The other is that an amendment should not ordinarily be allowed if it would deprive other side of a valuable right accrued by lapse of time. Where, however, proposed amendment is in essence a different approach to the facts in existence, amendment is to be allowed.

8. In **The Nayabadi and others –v- Smt. Sanghamitra Sahoo and another** : 1991(II) OLR 456 it has been held that when an amendment sought for is in continuation of the stand already taken in the written statement and for the purpose of better clarification of the same, it should be allowed provided it does not change the nature and character of the suit.

9. It is pointed out in **Andhra Bank -vrs.- ABN Amro Bank N.V. and others(supra),** relied upon by the learned counsel for the petitioner, that mere delay is not a sufficient ground to disallow amendment of pleadings unless the facts sought to be introduced relate to any cause of action which is barred by time. Prayer for amendment of written statement should not be considered with the same rigour and strictness as prayer for amendment of plaint. In case the plaintiff has already examined some witnesses it can be compensated in terms of cost. In this connection, decisions of this Court in the cases of **Paradip Port Trust and another -v- M/s Pearl Fish Enterprises and others**: 1998(II) OLR 127 and **Shri Shri Kashi Biswanath Dev represented by Laxmidhar alias Lakhan Jena -v- Paramananda Routrai and others**: 1985(I) OLR 256 also may be referred to.

10. In the present case, rival claims of the parties are based on the compromise decree passed in T.S.No.26 of 1972. Plaintiff as well as defendant claim title and possession over the suit property on the basis of said decree. In the application for amendment plaintiff does not seek deletion of any pleading. His prayer is introduction of two additional paragraphs to the written statement. Defendant has not made any counter claim. So question of seeking a new relief does not arise. Pleadings sought to be incorporated into the written statement extracted above contains an elaborate description of the area of the suit property upon specific reference of the decree passed in T.S.No.26 of 1972. In paragraph-1 of the written statement itself it has been averred that the plan annexed to the plaint is inadequate and does not give correct state of affairs. Proposed amendment is nothing more than elaboration, explanation and clarification of the suit

property by the defendant. Such description is certainly in the interest facilitating determination of dispute between the parties. Admittedly, defendant has filed the application for amendment at a belated stage after commencement of trial. But delay alone cannot be the ground to refuse amendment of the written statement when plaintiff can be compensated in terms of cost for inconvenience caused to him.

11. It is difficult to appreciate how the decisions relied upon by the learned counsel for the opposite party is of any assistance to him. Decision in **Heeralal –vrs.- Kalyan Mal & Ors** (supra) relates to an application for amendment of written statement to withdraw earlier admission totally displacing case of the plaintiff causing irretrievable prejudice which could not be compensated in terms of cost. In the present case, proposed amendment is simple description of the suit property and it does not seek to withdraw any admission taken in the written statement.

12. Decision in **South Konkan Distilleries and another –vrs.- Prabhakar Gajanan Naik and others** (supra) related to amendment of counter claim made in the written statement after expiry period of limitation for making such counter claim. In the said decision also it has been observed that it is settled that court must be extremely liberal in granting prayer for amendment. It is always open to the court to allow an amendment if it is of the view that allowing of an amendment shall really sub-serve the ultimate cause of justice and avoid further litigation.

13. Keeping in view the facts and circumstances of the case, nature of the pleadings of the parties, nature of amendment sought to the written statement and the legal principles referred to above, it is found that the reasons assigned by the trial court in refusing amendment of written statement are not sustainable. Therefore, refusal to accept prayer for amendment was improper.

14. For the reasons stated above, the impugned order is set aside and learned court below is directed to allow amendment sought for by the defendant subject to payment of cost of Rs.1000/-(rupees one thousand) by the defendant to the plaintiff within four weeks from today. Plaintiff shall also be entitled to further examine witnesses already examined by him as well as to examine any other witness and to further cross-examine witnesses, if any, examined by the defendant.

The writ petition is accordingly allowed.

Writ petition allowed.

2010 (II) ILR – CUT-1160

B.K.NAYAK, J.

CRLMA. NO. 152 OF 2010 (Decided on 8.10.2010)

BIDHU BISOYI & ANR. ……. Petitioners.

.Vrs.

STATE OF ORISSA …….. Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – Ss. 437, 439.

Bail – Conditions while granting bail – Direction to deposit very high amount of cash or fixed deposit as security, amounts to denial of bail.

In this case one co-accused who is a sitting MLA was released on bail by this Court on furnishing cash security of Rs.3 lakhs with other conditions – So the learned trial Court allowed the present petitioners on bail on the ground of parity with similar conditions – Hence this application to set aside the same.

Parity does not mean to impose same conditions which may vary depending upon the social and economic status, position and affordability of the accused persons – Held, this Court set aside the conditions imposed by the trial Court by imposing fresh conditions.

(Para 8)

Case laws Referred to:-

1.AIR 1985 SC 1666 : (Keshab Narayan Banerjee & Anr.-V-The State of Bihar).

2.(2000) 19 OCR (SC) 503 : (Jagroop Singh -V- K.Chatterjee).

For Petitioner - Savitri Ratho
For Opp.Party - None

Heard learned counsel for the petitioners and learned Additional Standing Counsel for the State. Perused the records.

2. The petitioner nos.1 and 2 in CRLMA NO.152 OF 2010 pray for setting aside/modification of the conditions imposed in the common bail order dated 16.08.2010 passed by the learned Special Judge (Vigilance)-cum-Additional Sessions Judge, Berhampur in Bail Application Nos.282 of 2010 and 281 of 2010. Similarly, petitioners in CRLMA No.155 of 2010 pray for setting aside/modification of the conditions imposed in the bail order dated 07.09.2010 passed by the learned Special Judge (Vigilance)-cum-Additional Sessions Judge,

Berhampur in Bail Application No.307 of 2010 of his Court. Since the bail orders passed by the lower court in all the bail applications arise out of G.R.Case No.3 of 2010 of the court of learned S.D.J.M., Berhampur and the conditions imposed by the lower court in the bail orders are exactly identical for all the petitioners in the bail applications, both the CRLMAs are heard together and disposed of by this common order.

3. The petitioners along with others including one Ramesh Jena, who is a sitting M.L.A., are implicated as accused persons in G.R.Case No.3 of 2010 of the court of learned S.D.J.M., Berhampur, arising out of Gosani Nuagaon P.S.Case No.1 of 2010 for alleged commission of offences under Sections 120-B/212/302/34 of the I.P.C. and Sections 25(1-B) (a) and 27 of the Arms Act. It is to be noted that while the petitioners were in custody, co-accused-Ramesh Jena filed BLAPL No.12462 of 2010 in this Court under Section 439, Cr.P.C. for his release on bail in the aforesaid G.R.Case. The said bail application was disposed of by order dated 30.07.2010 and co-accused-Ramesh Jena was directed to be released on bail on certain terms and conditions which are extracted hereunder :

" It is directed that the petitioner be admitted to bail of Rs.3,00,000/- (Rupees three lakhs only) with two solvent sureties each for the like amount to the satisfaction of the learned S.D.J.M., Berhampur and on furnishing cash security of Rs.3,00,000/- (Rupees three lakhs only) subject to the conditions that, until conclusion of trial.

(i) The petitioner shall not leave the territorial limits of State of Orissa without prior permission of the Court in which the case may be pending ;

(ii) The petitioner shall ordinarily reside in Bhubaneswar;

(iii) The petitioner shall furnish his address and telephone numbers to the D.C.P., Bhubaneswar and S.P., Berhampur immediately after his release from custody;

(iv) The petitioner shall not leave Bhubaneswar without prior intimation to D.C.P., Bhubaneswar;

(v) The petitioner shall furnish his itinerary to D.C.P., Bhubaneswar before leaving Bhubaneswar;

(vi) The petitioner shall not enter into the territorial limits of Berhampur Municipality without prior permission of the Court in which the case may be pending ; and

(vii) The petitioner shall not make any attempt to influence any witness while on bail"

4. After disposal of BLAPL No.12462 of 2010 by this Court, the bail applications of the present petitioners were heard by the Special

Judge (Vigilance)-cum-Additional Sessions Judge, Berhampur and diposed of by the impugned orders wherein the lower court has directed for release of the petitioners on bail on the ground of parity and further that the main accused was released on bail by this Court, by imposing the same terms and conditions as had been imposed by this Court in BLAPL No.12462 of 2010, only subject to substitution of the words, "Berhampur" and "S.P." for the words, "Bhubaneswar and "D.C.P.".

5. It is contended by the learned counsel for the petitioners that in BLAPL No.12462 of 2010 co-accused-Ramesh Jena was directed to be released on furnishing cash security of Rs.3.00 lakhs and executing bond for Rs.3,00 lakhs with two local solvent sureties each for the like amount and in giving such direction this Court was probably persuaded by the fact that the said co-accused was an M.L.A. and a moneyed and influential man, but the petitioners are ordinary individuals, who can not be equated with the said co-accused and they are unable to arrange cash of Rs.3,00 lakhs each and sureties for Rs.3,00/- lakhs each and as a result they have to languish in jail even though the court below passed bail order in their favour. It is further submitted that co-accused Ramesh Jena is an M.L.A., who is required to stay in Bhubaneswar to discharge his official duties and has facilities to stay there. So far as the petitioners are concerned they are neither required nor have the means and resources to stay at Bhubaneswar. Since charge sheet has already been submitted, there is no question of tampering with the evidence by the petitioners. Imposition of the aforesaid conditions mechanically by the court below virtually amounts to rejection of petitioners' prayer for bail.

6. It has been held by the Apex Court in the case of Keshab Narayan Banerjee and another v. The State of Bihar, AIR 1985 SC 1666 that imposition of condition for deposit of very high amount of cash or fixed deposit of a nationalized Bank by way of security virtually amounts to denial of bail. Such conditions are liable to be set aside/modified. It is also held in the case of Jagroop Singh v. K.Chatterjee; (2000) 19 OCR (SC) 503 that affordability of the prisoner must be a consideration for the Court in fixing the amount of bond.

7. Considering the facts and circumstances of the present case, I am of the view that the petitioners can not be equated with co-accused-Ramesh Jena with regard to their status and position in life and affordability to furnish security. The lower Court has granted bail to the petitioners on the ground of parity with co-accused –Ramesh

Jena. For maintaining parity, it is necessary for the court to examine materials in order to ascertain the nature and extent of involvement or complicity of accused persons in the crime. Parity, however, does not mean and extend to the nature of terms and conditions to be imposed while granting bail, which may vary depending upon the social and economic status, position and affordability of the accused persons.

8. Considering the facts and circumstances of the case, I am of the view that the conditions imposed by the court below virtually amount to denial of bail to the petitioners. I therefore, set aside the conditions imposed by the court below in the impugned bail orders and direct that the petitioners shall be released on bail on furnishing cash security of Rs.5,000/- (rupees five thousand) each and executing bond for Rs.50,000/- (rupees fifty thousand) with two local solvent sureties each for the like amount to the satisfaction of the learned S.D.J.M., Berhampur in G.R.Case No.3 of 2010 subject to the following further conditions that :-

(i) the petitioners shall not leave the territorial limits of State of Orissa without prior permission of the court in which the case may be pending;

(ii) the petitioners shall furnish their address and telephone numbers to the Superintendent of Police, Berhampur immediately after their release from custody;

(iii) the petitioners shall appear before the L.I.C., Gosani Nuagaon Police Station once on the last Saturday of every month till conclusion of trial of the case and in case of non-appearance the I.I.C., Gosani Nuagaon Police Station shall promptly intimate the trial court about such non-appearance;

(iv) the petitioners shall appear before the court on each date till conclusion of trial unless on any particular date the appearance of any of them is dispensed with for sufficient reasons; and

(v) the petitioners shall not, directly or indirectly, make any inducement threat or promise, nor shall in any manner try to influence the prosecution witnesses.

Violation of any of the aforesaid conditions shall entail cancellation of bail.

Both the CRLMAs are accordingly disposed.

Application disposed of.

2010 (II) ILR – CUT-1164

S.K.MISHRA, J.

CRLREV. NO.795 OF 2008 (Decided on 21.10.2010)

BASANTI CHAMPATI …… Petitioner.

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.202.

Order taking cognizance – Magistrate is required to see whether the materials on record prima facie reveal a case as alleged by the Complainant or otherwise – He is not required to examine in detail to see whether the statements of witnesses are sufficient to convict the accused.

Held, order refusing to take cognizance of the offence alleged is not sustainable which is set aside and the learned Magistrate is further directed to reconsider the matter in the light of the observations made in the judgment.

For Petitioner - D.P.Dhal.
For Opp.Parties - Jyotirmaya Sahoo.

Heard learned counsel for both the parties.

Admit.

The petitioner assails the order dated 13.12.2007 passed by the learned J.M.F.C., Banpur in I. C.C. No.69 of 2007 refusing to take cognizance of the offence alleged.

The facts leading to filing of this Criminal Revision may be briefly stated as follows:

The present petitioner filed a complaint before the learned J.M.F.C., Banpur, which was registered as I. C.C. No.69 of 2007. The offences alleged were under Sections 323, 294, 354, 379/506 of the Indian Penal Code, hereinafter referred as "I.P.C.", for brevity. The complainant alleged that two days prior to the date of occurrence, due to quarrel among the children, there was exchange of hot words in between the complainant and the accused persons and at that time, the accused persons threatened to see her in future. The complainant further alleged that when she was standing near the front verandah of her house, suddenly the accused persons arrived

there and abused her in fithy language. When she protested, the accused persons rushed at her, caught hold of her pigtail and twisted the same. The complainant fell down on the floor as a result of which she became half naked. Thereafter, the accused persons dealt kick blows to the back of the complainant and snatched away a gold chain from her neck.

After recording the initial statement of the complainant under section 200 of the Criminal Procedure code, 1973, hereinafter referred to as "Code", for brevity, the learned Magistrate examined the witnesses produced by the petitioner under Section 202 of the Code. Two witnesses namely, Banamali Biswal and Gobardhan Pradhan were examined on behalf of the complainant. After recording the initial statement and the statements of the witnesses under Section 202 of the Code, learned trial court refused to take cognizance and such order has been assailed in this Revision.

Learned counsel for the petitioner submits that the order passed by the learned Magistrate is palpably wrong and it is not the duty of the Magistrate to assess the evidence at that stage. Since the Magistrate has discussed the materials available on record and came to a conclusion that the witnesses can not be believed, he has entered into a realm of appreciation of evidence, which is required at the end of the trial. Learned counsel for the opposite parties, on the other hand, supported the findings recorded by the trial court and prayed to dismiss the revision petition.

On examination of the records it is found out that the Magistrate has come to the conclusion that the witnesses, who have fully corroborated the facts mentioned in the complaint petition, seems to be not believable. It is appropriate to quote the order passed by the learned Magistrate to appreciate the error committed by him. The relevant portion of the order reds as follows:

"xxx It is found that the complainant and two witnesses stated about the occurrence fully corroborating that the facts mentioned in the complaint petition which seems to be unbelievable on the part of two witnesses who stated after two months of the occurrence but could re-produce the exact verbatim used in the complaint petition. The witnesses stated that they have seen all the occurrence but it is seen from their statement that they being the co-villagers, they have not opened mouth on the act of the accused nor told anything to the complainant after such occurrence but they could come to this court after two months to say about the occurrence what they have seen. So the entire occurrence as alleged seems to be unbelievable. Applying pious judicial mind and after careful perusing the materials

on record I am of the considered opinion that there is no sufficient ground to proceed against the accused cited in the complaint petition. Accordingly, complainant petition stands dismissed under Section 203 of Code".

On a plain reading of the order impugned, this Court has come to the conclusion that the Magistrate has entered into a detailed discussion on the merits of the case on appreciation of evidence. At the stage of taking cognizance, the Magistrate is required to see whether the materials on record prima facie reveal a case as alleged by the complainant or otherwise. He is not required to examine in detail to see whether the statements of witnesses are sufficient to convict the accused. Moreover, the learned Magistrate has very strangely come to the conclusion that the witnesses are not believable because they support the case of the complainant after two months of the occurrence and they have not interfered in the incident. These are the circumstances which should be taken into consideration at the final stage of the criminal trial. Hence, the considerations sought by the learned Magistrate are not germane to the process of taking cognizance.

Accordingly, the order passed by the learned Magistrate is not sustainable. In the result the Revision application is allowed. The order dated 13.12.2007 passed by the learned J.M.F.C., Banpur in I.C.C.No.69 of 2007 is here by set aside. The learned Magistrate is directed to reconsider the matter of taking cognizance in the light of the observations made in the judgment.

The petitioner is directed to appear before the learned Magistrate on 14.12.2010.

Revision allowed.

2010 (II) ILR – CUT-1167

C.R.DAS, J.

CRL. REV. NO.416 OF 2000 (Decided on 16.7.2010)

BINODA BIHARI SHARMA …….Petitioner.

.Vrs.

STATE OF ORISSA …….. Opp.Party.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – SEC.279, 304-A.

Vehicular accident – Conviction by the Courts below – Defence plea is accident due to bursting of tyre – It was within the special knowledge of the driver – "Poor maintenance" of vehicle itself a "negligent act" contributing to the cause of accident, can not be considered in favour of the accused in absence of proof by preponderance of probabilities to the effect that the vehicle has had been maintained with proper care.

Held, no justification to interfere with the order of conviction – However since 20 years have been elapsed from the date of occurrence instead of substantive sentence of imprisonment the petitioner be saddled with sentence of fine only.

(Para 8,9 & 10)

For Petitioner - M/s. R.N.Mohanty, M.K.Panda, & R.C. Ojha.
For Opp.Party - Addl. Standing Counsel

C.R.DASH, J. This revision arises out of the appellate judgment of conviction of the petitioner under Sections 279/304-A I.P.C. The petitioner has been sentenced to suffer R.I. for three months for the offence under Section 279 I.P.C. and R.I. for six months for the offence Under Section 304-A I.P.C. with a direction that both the sentences shall run concurrently.

2. Compendium of the prosecution case is that at about 9.30 A.M. on 09.08.1990 near Sendhei Bridge of village Tarimula in the district of Keonjhar, the present petitioner caused serious to one Pinku Rout, a boy of four years old, by dashing against him the scooter, he was driving in a rash and negligent manner. Subsequently said Pinku succumbed to the injuries while undergoing treatment in S.C.B. Medical College and Hospital, Cuttack. On the basis of the causality memo submitted by the Medical Officer (P.W.11), P.W.13, S.I. of Police attached to Ghasipura Police Station drew plain paper F.I.R. and took up investigation. On completion of investigation,

charge sheet was filed against the petitioner implicating him in the offence punishable under section 279, 304 A/201 I.P.C.

3. The defence plea is one of complete denial and alternatively it is pleaded that on the relevant date on which the accident occurred the scooter alleged to be involved in the accident was under repair in the garage of D.W.1 located at Jajpur Road.

4. The prosecution has examined 13 witnesses to prove the charge. Out of them learned trial court held P.Ws. 1,2,3,4,5, 6 and 8 to be the eye witnesses to the occurrence. P.Ws. 11 and 12 are the Medical Officers. P.W.13 is the I.O. Some of the witnesses had attended the "Sudhikriya" of the deceased boy and P.W.7 claimed himself to be the pillion rider at the time of the accident.

The defence has examined D.W.1 to prove the fact that on the relevant date of the alleged accident the scooter was being repaired by D.W.1 in his garage at Jajpur Road.

5. Learned counsel for the petitioner submits that there are material contradictions in the evidence of the witnesses. It is further submitted that P.W.5 having corroborated the defence plea to the effect that the accident was caused owing to bursting of tyre making the scooter to swerve beyond the control of the petitioner, the conviction as recorded by the learned court below is not tenable in the eye of law. Learned counsel for the state on the other hand supports the impugned judgment.

6. It is well settled in law that the revisional court is precluded from scanning the evidence as done in an appeal unless it is shown to the satisfaction of such court that there has been error by the court concerned in the decision making process. It has been held in number of decisions that improper appreciation and mis-appreciation of evidence is an error pertaining to such a realm.

7. Perusal of the impugned judgments shows that learned trial court held P.Ws.1 to 5, 6 and 8 to be the eye witnesses and relied mostly on the evidence of P.W.1, who was present just at the spot of the occurrence. He also took into consideration evidence of other prosecution witnesses. Learned Sessions Judge in appeal, as found from the appellate judgment, has scanned the evidence in great details and has held that P.Ws. 6 and 8 are post-occurrence witnesses. He has held P.Ws. 1 to 5 to be eye witnesses and relying on their evidence and other corroborative evidence has held the petitioner guilty of offence under section 279/304A I.P.C. In view of cogent evidence adduced by the prosecution through P.Ws. 1 to 5, learned courts below, on the face of such evidence have rightly disbelieved D.W.1. On thorough re-examination of the evidence on record, learned appellate court having reached its findings, I do not feel persuaded to re-examine the evidence against in exercise of my revisional jurisdiction. The

contradictions pointed out by learned counsel for the petitioner are also at the fringe and by no supposition, those can be held to have struck at the very root of the prosecution case.

8. Now coming to the defence plea raised for the first time in appeal to the effect that the accident happened owing to bursting of the tyre of the scooter and P.W.5 has corroborated such defence plea, it is found from discussion in the appellate judgment that P.W.5 has testified that the scooter was being driven in speed at the time of accident. Bursting of tyre may happen only when the tube and tyre have already spent their lives or in the event of poor maintenance of the same. Mechanical failure of a vehicle contributing to cause of an accident is also a factor coming under "poor maintenance". Care and maintenance of the vehicle as a fact is within the special knowledge of the driver of the vehicle. Poor maintenance of the vehicle is itself a negligent act as it speaks of "absence of care" so far as the vehicle is concerned. Therefore, driving of such a vehicle in public road in speed oblivious of the defects, mechanical or otherwise resulted from poor maintenance is no doubt a negligent act. Mechanical failure or any other defect of a vehicle contributing to the cause of accident can not therefore, be considered in favour of the accused in such a case, in absence of proof, of course, by preponderance of probabilities to the effect that the vehicle has had been maintained with proper care. The contention raised by learned counsel for the petitioner on this score on the basis of alleged testimony of P.W.5, therefore, merits no consideration inasmuch as death of Pinku Rout in the present case is the direct result of rash and negligent act of the petitioner and such act of the petitioner is the proximate and efficient cause without the intervention of another's negligence.

9. Regard being had to the detailed discussion of the evidence made by learned trial court and the Appellate Court and the reasonings given by them to believe the prosecution case with which I am one in my view, I do not find any justification to interfere with the order of conviction recorded against the petitioner under Sections 279/304-A I.P.C

10. Learned counsel for the petitioner alternatively submits that for the offence under Section 279/304-A I.P.C. the imprisonment for either description or fine or both may be imposed and the occurrence in this case having happened on 03.08.1990, and 20 years having already elapsed in the mean time, no substantive sentence of imprisonment be recorded against the petitioner and he be saddled with the sentence of fine only.

11. Regarding being had to the submissions of learned counsel for the petitioner and the fact that much time has elapsed in the mean time and no purpose will be served by sending the petitioner to prison after 20 years, the petitioner is sentenced to pay a fine of Rs.1,000/- for the offence under

12. Section 279 I.P.C. and fine of Rs.3,000/- for the offence under Section 304-A I.P.C. in default to suffer R.I. for six months.

With the aforesaid modification of sentence the revision is allowed in part.

Revision allowed in part.