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

W.P. (C ) NO.17178 OF 2011 (Decided on 13.7.2011)

**NORTH EASTERN ELECTRICITY SUPPLY COMPANY OF ORISSA LTD.(NESCO).** ……. Petitioner.

*.Vrs.*

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

**PREVENTION OF CORRUPTION ACT,1988 (ACT NO. 49 OF1988) – S.2 (b), 2(c).**

**Whether the employees of North Eastern Electricity Supply Company of Orissa Ltd. (NESCO) are public servants for the purpose of bringing them under the purview of the provisions of the Prevention of Corruption Act, 1988 – Held, Yes.**

**The petitioner company as well as other distribution companies have been discharging public duties under Section 2(b) of the P.C. Act and therefore their employees are public servants under the definition of Section 2 (c) of the said Act – Held, the impugned order passed by Opp.Party No.1 holding the employees of the Petitioner-Company are public servants for the purpose of bringing them under the purview of the provisions of the Prevention of Corruption Act, 1988 is correct and legal.** (Para 17)

**Case laws Referred to:-**

1.(2002) 5 SCC 111 : (Pradeep Kumar Biswas-V- Indian Institute of Chemical Biology & Ors.)
2.AIR 1962 SC 1621 : (Ujjam Bai-V- State of U.P.)
3.(1975) 1 SCC 421 : (Sukhdev Singh-V- Bhagatram Sardar Singh Raghuvanshi)
4.(1981) 1 SCC 722 : (Ajay Hasia-V- Khalid Mujib Sehravardi).

For Petitioner - M/s. Rajjeet Roy, S.K.Singh & N.Hota.
For Opp.Parties - Government Advocate

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***V.GOPALA GOWDA, C.J.*** The petitioner is a company incorporated under the Companies Act, 1956 on 19.11.1997. Its main object is to acquire, establish, construct, erect, lay, operate, run, manage, repair, maintain, alter, renovate, modernize, work and use electrical lines for the purposes of distribution of power etc. in the State of Orissa and

elsewhere,.The petitioner-company is challenging the order dated 26th May, 2011 (Annexure-1) passed by the Commissioner-cum-Secretary, Department of Energy-Opposite Party no.1 holding the employees of the petitioner-company are, public servants, for the purpose of bringing them under the purview of the provisions of the Prevention of Corruption Act, 1988 (for short 'the PC Act'), urging various facts and legal contentions.

2. The brief facts are stated herein :

The PC Act, 1947 was amended in 1964 on the recommendations made by the Santhanam Committee. The statement of objects and reasons of the said Act is to make the anticorruption laws more effectively "widening the scope of definition of the expression "public servant", incorporation of offences under Sections 161 to 165A of the Indian Penal Code. The terms of reference of the Committee were to "suggest measures calculated to provide a social climate both amongst public servants and in the general public in which bribery and corruption may not flourish." The relevant passage from the recommendations made by the Santhanam Committee, placed by the petitioner is extracted hereunder :

> "The advance of technological and scientific development is contributing to the emergence of a "mass society" with a large rank and file and small controlling elite, encouraging the growth of monopolies rise of a managerial class and intricate Institutional mechanisms. The inability of the society to appreciate an honest functioning social, political and economic process resulting in the emergence and growth of white collar and economic crimes. Corruption is a white collar crime defying any permanent solution."

**3**. The relevant features of the PC Act is reproduced as under :

> "Section 2(b) defines "public duty" to mean a duty in the discharge of which the State, the public or the community at large has an interest."
>
> Section 2(c) defines "public servant" which means :

(i) any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty;

(ii) any person in the service or pay of a local authority;

(iii) any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Comopanies Act, 1956;

(iv) any Judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;

(v) any person authorised by a court of justice to perform any duty, in connection with the administration of justice, including a liquidatory, receiver or commissioner appointed by such court;

(vi) any arbitrator or other person to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority;

(vii) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;

(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty;

(ix) any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956;

(x) any person who is a Chairman, member or employee of any Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board;

(xi) any person who is a Vice-Chancellor or member of any government body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University and any

person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations;

(xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government or local or other public authority.

19. Previous sanction necessary for prosecution : 1) No court shall take cognizance of an offence punishable under Sections 7, 10, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-

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(b) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office sae by or with the sanction of the Central Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office."

**4.** The Company has got its memorandum of Articles of Association (for short 'memorandum of Association').

(i) In terms of Article 29A of the memorandum of Association, the directors appointed by BSES (Bombay Sub-urban Electricity Supply) including any Managing director if considered necessary by BSES shall be responsible for the day to day management of the Business.

(ii) Article 29A(2) of the memorandum of Association, states that No director (including the Chairman) appointed by GRIDCO (Grid Corporation of Orissa Limited) shall have any executive responsibility or power relating to the Company unless specifically agreed otherwise by BSES. No director appointed by the Trustees shall have any executive responsibility.

(iii) Article 44 of the memorandum of Association, provides that the business of the Company shall be managed by the Board who may exercise all such powers of the Company and do all such acts and things as are not,

by the Act, or any other Act or by the Memorandum or by the Articles of the Company required to be exercised by the Company in general.

(iv) Article 45(p) of the memorandum of Association, provides that the Director shall have the power to appoint, and at their discretion remove or suspend such general managers, managers, secretaries, assistants, supervisors, scientists, technicians, engineers, consultants, legal, medical or economic advisers, research workers, labourers, clerks, agents and servants for permanent, temporary or special services as the Board may from time to time think fit, and to determine their powers and duties and fix their salaries, or emoluments or remunerations, and to require and/or security in such instances and to such amounts as the Board may think fit and also from time to time provide for the management and transaction of the affairs of the Company in any specified locality in India or elsewhere in such manner as the Board may think fit;"

**5**. The case of the petitioner is that in terms of the Orissa Electricity Reforms Act, 1995 (in short 'the OERC Act'), the electricity industry of Orissa was restructured whereby the generation, transmission and distribution of electricity was made open to private sector.

Accordingly a Commission known as Orissa Electricity Regulatory Commission was established in terms of Section 3 thereof and as per section 12(1), the State Government shall have the powers to issue policy directives on matters concerning electricity in the State including the overall planning and coordination and all such policy directives shall be consistent with the objects sought to be achieved by this Act.

Section 14(1) thereof provides for licensing and it says, No person, other than those authorised to do so by licence or by virtue of exemption under this Act or authorised or exempted by any other authority under the Electricity (Supply) Act, 1948 shall engage in the State in the business of –

(a) Transmitting; or
(b) Supplying electricity

**6.** The license is granted by the Commission as per Section 14 thereof and the licence is revoked as per Section 18.

**7.** Under the provisions of the said OERC Act, a transfer scheme called "Orissa Electricity Reforms (Transfer of Assets, Liabilities, Proceedings and Personnel of Gridco to Distribution Companies Rules, 1998 (for short 'the

Rules, 1998) was framed on 25.11.1998 whereby assets and personnel as they existed prior to the transfer got transferred to the distribution companies.

(i) Sub-rule (3) of Rule 3 of the Rules, 1998 provides, that With effect from the appointed date the Distribution Undertakings of Gridco classified under Sub-rule (1) and comprising the Specified Assets, Specified Liabilities, Specified Proceedings and Specified Personnel as agreed to between Gridco and each of the Distcos (Distribution Companies) and set out in the Schedules A, B, C and D shall stand transferred to and vest in Cesco, Nesco, Wesco and Southco respectively without any further act or things to be done by the State Government, Gridco, any Distco, the Personnel, debtors or creditors or any other person, subject, however, to the terms and conditions contained in these rules.

Sub-rule (5) of Rule 3 of the Rules, 1998 provides, that On the transfer and vesting of the Distribution Undertakings and except as otherwise provided in these rules the relevant Distco (Distribution Companies) shall be responsible for all, or the relevant part of any, contracts, tenders, rights, deeds, schemes, bonds, agreements and other instruments of whatever nature relating to the Distribution Undertakings, which are subsisting or having effect on the Appointed Date, in the same manner as Gridco was liable immediately before the Appointed Date and the same shall be in full force and effect against or in favour of the relevant Distco and may be enforced as fully and effectively as if instead of Gridco, the relevant Distco had been a party thereto :

Provided however, if any of the Specified Assets transferred to a Distco (Distribution Company) are subject to any security document or arrangement in favour of any third party such assets shall stand transferred to the relevant Distcos subject to such security but Gridco shall enter into an agreement with the concerned Distcos for payment and discharge of such liability by Gridco to the third parties.

(ii) Sub-rule (2) of Rule 4 of the Rules, 1998 provides that The Specified Personnel on the Appointed Date shall cease to be in the service of Gridco and they shall not assert or claim any benefit of service in Gridco from the Appointed Date except as provided in these rules.

(iii) Sub-rule (7) of Rule 4 of the Rules, 1998 provides that The existing conditions of the service and the service regulations of Gridco shall apply *mutatis mutandis* to the Specified Personnel trasnferred to the Distcos, till the Distcos (Distribution Companies) frame the service regulation subject however to the conditions specified in Sub-rule (1).

**8**. It is contended by the learned counsel for the petitioner-company that the electricity distribution business in the State was thus transferred to the petitioner in the area of license granted to it by the Commission. It is further contended that pursuant to the letter dated 6.11.2010 addressed to the DSP, Vigilance, Bhubaneswar Division, Bhubaneswar (Annexure-3), petitioner raised objecton to the decision of bringing the petitioner under the provisions of the PC Act. It is contended that the petitioner-company is a licensee and does not discharge the public duty in terms of section 2(b) of the PC Act or its employees are not the public servant in terms of section 2(c) of the PC Act. Therefore, the impugned order passed by the opposite party no.1 holding that the employees of the petitioner-company are discharging public duties in terms of section 2(b) of the PC Act and are falling within the definition of "Public Servants" under Section 2(c) of the PC Act is not correct since the definition "Public Servants" does not include the employees of private entity. Further under Section 2(c)(viii) of the PC Act public servants, inter alia, means 'any person' 'any person' who holds an office by vitrue of which is authorised and required to perform any public duty. The petitioner is not a person who holds an office. To come to a conclusion that a person "holds an office", there must be a duty so assigned to such person either by statute or by an executive order. Petitioner who is a licensee can not be said to be a holder of office as there is no duty cast upon it in either of the form. Further it is urged that the petitioner-company cannot be said to have been authorised or required to perform public duties. Therefore, passing the impugned order applying the provisions of PC Act to the employees is wholly improper in law and further as per section 14 of the OERC Act corresponding the provisions of the Electricity Act, 2003, the license granted in favour of the company is to engage itself in the distribution of electricity in its assigned area. If the petitioner is "authorised or required" to "perform a pubic duty", then it is so authorised by Commission and not by the Government. A plain look at the sub-section suggets that words "by the Government" are what the sub-section seeks to convey. There is no express or implied authorisation or requirement by the Government for the petitioner to perform a public duty so as to bring it under the definition of sub-section (c) of Section 2 of the PC Act. Further it is contended that the statement of objects and reasons of the PC Act clearly envisage that the same is intended to cover the employees who have nexus with the Government which may be estalished either by way of master servant relationship or by way of command-obedience relationship. The relationship between the Governemnt and the petitioner is not that of master-servant and, therefore, the petitioner cannot be brought under the purview of the PC Act. From the terms of reference and the recommendation made by Santhanam Committee, it is manifestly clear that

the Committee was required to suggest measures for curbing corruption in the Government and amongst its servants. The recommendation of the Committee, that was responsible for the enactment of the PC Act, did not intend to cover the employees of the private sector. It is further contended that if parameters like management, control and funding are looked at, then also petitioner does not come under the purview of the PC Act. The management of the petitioner-company, as per its Articles of Association, is done by a Board comprising persons of the BSES and Government has no role in it. Control of the Government over the petioner is completely absent. There is no funding by the Government in so far as the business of petioner is concerned. It is, therefore, evident that petioner has no nexus with the Government so as to bring it under the definition of 'public servant" to apply the provision of PC Act. In the petitioner-company BSES has 51%, the Employees Trust has 10% and the Gridco has 9% equity. However, this equity is not same as that of funding and in any case, Gridco is not same as that of Government.

**9.** The petitioner-company has got its own vigilance and is well-equipped to meet any challenge that might come. In cases involving corruption of its employees, petitioner-company is armed with its service regulations to deal with contingencies arising out of such cases. Measures such as disciplinary proceedings and even, instances where corruption assumes contributory factor for acts of omission and commission, petitioner-company does not lack competence to deal with such situations. Proposed attempt of the State Vigilance to inquire into the cases of corruption involving the employees of the petitioner is unauthorised and, therefore, unsustainable in law.

**10.** It is further contended that in the enactment of Electricity Act, 2003 in which the OERC Act stands saved, the Distribution Companies in essence can be viewed as a creature of the statute. The Electricity Act, 2003 clearly outlines the power of the State Government. Reference to the statements of objects and reasons clearly highlight the policy of encouraging private sector participation in Generation, Tansmission and Distribution and the objective of distancing the Regulatory Responsibilities from the Government to the Regulatory Commission. The aim of the new legislation is to regulate the electricity supply industry in the country which would replace the existing laws, preserve its core freature other than those relating to the mandatory existence of the State Electricity Boards and the responsibilities of the State Government and State Electricity Boards with respect to regulating licenses. Therefore, it can clearly be inferred from the aforeasid Act that it is the object of the Parliament to distance the Electricity

Industry from over arching Government control and finance control. The impugned order is in contravention of the provision of the said Act. Therefore, the same is liable to be quashed.

11. The OERC Act was enacted by the State legislature which received assent of the President on 3rd January, 1996 with a view to achieve the following objects :

> "An act to provide for Restructuring of the Electricity Industry for the Rationalisation of the Generation, Transmission, Distribution and Supply of Electricity for Avenues for Particiption of Private Sector Interprenures in the Electricity Industry and Generally for taking Measures conducive to the Development and Management, of the Electricity Industry in the State in an Efficient Economic and Competitive manner including the Constitution of an Electricity Regulatory Commission for the State and for matters connected therewith or incidental thereto."

**12**. The OERC Act must be read along with the Electricity Act, 2003 for the same purpose for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

**13.** Though there are two enactments in the same field, exercising respective legisltive power by the parliament and State Legislature under Articles 246(1) & 246(2) of the Constitution of India from the same entry of the concurent list, the object and intentment of both the enactments are same and the OERC Act received the assent of the President in view of Article 254(1) of the Constitution, the said State Act has application to the case at hand. Hence it would be necessary for us to refer to certain provisions of the said enactment. In view of the above, whether the grant of license by the Commission which is established and constituted under section 3 of the OERC Act and granting license by it in favour of the eligible licensees for the purpose of discharging the functions of Gridco (Grid Corporation of Orissa Limited) as referred in section 13 of the OERC Act which is a statutory Corporation incorporated under the Companies Act, 1956 with the main object of engaging in the business of procurement, transmission and bulk supply of electric energy, shall subject to the powers

of the State Government under section 12, be the principal company to undertake planning and coordination in regard to transmission and to determine the electricity requirements in the State in coordination with the Generating Companies, State-Government, contiguous States, the Commission, the Regional Electricity Board and the Central Electricity Authority and granting licence in favour of licensee by transmission and supply of electricity. The said licence has been obtained by the petitioner-company by filing an application before the Commission in such form and payment of such fee as prescribed by the regulations, authorising it to transmit electricity in a specified area of transmission; and/or supply electricity in a specified area of supply as described under sub-section (1) after fulfilling the conditions (a) to (g) of sub-section (4), provisions (a) to (d) of sub-section (2), sub-sections (3), (5), (8), (9).

**14.** By careful reading of the provision of under sections 14 & 15 in (Chapter-VI of the OERC Act) regarding grant of license or licence particularly, sub-sections (a) to (g) of sub-section (4) of section 15 without prejudice to the generality of Sub-section (3), conditions included in a licence may require the licencee to enter into agreements on specified terms with other persons for the use of any electric lines, electrical plant and associated equipment operated by the licensee; comply with any direction given by the Commision; refer all disputes arising under the licence for determination by the Commission; furnish information, documents and details which the Commission may require for its own purposes or for the purposes of the Central Government or the State Government or the Central Electricity Authority; comply with the requirements of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 and rules framed thereunder in so far as they are applicable; undertake such functions and obligations of the Board under the Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948; obtain the approval of the Commission of such things that are required under the licence conditions or for deviation from the same; rectify the Commission of any scheme that it is proposing to undertake including the schemes in terms of the provisions of the Electricity (Supply) Act, 1948; purchase power in an economical manner and under a transparent power purchase procurement process; supply in bulk to other licensees or to customers; and fix a tariff or to calculate its charges from time to time; in accordance with the requirements prescribed by the Commission and the provisions under sub-sections (5), (8) and (9) would clearly go to show that for the licensee registered under the Companies Act, it is required to discharge its functions and duties of the State Government. The OERC Act is to provide for Restructuring of the Electricity Industry for the Rationalisation of the Generation, Transmission, Distribution And Supply

of Electricity for Avenues for Particiption of Private Sector Interprenures in the Electricity Industry and Generally for taking Measures conducive to the Develooment and Management, of the Electricity Industry in the State in an Efficient Economic and Competitive manner including the Constitution of an Electricity Regulatory Commission for the State and for matters connected therewith or incidental thereto. Therefore, the terms and conditions by virtue of which are incorporated in the lcense issued in favour of the licensee, the licensee performs the public functions and duties which are required to be performed by the Electricity Board under the provisions of Electricity (Supply) Act, 1948 and the Indian Electricity Act, 1910 and the Rules and Regulations made thereunder and, the prtitioner herein, thereby discharging the public functions and duties of the earstwhile Electricity Board with the avowed object of achieving the objects and intent of the OERC Act which are extracted above, therefore, we have to hold that though the petitioner is a private sector company on account of the State Government enacting the law (supra) the petitioner-licensee is discharging the functions of earstwhile Electricity Board or Gridco for the purpose of generation, transmission, distribution and supply of electricity in the assigned area of the State to supply power to the consumers after satisfying certain terms and conditions (supra). Therefore, the contention raised by the petitioner that it is not either instrumentality or authority to come within the purview of Article 12 of the Constitution of India as it is not discharging the public functions and duties to bring its employees within the provisions of the PC Act, cannot be accepted following the decision of the seven Judge Constitutional Bench of Apex Court in ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and others***, reported in [2002]5 SCC 111 wherein after considering its various decisions the apex Court held that the functions functions / duties to be performed by the authority come within the purview of 'State' under Article 12 of the Constitution and has also laid down the law regarding Article 12 on 'centers of power' and the cause for expansion of 'state' at paras 6,10, 15, 16, 40, 41 and finally it has summed-up at para-98 which relevant paragraphs from the above judgment reads as follows :

> "6. That an "inclusive" definition is generally not exhaustive is a statement of the obvious and as far as Article 12 is concerned, has been so held by this Court in *Ujjam Bai v. State of U. P*. AIR 1962 SC 1621. The words "State" and "authority" used in Article 12 therefore remain, to use the words of *Cardozo (Benjamin Cardozo : The Nature of the Judicial Process),* among "the great generalities of the Constitution" the content of which has been and continues to be supplied by courts from time to time.

10. Keeping pace with this broad approach to the concept of equality under Articles 14 and 16, courts have whenever possible, sought to **curb an arbitrary exercise of power against individuals by "centers of power", and there was correspondingly an expansion in the judicial definition of "State" in Article 12.**

15. The use of the alternative is significant. The court scrutinised the history of the formation of the three Corporations, the financial support given by the Central Government, the utilization of the finances so provided, the nature of service rendered and noted that despite the fact that each of the Corporations ran on profits earned by it nevertheless the structure of each of the Corporations showed that the three Corporations represented the "voice and hands" of the Central Government. The Court came to the conclusion that although the employees of the three Corporations were not servants of the Union of the State, "these statutory bodies are 'authorities' within the meaning of Article 12 of the Constitution".

16. Mathew, J. in his concurring judgment went further and propounded a view which presaged the subsequent developments in the law. He said : (*Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, (1975) 1 SCC 421 at p. 449 para 82).

"A State is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State."

It is further held by Mathew J. in Sukhdev Singh (supra), referring to the judgments of the Supreme Court of United States of America that;

**The State may aid a private operation in various ways** other than by direct financial assistance. It may give the organization the power of eminent domain, it may grant tax exemptions, or it may give it a monopolistic status for certain purposes. **All these are relevant in making an assessment whether the operation is private or savours of State action.** See generally : The meaning of 'State Action', LX Columbia Law Rev 1083.

**Institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed government agencies.** See the decisions in Terry v. Adams 273 US 536 and Nixon v. Condon 286 US 73.

Activities which are too fundamental to the society are by definition too important not to be considered government function.

23. "From this perspective, the logically sequitur is that **it realty does not matter what guise the State adopts for this purpose,** whether by a corporation established by statute or incorporated under a law such as the Companies Act or the Societies Registration Act, 1860. **Neither the ostensible form of the corporation, nor is ostensible autonomy would take away from its character as 'State'** and its constitutional accountability under Part II vis-a-vis, the individual **if it were in fact acting as an instrumentality or agency of the Government.**

40. The picture that emerges is that the tests formulated in *Ajay Hasia* [**Ajay Hasia v. Khalid Mujib Sehravardi** (1981) 1 SCC 722] are not a rigid set of principles so that if a body falls within any one of them it must, *ex hypothesi* be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

41. Coming now to the facts of CSIR, we have no doubt that it is well within the range of Article 12, **a conclusion which is sustainable when judged according to the tests judicially involved for the purpose.**

**98.** We sum up our conclusions as under:

(*1*) Simply by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of "other authorities" in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to the public. Further, the statute *creating* the entity should have vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs of other people — their rights, duties, liabilities or other legal relations. If created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it

should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavour and clear indicia of power — constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap. Tests 1, 2 and 4 in *Ajay Hasia* enable determination of governmental ownership or control. Tests 3, 5 and 6 are "functional" tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Unfortunately thereafter the tests were considered relevant for testing if an authority is the State and this fallacy has occurred because of difference between "instrumentality and agency" of the State and an "authority" having been lost sight of sub silentio, unconsciously and undeliberated. In our opinion, and keeping in view the meaning which "authority" carries, the question whether an entity is an "authority" cannot be answered by applying the tests laid down in *Ajay Hasia v. Khalid Mujib Sehravandi, (1981) 1 SCC 722* tests.

(*2*) The tests laid down in *Ajay Hasia case* are relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither *all the tests* are required to be answered in the positive nor a positive answer to *one or two tests* would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned. When an entity has an independent legal existence, before it is held to be the State, the person alleging it to be so must satisfy the court of brooding presence of the Government or deep and pervasive control of the Government so as to hold it to be an instrumentality or agency of the State.

***CSIR if "the State"***

**15.** In the decision of the apex Court in ***Ujjam Bai v. State of Uttar Pradesh*** reported in AIR 1962 SC 1621 wherein it is held :

> "(151). In the first place, it has to be pointed out that the definition is only inclusive, which itself is apt to indicate that besides the Government and the Legislature there might be other instrumentalities of State action which might be comprehended within the expression 'State'.....Again, Article 12 winds up the list of authorities falling within the definition by referring to 'other authorities' within the territory of India which cannot obviously be read as ejusdem generis with either the Government or legislature or local authorities. The words are of wide amplitude and capable of comprehending every authority created under a stature and functioning within the territory of India. There is no characterization of the nature of the 'authority' in this residuary clause and consequently it must include every type of authority set up under a statute for the purpose of administering the laws enacted by the Parliament or by the State including those vested with the duty to make decisons in order to implement those laws."

**16**. In the decision of the Apex Court in Pradeep Kumar Biswas (supra) the decision of the United States of America is extensively referred and the said judgment has been extensively quoted by the Division Bench of Karnataka High Court in Writ Petition No. 14215 of 2006 (***Flemingo Dutyfree Shops Pvt. Ltd., A Company Incorporated under The Companies Act, 1956 v. Union of India (UOI) rep., by its Secretary to Government Civil Aviation Department and Ors.)*** decided on 19.12.2008 wherein the stand taken by the petitioner therein that the petitioner is not discharging any public function and duties. Therefore, it does not come within the purview of Article 12 as it is neither the authority or instrumentality of the State. The said contention has been answered after referring to the aforesaid constitutional Bench decision of the apex Court. The decision in Pradeep Kumar Biswas (supra)referring to the decision of Ujjam Bai (Supra)and also placing rellance on the decision in the case of Sukhdev Singh (supra) in which various decisions of the foreign courts judgments have been referred to, would clearly go to show that the functions and duties which are required to be performed as a licensee under the provisions of OERC Act, are the public functions and duties. The said finntions were being discharged by the earstwhile Board and the Gridco for the purpose of transmission to its consumers in area which has been agreed, the area of operation is of electricity districts of Balasore, Baripada, Jajpur, Bhadrak existing as of date. Therefore, the petitioner-company though private company is discharging its public functions/duties. Therefoe, its employees will come under the definition of the public duty in discharge of the State, the public or entity at large, has a interest and they all come under the definition

of public servant under the meaning of section 2(c) of PC Act that any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty. So the employees engaged by the licensee-company are performing the public duty and are public servant.

**17**. Therefore, the impugned order issued by the O.P.No.1 bringing the petitioner and other licensees which are all distribution companies within the purview of PC Act as they have been discharging public duties under section 2(b) of the PC Act and,therefore, their employees are public servants under the definition of section 2(c) of the said Act in view of the decisions of the Apex Court (supra) and various decisions of United States of America extracted from the Division Bench Judgment of the Karnataka High Court (supra) to which the Chief Justice is one of the Presiding Judge, which wholly apply to the facts and circumstances of the case. Therefore, the legal contention urged in this case that the impugned order is unconstitutional and the same cannot be applied to the employees of the petitioner-licensee-company, cannot be accepted.

**18**. For the reasons stated supra, the writ petition is devoid of merit and is liable to be dismissed accordingly.

Writ petition dismissed.

**2011 ( II ) ILR- CUT- 910**

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

W.A. NO.41 OF 2010 (Decided on 13.09.2011)

**DIRECTOR OF MEDICAL EDUCATION & TRAINING ORISSA** … ….Appellant.

*.Vrs.*

**REGIONAL COLLEGE OF HEALTH SCIENCE (ANM/HW(F),TRAINING CENTRE & ANR.** ……Respondents.

**EDUCATION – Educational institutions admitting students without requisite recognition or affiliation is illegal.**

**In the present case the respondent No.1-Institution is not a recognized educational institution so admission of students in the said institution is illegal – Held, the impugned order passed by the learned Single Judge directing the appellant to allow the students of respondent No.1-Institution to fill up the forms and to conduct examinations is set aside.** (Para 20)

**Case laws Referred to:-**

1.AIR 1986 SC 1188 : (Nageshwaramma -V- State of Andhra Pradesh & Anr.)
2.AIR 1992 SC 1926 : (State of Maharashtra -V- Vikas Sahebrao, Roundale)
3.AIR 1994 SC 43 : (St. John's Teacher Training Institute (for women), Madurai -Vrs-State of Tamil Nadu & Ors.)
4.AIR 2007 SC 458 : (Minor Sunil Oraon Tr. Guardian & Ors.-V-C.B.S.E. & Ors.)

For Appellant - M/s. R.C.Mohanty, K.C.Swain
For Respondents - Mr. J.K.Rath, Sr.Advocate
M/s .M.K.Khuntia, A.K.Apath, G.R.Sethy, B.K.Pattnaik, & P.K.Rout (for Res. No.1)
M/s. Sanjeeb K. Dwibedi & S.K.Dwibedi (for Res.No.2)
M/s. Sanjit Mohanty, Sr.Advocate (for the Intervenor-students)
Ms. Meera Ghosh (for Intervenor-students)

***V. GOPALA GOWDA, C.J.*** The present writ appeal has been filed by the Director of Medical Education & Training, authorized to represent the Commissioner-cum-Secretary, Health & Family Welfare Department, questioning the correctness of the impugned order dated 29.01.2010 passed by the learned Single Judge in W.P.(C) No.15352 of 2008 urging various facts and legal contentions.

2. The brief facts of the case are stated for the purpose of appreciating the rival and legal contentions of the parties.

The appellant is the Chairperson of Orissa Nurses and Midwives Examination Board, which is established for the purpose of teaching and conducting examination of certificate course to impart Nursing Training and proficiency in General Nursing and Midwifery. The Board is empowered to grant certificate to the eligible candidates after conducting examination from time to time. The Board is also empowered, subject to sanction of the State Government, to recognize hospital for the purpose of training and sending candidates for examination for getting Certificate in General Nursing and Midwifery. The State Government approved the Board vide Government Order No.8245 dated 13.08.1958 and subsequently the State Government has formulated the Sate Task Force (for short, 'STF') and realignment of Nursing cadre with the Department of Health & Family Welfare through a resolution and that resolution has been notified in the Orissa Gazette on 22nd September, 2009.

3. The Orissa Nurses and Midwives Registration Act, 1938 was given the assent of the Government and was published in the Orissa Gazette dated 8th July, 1938. The said Act provides for the registration and better training of Nurses, Health Visitors, Midwives and Dais in Orissa and to secure their better training. As per the said Act, initially the Orissa Medical College Hospital & Baptist Mission Hospital, Berhampur were recognized the institutions for training in General Nursing and Midwifery. The Mission Hospital, G. Udaygiri, Ganjam was a recognized institution for training in the subject of general nursing. The following institutions were the recognized institutions for imparting training in the subject specified below:

(i) Sriram Chandra Bhanja Medical College and Hospital, Cuttack = General Nursing & Midwifery,

(ii) Christian Hospital for Women and General Nursing & Children, Berhampur = Midwifery

(iii) Mission Hospital, G. Udaygiri = General Nursing

(iv) Government Headquarters Hospital, Berhampur General = Nursing & Midwifery, and

(v) Government Headquarters Hospital, Baripada = General Nursing

4. The subject of Health and Education is within the concurrent list and the Acts and Rules framed by the Central Government operate in their respective domains and there is no conflict between any law enacted by the State Government and any particular law enacted by the Central Government. Sub-section (2) of Section 10 of the Indian Nursing Council Act, 1947 (for short, 'INC Act, 1947') confers power to recognize qualification in these fields of General Nursing, Midwifery, health visitors. Sub-section (2) of Section 10 of the said Act, provides that "any authority within the State, being recognized by the State Government in consultation with the State Council, if any, for the purpose of granting any qualification, grants, a qualification in general Nursing, Midwifery, Health Visitors, Public Health Nursing, not included in the schedule, may apply to the Council to have such qualifications recognized". Accordingly, the Indian Nursing Council has been vested with the power to recognize or approve any particular institution or college for awarding qualification recognized by the Council.

5. The Indian Nursing Council (for short, 'INC') has been issuing regulations with regard to the minimum clinical and infrastructural facilities required to open a school/college of Nursing keeping in mind the provisions of Section 16 of the INC Act, 1947. These minimum required facilities are insisted upon every Nursing Institution in order to maintain uniform standard of Nursing Education all over the country. The maintenance of these minimum clinical and infrastructural facilities is very much necessary for undergoing the syllabus prescribed by the INC in order to obtain a recognized qualification. It is necessary that all the Nursing Institutions empowered to award qualifications in Nursing have the prescribed minimum requirements stipulated by the INC.

6. Any institution, or a registered Society, or a Private or Public Trust, registered under the Societies Registration Act or a company registered under the Companies Act, wishes to open an ANM Training School should obtain No Objection/Essentiality Certificate from the State Government. The INC on receipt of such proposal from the institution to start ANM Training Programme will undertake the first inspection to assess the suitability with regard to the physical infrastructure, clinical facility and teaching facility in order to give permission to start the programme. The institution will have to admit the students only after taking approval from the State Nursing Council and Examination Board. The INC will conduct inspection every year till the

first batch completes the programme. Permission will be given year by year till the first batch completes the course.

7. Respondent No.1-Institution filed the writ petition seeking for issuance of a direction to the appellant to conduct the final Board Examination of the students of its institution for the academic year 2006-2007 as the Respondent No.1-Instition was opened since 2004 and had also filed a Misc. Case for giving permission to the students of the institution to fill up their forms for appearing at the ANM/HW(F) Examination to be held either in the month of December, 2008 or in the month of January, 2009. The learned Single Judge, vide order dated 19.11.2008, directed the present appellant to allow the students of Respondent No.1-Institution to submit their applications and conduct examinations. The students have appeared at the examination and their results have been published pursuant to direction issued in the writ petition. The impugned order is challenged raising the following questions of law:

(i) Whether it is permissible for this Court to issue direction to allow the students to fill up the forms of the institution which does not have the required permission to start the institution as per the statutory regulation?

(ii) Whether schools can be opened without complying with the statutory regulations which are mandatory in nature?

(iii) Can any institution without having any of the necessary requirements under the statutory law for its establishment, have any right to admit students to a course of study prior to approval is obtained from the authority?

(iv) Whether the Hon'ble Court can direct the appellant 'Board' to act as per direction of this Court, which is in direct contravention of the binding law?

(v) Whether, while exercising jurisdiction under Article 226 of the Constitution of India, the Hon'ble Court can pass such orders which are in conflict, contrary to the statutory provisions and principles of law in that regard laid down by the Hon'ble Supreme Court ?.

8. Mr. Mohanty, learned Counsel appearing for the appellant urges the following grounds:

The impugned order dated 29.01.2010 passed by the learned Single Judge is contrary to the statutory provisions of INC Act and Regulations as

the Respondent No.1 has not obtained recognition to establish its school as required under the provisions of the Act and Regulation. The learned Single Judge has failed to appreciate the factual and legal position in so far as not obtaining any permission/approval from the competent authority by the first respondent as required under the statutory and mandatory rules which are applicable to the institutions under the provisions of the INC Act. The institution has not obtained the recognition/permission from the competent authority under the Act and Regulations, therefore, admitting the students for the Certificate Training Course of Nursing and Midwifery is illegal and the same is not permissible in law. This aspect of the matter has not been taken note of by the learned Single Judge while passing the impugned order.

9. In support of the above legal contention, Mr. Mohanty, learned counsel has relied upon the decisions of the Hon'ble Supreme Court in the case of ***Nageshwaramma vs. State of Andhra Pradesh and another,*** *AIR 1986 SC 1188,* wherein the apex Court while examining the power under Articles 32 and 226 of the Constitution has interpreted Sections 20 and 21 of the Andhra Pradesh Education Act and held that establishment of the institution without permission is unauthorized and the students trained in such institutes cannot be permitted to appear in the examination. The Court cannot issue direction under Article 32. The direction issued in the Misc. Case is totally impermissible in law and the same is contrary to the aforesaid decision. In this regard, he has also relied upon a decision of the Hon'ble Supreme Court in the case of ***State of Maharashtra vs. Vikas Sahebrao, Roundale,*** reported in *AIR 1992 SC 1926.* He has also placed strong reliance on another decision of the Hon'ble Supreme Court in the case of ***St. John's Teacher Training Institute (for women), Madurai vs. State of Tamilnadu and others,*** reported in *AIR 1994 SC 43* in support of the contention that the Court should not embarrass the academic authorities by itself taking over their functions. Further reliance is placed upon another decision of the Hon'ble Supreme Court in the case of ***Minor Sunil Oraon Tr. Guardian & Ors. vs. C.B.S.E. & Ors,*** reported in *AIR 2007 SC 458,* wherein the students admitted in the institution having no affiliation from C.B.S.E., filed writ petition with a prayer to allow the students to appear in the examination conducted by the C.B.S.E. and to publish their result. Though initially the Hon'ble Court permitted the students to appear in the examination pursuant to the interim order, subsequently the writ petition was dismissed on the ground that the school was not affiliated to C.B.S.E. The said order was challenged in the appeal. The Hon'ble apex Court deprecated the practice of Educational Institution admitting students without the requisite recognition and affiliation.

10. In view of the aforesaid decision of the Hon'ble Supreme Court, the learned counsel for the appellant submits that the admission of students without prior permission or recognition by the Board as required under the INC Act and the interim order passed permitting the students to appear for the examination and direction to declare the result is not legal and valid, therefore, the impugned order is liable to be quashed.

11. Mr. Rath, learned Senior Advocate appearing on behalf of the respondent No.1-Institution sought to justify the impugned order passed by the learned Single Judge contending that the students have completed the course for the academic session 2006-2007. Learned counsel placed strong reliance upon the letters no. 321 dated 30th August, 2010 and No. 323 dated 30th August, 2010 issued by the Secretary, Orissa Nurses & Midwives Examination Board to the Assistant PIO, Directorate of Health Services, Orissa on the application of Basanta Kumar Panda under R.T.I. Act, 2005. The information furnished in paragraph 4 of the list and letter at paragraphs 1 and 2 in second letter reads thus:

Para-4 of letter No.321 dated 30.08.2010.

> "The ANM students of the Government ANM Training Centres appear the examination for the Session 2007-2008 as per the syllabus and regulation of 1977 of INC."

Paras-1 and 2 of letter No.323 dated 30.08.2010.

> "1. Prior to 2006 there was neither any rule nor regulation for opening of ANM School under private sector as per INC Syllabus. Some Private ANM Training Schools opened during the period from 2001-2006 have been allowed to present their students to appear the examination on the basis of the Government instruction in accordance with 1977 Regulation of Indian Nursing Council, New Delhi.
>
> 2. Prior to 2006 there was no necessary to obtain NOC from State Government and approval from INC for opening of ANM School under Private Sector, when the Government of Orissa in Health and FW Department issued NOC to the Private Sector during the year 2006-2007 as per INC Regulation which was implemented in the State during the year 2008."

12. Therefore, it is contended by the learned Senior Counsel on behalf of first respondent that the Orissa Nurses and Midwifery Board has admitted

that prior to 2006 there was no rule or regulation for opening ANM School under private sector as per INC Syllabus. Some private training schools were opened during the period from 2001 to 2006 and their students have been allowed to appear at the examination on the basis of the Government instruction in accordance with 1977 Regulation of Indian Nursing Council, New Delhi. Further it is contended that prior to 2006 there was no necessity to obtain NOC from the State Government and approval from INC for opening ANM School under private sector. Therefore, it is submitted that the impugned order passed by the learned Single Judge, as an interim measure, permitting the students to file application to appear at the examination and subsequently giving direction to declare their result is legal and valid. Therefore, the grounds and the legal contentions urged in this appeal are misplaced and they are not applicable to the facts and circumstances of the case. Hence, learned counsel for the Respondents requested to dismiss the writ appeal.

13. Two miscellaneous applications were filed by some of the students at the time of hearing of the writ appeal. Mr. S. Mohanty, learned Senior Advocate has appeared for one of the students and placed the Misc. Case No. 715 of 2011. He submitted that if this Court interprets Section 10 of the INC Act to mean that for the purpose of establishing the institution by a private or public trust or by a society, the permission and recognition of the State Government in consultation with INC, is required, the intervening students cannot have right to seek appropriate direction as prayed in the writ petition having regard to the undisputed fact of the case that the first respondent has not obtained permission and recognition from the State Government in consultation with INC. If this Court exercises its equity jurisdiction keeping in view the undisputed fact that the course of the students is completed pursuant to the interim directions issued in the writ petition and the students of the first respondent-institute have been permitted to take examination and results have been declared, the only thing is that the Board has to make an endorsement in the certificates to facilitate the students to practise or to get employment as Nurses, Midwifery, ANM & Health Visitors in the hospitals or Nursing Homes. The same submission is also made by Ms. Meera Ghose, learned counsel appearing for other batch of the students in misc. case no.716 of 2011.

14. With reference to the above rival legal contentions, this Court is required to examine the questions raised by the appellant i.e. Question nos. (i), (ii) & (iii). For this purpose, it would be just and necessary for this Court to extract the statutory provisions of sub-sections (1)m (2) & (3) of Section 10 of the INC Act.

**"10. Recognition of qualifications.**

(1) For the purposes of this Act, the qualifications included in [Part 1 of] the Schedule shall be recognized qualifications, and the qualifications included in Part II of the Schedule shall be recognized higher qualifications.

(2) Any authority within the [States} which, being recognized by the [State] Government [consultation with the State Council, if any] for the purpose of granting any qualification, grants a qualification in general nursing, midwifery, [auxiliary nursing midwifery], health visiting or public health nursing, not included in the Schedule may apply to the Council to have such qualification recognized, and the Council may declare that such qualification, or such qualification only when granted after a specified date, shall be a recognized qualification for the purposes of this Act.

(3) The Council may enter into negotiations with any authority in any territory of India to which this Act does not extend or foreign country which by the law of such territory or country is entrusted with the maintenance of a register of nurses, midwives or health visitors, for the settling of a scheme of reciprocity for the recognition of qualifications, and in pursuance of any such scheme the Council may declare that a qualification granted by any authority in any such territory or country, or such qualification only when granted after a specified date, shall be a recognized qualification for the purpose of this Act:

Provided that no declaration shall be made under this sub-section in respect of any qualification unless by the law and practice of the foreign country in which the qualification is granted persons domiciled or originating in India and holding qualifications recognized under this Act are permitted to enter and practice the nursing profession in that country.

Provided further that-

(i) any reciprocal arrangements subsisting at the date of the commencement of this Act between a State Council and any authority outside India for the recognition of qualifications shall, unless t he Council decides otherwise, continue in force, and

(ii) any qualification granted by an authority in a territory of India to which this Act did not extend at the date of its commencement, and recognized on the said date by the State Council of a State to which this Act then extended, shall continue to be a recognized qualification for the purpose of registration in that State".

15. On a careful reading of sub-sections (1) and (2) of Section 10 of the Act, it emerges that the Act has specified the qualifications issued by the authorities mentioned in Part I and part II of the Schedule to the Act as the recognized qualifications. It further emerges that any Institution within the State being recognized by the State in consultation with the State Council to grant any qualification but not included in the Schedule to grant the qualification in general Nursing, Midwifery, ANM, Health Visitor and public health nursing is required to have such qualification recognized by the INC so that the certificates, diplomas or degrees in the aforesaid course granted by such institution will be regarded as recognized qualification. The qualification granted by the first respondent having not been recognized by the State in consultation with INC is not to be treated as valid.

Section 11 speaks about effect of recognition, which reads thus:

"11. **Effect of recognition**. (1) Notwithstanding anything contained in any other law,-

(a) any recognized qualification shall be a sufficient qualification for enrolment in any [State] register

(b) no person shall, after the date of the commencement of this Act, be entitled to be enrolled in any [State] register as a nurse, midwife, [auxiliary nurse-midwife,] health visitor, or public health nurse unless he or she holds a recognized qualification:

Provided that any person already enrolled in any State register before the said date may continue to be a so enrolled notwithstanding that he or she may not hold a recognized qualification.

(c) xx xx xx"

16. The aforesaid provision makes it very clear that the recognized qualification enables a person to get a certificate of registration. Section 12 speaks of the power to require information as to courses of studies and training and examination. It is relevant to extract Section 12 hereunder:

"12. **Power to require information as to courses of study and training and examinations.** Every authority in any [State] which grants a recognized qualification or a recognized higher qualification shall furnish such information as the Council may, from time to time, require as to the courses of study and training and examinations to be undergone in order to obtain such qualification, as to the ages at which such courses of study and examinations are required to be undergone and such qualifications conferred, and generally as to the requisites for obtaining such qualification".

Section 13 speaks of the "Inspections" by the Executive Committee, which reads thus:

"13. **Inspections.**

(1) The Executive Committee may appoint such number of inspectors whether from among members of the Council or otherwise as it deems necessary to inspect any institution recognized as a training institution, and to attend examinations held for the purpose of granting any recognized qualification or recognized higher qualification.

(2) Inspectors appointed under this section shall report to the Executive Committee on the suitability of the institution for the purposes of training and on the adequacy of the training therein, or as the case may be, on the sufficiency of the examinations."

Section 14 speaks about the withdrawal of recognition, which reads thus:

"(1) When, upon report by the Executive Committee, it appears to the Council-

(a) that the courses of study and training and the examinations to be gone through in order to obtain a recognized qualification from any authority in any State or the conditions for admission to such courses or the standards of proficiency required from the candidate at such examinations are not in conformity with the regulations made under this Act or fall short of the standards required thereby or

xx xx xx"

17. After going through the above said provisions of the Act, it is abundantly clear that any institution, which is required to be established either in a public or private sector or by a society as per the Societies

Registration Act, must necessarily obtain recognition from the State Government as required under the provisions of the INC Act to facilitate the Board for the purpose of conducting examinations as per the provided Syllabus particularly the course of training either for Nursing or Midwifery. The statutory provisions referred to supra mandate the institution, which is required to be established, to seek recognition and get recognition. If the recognition is not obtained by the first respondent and the Authorities make the students to appear in the examinations that would be conducted by the Board and directing the Board to issue the certificate to them would not be legal. It is an undisputed fact as stated by the learned Senior Advocate Mr. Rath that recognition of the first respondent has not been obtained from the State Government in consultation with INC for admitting the students for the academic course of 2006-2007, as the same is not required in law. The said legal contention urged by the learned counsel on behalf of the first respondent cannot be accepted by this Court in view of the aforesaid statutory provisions of the Act. The contentions urged by the learned Senior Advocate Mr. Rath that neither recognition from the State Government is required nor the provisions of the Act and Regulations are applicable to the first respondent cannot be accepted at all, as the Act, 1947 is enacted to regulate and control the courses in the Nursing, Midwifery or the Heath Visitors and to establish a uniform standard of training for Nurses, Midwifery and Health Visitors and for issuance of certificate to them after giving necessary training in the courses approved by the competent Authority under the provisions of the Act by the recognized institutions which would provide all facilities including the teaching faculties to teach them and train them to make them good Nurses, Midwifery and Health Visitors to render medical services to the needy people of the country.

18. Having regard to the laudable object of the Act, 1947 that the institutions are being established for the purpose of imparting instruction and issuing certificate of the approved qualifications to the successful candidates in different courses as per the syllabus prescribed under the Act by the Board for the purpose of getting good education in the recognized course to come out from the institutions to render health services to the needy people, the argument advanced on behalf of the first respondent that recognition from the State Government is not required to establish such an institution to impart training in the above courses cannot at all be accepted as the same is contrary to the provisions of the Act & Regulations referred to supra.

19. For the aforesaid reasons, the above questions of law which arise for our consideration are certainly answered in favour of the appellant. The first respondent-institution is not recognized by the State Government. Strong

reliance has been placed upon the letters dated 30.08.2010 produced by the first respondent in justification of the impugned order which are referred to above. While noting the submission of learned Senior Advocate that courses having been completed in 2006, no NOC is necessary to be obtained from the Nursing Board as is required under the provisions of Section 10 of the Act, we are of the view that the contention urged in this regard is wholly untenable in law. The above said letters are contrary to the statutory provisions of the Act and Regulations. Therefore, the reliance placed upon the said letters is misplaced as they don't support the case of the first respondent. Hence, we answer question nos. (i) to (iii) against respondent no.1 and the order of the learned Single Judge passed in the miscellaneous case allowing the students to appear in the examination directing the Board to declare their result do not confer any right upon them at all for the reasons that respondent no.1-institution did not get recognition from the State Government in consultation with INC as required under the provisions of Sec. 10 of the Act, for which the qualification/certificates cannot be issued in favour of the students, which practice has been deprecated by the Supreme Court in its decisions referred to supra. Relevant paragraph in one of the aforesaid decisions in the case of ***Minor Sunil Oraon Tr. Guardian & Ors. v. C.B.S.E. & Ors***. reported in AIR 2007 SC 458 is quoted below:

> "22. Time and again, therefore, this Court had deprecated the practice of educational institution admitting the students without requisite recognition or affiliation. In all such cases the usual plea is the career of innocent children who have fallen in the hands of the mischievous designated school authorities. As the factual scenario delineated against goes to show the school has shown scant regards to the requirements for affiliation and as rightly highlighted by learned counsel for the CBSE, the infraction was of very serious nature. Though, the ultimate victims are innocent students that cannot be a ground for granting relief to the appellant. Even after filing the undertakings the School non-challantly continued the violations."

20. The above decision upon which reliance has been placed by Mr. Mohanty, learned Advocate for the appellant supports the case of the appellant. Therefore, we have answered the point Nos.(i), (ii) and (iii) in favour of the appellant. Since, respondent No.1-Institution is not a recognized educational institution, the very admission of the students in the said institution is illegal, this Court cannot exceed its jurisdiction to grant equitable relief against the provisions of the Act and the law laid down by the apex Court in the cases referred to above as it would amount to commission

of illegality and irregularity in exercise of jurisdiction not vested with this Court. Therefore, this Court has to set aside the impugned order. Accordingly, the impugned order is set aside and the appeal is allowed.

Writ appeal allowed.

**2011 ( II ) ILR- CUT- 923**

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

W.P.(C ) NO.10116 OF 2011 (Decided on 16.7.2011)

**M/S. BHARAT MOTORS** ……Petitioner.

*.Vrs.*

**COMMISSIONER OF COMMERCIAL TAXES, CTC. & ORS**. …….. ..Opp.Parties.

**ORISSA SALES TAX ACT, 1947 (ACT NO.14 OF 1947 ) – S.5-A.**

**Petitioner claimed refund of surchage on the basis of a judgment reported in 2007 (I) OLR 415 (BAJAJ AUTO Vrs. STATE OF ORISSA) – Claim not disposed of by the sales tax authority – Inaction challenged.**

**In this case assessment completed much prior to the above judgment – Assessment order not challenged; hence attained finality – Claim for refund being made beyond 3 years, Section 72 of the Contract Act, 1872 is applicable in favour of the revenue but not to the petitioner – Petitioner is not entitled for refund as claimed.**

(Para 4)

**Case laws Referred to:-**

1.(1990) 77 STC 303 : (P. Rama Rao & Sons-V- State of Orissa)
2.(1958) 9 STC 747,AIR1959 SC 135 : (Sales Tax Officer-V-Kanhaiya Lal)
3.AIR 1961 SC 1438 : ( Oriental Paper Mills-V-State of Orissa)
4(1998) 111 STC 467 (SC) : (Mafatlal Industries Ltd.-V-Union of India & Ors.)

For Petitioner - Mr. Jagabandhu Sahoo
For Opp.Parties - R.P.Kar (Standing Counsel)

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Heard Mr. Jagabandhu Sahoo, learned counsel for the petitioner & Mr. R.P.Kar, learned Standing Counsel for Commercial Tax.

The petitioner has come up before this Court challenging the inaction on the part of the opposite parties in granting refund of surcharge realized from the petitioner for the assessment year 1999-2000 in contravention of the ratio of the judgment dated 5.1.2007 passed in W.P.(C) Nos. 233, 3870, 4618 & O.J.C. No.4303 of 2002, 1145 of 2003, 9766 & 2584 of 2005 M/s. Bajaj Auto Ltd. And another etc. v. State of Orissa and others, reported in 2007 (1) OLR 415 (Orissa), the clarification of the Deputy Secretary to the

Government of Orissa, Finance Department vide letter dated 20.11.2001 (Annexure-2) though this Court quashed the clarification of the Government of Orissa vide letter (supra) holding the same misconceived and has no legal sanctity. It is urged on behalf of the petitioner that the above judgment enures to the benefit of the petitioner. He has also placed reliance on the Division Bench judgment of this Court in P. Rama Rao and sons v. State of Orissa, (1990) 77 STC 303, in support of the case of the petitioner wherein, at paragraph-10, after referring to the earlier decisions of the apex Court, namely, (1958) 9 STC 747; AIR 1959 SC 135 (Sales Tax Officer v. Kanhaiya Lal) and (1961) 12 STC 357; AIR 1961 SC 1438 (Orient Paper Mills v. State of Orissa) in connection with section 72 of the Indian Contract Act, 1872 this Court has held that there is no law of limitation especially for public bodies for refund of surcharge duty what was wrongly recovered to whom it belongs.

2. Mr. Kar, learned Standing Counsel for the Commercial Taxes submitted that the principle enunciated in above referred case by this Court placing reliance upon the decisions (supra) in connection with section 72 of the Indian Contract Act, 1872 inter lia, is not a good law, in view of the Constitution Bench decision of the Apex Court in the case of **Mafatlal Industries Ltd. V. Union of India and others,** (1998) 111 STC 467 (SC), wherein the nine Judge Bench of the apex Court after interpretation of the constitutional provisions, namely, Articles 38, 39, 336 and 265 of the Constitution of India, provisions of section 11-B, 11-D, 12-A, 12-C and 12-D of the Central Excises and Salt Act, 1944 and rule 23-B of the Central Excises and Salt Rules, 1944, at paragraph-70, after referring to the decisions of this Court cited in their judgment in the case of P. Rama Rao (supra) has clearly answered the point no.2 which came up for consideration before the constitutional Bench. The relevant portion of the said paragraph-70 is quoted hereunder :

> "XX XX Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So long as the order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. But what is happening now is that the duty which has been paid under a proceeding which has become final long ago-may be an year back, ten years back or even twenty or more years back-is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court. It is

> necessary to point put in this behalf that for filing an appeal or for adopting a remedy provided by the Act, the limitation generally prescribed is about three months ( a little more or less does not matter). But according to the present practice, writs and suits are being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law ! XX XX"

3. In view of the above said legal principle laid down by the Constitution Bench of the apex Court, we are of the opinion that placing reliance on the judgment of the Division Bench of this Court in the case of P. Rama Rao (supra) by the learned counsel for the petitioner, wherein the clarification of the Deputy Secretary to the Government of Orissa, Finance Department vide letter dated 20.11.2001 (Annexure-2) was quashed as the same was without authority of law and consequently extra demand made on the petitioners therein was also quashed.

4. In the instant cases, having referred to the undisputed fact that assessment orders were passed in the years 2001 to 2003 and the duty has been paid by the petitioner. The assessment orders passed against the petitioner six years and four years prior to the judgment of this Court in the Case of P. Rama Rao (supra), which orders are not challenged either before the Appellate Authority of this Court and, therefore, the assessment orders have attained the finality. The claim is made beyond three years from the date of assessment orders. Hence the reference made to section 72 of the India Contract Act is applicable in favour of the Revenue and not in favour of the petitioner since the constitutional Bench decision (supra) is against the petitioner. Therefore, the petitioner is not entitled for refund as claimed.

Therefore, the writ petitioner fails and is dismissed accordingly.

Writ petition dismissed.

**2011 ( II ) ILR- CUT- 926**

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

W.P.(C) NO.17267 OF 2011 (Decided on 13.07.2011)

**DURYODHAN SINGH** ……Petitioner.

*.Vrs.*

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

**INDIAN REGISTRATION ACT, 1908 (ACT NO. 16 OF1908) – S.17 (d).**

**Auction of sairat for a period less than a year – Registration of agreement not necessary U/s.17 (d) of the Indian Registration Act, 1908 – When the document is not required to be registered, question of payment of stamp duty as demanded orally by the Opp. Party is impermissible in law.**

**Held, issue writ of mandamus to the Opp.Party to execute the agreement in favour of the petitioners in respect of the sairat in question for a period of one year without insisting for payment of stamp duty.** (Para 5,6)

For Petitioner - U.K.Samal
For Opp.Parties - Addl.Govt Adocate

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Since all the writ petitions involve the common question of law, the same are up together for hearing and final disposal.

2. On oral prayer, learned council for the petitioners is permitted to delete all the opposite parities and directed to impaled Sib-Collector, Panposh as opposite party in all the case the cases, who has conducted the auction.

3. Heard Mr, U.K. Smal, learned council for the petitioners and learned Additional Government Advocate.

4. The prayer of the petitioners in these cases is that the oral demand made by the to opposite party to deposit 5% of the bid amount as stamp duty for registration of the agreement before the Registration Authority , under the provisions of Section 17 of the Indian Registration Act and the Indian Stamp Act is under challenge before this Court for issuance of a writ of mandamus to the opposite party by placing strong reliance upon Rule 53 of the Orissa

Minor Mineral Concession Rules, 2004 and the advertisement dated 24.02.2011 produced under Annexure- 4 that the auction of sairat in question is for a period of less that one year i.e. from 2011- 2012 (unto 31.03.2012 ) which is not required to be registered under Section 17 (d) of the Indian Registration Act. If the document is not required to be registered, the question of payment of Stamp duty under the Indian Stamp Act and Rule 53 of the OMMC Rules does not arise in the facts and circumstances of the case. Therefore, learned counsel for the petitioners Mr. Samal has requested this Court to issue a writ of mandamus to the opposite party to execute an agreement in favour of the petitioners without insisting to pay the Stamp duty as the petitioners are the highest bidders and have deposited the total bid amount.

5. On perusal of the averments of the petitioners and the undisputed facts of auction notification dated 24.02.2011 for the sairat in question which is for a period 2011-12 (UPTO 31.03.2012) which is less than a year. Therefore, the question of registration of the agreement under section 17 (d) of the Indian Registration Act, 1908 is wholly unnecessary. When the documents are not required to be registered, the question of payment of stamp duty as demanded orally by the opposite party is wholly impermissible in law .

6. In the view of the matter, it is a fit case to issue a writ of mandamus to the opposite party with a direction to execute the agreement in favour of the petitioners in respect of the sairat in question for a period a of one year from the date of execution of the agreement upto 31.03.2012 without insisting for payment of the stamp duty. Accordingly, we direct. The entire exercise shall be done within a period of two weeks from the date of production of certified copy of this order.

7. With the aforesaid observation and direction, the writ petitions as well as the Misc. Cases are disposed of.

Writ petition disposed of.

**2011 ( II ) ILR- CUT- 928**

**V.GOPALA GOWDA, CJ & H.S.BHALLA, J.**

W.P.(C) NO.21449 OF 2011 (Decided on 15.11.2011)

**JATINDRA PRADAD DAS** …….. …Petitioner.

*.Vrs.*

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

**CONSTITUTION OF INDIA, 1950 – ART.311.**

**ORISSA SUPERIOR JUDICIAL SEVICE RULES,1963 - RULE. 17**

**Seniority – Rule 17 of the Orissa Superior Judicial Service Rules, 1963 – Seniority to be counted from the date of initial appointment and not from the date of confirmation.**

**Petitioner claims seniority over O.P.3 & 4 – Service rendered by the petitioner in the Fast Track Court as Addl. Dist. Judge was not taken into consideration while fixing his seniority – Held, direction issued to O.P.2 to treat the period of service rendered by the petitioner in the Fast Track Court for the purpose of his seniority from the date of his appointment and refix his seniority in terms of the observation made in the judgment.** (Para 26,27,28)

**Case law Relied on:-**

AIR 2002 SC 2096 : (Brij Mohanlal -V- Union of India & Ors.)

**Case laws Referred to:-**

1.AIR 1990 SC 1607 : (The Direct Recruit Class-II Engineering Officers' Association & Ors.-V-State of Maharastra & Ors.)
2.(2006) 2 SCC 545 : (State of Bihar & Ors.-V-Project Uchcha Vidya, Sikshak Sangh & Ors.)
3.AIR 1981 SC 1829 : (Air India-V- Nergesh Meerza & Ors.)
5.1984(4) SCC 450 : (Shri O.P. Singla & Anr.-V-Union of India & Ors.)
6.2000 SC 2808 P-20 : (Rudra Kumar Sain & Ors.-V-Union of India & Ors.)
7.AIR 1999 SC 3616 : (S.L. Chandrakishore Singh-V-State of Manipur & Ors.)

For Petitioner - M/s. Bijan Ray & Yashobanta Das, Sr. Counsel along with Sri B.Mohanty, D.Chhotray, D.R.Das, S.Mohanty & B.Moharana.

For Opp.Parties - Mr. Ashok Mohanty, Advocate General (for O.P.1 & 2)

M/s. Ashok Kumar Parija, Sanjit Mohanty, Senior Counsel along with Sri S.P. Sarangi, P.K.Dash, R.K.Tripathy, B.C.Mohanty, P.P.Mohanty, D.K.Das, a.K.Kanungo, L.Swain, A.Pattnaik, B.R.Sarangi (for O.P.3)

M/s. J.Patnaik, Sr.Counsel along with Sri B.Mohanty, H.M.Dhal, T.K,.Pattnaik, A.Pattnaik, R.P.Ray, Smt. S.Pattnaik, B.S.Rayaguru & S.M.Rizbi (for O.P.4)

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***H.S.BHALLA, J.*** Before adverting to the facts of the present writ petition, we would like to observe that the plight of the petitioner is akin to the passengers, who have been forced to board a ship, which is surrounded by stormy winds, having a ray of hope to reach its destination safely and in order to dispel those stormy winds, the writ petitioner is claiming seniority over and above the opposite parties no. 3 and 4, which has been denied by the decision of the Full Court on administrative side, by knocking at the door of this Court through the instant petition filed on judicial side.

2. The facts required to be noticed for disposal of this writ petition are that the petitioner submitted a representation on 13.11.2009 praying for fixation of his seniority over the opposite parties 3 and 4 with a consequential prayer to treat the period of his service as Additional District Judge, Fast Track Court as continuity of service in the promoted cadre of Orissa Superior Judicial Service (Senior Branch). The representation of the petitioner was rejected by the Full Court of the High Court of Orissa and the letter dated 8.8.2011 was communicated to the petitioner denying his due promotion and seniority vis-à-vis opposite parties 3 and 4. The impugned letter dated 8.8.2011 runs as under:

> "With reference to your letter no. 2215 dated 13.11.2009 on the above subject, I am directed to say that on careful consideration of the matter the Court are pleased to reject the representation dtd.13.11.2009 of Shri J.P.Das, Ex-District Judge, Khurda at present Registrar General, Orissa High Court, Cuttack.
> Shri Das be informed accordingly."

3. As per the case of the petitioner, the letter in question and the decision of the Full Court is directly contrary to the direction of the apex

Court rendered in the case of **Brij Mohanlal v. Union of India and others**, AIR 2002 S.C. 2096. He has further pointed out that the direction issued by the apex Court in the aforesaid case is binding on the High Court in terms of Article 141 of the Constitution of India. The petitioner has categorically pleaded that his initial appointment as Additional District Judge, Fast Track Court having been made by following statutory procedure prescribed under the Orissa Superior Judicial Service Rules, 1963, hereinafter to be referred to as "Rules, 1963", in short and the Orissa Judicial Service (Special Scheme) Rules, 2001, hereinafter to be referred to as "Scheme Rules, 2001", in short, and the petitioner having continued in the said post on promotion uninterruptedly till regularization in accordance with the prescribed law, the period of such service shall have to be construed as regular service under the law and has to be taken into account for considering his seniority and as such seniority under the law has to be counted from the date of his initial appointment and not from the date of his confirmation as per the ratio laid down by the Constitution Bench of the apex Court in the case of **the Direct Recruit Class-II Engineering Officers' Association and others v. State of Maharastra and others**, AIR 1990 S.C. 1607. It was further pleaded that the petitioner's initial appointment as Addl. District Judge (Fast Track) in the cadre of Superior Judicial Service (Senior Branch) being in pursuance of a lawful recruitment process statutorily prescribed under the Rules and 2001 Scheme and the petitioner having continued in the said post uninterruptedly till regular absorption, the period of his service in such higher cadre cannot be ignored while considering his seniority under the law and the opposite parties 3 and 4 cannot be construed as seniors to the petitioner as they were not born in the cadre of Orissa Superior Judicial Service (Senior Branch) at the time of petitioner's initial appointment as Additional District Judge (Fast Track Court). It was finally pleaded that the petitioner having been denied seniority over and above the opposite parties 3 and 4, the petitioner had no other option but to file this writ petition invoking the jurisdiction of this Court with a direction for quashing Annexures-2 and 10 and to place the petitioner as senior above the opposite parties 3 and 4 in the gradation list and the petitioner has also prayed necessary Super Time Scale accordingly.

4. On the other hand, the writ petition was opposed by the opposite parties and they opted to file separate counter affidavits. Opposite party no.1 has pointed out that in pursuance of 11th Finance Commission Award to set up Fast Track Courts to regulate the appointments therein, the Government of Orissa in Home Department published a notification on 7.4.2001 notifying the Scheme Rules, 2001. The said Rules came into force from the date of its publication in the Orisssa Gazette, i.e., with effect from 10.2.2001 and by

establishment of Fast Track Court, there was no increase or addition in the cadre strength of O.S.J.S (Senior Branch). It is further pleaded that appointment was made on ad hoc and purely temporary basis for implementation of the scheme. It is also pleaded that the petitioner's appointment under Annexure-3 was not in accordance with Rules, 1963 and when the petitioner was appointed as Additional District Judge (Fast Track Court), there was no cadre post available in the Orissa Superior Judicial Service to be filled up by way of promotion and by denying most of the assertions raised in the writ petition, opposite party no.1 finally prayed for dismissal of the same.

5. Opposite party no.2 categorically pleaded that rejection of the representation of the petitioner under Annexure-1 is legal and justified and is in consonance with the established canons of service jurisprudence. It is further categorically pleaded that the law laid down in the case of Brij Mohanlal (supra) cannot ipso facto entitle the petitioner to claim seniority. It is further pointed out that on 1.10.1993 there was an existing vacancy in the cadre of O.S.J.S.(S.B.) to be filled up by direct recruitment, but on account of retirement of Sri P.B.Patnaik there was an anticipated vacancy and taking into these two vacancies, the Full Court of this Court in its deliberations dated 29.9.1999 decided to fill up these two vacancies by direct recruitment and the opposite parties 3 and 4 were recruited and joined the cadre on 3.2.2003 and 7.2.2003 respectively. This opposite party no.2 has also taken similar stand as pleaded by opposite party no.1 in its counter denying most of the assertions raised in the petition and finally prayed for dismissal of the writ petition.

6. Opposite parties 3 and 4 have filed separate counter affidavit but in a similar fashion and they both have categorically pleaded that they were appointed under Rule 8 of the Rules, 1963 by direct recruitment as Additional District & Sessions Judge and they were allowed ad-hoc promotion on regular basis under Rules, 1963 and selection grade was also conferred on them in the year 2008 whereas the selection grade was released to the petitioner with effect from 22.10.2009 vide notification dated 29.10.2009 (Annexure-11) and the petitioner did not challenge either the seniority shown in the gradation list of O.S.J.S (Senior Branch) or the conferment of the selection grade to the answering opposite parties. They have opposed the petition by pleading in their written reply categorically that the contention of the petitioner is misconceived and cannot be sustained inasmuch as the opposite parties 3 and 4 have been appointed in the cadre of O.S.J.S (Senior Branch) against the sanctioned posts whereas the petitioner was appointed as Additional District & Sessions Judge in Fast

Track Court under the Scheme Rules, 2001. They have further pointed out that the claim of the petitioner for getting his continuity of service with effect from 26.4.2002 and seniority over them is not tenable and his representation has rightly been rejected. They have further pointed out that the petitioner was appointed as Additional District & Sessions Judge in Fast Track Courts in conformity with Rules 3, 4 and 5 of the Scheme Rules, 2001 and the alleged ad-hoc promotion is not under the cadre strength under Rule 4(2) of the Rules, 1963 and not in accordance with the provisions of the Rules, 1963. Therefore, his ad-hoc promotion under the Scheme Rules, 2001 cannot be treated as promotion to the cadre of O.S.J.S (Senior Branch) under Rule 9 of the Rules, 1963. The petitioner was given ad hoc promotion under the Scheme Rules, 2001 with the object as stated in the Rules and the service rendered by the petitioner in the Fast Track Courts being for a short duration, neither can be treated as service in O.S.J.S (Senior Branch) nor can be characterized as uninterrupted service precisely for the reason that the service rendered by the petitioner in the Fast Track Court was not an appointment in the cadre of O.S.J.S (Senior Branch). By denying other assertions raised in the writ petition, both the opposite parties have finally prayed for dismissal of the writ petition.

7. We have heard learned Senior Counsel Mr.Bijan Ray along with Mr.Y.Das appearing for the petitioner, Mr.Sanjit Mohanty for opp.party no.3, Mr.Jagannath Patnaik for opp.party no.4, and Mr.Ashok Mohanty, learned Advocate General appearing on behalf of opp.parties no.1 and 2 at length and also have gone through the entire record produced before us meticulously.

8. The moot question that emerges for consideration before this Court is as to whether the service rendered by the petitioner in Fast Track Court as Additional District Judge is to be taken into account while fixing his seniority after regularization of his service in accordance with the Rules in the parent cadre and whether the decision taken by the Full Court of this Court is liable to be set aside and if so, its effect.

9. The record clearly spells out that a Committee was constituted on 23.12.2009 by the Full Court in order to consider the representation of the petitioner along with the representation of other officers and vide report dated 3.3.2011 the Committee rejected the representation of the petitioner by way of majority whereas one member of the said Committee gave his dissenting view. In the Full Court meeting held on 2.8.2011, majority members of the Full Court accepted the report of the Committee constituted for the purpose and thereafter, the impugned letter rejecting the

representation of the petitioner, reproduced above, was communicated to the petitioner. In order to effectively decide the matter in issue, it is necessary to reproduce the relevant portion of the report of the Committee, which runs as under :

> " Considered the representation of Shri J.P.Das, Registrar General of the Court.
>
> Shri Das claims seniority over and above Shri D.Dash and Shri S.Pujhari as he was appointed as Ad hoc Addl.Sessions Judge prior to them. Shri Dash and Shri Pujhari were appointed in regular cadre vacancy of 44 against the available direct recruit quota of 2 (11 being the total quota). When Shri Dash and Shri Pujhari were appointed, no quota to the promotees was available either in the cadre or in the ex-cadre (44+36). So no substantive vacancy was available for being filled up from the promotion quota. When Shri Das was not born in the cadre of substantive vacancy of District Judge (which includes cadre + ex-cadre) and also even no vacancy was available to absorb him in the cadre then, his claim for seniority in the cadre by no stretch of imagination be allowed.
>
> (1990 Supreme Court Constitution Bench decision on Direct Recruit has settled the law in this regard).
>
> The period of service rendered in F.T.Court as Ad hoc Addl. Sessions Judge cannot be taken into consideration as on earlier occasions also the Full Court considered the same and refused to take the same into consideration.

(1) While giving confirmation, the length of service in substantive cadre is considered and not the period of service rendered in F.T.Court as Ad hoc Addl. Sessions Judge.

(Full Court Resolution dated 17.1.2009 with the Committee Report)

(2) While giving Selection Grade, period of service rendered in F.T. Court as Ad hoc Addl. Sessions Judge is not taken into consideration for calculation of the length of service of 5 years.

(3) Shri B.C.Rath was given Selection Grade when he completed 5 years in substantive post (Resolution of the Full Court dated 30.7.2010).

(4) Shri J.P.Das and other Officers were granted Selection Grade by Full Court only after their completing 5 years in the substantive cadre. No grievance was made in not taken into consideration the period of service rendered in F.T.Court as Ad hoc Addl. Sessions Judge.

(5) The Committee also rejected the representation of Shri G.P.Sahu today on such analogy.

When Officers appointed in the junior cadre are promoted simultaneously on their promotion, they maintain the inter se seniority in the junior cadre.

The case of Shri G.P.Sahu and Shri G.S.Panigrahi was considered for promotion along with their batch-mates, who were junior to them. But they were not found suitable for regular vacancy and were appointed against Ad hoc vacancy available in the F.T. As they were not promoted to the regular cadre even though they were appointed as Ad hoc Addl. Sessions Judge, inter se seniority in the junior cadre was not given to them.

The aforesaid being the prudent for the Full Court and also the settled position of law, in case of Direct Recruit vis-à-vis Promotee, the representation of Shri J.P.Das deserves to be rejected."

10. It is admitted case of both parties that petitioner and opposite parties 3 and 4 were working in the Judicial Service of the Orissa State. The petitioner was promoted vide notification dated 5th January, 2002 and posted as Addl. Sessions Judge in the Fast Track Court, vide another notification dated 11.4.2002 the petitioner was transferred vice Sri S.K.Patnaik to the Additional District Judge Court at Bargarh. The record further spells out that the promotion of the petitioner had been done after following a due and proper procedure as applicable for promotion to the Superior Judicial Service. The petitioner continued to officiate as Additional District Judge (Fast Track) till he was regularized and substantively appointed on 15.12.2003. The opposite parties 3 and 4 were appointed to the Senior Branch of the Orissa Superior Judicial Service by direct recruitment vide notification dated 13.01.2003 and 22.01.2003. It is further admitted case that the seniority in the service is to be determined under Rule 17 of the Rules, 1963, which clearly provides that in case a promotee officer has continuously officiated on a posts from a date prior to the appointment of a direct recruit

and if he is subsequently appointed substantively in the service without reversion to his parent service, he would take seniority in the cadre over such direct recruits. In the present case the petitioner has been officiating on promotion against the post of Addl. District Judge (Fast Track) prior to the direct recruits and having been substantively appointed without any reversion to his parent cadre, would be entitled to seniority over the direct recruits appointed later. This position is further fortified by the directions of the apex Court in Brij Mohanlal (supra), wherein direction contained at paragraph 14 specifically stated that the service rendered in Fast Track Court will be deemed to be service rendered in the parent cadre and in case an officer is promoted to higher grade in parent cadre during his tenure in Fast Track Courts, the service rendered in Fast Track Court would be counted as service in such higher grade and the petitioner is thus entitled to count his service in the Fast Track Court towards his seniority in the Orissa Superior Judicial Service (Senior Branch). To our mind the High Court has wrongly interpreted the claim of the petitioner. The petitioner is claiming his seniority on the strength of officiating service prior to substantive appointment and therefore, the date of substantive appointment cannot be made a ground to ignore his claim. Moreover, there can be no estoppel against statutes and the Statutory Provisions and therefore, the said statutory provisions cannot be ignored on the grounds of an earlier administrative decision or precedent. The stand taken by majority of judges is contrary to the statutory provisions of the Rules, 1963 and 2007 and also contrary to the law laid down by the apex Court in **State of Bihar and others v. Project Uchcha Vidya, Sikshak Sangh and others,** (2006) 2 SCC 545, in which it was laid down as under:

> "We do not find any merit in the contention raised by the learned counsel appearing on behalf of the respondents that the principle of equitable estoppel would apply against the State of Bihar. It is now well known, the rule of estoppels has no application where contention as regards a constitutional provision or a statute is raised. X x x x "

The aforesaid view also finds support from the decision of the apex court in **Air India v. Nergesh Meerza and others**, AIR 1981 Supreme Court, 1829, wherein the Supreme Court held as under:

> "x x x It is well settled that there can be no estoppel against a statute much less against constitutional provisions. X x x "

11. The selection grade when it became due to the petitioner would not debar him from claiming seniority to which he is legally entitled to. The grounds taken for denying him seniority by the Committee constituted for the purpose are erroneous as two wrongs would not make a right. In respect of fixation of seniority of an officer, it is settled law that it is the continuous length of service of such officer that would govern seniority on the post and the officiating service has to be counted. The case of Brij Mohanlal (supra) is fully applicable to the facts of the case in hand as per the direction contained at paragraph no.14 issued by the apex Court, which runs as under:

> "14. No right will be conferred on Judicial Officers in service for claiming any regular promotion on the basis of his/ her appointment on ad-hoc basis under the Scheme. The service rendered in Fast Track Courts will be deemed as service rendered in the parent cadre. In case any Judicial Officer is promoted to higher grade in the parent cadre during his tenure in Fast Track Courts, the service rendered in Fast Track Courts will be deemed to be service in such higher grade."

12. On perusal of the records, it reveals that the petitioner in his representation under Annexure-1 has clearly pointed out that his case is squarely covered by the decision in Brij Mohanlal (supra), but for the reasons best known to the Committee, they have not assigned any reason as to why the said case is not applicable to the case of the petitioner.

13. At this stage we would like to examine the case of the petitioner and opposite parties 3 and 4 from a different angle. As per the case of the opposite parties 3 and 4 in view of Rule 7 of the 2001 Scheme, the petitioner cannot claim regular promotion in the regular cadre on the basis of his appointment made under the 2001 Scheme. But the Rules framed under the 2001 Scheme are meant for special purposes and cannot over-ride the provisions contained in Rule 17 of Rules, 1963. It is settled law that if the appointee continues in the post uninterruptedly till regularization of service in accordance with the Rules, the period of officiating service shall be counted as per the law laid down by the apex Court in the Brij Mohanlal's case referred to supra. If the incumbent is appointed as is in the case of the petitioner to a post, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation, meaning thereby where initial appointment is only ad-hoc and the person continued and promoted to a higher grade in the parent cadre, then the service rendered by him on ad-hoc basis is required to be counted for the purpose of his seniority. In the instant case, the petitioner was promoted to the post of

Addl. District Judge (Fast Track) on 26.4.2002 and continued uninterruptedly till his appointment in the parent cadre and as such, the period of his service in the Fast Track Courts shall be counted for reckoning his seniority. In **Shri O.P. Singla and another v. Union of India and others**, reported in 1984(4) S.C.C., 450, a Bench of three Judges of the apex Court has held that seniority of direct recruits and promotees, if appointed under Rules, has to be determined on the basis of dates from which the promotees have been officiating continuously either in the temporary post or against a substantive vacancies. The relevant portion of the said judgment is quoted below:

> "xx x x Promotees who are appointed to the Service under either of these two Rules must be considered as belonging to the same class as direct recruits appointed under Rule 5(2). They perform similar functions, discharge identical duties and bear the same responsibilities as direct recruits. They are appointed on a regular basis to posts in the Service in the same manner as direct recruits are appointed, the only distinction being that whereas the latter are appointed on the recommendation of the High Court, promotees are appointed in consultation with the High Court. Therefore, no distinction can be made between direct recruits on one hand and promotees appointed to the Service on the other, in the matter of their placement in the seniority list. Exclusion from the seniority list of those promotees who are appointed to posts in the Service, whether such appointment is to temporary posts or to substantive vacancies in a temporary capacity, will amount to a violation of the equality rule since, thereby, persons who are situated similarly shall have been treated dissimilarly in a matter which constitutes an important facet of their career."

The aforesaid view is also fortified by the decision of the apex Court in **Direct Recruit Class-II Engineering Officers' Association and others v. State of Maharashtra and others**, AIR 1990 SC 1607, the relevant portion of which is quoted below:

> "If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with rules, the said period of officiating service will be counted."

14. Though the promotion of the petitioner was ad-hoc, the petitioner's initial appointment as Additional District Judge (Fast Track), Bargarh was after the High Court recommended the petitioner's suitability for

promotion to the cadre of O.S.J.S (Senior Branch) by following statutory provisions of the Rules which was notified by the Government under the orders of the Governor of Orissa (Annexure-3 & 4), and after having rendered uninterrupted service, such ad-hoc promotion was regularized by the Home Department vide notification No. 54392/ HS dated 15.12.2003 under the provisions of the Rules, 1963 and the petitioner was posted as Addl. District Judge, Bargarh vide Court's notification dated 19.1.2004. The petitioner joined as Additional District & Sessions Judge, Bargarh on 3.2.2004 on regular basis. The said notifications are filed as Annexures-5 and 6 respectively.

15. The contention of the opposite parties 3 and 4 that the promotion/ appointment of the petitioner has been done under the Scheme Rules, 2001 and not under the Rules, 1963, is liable to be noticed for the sake of rejection. It appears that before developing this argument, the opposite parties have not gone through the record. Their contention is against the record and in fact the petitioner was considered along with two other officers, namely, Sri G.R.Purohit and Sri M.K.Panda and after consideration by the Full Court in its meeting held on 14.12.2001 at 4.00 P.M. in the Conference Hall of the Orissa High Court, Cuttack, the petitioner along with two other officers was found fit for the purpose of his promotion to the cadre of O.S.J.S. (Senior Branch). It was further resolved that these officers are found suitable for promotion to the cadre of O.S.J.S. (Sr. Branch) and their names were recommended to the State Government for promotion to the cadre of O.S.J.S. (Sr. Branch). At this stage it is necessary to re-produce the relevant portion of the minutes of the meeting of the Full Court against Agenda No.3, which runs as under:

| | |
|---|---|
| Any other matter with the rmission of Hon'ble Chief Justice. | |
| Promotion of officers of O.S.J.S. .Br.) to the cadre of O.S.J.S. (Sr.Br.) their posting as ad hoc Additional strict Judges against Fast Tract urts. | Considered the Judicial and administrative capabilities along with C.C.Rs. of the following officers in the cadre of Orissa Superior Judicial Service (Jr.Br.) for the purpose of their promotion to the cadre of Orissa Superior Judicial Service (Sr.Branch).<br><br>1. Shri G.R.Purohit, Secretary, Consumer Disputes Redressal Commission, Cuttack<br>2. Shri M.K.Panda, Deputy Secretary, Orissa Legal Services Authority, Cuttack.<br>3. Shri J.P.Das, Adviser, O.E.R.C., Bhubaneswar.<br><br>Resolved that all the above named officers are found suitable for promotion to the cadre of O.S.J.S. (Sr. Branch) and accordingly their names be recommended to the State Government for promotion to the cadre of O.S.J.S. (Sr. Branch) for their appointment against the Fast Track Courts on ad-hoc basis." |

The aforesaid Full Court meeting was presided over by the then Chief Justice (Justice P.K.Balasubramanyan) wherein the promotion of the petitioner and two other officers were considered taking into their judicial and administrative capabilities along with their confidential reports and thereafter the name of the petitioner was recommended to the State Government for promotion to the cadre of O.S.J.S. (Sr. Branch) and such promotion can only be granted under the Rules, 1963 and therefore, the contention of the learned counsel for the opposite parties referred to supra is liable to be rejected and the proceedings of the Full Court reproduced above demolishes the case of the opposite parties, who have taken the plea that the promotion of the petitioner was under the Scheme Rules, 2001. This plea and

contention is contrary to factual position as revealed from the resolution of the Full Court of this Court, the relevant portion of which is entra-cited above.

16. It is crystal clear that the petitioner has undergone a regular, lawful and statutory procedure when he was appointed as Addl. District Judge (Fast Track), Bargarh, albeit on ad-hoc promotion. Therefore, his uninterrupted service in the cadre of Orissa Superior Judicial Service (Senior Branch) is to be counted with effect from 26.4.2002, on which date he joined the post initially and his subsequent regularization pursuant to Annexures-5 and 6 shall be deemed to be effective from the date of his initial appointment on promotion on ad-hoc basis. The period of service spent by him in the Fast Track Court cannot be thrown to winds and not counting this period for the purpose of seniority would be putting the petitioner to slow fire, which is not permissible under law as discussed above, in view of the petitioner's uninterrupted service till he was absorbed in his parent cadre. The scheme of Fast Tract Court came up for consideration before the apex Court in Brij Mohanlal's case, in which the apex Court has given directions. The relevant direction given in the said case is reproduced in paragraph 11 of this judgment.

17. The aforesaid direction of the apex Court clearly lays down the mandate that the promotees' service in such Fast Track Courts shall be counted towards regular service. Moreover, the appointment of the petitioner was never on officiating basis for any particular period, but was a final selection in accordance with the Rules, 1963 and Scheme Rules 2001 and that is why the apex Court directed for filling up all the consequential vacancies in the lower cadre from which the promotions are given in Fast Track Courts simultaneously. Moreover, it was also made clear that the persons appointed under the Scheme shall get all service benefits which are applicable to the members of Judicial Service of the State on equivalent status. The State Government took cognizance and promoted the incumbents like the petitioner from the cadre of Orissa Superior Judicial Service (Junior Branch) to Orissa Superior Judicial Service (Senior Branch) by following the prescribed procedure. The opposite parties 3 and 4 joined in Orissa Superior Judicial Service (Senior Branch) as direct recruits as contemplated under Rules 5 and 8 of the Rules, 1963. They were appointed as Addl. District Judges vide Home Department Notification Nos. 2495 and 2496 dated 13.01.2003, copy of which is filed as Annexure-8 to the writ petition and the High Court notifications dated 22.1.2003, filed as Annexure-9 and 9-A respectively. The opposite parties 3 and 4 joined in their respective posts on 3.2.2003 and 7.2.2003 respectively, meaning thereby they were born in the cadre of Orissa Superior Judicial Service (Senior

Branch) after about 10 months of the petitioner entering into such cadre on promotion to the post. But even then the opposite parties 3 and 4 were given selection grade with effect from 3.2.2008 and 7.2.2008 respectively vide Court's notification no. 79 and 80 dated 22.2.2008, copy of which is annexed as Annexure-10, thereby ignoring the claim of the petitioner with regard to his seniority. All this clearly spells out that the petitioner and other officers were superseded by the opposite parties 3 and 4 and on the other hand the petitioner was promoted to the cadre of Selection grade with effect from 22nd October, 2009 vide notification no. 899 dated 29.10.2009 of the High Court (Annexure-11) and in this manner the period of service as Addl. District Judge (Fast Track) was not taken into consideration ignoring the settled law of the apex Court.

18. The law quoted by the learned counsel for the contesting opposite party no.1 titled as **Ajit Prasad Verma and others v. The State of Jharkhand through the Law Secretary-cum-Legal Remembrancer, Govt. of Jharkhand and others**, W.P.(S) No. 4957 of 2004 is on a different footing i.e. under the Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Rules, 2001 whereas Rules, 1963 is totally different. Moreover, the petitioners in the case of Ajit Prasad Verma (supra) were appointed till continuance of the Fast Track Courts. In that case the recommendation letter clearly indicated that promotion is against ex–cadre post and till the posts are brought under the Jharkhand Superior Judicial Service and till continuance of the Fast Track Courts. Paragraph 19 of that judgment clearly spells out with regard to the fact that the petitioners were promoted for a specific purpose and for a particular period whereas in the case of the present petitioner, no such rider was created while promoting him and moreover, he continued uninterruptedly in the post till the order was passed in his favour by virtue of which he was promoted under the Rules, 1963. A reading of the said case would show that it bears no resemblance to the facts in the instant case and does not in any manner support the point canvassed on behalf of the opposite parties in the context of the nature and circumstances of the instant case. Moreover, determination of seniority is important for an employee. His promotion is dependent on this and the fixation of seniority must be based on some sound legal principles, which are just and fair. This is the mandate of Articles 14 and 16 of the Constitution of India. The reasons assigned by the Committee constituted by the High Court which disposed of the representation of the petitioner are misconceived in the facts of the case. Moreover, the Scheme Rules, 2001 cannot override the provisions of the Rules, 1963. Rule 17 of the Rules, 1963 clearly spells out that seniority of officers in the service shall be determined in accordance with the dates of substantive appointment to the service and if the promoted

officer, who may have been allowed to continuously officiate from a date prior to the date of appointment of a direct recruit, shall, if he is subsequently substantively appointed in the service without reversion to his parent service, take his seniority in the cadre over such direct recruits.

19. The opposite parties are trying to build a castle on the sandy foundation by referring to various Rules, particularly, Scheme Rules, 2001 and Rules, 1963. But to our mind no interpretation of Rules is involved in the instant case. The point involved is whether the period of service rendered in the Fast Track Courts by the petitioner as an Additional District Judge is to be counted as service in the parent cadre, particularly when the petitioner served continuously in the cadre uninterruptedly. The Scheme Rules, 2001 neither conceive nor empower the authority to give any promotion to any inservice candidate. The promotions are effected only by the parent rule, i.e., Rules, 1963 and thereafter appointment under the Scheme Rules, 2001. Moreover, the petitioner has not claimed any promotion during his tenure in Fast Track Court, but he was promoted by the Government on due consultation with the High Court on 5.1.2002 and the same was made under Rules, 1963 but not under Scheme Rules, 2001. He continuously officiated in the Senior Branch until regularized on 15.12.2003 (Annexure-5) and thereafter without reversion to Junior Branch, in terms of Rule 17 proviso to Rules, 1963 the petitioner carried his seniority in the cadre of Senior Branch for all purposes. As already discussed, but at the cost of repetition, Rule 17 proviso to Rules, 1963 clearly spells out the continuous officiation and as per this Rule, if promoted officer is allowed to officiate continuously from a date prior to the date of appointment of direct recruits and if he is subsequently substantively appointed in the service without reversion to his parent service, takes a seniority in the cadre over such direct recruit. Moreover, through notification dated 5.1.2002 (Annexure-3) the petitioner and two other officers were allowed ad hoc promotion on the basis of the recommendation of the Full Court and pursuant to this notification, the High Court by notification dated 11.4.2002 (Annexure-4) transferred and appointed the petitioner as Ad-hoc Additional District Judge in the Additional District Judge Courts established out of the 11$^{th}$ Finance Commission Award in the Judgeship and Sessions division of Sambalpur-Bargarh-Deogarh-Jharsuguda with headquarters at Bargarh.In view of all this, it is crystal clear that the petitioner was promoted under the Rules, 1963 and there is no provision under the Scheme Rules,2001 for promotion of an officer from Junior Branch to Senior Branch of the service. After promotion, he was appointed under the Scheme Rules, 2001 as Fast Track Courts were created under the scheme. In view of the law laid down in Direct Recruit Class-II Engineering Officers' Association (supra), the petitioner's seniority has to be counted from

5.1.2002, the date of his initial appointment to Senior Branch and not from the date when he was regularized. The notification issued by the Government in Home Department dated 15.1.2003(Annexure-5) further strengthens the case of the petitioner with regard to his promotion under Rules, 1963. If the petitioner was promoted and appointed under the Scheme Rules, 2001, issuance of the notification by the Government of Orissa in Home Department would not arise. We have gone through this notification, which clearly spells out that the petitioner, who was allowed ad-hoc promotion to the Senior Branch of the Orissa Superior Judicial Service vide Home Department notification dated 5.1.2002, was allowed to officiate in the said Branch on regular basis and was performing judicial function of hearing appeal under the Code of Civil Procedure and conducting sessions trial under the Code of Criminal Procedure and in fact while performing his duties, he was having the same jurisdiction as is being exercised by the regular cadre officers of the Senior Branch and he had the jurisdiction to entertain arbitration petitions under Section 34 of the Arbitration and Conciliation Act, 1996. Even appointment to an ad-hoc post for long duration would be sufficient to hold that such person was holding the post in a substantive capacity. To approximate to the official diction used in this connection, we may well say that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially for long duration in contradistinction to a person who holds for a definite or temporary period or holds it on probation subject to confirmation. The Committee was not justified by relying upon the earlier order for rejecting the representation of the petitioner.

20. Admittedly on 5.1.2002 the petitioner under Annexure-5 was promoted to the post of ad-hoc Additional District Judge in the District Judge cadre and as already discussed above, the petitioner was promoted by the Government in consultation with the High Court and that is why the notification was issued and as such, the issue relating to non-existence of any substantive vacancy in the post of the cadre on the date of appointment of opposite parties 3 and 4 is wholly academic. In the Civil List published in 2006 the petitioner's entry in the cadre has been shown as 26.4.2002, i.e., the date of joining, whereas the opposite party nos. 3 and 4 were appointed on 3.2.2003 and 7.2.2003 respectively and therefore, the matter was not considered by the competent authority with regard to the vacancy, if any in January, 2002 when the petitioner was promoted to the Post of Additional District Judge and appointed by the State Government on the basis of the resolution of the Full Court of this Court referred to supra in the Fast Track Court and was posted as Additional District Judge. Moreover, the question of non-existence of any vacancy in the post of the cadre was not an issue

either before the Committee or before the Full Court or for that matter in the present writ petition. The petitioner's promotion was regularized on 15.12.2003 (Annexure-6) when he was brought to regular cadre or in other words in the substantive cadre as referred to by the authorities. The apex Court in the said Direct Recruit Class-II Engineering Officers' Association (supra) in paragraphs 44 (A) & (B) has held that presumption should be raised that there was relaxation when there is a deviation from the quota rule. The decision of the Committee and the Full Court of this Court is contrary to law as propounded by the apex Court in Brij Mohanlal (supra) and Direct Recruit Class-II Engineering Officers' Association (supra). The three Judges Bench of the apex Court while considering the scheme framed for Fast Track Courts gave direction in para 10, sub-para-14, page 2101, which has already been reproduced in para 11 of this judgment. The opposite parties also raised an untenable contention that the petitioner was promoted under the Scheme Rules, 2001 and therefore, the services for such period is not available to be computed or reckoned as service in the parent cadre specially when the apex Court has settled the law relating to the issue. The direction issued by the apex Court in that case is binding on all courts and other authorities.

21. In so far as promotion to selection grade of the opposite parties 3 and 4 is concerned, the same is governed by the Orissa Superior Judicial Service Rules, 1963. The petitioner was allowed promotion on the recommendation of the High Court and notification dated 5.1.2002 was issued by the State Government in this regard. After issuance of this notification, the petitioner joined as Additional District Judge (Fast Track Court), Bargarh on 26.4.2002. Thus, applying the five years rule, the petitioner became entitled to be considered for such promotion to the selection grade on 25.4.2007, whereas the opposite parties 3 and 4 were appointed as Additional District Judge on 3rd and 7th February, 2003 respectively and thus, became eligible for consideration for their promotion to selection grade only in February, 2008, i.e., long after the petitioner earned his eligibility in April, 2007. All this clearly spells out that the promotion of opposite parties 3 and 4 to the selection grade prior to the petitioner is illegal. Thus, the petitioner has to be considered for promotion only prior to the opposite parties 3 and 4. The contention of the learned Senior Counsel on behalf of the opposite parties 3 and 4 that the promotion was fortuitous is fallacious. The Constitution Bench in the case of **Rudra Kumar Sain and others v. Union of India and others**, AIR 2000 SC 2808 in para 20 held that :

> "In the Service Jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such appointment cannot be held to be 'stop gap or fortuitous or purely ad hoc". In this view of the matter, the reasoning and basis on which the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be 'fortuitous/ ad hoc stop-gap" are wholly erroneous and therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous." (underline is made by this Court)

22. The contention of the opposite parties with regard to non-joinder of necessary parties is liable to be noticed only for the sake of rejection. It has been alleged on behalf of the opposite parties that the petitioner's case suffers from non-joinder of necessary parties since he has not arrayed the officers senior to him as necessary parties in his writ petition. After having gone through the record, we find that the gradation list as prepared by the High Court for the present purpose is as follows:

1. Sri Debabrata Dash (Opp.party No.3)
2. Sri Shatrughna Pujahari (Opp.Party No.4)
3. Sri Sarat Chandra Mishra
4. Sri Bijaya Narayan Mishra
5. Sri Gyana Ranjan Purohit
6. Sri Manoj Kumar Panda
7. Sri Jatindra Prasad Das ( writ petitioner)
8. Sri Saroj Kumar Mohapatra

The officers at Sl.Nos.3 to 6 are undisputedly senior to the present petitioner and they stand on the same platform and on similar footing like the petitioner. Their period of service in the Fast Track Courts much prior to the joining of opposite parties 3 and 4 have not been taken into consideration and all of them including the petitioner have been made junior to opposite parties 3 and 4. The petitioner is not affecting their seniority right in any manner and he does not have any grievance or cause of action against the officers at Sl.Nos.3 to 6. The petitioner has assailed the principle of not calculating his services rendered in the Fast Track Courts in the length of regular service as has been adopted by the High Court. In case the prayer of the petitioner is allowed, the opposite parties 3 and 4 presently at Sl.Nos.1 and 2 would be below Sri Saroj Kumar Mohapatra at Sl.No.8 and in that event the officers at Sl.Nos.3 to 6 being undisputedly senior officers to the

petitioner would be rather benefited in getting seniority instead of being affected in any manner. In other words, it can be stated that the officers at Sl.Nos.3 to 6 being no way to be affected by the decision of the present writ petition can never be said to be necessary parties to the proceedings. No list or order fixing seniority of the petitioner vis-à-vis other individual except opposite parties 3 and 4 is being challenged. Moreover, a necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision. The contention raised on behalf of the opposite parties no.3 and 4 is not sustainable and in the instant case the name of the officers mentioned at Sl.Nos.3 to 6 are neither necessary nor proper parties. They are not the parties without whom no order can be passed as the principle to be decided in this case will either benefit them or maintain their status quo. It is also well settled that beneficiaries are neither proper nor necessary parties.

23. Learned Senior Counsel, Mr.Sanjit Mohanty, appearing on behalf of opposite party no.3 vehemently argued that the writ petition is barred by delay and latches and he further submitted that on this short ground alone, the writ petition is liable to be dismissed. In order to lend support to this contention, he further submitted that the petitioner did not challenge the conferment of selection grade released in favour of opposite parties 3 and 4 on 22/23.2.2008 and the petitioner remained silent and did not chose to challenge any of the aforesaid order on any permissible grounds. He waived his right to question the seniority of opposite parties 3 and 4. The above contention of the learned Senior counsel for opposite party no.3 is against the record since we find that the petitioner filed the representation on 13.11.2009 where he has categorically challenged the selection grade granted to the opposite parties 3 and 4 vide notification nos.79 & 80 dated 23.02.2008. The record further spells out that the opposite parties 3 and 4 were born in the cadre of O.S.J.S. (Senior Branch) with effect from 3rd and 7th February, 2003 respectively when they joined as Additional District Judges, i.e. 10 months after joining of the petitioner in the cadre and both of them have been given promotion to selection grade District Judge on 3rd and 7th February, 2008 respectively. This fact was categorically pleaded by the petitioner in his representation dated 13.11.2009, which was filed after about one year seven months from the date when the selection grade was released to the opposite parties 3 and 4. The matter remained pending with the High Court for more than twenty months as the representation was filed on 13.11.2009 and the same was rejected on 8.8.2011. It is not a case where relief could be declined only on the ground of latches or delay and then again there is no delay in filing the present writ petition as the

representation was rejected on 8.8.2011 and the present writ petition has been filed on the same day, i.e., on 8.8.2011. The mere fact that the petitioner did not challenge the selection grade passed in favour of the opposite parties 3 and 4 by way of writ petition and challenged the same through representation does not dis-entitle him to claim seniority through the present writ petition, which has been filed on the same date when the representation was rejected. The cause of action really arose to the petitioner for moving the writ petition after he was communicated with the impugned order rejecting his representation.

24. In view of the foregoing analysis and reasons, in our opinion, therefore, there has been no unreasonable delay on the part of the petitioner to challenge the impugned order and consequently, the order by virtue of which the opp.parties 3 and 4 were granted selection grade.

25. It is now well settled that even in the case of probation or officiating appointment, which are followed by confirmation unless contrary rule is shown, the service rendered as officiating appointment or probation cannot be ignored for reckoning the length of continuous officiating service for determining the place in the seniority list. Even if the first appointment is made by not following the prescribed procedure and such appointment is approved later on, the approval would mean confirmation by the authority and shall relate back to the date on which his appointment was made by the State Government on the basis of the Full Court resolution and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation of the petitioner. This view of ours is also supported by the judgment of the apex Court in **S.L.Chandrakishore Singh v. State of Manipur and others**, AIR 1999 Supreme Court, 3616, the relevant portion of which is quoted below:

> "For the reasons aforestated, this writ petition is allowed with a direction to the respondents to treat the date of officiating appointment of the petitioner as the date of his regular appointment and refix his seniority in terms of the direction, consequently, the seniority list published under Rule 28 of the rules by notification dated 30.3.1990 (Annexure-7) and the impugned order dated 16.8.1989 (Annexure-3) are hereby set aside in so far petitioner is concerned."

26. Seen from any angle, we are of the opinion that majority view of Full Court of the High Court has erroneously accepted the report of the Committee by wrongly interpreting the provisions of law applicable in the

case and ignoring the judgments in Brij Mohanlal (supra) and Direct Recruit Class-II Engineering Officers' Association (supra), which squarely cover the matter involved in the present writ petition in favour of the petitioner.

27. Having thus considered the version of the contesting parties and deliberating over the arguments advanced by the learned Senior Counsel and learned Advocate General in the light of the record produced before us, it clearly led us to the irresistible conclusion that the Committee fell in error in rejecting the representation of the petitioner and thereafter the Full Court erroneously accepted the report of the majority view of the Committee and finally passed the impugned order and the petitioner being senior to the opposite parties 3 and 4 was liable to be released selection grade with effect from 25.4.2007 prior to the opposite parties 3 and 4 and as such, the notification under Annexure-10 is liable to be set aside.

28. In view of our conclusions, as aforesaid, we quash the report of the Committee dated 3.3.2011 and the letter Annexure-2 by virtue of which the petitioner was communicated that his representation has been rejected and the notification dated 22.2.2008 (Annexure-10). The writ petition filed by the petitioner is allowed. The opposite party no.2 is directed to treat the period of service rendered by the petitioner in the Fast Track Court for the purpose of his seniority from the date of his appointment i.e. 26.4.2002 and re-fix his seniority in terms of the observation made in this judgment. Since the future of the officers to a great extent depends on seniority and many may be on the verge of superannuation, the High Court would do well in finalizing the seniority within a period of two months from the date of receipt of a copy of this judgment. A fresh seniority list shall be prepared in the light of our direction by following the judgments of the apex Court referred to above along with consequential benefits under law.

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

Writ petition allowed.

**2011 ( II ) ILR- CUT- 949**

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

W.P.(C ) NOS. 6701, 6702 OF 20011 (Decided on 06.09.2011)

**M/S. TATA SPONGE IRON LTD.** ……..Petitioner.

*.Vrs.*

**COMMISSIONER OF SALES TAX ORISSA & ORS.** …….. Opp.Parties.

(A). **ORISSA ENTRY TAX ACT, 1999 (ACT NO.11 OF 1999 ) – S.9-C. r/w Section 42 of the OVAT Act, 2004.**

**Principles of natural justice – Joint Commissioner of Sales Tax constituted the audit team and monitered the Audit process – Involved him self in the tax audit and approved audit visit report – Not to take up assessment.**

(Para 17,18)

(B).**ORISSA ENTRY TAX ACT, 1999(ACT NO. 11 OF 1999 ) – S.9-C (6) (7) r/w Section 42(6), (7) of the OVAT Act.**

**Limitation – Reckoning of – Dealer claiming assessment barred by limitation – Unless the petitioner succeeds in establishing that it has received the audit visit report six months earlier than the date of the assessment order – Period of six months as provoded U/s. 42 (6) would run from the date of receipt of audit visit report by the dealer**.

(Para 20,21,23)

(C). **Amendment** – **Though not given retrospective effect – Aid can be had to construe earlier ambiguous provision**.

(Para 23)

(D). **Precedent** – **Order passed by High Court – Binding on subordinate Judiciary, Tribunal, Quasi judicial authority – Decision rendered by two Judges binding on Co-ordinate Bench of two Judges.**

(Para 21,25)

**Case laws Referred to:-**

1.(1984) 1 SCC 700 : (CIT, West Bengal-III & Ors.-V-Oriental Rubber Works.)
2.(1997) 7 SCC 556 : (P.K.Ramachandran-V- State of Kerala & Anr.)
3.(2008) 18 VST 493(P& H) : (Shreyans Industries Ltd.-V-State of Punjab & Ors.)
4.(1963) 48 ITR (SC) 154 : (Ahmedabad Manufacturing & Calico Printing Co.Ltd. -V- S.G.Mehta, Income-Tax Officer & Anr.)

5.(1977) 39 STC 12 : (Thiru Manickam & Co.-V- The State of Tamil Nadu).
6.AIR 1962 SC 1893 : (M/s. East India Commercial Co.Ltd.-V-Calcutta & Anr.-V- Collector of Customs, Calcutta).

For Petitioner - Mr. B.K.Mahanti, Sr. Advocate.
For Opp.Parties - Mr. R.P.Kar, Standing Counsel for Revenue

***B.N. MAHAPATRA, J***. In W.P.(C) No.6701 of 2011 challenge has been made to the order of assessment dated 21.01.2011 (Annexure-1) passed under Section 42 of the Orissa Value Added Tax Act, 2004 (for short, "OVAT Act") by opposite party No.2-Joint Commissioner of Sales Tax, Jajpur Range, Jajpur Road for the period from 01.04.2006 to 31.03.2007. In W.P.(C) No.6702 of 2011 challenge has also been made to the order dated 21.01.2011 (Annexure-1) passed under Section 42 of the OVAT Act for the period 01.04.2007 to 31.03.2008 by the said opposite party No.2.

2. Since the issues involved are identical in the aforesaid writ petitions, they are disposed of by this common judgment.

3. The petitioner's case in a nutshell is that it is a Public Limited Company incorporated under the Companies Act, 1956 and carries on business in manufacturing and selling of sponge iron at Beleipada, Joda in the District of Keonjhar. It is registered as a dealer with opposite party No.3-Sales Tax Officer, Barbil Circle, Barbil under the provisions of the OVAT Act, Orissa Entry Tax Act, 1999 (for short, OET Act) and Central Sales Tax Act, 1956 (for short, CST Act). On 05.11.2008, tax audit was conducted for the period 2007-08 and again on 16.05.2009 tax audit was conducted for the period 01.04.2006 to 31.03.2008. The audit visit report in Form-303 was prepared on 05.12.2009. Opposite party No.2-Joint Commissioner of Sales Tax has approved the said audit visit report on 18.01.2010. Pursuant to the notice issued in Form VAT-306 for assessment of tax as a result of audit prescribed under Rule 49(1) of the Orissa Value Added Tax Rules, 2005 (for short, "OVAT Rules"), the petitioner produced the relevant books of account as well as the documents before opposite party No.2 and submitted its written note of submission. The assessment proceeding was concluded on 07.07.2010. The petitioner received the assessment orders dated 21.01.2011 on 14.02.2011. Being dissatisfied with the said assessment orders, the petitioner has filed the present writ petitions.

4. Mr. B.K. Mahanti, learned Senior Advocate appearing for the petitioner submitted that the orders of assessment having been passed raising huge demands coupled with penalty without assigning any reason are liable to be annulled. It was vehemently argued that opposite party No.1-

Commissioner of Sales Tax, Orissa in exercise of powers conferred on him under Rule 4(7) of the OVAT Rules assigned the records of the petitioner-dealer to the jurisdiction of Jajpur Range, the Larger Taxpayers' Unit (for short, 'LTU') constituted in the said Range vide Notification No.14394-III(III) 32/2007-CT dated 05.09.2007. The impugned orders of assessment have been passed by opposite party No.2-Joint Commissioner of Sales Tax, Jajpur Range, who is not competent to assess the petitioner. The orders of assessment being passed by an authority who is not vested with authority and jurisdiction to assess, the same are liable to be quashed.

5. It is further submitted that the orders of assessment have been passed violating the principles of natural justice. A close glance at the audit visit report under Annexure-2 and notice in Form VAT-306 for audit assessment under Annexure-3 series would reveal that conspicuously the opposite party no.2-Joint Commissioner of Sales Tax himself having approved the audit visit report on 18.01.2010 has proceeded to assess the petitioner. It is a clear case of bias as opposite party No.2 has acted both as the investigator and adjudicator. In support of his contention, Mr. Mahanti, learned Senior counsel relied upon a judgment of this Court in the case of *National Trading Co. vs. Asst. Commissioner of Sales Tax, Cuttack*, 2001 (122) STC 212 and *Falcon Marine Export Ltd.* in W.P.(C) No.91 of 2011.

6. It was further argued that the orders of assessment passed are time-barred having been passed beyond the prescribed time stipulated under sub-section (6) of Section 42 as well as sub-section (7) of Section 42 of the OVAT Act. The audit visit report shows that the same was approved on 18.01.2010 by opposite party No.2-Joint Commissioner of Sales Tax, Jajpur Range. Perusal of the assessment orders reveals that the same are passed on 21.01.2011. As per the requirement of Section 42(6) of the OVAT Act, the orders of assessment were required to be passed on or before 17.07.2010. Though the proviso to sub-section (6) of Section 42 of the OVAT Act provided that if for any reason the assessment is not completed within the time specified in this provision, the Commissioner, may on the merits of each case, allow such further time not exceeding six months for completion of the assessment proceedings, no such extension of time has ever been brought to the notice of the petitioner. The orders of assessment are silent about such extension of time granted by opposite party No.1. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *CIT, West Bengal-III and others, vs. Oriental Rubber Works*, (1984) 1 SCC 700, Mr.Mahanti submitted that opposite party-revenue are obliged to expeditiously communicate the Commissioner's approval as well as recorded reasons of the Authorized Officer on which such approve based to

the petitioner. It was alternatively argued that even if assuming that there has been extension of time by opposite party No.1, the orders of assessment having been passed on 21.01.2011, the same exceeded one year. Moreover, Section 42(7) of the OVAT Act provides that no order of assessment shall be passed after expiry of one year from the date of receipt of the audit visit report. Annexure-2 reveals that opposite party No.2 has given the said audit visit report on 18.01.2010 after approving it. Orders of assessment having been passed on 21.01.2011 and served on the assessee-petitioner on 16.02.2011, the same are hit by provisions of limitation stipulated in the statute.

7. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *P.K. Ramachandran vs. State of Kerala and another,* (1997) 7 SCC 556, Mr. Mahanti, contended that the law of limitation may harshly affect a particular party but it has to be applied with all its rigor when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds.

8. Placing reliance on the judgment of Punjab and Haryana High Court in the case of *Shreyans Industries Limited vs. State of Punjab and others,* [2008] 18 VST 493 (P & H), Mr. Mahanti contended that the Commissioner is required to exercise his power of extending time for completion of assessment before the assessment becomes time barred. There is no question of deferring an assessment which has already become time barred.

9. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Ahmedabad Manufacturing and Calico Printing Co. Ltd. vs. S.G. Mehta, Income-Tax Officer and Another*, (1963) 48 ITR (SC) 154, Mr. Mahanti contended that the Rule that an Act did not have retrospective operation on substantial rights which had become fixed before the date of commencement of the Act was not unalterable. The legislature might affect substantial rights by enacting laws which were expressly retrospective or by using language which had that necessary result. The language might give an enactment more retrospectivity than what the commencement clause gave to any of its provisions. When this happened the provisions thus made retrospective, expressly or by necessary intendment, would operate from a date earlier than the date of commencement and would affect rights which, but for such operation, would have continued undisturbed.

10. Mr. Mahanti, learned Senior Advocate further submitted that when no discrepancy is noticed in the books of account, the SION method adopted, in order to find out the suppression, is not supported by any justified reason. There is nothing on record to show that there has been any sale

suppression. Short production of finished goods out of raw materials depends on various factors, namely, skill of employees, quality of raw materials, use of the machinery, load of electricity etc. They cannot be said to be uniform all through the year. Variations in production are bound to occur. Since the SION method, has not been statutorily provided, no sanctity can be attached to it while assessing the turnover of the petitioner as if the said method is sacrosanct. In absence of any material whatsoever, the adoption of SION method is without rationality. There has not been proper appreciation as well as consideration of facts involved. The petitioner has produced the relevant materials correlating the entries in books of account with regard to input tax credit availed in respect of HSD. The petitioner also placed invoices showing purchase of HSD from outside the State as well as inside the State. No attempt was made by opposite party No.2 to find out the component of input credit which could be allowed on the purchases of HSD made within the State. The decision relied upon by opposite party no.2 in the assessment orders has no application to the facts of the present cases. Therefore, the assessment orders palpably indicate arbitrary and inflated demands and are liable to be quashed.

11 Per contra, Mr. R.P. Kar, learned Standing Counsel appearing for the Revenue submitted that opposite party No.2-Joint Commissioner of Sales Tax was never the head of the audit team as has been contended. The audit visit report dated 05.12.2009 was submitted by a team led by Sri S.R. Mishra, the then ACCT, Barbil Circle on 18.01.2010. Opposite party No.2 has signed at the end of the audit visit report as a token of receipt of the report. The receipt of the audit visit report is an administrative act. The receipt of the report is for the limited purpose of onward transmission of the same to the Assessing Authority. Alternatively, Mr. Kar, learned Standing Counsel submits that in case this Court feels that opposite party No.2 is not a competent authority to make assessment, the present matter may be remanded to any other competent officer having jurisdiction over the dealers assigned to LTUs, who is no way connected with the tax audit of the petitioner.

12. It was further contended that since there is availability of alternative remedy by way of filing appeal under the OVAT Act, the present writ petitions are not maintainable. On 22.02.2010, the petitioner received the notice dated 10.02.2010 sent along with the audit visit report. Originally, the date was fixed for appearance of the assessee-dealer on 10.03.2010, but on its request, the date of appearance was extended to 03.05.2010. Due to various reasons, the case could neither be taken up on 03.05.2010 nor on 09.06.2010 and 29.06.2010. It was only on 07.07.2010 the assessee-

petitioner produced the books of account for examination. The audit visit report was confronted to the authorized officer and the books of account produced by the dealer were examined. The statement of the representative of the dealer was recorded. However, the assessments could not be completed awaiting examination of some more documents and the cases were adjourned to 20.10.2010. Therefore, the assessments could not be completed within six months for which opposite party No.2 sought for extension of time as provided under the proviso to Section 42(6) of the OVAT Act. Opposite party No.1-Commissioner of Sales Tax, Orissa extended the time for a period of six months and directed the Assessing Authority to complete the audit assessment by 09.02.2011 positively. Since the audit visit report was received by the dealer on 22.02.2010 so the Commissioner of Sales Tax could have extended the time till 21.02.2011, i.e., one year from the date of receipt of the audit visit report by the dealer-assessee. It is submitted that unless the audit visit report is actually served on the dealer, the assessment proceedings cannot commence as per law. In support of his contention, Mr. Kar, learned Standing Counsel placed reliance upon an unreported judgment of this Court dated 09.10.2007 passed in the case of [*M/s. Lalchand Jewellers Pvt. Ltd. Vs. Asst. Commissioner of Sales Tax, Puri Range, Puri* in W.P.(C) No.11864 of 2007] and submitted that since in the said case the order of assessment had been passed within six months from the date of receipt of the audit visit report by the dealer the same was treated to be valid and within the period of limitation. Mr. Kar, further submitted that Sections 42(6) and 42(7) of the OVAT Act did not stipulate that the period would start from receipt of the audit visit report by the Assessing Authority or the dealer. While interpreting the said provision, this Court in *Lalchand Jewellers Pvt. Ltd.* (supra) held that the period commences from the date of receipt of the audit visit report by the dealer. The order of this Court is binding on the Assessing Officer who has acted as per the decision of this Court. According to Mr. Kar, the assessment has rightly been completed within one year from the date of receipt of the audit visit report by the dealer.

13. It was further argued by Mr. Kar that sub-section (6) of Section 42 of the OVAT Act was amended by the Orissa Value Added Tax (Amendment) Act, 2010 and in place of words “receipt of” the words “service of notice on the dealer” was replaced. The aforesaid amendment in the nature of clarification in which the real intention of the legislature can be fully comprehended and the real intention of the legislature before amendment was interrelated in the sense that the period of six months or one year as the case may be is required to be counted from the receipt of audit visit report by the dealer along with notice of assessment. The clarification was necessary to avoid confusion and is in effect

conceptually and contextually same to the view expressed by this Hon'ble Court. Placing reliance on the judgment of the apex Court in the case of *Thiru Manickam and Co. vs. The State of Tamil Nadu, (1977) 39 STC 12,* Mr. Kar contended that subsequent amendment to Section 42(6) of the OVAT Act is clarificatory in nature.

14. Mr.Kar further submitted that the intention of the Legislature for prescribing the period of six months and one year for completing the assessment is in the interest of early collection of Value Added Tax in cases where the dealer failed to submit correct return and the facts are detected only during audit visit. Therefore, the period of six months/one year is a mandate on the assessing authority and no right is conferred on the dealer. The Assessee-petitioner is not correct to say that the period of limitation for making assessment had expired on 17.01.2011. It is submitted that the assessment of tax and the period prescribed for that purpose are part of procedural provisions. Therefore, the time limit given in sub-sections (6) and (7) of Section 42 of the OVAT Act should be interpreted in the manner as done by this Hon'ble Court in *Lalchand's case (supra)*. The assessment of tax on the basis of fraud which comes to forefront in course of audit assessment should not be allowed to be frustrated because of technical interpretation given by the dealer to escape the liability. The interpretation that frustrates demand and collection of tax is to be avoided in the public interest. Receipt of audit visit report by the Assessing Officer is a part of the "audit" process and receipt of the audit visit report by the dealer is a part of the "assessment" process. The assessment process starts with the issue/service of notice on the dealer along with the audit visit report. Therefore, in the context of assessment, "receipt of Audit Visit Report" is envisaged under the OVAT Act to be receipt of Audit Visit Report by the dealer. It cannot be a receipt of audit visit report by the Assessing Authority which is a part of the audit process, a stage prior to assessment process. It is only after receipt of the audit visit report, the actionable cause lies with the dealer. On the other hand, no cause of action lies with the Assessing Officer when audit visit report is merely received by him except to forward the audit visit report along with notice to the dealer. In any event the position in law has been clearly stated in *Lalchand's case (supra).*

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

(i) Whether opposite party No.2-Joint Commissioner of Sales Tax having approved the audit visit report is competent to assess the petitioner?

(ii) Whether the impugned orders of assessment are barred by limitation under Section 42(6) and (7) of the OVAT Act, 2004?

(iii) Whether the demand raised in the orders of assessment on the ground of suppression of sale is without any valid reason?

16. So far as question No.(i) is concerned, the specific case of the petitioner is that on perusal of the audit visit report and the orders of assessment, it reveals that opposite party No.2 who has approved the audit visit report on 18.01.2010 has passed the impugned orders of assessment. Therefore, it is clear that opposite party No.2 has acted both as investigator and adjudicator. According to Mr. Kar, opposite party No.2 is not the head of the audit team as has been contended by the petitioner. The audit programme was approved by the Commissioner and accordingly, opposite party No.2-Joint Commissioner of Sales Tax constituted an audit team to conduct the audit. Opposite party No.2 has signed the audit visit report in a mechanical manner as a token of receipt of the report.

17. In paragraph-5 of the counter affidavit, it is stated that the audit was directed by opposite party No.2. The receipt of the audit report is a part of the audit process and is purely administrative in nature. In paragraph-6 of the counter affidavit, it is stated that the Joint Commissioner of Sales Tax of the Range is required to constitute an audit team and monitor the progress of the audits assigned to the team. In view of this, it cannot be said that opposite party No.2-Joint Commissioner of Sales Tax is not involved in the audit process.

18. Therefore, we are of the view that in order to maintain transparency, any officer who is involved in any manner or has acted with the process of audit and preparation of the audit report in respect of the dealer should not be the Assessing Officer of that dealer. Otherwise, there will be violation of cardinal principles of natural justice. Our view is fortified by the judgment of this Court in ***National Trading Co.*** *(supra)* wherein this Court held as follows:

> "……Although many contentions were raised in support of the writ petition, we need not examine them as the matter can be decided on the following : short point being that the reporting officer himself cannot be the assessing officer. It is said that justice should not only be done but should manifestly be seen to be done. Justice can never be seen to be done if a person acts as a Judge in his own cause or is himself interested in its outcome. This principle applies not only to judicial proceedings but also to quasi-judicial and administrative proceedings. In the case at hand, there is no dispute that the

> reporting officer himself took up the impugned assessment proceedings and completed the same. This he could not have done."

19. Question No.(ii) is as to whether the period of six months and one year provided under sub-Sections (6) & (7) of Section 42 of the OVAT Act for the purpose of limitation shall run from the date of receipt of the Audit Visit Report by the Assessing Officer or from the date of receipt of the same by the Assessee. At this juncture, it is necessary to extract here the provision of Section 42 (6) of the OVAT Act.

> 42(6) Notwithstanding anything contained to the contrary in any provision under this Act, an assessment under this section shall be completed within a period of six months from the date of receipt of this Audit Visit Report.
>
> Provided that if, for any reason, the assessment is not completed within the time specified in this sub-section, the Commissioner may, on the merit of each such case, allow such further time not exceeding six months for completion of the assessment proceeding."

20. This Court in the case of ***Lalchand Jewellers Pvt. Ltd. (supra)*** held that such limitation shall run from the date of receipt of the Audit Visit Report by the dealer. Mr. Mahanti, learned senior counsel submitted that this Court in *Lalchand Jewellers Pvt. Ltd. (supra)* made a passing remark regarding limitation and was not expression of any opinion on law. For better appreciation of the fact, it is necessary to extract the relevant paragraphs from the order dated 09.10.2007 passed in the case of ***Lalchand Jewellers Pvt. Ltd. (supra):***

> "Learned counsel for the petitioner is assailing the said assessment order mainly on three grounds. First, the assessment order covers the period from 1.4.2005 to 31.07.2006 which is beyond one financial year. According to him, 'year' has been defined under Section 2(64) of the said Act as financial year but the said assessment covers more than one financial year and is bad in law. The second ground is that the said order of assessment is violative of the principles of natural justice inasmuch as the petitioner was asked by notice dated 6.3.2007 to appear and produce the relevant books of accounts before the Assessing Officer on 13.3.2007 at 11 A.M. It is contended that it is difficult for the petitioner to satisfy the authority on the basis of voluminous documents of the Audit Visit Report within one day i.e. by 13.3.2007. As such, appropriate

opportunity of hearing was not given to him to explain. The third point is that it is provided under Section 42(6) of the Act that assessment should be completed within a period of six months from the date of receipt of Audit Visit Report. In the instant case, the Audit Visit Report is dated 30.8.2006 and six months from that period will expire by February, 2007. As the assessment order was passed on 13.3.2007, the same is bad in law.

Learned counsel appearing for the Revenue has controverted all these points by referring to various provisions of the Act and considering the submissions of the learned counsel for the both the parties, this Court is unable to accept the petitioner's contentions for the reasons discussed herein below.

If we take up the last objection of the learned counsel for the petitioner first it appears from Section 42(6) of the Act, that the assessment order has to be completed within a period of six months from the date of receipt of the Audit Visit Report. Even though the Audit Visit Report is dated 30.8.2006, no where in the petition, there is any averment about the date when the petitioner received the same. Unless the petitioner succeeds in establishing that it has received the same six months earlier than the date of the assessment order the provisions of Section 42(6) is not attracted. No such case has been made out in the writ petition."

*(Underlined for emphasis)*

21. Thus, it is amply clear that this Court in interpreting Section 42(6) held that unless the petitioner succeeds in establishing that it has received the audit visit report six months earlier than the date of orders of assessment, the provisions of Section 42(6) are not attracted. The above order of this Court has not been challenged and therefore, it has attained its finality. Needless to say that the order passed by this Court is binding on the Sub-ordinate Judiciary, Tribunals and Quasi Judicial Authorities. The Hon'ble Supreme Court in the case of ***M/s. East India Commercial Co. Ltd., Calcutta and another vs. Collector of Customs, Calcutta,*** *AIR 1962 SC 1893,* held as follows:

"29……..Under Art. 215, every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Under Art. 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority, including in

> appropriate cases any Government, within its territorial jurisdiction. Under Art. 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer. We, therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding".

22. It is not the case of the petitioner, that the Assessing Officer has acted contrary to the order of this Court passed in the case of *Lalchand Jewellers Pvt. Ltd. (supra)***.** On the contrary it is submitted that no opinion on the legal position was expressed. By quoting from the order, we conclude that the stand is untenable. As a matter of fact the position in law has been delineated.

23. The provisions of Section 42(6) was interpreted by this Court in Lalchand Jewellers (supra) in W.P.(C) No.11864 of 2007 disposed of on 09.10.2007 and this Court held that period of limitation of six months shall run from the date of receipt of audit visit report by the dealer. Subsequently, sub-section (6) of Section 42 of the said Act was amended by the Orissa Value Added Tax (Amendment) Act, 2010 and in place of the words "receipt of" the words "service of notice on the dealer" were replaced. The Hon'ble Supreme Court in the case of *Thiru Manickam & Co. (supra),* held that an amendment which is by way of clarification of an earlier ambiguous provision can be useful aid in construing the earlier provision, even though such an amendment is not given retrospective effect.

24. In the instant case, the audit visit report was received by the dealer on 22.02.2010, the assessment could not be completed within six months and the Assessing Officer sought for extension of time from the Commissioner and the Commissioner extended the time to complete the audit assessment by 09.02.2011 positively. Although the Commissioner

could have extended the time till 21.02.2011, i.e., one year from the date of receipt of the Audit Visit Report by the dealer-assessee. The assessment in the instant case has been completed on 21.01.2011. When the impugned orders of assessment were passed, the judgment of this Court on the period of limitation was in operation. Therefore, the stand now taken by the assessee is not acceptable and we are of the view that the impugned orders of assessment have been passed within the period of limitation.

25. Law is well settled that a decision by two Judges has a binding effect on another co-ordinate Bench of two Judges, unless it is demonstrated that the said decision by any subsequent change in law or decision ceases to be laying down a correct law. [*See Government of Andhra Pradesh & Anr. Vs. B.Satyanarayan Rao (dead) by LRs and Ors., (2000) 4 SCC 262]*

26. In view of the decision of this Court directly on the point of limitation provided under Section 42(6) of the OVAT Act and decision of the Hon'ble Supreme Court in *Manickam (supra)*, it is not necessary to deal with other decisions relied upon by either of the parties on the point of limitation. The facts of those cases are also distinguishable from the facts of the present case.

27. Question No.(iii) is as to whether the demand raised in the orders of assessment on the ground of suppression of sale is without any valid reason.

Since, we are going to remand the matter to the competent Assessing Officer, adjudication of the said question would be only an academical exercise.

28. In the facts situation, we set aside the orders of assessment passed under Annexure-1 in both the aforesaid writ petitions and remand the matter for fresh assessment by the competent Assessing Authority having jurisdiction over the dealers assigned to LTUs, who is in no way connected with the tax audit of the petitioner. However, we make it clear that we have not expressed any opinion on the merits of the cases except on the question of limitation and jurisdiction/authority of Joint Commissioner of Sales Tax who has passed the impugned assessment orders. The fresh assessment process shall be completed within a period of eight weeks from today after giving opportunity of hearing to the petitioner-dealer.

29. With the aforesaid observations and directions, the writ petitions are disposed of.

Writ petition disposed of.

**2011 ( II ) ILR- CUT- 961**

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

W.P.(C ) NO.14732 OF 2009 (Decided on 10.08.2011)

**RABINDRA KUMAR BISOI & ORS.** ……Petitioners.

*.Vrs.*

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

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

**P.I.L. – Illegal construction of mobile towers in Bhoodan land which is meant for the poor and landless persons – Action challenged – Writ petition filed by interested persons for the welfare of the people – Held, P.I.L. is maintainable.**

**No objection certificate/permission granted by Bhoodan Yagna Samiti and the Executive officer Puri Municipality, can not confer any right infavour of O.P.8 to install mobile transmission tower in Bhoodan land which is contrary to the statutory provisions contained in the Orissa Bhoodan and Gramadan Act 1970 and Rules 1972 – Held, any action of the authority in violation of the provisions of the statute cannot be allowed to sustain in law – Direction issued to remove the mobile tower within twelve weeks.** (Para 32,33)

**Case law Referred t:-**

AIR 2007 Ker 33 : ( Reliance Infocomm Ltd.-V-Chemanchery Gram, Panchayat and Ors.)
2.2010(1) OLR (SC)380 : (State of Uttaranchal-V-Balwant Singh Chaufal & Ors,)
3.2008(II) CLR – 509 : (Ramji Singh & eight Ors.-V-State of Orissa & Ors.)
4.(1980)1 SCC 98 : (Hussainara Khatoon (IV) –V- State of Bihar)
5.(1980)4 SCC 162 : (Municipal Council, Ratlam-V- Vardhichan)
6.(2003) 7 SCC 546 : (Guruvayoor Devaswom Managing Committee & Anr.-V- C.K. Rajan & Ors.)
7.AIR 2000 SC 3243 : (Badrinath-V- Government of Tamil Nadu & Ors.)
8.AIR 1973 SC 855 : (Sirsi Municipality by its President, Sirsi -V- Cecelia Kom Francis Tellis)

For Petitioner - M/s. Sukanta Ku. Dalai & T.K.Swain.
For Opp.Parties - M/s. S.K.Pattnaik, D.P.Das & P.K.Pattnaik (for O.P.No.8)

Addl. Govt. Advocate (for O.P.No.1 to 7)
M/s. B.R.Sarangi & M.Mohanty (for O.P.No.9)
M/s. B.P.Tripathy, M.Mohanty, K.P.Behera
(for O.P.No.10)

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***B.N. MAHAPATRA, J***. In the present writ petition challenge has been made to the construction of mobile tower by opposite party No.8-The General Manager, North-East Circle, Assam Region, Telecom Circle of Wireless, Tata & IT Services Ltd., At: DN-30, Sector-5, Salt Lake, Calcutta-91 and opposite party No.9-The General Manager, Idea Cellular Ltd., Plot No.437, Ground Floor, Chandrasekharpur, Bhubaneswar, Dist: Khurda in a prohibited Bhoodan area and inaction of opposite party No.7-Tahasildar, Puri in not prohibiting/evicting the unauthorized occupants from the said Bhoodan land on the ground that such construction in the Bhoodan land is illegal and also detrimental to the public life.

2. Petitioners' case in a nutshell is that they are permanent residents of Penthakata area under Puri Sea Bench Police Station in the District of Puri. They are public spirited persons and always interested for development and upliftment of the local area. They have filed this writ petition in the nature of Public Interest Litigation. Except larger interest of public in agitating the grievance of the local people, the petitioners have no other interest. According to the petitioners, opposite party Nos.8 and 9 have illegally constructed Mobile Towers in the Bhoodan land. The petitioners approached the Administrative Officer, Bhoodan Yagna Samiti, Bhubaneswar who is the competent authority, by filing a representation, under the Orissa Bhoodan and Gramadan Act, 1970 (for short, "Act, 1970") to evict the encroachers. Pursuant to such representation, the Administrative Officer vide its letter dated 30.05.2009 (Annexure-2 series) intimated to the Tahasildar, Puri about the illegal construction of Mobile Towers over Bhoodan Plots in Balukhanda Penthakata area, Puri and requested to stop construction of the towers. The Tahasildar, Puri in connivance with opposite party Nos.8 and 9 did not take any effective action rather he has encouraged the said opposite parties to go ahead with the work. In spite of several representations made to the different authorities, no appropriate action has been taken by them. Hence, the present writ petition.

3. Mr. S.K. Dalai, learned counsel appearing for the petitioners submits that the Bhoodan and Gramadan Act is an Act to facilitate donation of land for Bhoodan Yagna and Gramadan. The Act has been enacted for distribution of land to the landless persons, who don't own any land or who owns land which does not exceed such limits as may be prescribed. As per

Section 26(b) of the Act, 1970, if any person is found to be in unauthorized occupation of any land of the Bhoodan Yagna Samiti, the Tahasildar having jurisdiction can remove the unauthorized encroachers after giving reasonable opportunity of hearing. But in the instant case, in spite of the request made by the Administrative Officer, no action has been taken by the Tahasildar. It is submitted that opposite party Nos.8 and 9 by using money and political power have gained over the authorities for which they are not taking any action against them. It is further submitted that because of functioning of the Mobile Towers over the land in question, it creates environmental pollution and health hazards in the locality. Mr. Dalai, further submitted that Rule 13(4) of the Orissa Bhoodan and Gramadan Rules, 1972 (for short, "Rules, 1972") envisages that all alienations by way of mortgage, sale, lease, exchange, gift, bequest or otherwise of the lands granted under the provisions of the Act shall be void and inoperative.

4. Mr. B.P. Tripathy, learned counsel appearing for opposite party No.10-Administrative Officer, submits that the landless persons to whom the land have been allotted by the Samiti have no right to alienate the land in any manner.

5. Mr. S.K. Pattnaik, learned counsel appearing on behalf of opposite party No.8 submits that PIL is not maintainable as the same has been filed without disclosing the grievance as to how public interest is affected by establishing the telecom towers in Bhoodan land. Sri Jyotiprakash Mishra and Smt. Manjushree Mishra, on whose land the telecom towers have been constructed, are not made parties in the present writ petition. Therefore, the writ petition is liable to be dismissed on the ground of non-joinder of parties. In support of his contention, Mr. Pattnaik relied upon the judgment of this Court in the case of *Ramji Singh & eight others vs. State of Orissa and others, 2008 (II) CLR – 509.* It is submitted that opposite party No.8-Company, which is a registered Company under the Companies Act, 1956 has been established for carrying on the business of providing passive infrastructure facilities to the telecom service providers and for that purpose opposite party No.8 erects Mobile Towers and makes it available for use by the telecom service providers. Jyotiprakash Mishra and Manjushree Mishra, who are the recorded land owners of Plot No.50/69, Khata No.73/4, Mouza – Puri Sahara, Unit No.34, Mouza – Balukhanda, Tahasil – Puri have given licence to opposite party company for setting up of mobile telecom towers on their land. The land owners provided the record of rights and non-encumbrance certificate of the above plot which was recorded as stitiban status in favour of the said land owners. The land was centrally located and ideal for setting up of the telecom tower and was fit for catering the need of providing wireless communication facility to the consumers of that area. An agreement dated 10.04.2009 for leave and licence was executed by the land owners in favour of

opposite party No.8 and physical possession of the said land was also delivered. The requisite permission from the Puri Municipality was also obtained under Annexure-B attached to the counter affidavit filed on behalf of opposite party No.8 for installation of tower.

6. It is further argued that on the basis of the complaint, the Tahasildar, Puri issued a notice to opposite party No.8, who had filed its show-cause reply. A proceeding under Section 133 Cr.P.C. vide Criminal Misc. Case No.636 of 2009 was instituted before the Sub-Divisional Magistrate, Puri alleging health hazards to the general public of the locality. In the said case, opposite party No.8 appeared and contested by filing all relevant documents including the "No Objection Certificate" (NOC) of Anchalika Bhoodan Yagna Samiti dated 01.04.2009 and the said case has been dropped by the Sub-Divisional Magistrate, Puri vide order dated 03.06.2010.

7. Mr. Pattnaik, learned counsel submits that the tower has been built as per the standard specification fixed by the Structural Engineering Research Centre (SERC), Chennai which is a technically qualified organization in the field. The height of the transmission tower is 50 metres and the same has been constructed strongly to withstand the wind speed upto 200 KM per hour. The seismic load factor has been kept in view while constructing the tower. It has no health hazard as held by the Kerala High Court in the case of *Reliance Infocomm Ltd. Vs. Chemanchery Gram Panchayat and Others*, AIR 2007 Ker 33. Opposite party No.8 has taken all precautions and safety measures before erecting the transmission towers. The Government of India, Ministry of Communication and Information Technology, Department of Telecommunication vide its letter dated 20.08.2007 to the Government of Kerala has clarified that there is no health hazard from the radiations of the Mobile telephone tower since the radiation is well controlled as the equipments used are manufactured under stringent norms as per the international requirement. The Ministry of Health and Family Welfare Department, Government of India, New Delhi in a meeting dated 29.05.2006 at the Indian Council for Medical Research (ICMR), New Delhi held that there is not enough evidence to show direct health hazard of RF exposure from mobile base stations.

8. Mr. Pattnaik, placing reliance on the judgment of the apex Court in the case *State of Uttaranchal vs. Balwant Singh Chaufal and others, 2010 (1) OLR (SC) – 380* and judgment of this Court in the case of *Ramji Singh & eight others vs. State of Orissa and others, 2008(II) CLR -509,* submits that PIL should not be entertained unless larger interest of the public is affected.

9. It was submitted that Section 290 (1) of the Orissa Municipal Act provides that the Municipal shall grant licence for the purpose of—

(w) using of any industrial purpose any fuel or machinery,

(x) doing in the course of industrial process anything which likely to be offensive or dangerous to human life, or health or property.

The aforesaid section further provides that before granting any licence, prior public notice is required to be issued. In the present case, no objection had been raised by the residents of the locality including the present petitioners. The general provision regarding licence and permission is dealt with under Section 337 of the Orissa Municipal Act, 1950. The opposite party No.8 has also deposited the renewal fee of Rs.1,000/- and the holding tax and trade licence fee for 2010-11. Opposite party No.8 has obtained "No Objection Certificate" from the State Pollution Control Board for establishing a Diesel Generator Set for the use for supplying uninterrupted power supply in case of failure of electric power connection.

10. As per Section 21(c) of the Act, 1970, the allottee shall not transfer the land or the house but shall have heritable right. The use of word 'transfer' in Section 21(c) and use of the word 'alienation' in Rule 13(4) makes it clear, that the restriction imposed cannot apply to a case of 'leave and licence' for a temporary period and as such the permission granted by the land owner to opposite party No.8 for erection of a temporary structure for a temporary period does not make the licence void. Sections 26-A, 26-B and Section 27 of the Act, 1970 provides for cancellation of grant of allotment, eviction of unauthorized occupant and for preferring appeal against the orders passed and Section 29 of the said Act provides for challenging the order before the Civil Court by the person aggrieved. In view of the same, the PIL is not sustainable.

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

(i) Whether this writ petition in the nature of public interest litigation is maintainable?

(ii) Whether in view of the No Objection Certificate issued by Bhoodan Yagna Samiti and the Executive Officer, Puri Municipality, any right accrues in favour of opposite party No.8 to install mobile tower in the Bhoodan Land?

12. Question No.(i) is as to whether the petitioners have made out a prima facie case to maintain the writ petition in the nature of public interest litigation.

13. The case of opposite party No.8 is that the allegations of the petitioners that condition of grant of Bhoodan Land is allegedly violated cannot be treated as a grievance affecting the public at large. In support of his contention, Mr. Pattnaik relied upon the decision of the apex Court in the case of ***Balwant Singh Chaufal (****supra)* and the judgment of this Court in the case of *Ramji Singh (supra).*

14. The case of the petitioner is that in exercise of power under Article 226 of the Constitution of India, this Court can entertain a petition filed by any interested person for the welfare of the people. It is argued by Mr. Dalai that where the administrative decision is harmful to the environment and jeopardised people's right to natural resources, such as, air and water, the writ petition in the nature of public interest litigation can be maintained before this Court.

15. Undisputedly, the land on which the transmission tower has been constructed is within the Bhoodan Land, which was meant for the poor and landless persons. Order dated 03.06.2010 (Annexure-C) passed by the Sub-Divisional Magistrate, Puri under Section 133 Cr.P.C. reveals that in the said proceedings, inquiry report was sought for from Sea Beach Police Station. The said Police Station reported that the area on which the tower has been installed comes about 200 metres from the sea and local people expect mishap at any time which will cause huge loss of life and property. The further allegations of the petitioners is that the said tower has been constructed in a land belonging to Bhoodan Yagna Samitee and the same is causing sound and air pollution. According to the petitioners, the land allotted to landless and poor persons under the Act, 1970, cannot be in any manner leased out by the allottee for commercial purpose. Since, the mobile transmission tower in question has been installed in Bhoodan land where poor, disadvantaged and weaker section of the people are staying and they are unable to approach the Court individually to protect their statutory, constitutional and civil rights, only six people through the present PIL can vindicate the legal wrong and legal injury caused to them and also the residents of the area as there is infringement of their above rights.

16. At this juncture, it would be beneficial to refer to some of the decisions of Hon'ble Supreme Court. In ***Hussainara Khatoon (IV) vs. State of Bihar,*** (1980) 1 SCC 98, the Hon'ble Supreme Court observed as under:

> "…… Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always come across 'law for the poor' rather then 'law of the poor'. The law is regarded by them as something mysterious and forbidding-always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community."

17. In ***Municipal Council, Ratlam vs. Vardhichan***, (1980) 4 SCC 162, the Hon'ble Supreme Court held:

> "…… Why drive common people to public interest action ? Where directive principles have found statutory expression in do's and don'ts the Court will not sit idly by and allow municipal government to become a statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice."

18. In the case of ***Guruvayoor Devaswom Managing Committee & Anr. Vs. C.K. Rajan & Ors.,*** *(2003) 7 SCC 546,* a three Judge Bench of the Hon'ble Supreme Court after referring to its earlier Constitution Bench and other large number of decisions held as under:

> **"**50. The principles evolved by this Court in this behalf may be suitably summarized as under:
>
> (*i*) The Court in exercise of powers under Article 32 and Article 226 of the Constitution of India can entertain a petition filed by any interested person in the welfare of the people who is in a disadvantaged position and, thus, not in a position to knock the doors of the Court.
>
> The Court is constitutionally bound to protect the fundamental rights of such disadvantaged people so as to direct the State to fulfil its constitutional promises. (See *S.P. Gupta* v. *Union of India*, (*1981) Supp. SCC 87, People's Union for Democratic Rights* v. *Union of India*, *(1982) 2 SCC 494; Bandhua Mukti Morcha* v. *Union of India*

(*1984) 3 SCC 161;* and *Janata Dal* v. *H.S. Chowdhary*, *(1992) 4 SCC 305*)

(*ii*) Issues of public importance, enforcement of fundamental rights of a large number of the public vis-à-vis the constitutional duties and functions of the State, if raised, the Court treats a letter or a telegram as a public interest litigation upon relaxing procedural laws as also the law relating to pleadings. (See *Charles Sobraj* v. *Supdt., Central Jail (1978) 4 SCC 104* and *Hussainara Khatoon (I)* v. *Home Secy., State of Bihar (1980)1 SCC 81.)*

(*iii*) Whenever injustice is meted out to a large number of people, the Court will not hesitate in stepping in. Articles 14 and 21 of the Constitution of India as well as the International Conventions on Human Rights provide for reasonable and fair trial.

(*iv*) The common rule of locus standi is relaxed so as to enable the Court to look into the grievances complained on behalf of the poor, the depraved (*sic*), the illiterate and the disabled who cannot vindicate the legal wrong or legal injury caused to them for any violation of any constitutional or legal right. [See *Fertilizer Corpn. Kamgar Union (Regd.)* v. *Union of India*, *S.P. Gupta*, *People's Union for Democratic Rights*, *D.C. Wadhwa (Dr)* v. *State of Bihar* and *BALCO Employees' Union (Regd.)* v. *Union of India*.]

(*v*) When the Court is prima facie satisfied about variation of any constitutional right of a group of people belonging to the disadvantaged category, it may not allow the State or the Government from raising the question as to the maintainability of the petition. (See *Bandhua Mukti Morcha*.)……."

19. The Hon'ble Supreme Court in the case of *Delhi Jal Board vs. National Campaign for Dignity and Rights of Sewerage and Allied Workers & Ors., (Civil Appeal No.5322 of 2011 decided on 12th July, 2011*) held as under:

"16.This Court has time and again emphasized the importance of the petitions filed pro bono public for protection of the rights of less fortunate and vulnerable sections of the Society. In People's Union for Democratic Rights vs. Union of India (1982) 3 SCC 235, the apex Court said:

> …… No State has a right to tell its citizens that because a large number of cases of the rich and the well-to-do are pending in our courts, we will not help the poor to come to the courts for seeking justice until the staggering load of cases of people who can afford, is disposed of. The time has now come when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitized to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heatless society for generations. The realization must come to them that social justice is the signature tune of our Constitution and it is their solemn duty under the Constitution to enforce the basic human rights of the poor and vulnerable sections of the community and actively help in the realization of the constitutional goals."

20. The apex Court in the case of Balwant Singh Chaufal (supra), held that:

> "…… We would not like to overburden the judgment by multiplying these cases, but a brief resume of these cases demonstrates that in order to preserve and protect the fundamental rights of marginalized, deprived and poor sections of the society, the courts relaxed the traditional rules of locus standi and broadened the definition of aggrieved persons and gave directions and orders. We would like to term cases of this period where the Court relaxed the rule of locus standi as the first phase of the public interest litigation. The Supreme Court and the High Courts earned great respect and acquired great credibility in the eyes of public because of their innovative efforts to protect and preserve the fundamental rights of people belonging to the poor and marginalized sections of the society."

21. Thus, *Balwant Singh Chaufal (supra)* supports the case of the petitioners and does not support the case of opposite party No.8. Considering the nature of the prayer and the relief sought for by the petitioners in the present writ petition, Jyotiprakash Mishra and Smt. Manjushree Mishra are not necessary parties and therefore, decision of this Court in case of *Ramji Singh (supra)* has no application to the present case.

22. In view of the above, we are of the view that the present writ petition in the nature of public interest litigation is maintainable.

23. Question No.(ii) is as to whether on the basis of No Objection Certificate issued by the Bhoodan Yagna Samiti and the Executive Officer, Puri, any right accrues in favour of opposite party No.8 to construct the mobile transmission tower in a land belonging to Bhoodan Yagna Samiti.
To deal with question (ii), it is necessary to know what is the Statement of Object and Reasons for enacting the Orissa Bhoodan and Gramdan Act, 1970, and some of the relevant provisions of Act, 1970 and Rule, 1972.

24. The Object and Reasons for enacting the Act, 1970 read as follows:

> "For the purpose of regulating donation, distribution and management of lands donated to the Bhoodan Yagna Samiti, the Orissa Bhoodan Yagna Act, 1953 (Act 16 of 1953) was enacted. To provide for the establishment of Gramdan villages and matters ancilliary thereto in pursuance to the Gramdan movement initiated by Acharya Vinobha Bhave, the Orissa Gramadan Bill, 1965 was introduced in the Assembly on the 27th August, 1965.
>
> 2. As the scheme contemplated under the Orissa Gramdan Bill, 1965 was found to be at variance with the scheme under the Orissa Bhoodan Yagna Act, 1953, it is considered inexpedient to have two different conflicting Legislations and instead, it is worthwhile to rationalize the provisions thereof in a composite Bill.
>
> 3. The present Bill seeks to achieve this objective."

25. Sections 2(a) and 2(h) of the Act, 1970 defines "Bhoodan Yagna" and "landless person" which reads thus:

> "(a) "Bhoodan Yagna" means the movement initiated by Shri Acharya Vinobha Bhave for the acquisition of lands by way of donation, for distribution to the landless persons, or for a community purpose."
>
> "(h) "landless person" means a person who does not own any land or who owns land which does not exceed such limit, as may be prescribed."

26. Under Section 3 of the Act, 1970, the State Government shall, by notification, constitute a Samiti by the name of the Orissa Bhoodan Yagna Samiti which shall be a body corporate having perpetual succession and a

common seal with power to enter into contracts and to acquire, hold, administer and dispose of property both moveable and immovable and may, by the said name, sue or sued.

27. Section 26-A of the Act, 1970 defines "Cancellation of grant of allotment". It reads as follows: –

> "(1) whenever it comes to the notice of –
>
> (a) the Samiti, that any person to whom land has been granted under Section 14; or
>
> (b) the Grama Parishad, that any person to whom land has been allotted under Clause (a) of Section 19,
>
> was not a landless person when such grant or allotment was made, the Samiti or the Grama Parishad, as the case may be, may, after giving the person concerned a reasonable opportunity of being heard and after making such enquiry as it deems fit, make an order canceling the grant or the allotment, as the case may be."

28. Sub-rule (4) of Rule 13 of the Rules, 1972, imposes some restrictions. The same is quoted hereunder:

> "All alienations by way of mortgage, sale, lease, exchange, gift, bequest or otherwise of lands granted under the provisions of this Act shall be void and inoperative.
>
> Provided that the grants may for the purpose of incurring a loan for reclamation, cultivation or improvement of the land, mortgage the same with the State Government or any Co-operative Society subject to such loan being recoverable as arrears of land revenue."
>
> (*Underlined for emphasis)*

29. The case of opposite party No.8 is that Jyotiprakash Mishra and Smt. Manjushree Mishra to whom the Bhoodan land had been allotted has given licence to construct mobile tower in their land. Grant of licence by the allottee/grantee of Bhoodan Land in favour of opposite party No.8 is not covered under Rule 13(4) of the Rules, 1972. Further they have got "No Objection Certificate" from the Bhoodan Yagna Samiti and the Executive Officer, Puri Municipality to construct such tower. In any event, if opposite party No.8 found to be unauthorized occupation of the Bhoodan land, the Tahasildar having jurisdiction on an application by the Samiti or person if

any, to whom land has been granted by the Samiti shall, require the unauthorized occupant to evict from the land and deliver possession thereof.

30. The contention of opposite party No.8 is that Sri Jyotiprakash Mishra and Smt. Manjushree Mishra, the grantee/allottee of Bhoodan land have granted licence in its favour which is not covered under Rule 13(4) of the Rules, 1972. We are unable to accept such contention of opposite party No.8.

On a plain reading of Rule 13(4) of the Rules, 1972, it is clear that all types of alienations by way of mortgage, sale, lease, exchange, gift, bequest or otherwise of lands granted under the provisions of this Act shall be void and inoperative. The expression “Otherwise” appearing in Rule 13(4) brings within its ambit alienation of Bhoodan land by way of granting licence.

The Apex Court in *Lila Vati Bai v. State of Bombay*, AIR 1957 SC 521 held that the Legislature, when used the words 'or otherwise' apparently intended to cover other cases which may not come within the meaning of the preceding clauses. Thus, the Legislature, intended to cover all possible cases of vacancy occurring due to any reasons whatsoever. Hence, far from using those words ejusdem generis with the preceding clauses of the explanation the Legislature used those words in an all inclusive sense.

31. None of the authorities such as Bhoodan Yagna Samiti or the Executive Officer, Puri Municipality have taken note of Rule 13(4) of the Rules, 1972 before granting “no objection’ certificates” under Annexures-G and H respectively. Therefore, since licence granted in favour of opposite party No.8 is void and inoperative, No Objection Certificate/Permission granted by Bhoodan Yagna Samiti and Executive Officer, Puri Muncipality are non-est in the eye of law and that permission cannot validate the alienation which is void and inoperative in view of Rule 13(4) of the Rules, 1972.

The legal maxim “sublato fundamento cedit opus” is applicable, meaning thereby in case foundation is removed, the superstructure falls.

The Hon’ble Supreme Court in the case of ***Badrinath vs. Government of Tamil Nadu and others,*** *AIR 2000 SC 3243,* observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically. Non-compliance of mandatory requirements vitiates the proceedings.

32. It is the settled law that when the action of the State or its instrumentalities is not at par with the rules or regulations and supported by the Statute, the Court must exercise its jurisdiction to declare such an act as illegal and invalid.

In this regard, it would be necessary to refer to the decision of the apex Court in the case of ***Sirsi Municipality by its President, Sirsi v. Cecelia Kom Francis Tellis****, AIR 1973 SC 855*, wherein the apex Court observed that the rules or the regulations framed by the Government under the Statute are binding on the authorities.

Whenever any action of the authority is in violation of the provisions of the statute or the action is constitutionally illegal, it cannot be allowed to sustain in law. Wherever the statutory provision is ignored by the authority, the Court cannot become a silent spectator to such an illegality and it becomes the solemn duty of the Court to deal with the person(s) violating the law with heavy hands. (See *R.N. Nanjundappa v. T. Thimmaiah & Anr.,* AIR 1972 SC 1967, *Sultan Sadik v. Sanjay Raj Subba & Ors.,* AIR 2004 SC 1377)

33. In view of the above, the Bhoodan Yagna Samiti, Puri and the Executive Officer, Puri Municipality are not justified to grant permission/No Objection Certificate to opposite party No.8 to install mobile transmission tower in Bhoodan Land. The permission/No Objection Certificate granted by the Bhoodan Yagna Samiti and the Executive Officer, Puri Municipality cannot confer any right in favour of opposite party No.8 to install mobile transmission tower in Bhoodan Land. Therefore, opposite party No.8 is directed to remove the mobile tower which has been constructed on the Bhoodan land in question within a period of twelve weeks from the date of this order. The Tahasildar, Puri is also directed to ensure that the mobile tower illegally constructed on the said land is removed as per the above directions to opposite party No.8. If it does not remove the tower within the time allowed herein, then immediately after expiry of the period granted to it, opposite party No.3-Collector, Puri shall dismantle the tower at the cost of opposite party No.8.

34. We hope and trust, the functionaries of Bhoodan Yagna Samiti, Puri and the Executive Officer, Puri Municipality and the Tahasildar, Puri should not act in any manner contrary to the statutory provisions contained in the Act, 1970 and the Rules 1972.

35. With the aforesaid observations and direction, the writ petition is disposed of.

Writ petition disposed of.

**2011 ( II ) ILR- CUT- 974**

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

W.P.(C) NO.5323 OF 2007 (Decided on 28.09.2011)

**GOBINDA CHANDRA SAHOO** ……. Petitioner.

*.Vrs.*

**ORISSA STATE FINANCIAL CORPORATION & ORS**. ……Opp.Parties.

**STATE FINANCIAL CORPORATION ACT, 1951 (ACT NO.63 OF 1951) – S.29.**

**Seizure of petitioner's unit by the Corporation – Public Auction of the Unit – Dominant consideration is to secure the best price – In public auction there should be maximum public participation and everybody should get an opportunity for making an offer – Where bidders join together in public auction in order to depress the bid, suitable mode for selling the property can be by inviting tenders.**

**In this case the Corporation has sold the land and building of the industrial unit of the petitioner to the Opp.Party No.4 at a rate which is less than 50% of the offset price – Held, sale of the industrial unit of the petitioner in favour of O.P.4 is illegal and contrary to the interest of the Corporation as well as the petitioner which is quashed.**

(Para 10,11)

**Case laws Referred to:-**

1.8 (1995) 4 SCC 595 : (Chairman & Managing Director, SIPCOT-V-Contromix (P) Ltd.)
2.(2002) 3 SCC 496 : (Haryana Financial Corporation & Anr.-V-Jagdamba Oil Mills & Anr.)

For Petitioner - Mr. Asok Mohanty, Mr. V.Narasingh & Mr. S.K.Senapati.
For Opp.Party 1 to 3 - Mr. Sankarsan Rath & Mr. Sandeep Rath
For Opp.Party 4 - Mr. Sanjit Mohanty & Mr. S.C.Samantaray

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***B.P. DAS, J.*** The petitioner, who is the Managing Director of M/s.B.L. Roller Flour Mill (P) Ltd., has filed this writ petition with a prayer to direct the Orissa State Financial Corporation (hereinafter called "the Corporation") to consider the application filed by him for settlement of the loan account under the O.T.S. Scheme, 2007 and to declare the sale of the land and building of

the said industrial unit effected by the Corporation in favour of O.P.4 by letter dated 22.2.2007 (Annexure-6) as illegal.

2. The case of the petitioner, in short, is that he established the aforesaid Roller Flour Mill at Chandanpur in Puri district with the financial assistance provided by the Corporation by sanctioning a term loan of Rs.75.00 lakhs as per the sanction order dated 3.8.1999, vide Annexure-1. Due to default in re-payment of the loan, the Corporation in exercise of its power under Section 29 of the State Financial Corporations Act, 1951 seized the petitioner's unit and took over possession of the same so also forfeited his collectoral security as per the orders dated 16.12.2005 in Anexure-2 series. Thereafter, the Corporation published a sale notice dated 13.1.2006 in the Oriya daily, "The Samaj" on 14.1.2006 vide Annexure-3, inviting offers for purchase of the land, building and machinery (LMB) of various industrial units including that of the petitioner at serial no.45. The offset price of the petitioner's unit was fixed at Rs.82,12,000/- and the E.M.D. at Rs.4,10,600/-. The Corporation sold the plant and machinery to one Jitendra Pratap of Uttar Pradesh at a consideration price of Rs.40,66,000/- on outright purchase basis as per the sale letter dated 23.2.2006 in Annexure-4 and after deposit of the entire sale consideration, possession of the plant and machinery was delivered to the said purchaser on 31.3.2006.

On 21.2.2007 the petitioner made a representation to the Branch Manager of the Corporation, Puri Branch, stating that by letter dated 21.1.2006 he was asked to appear in person or through accredited authorized representative in Defect-cum-Disposal Advisory Committee (DDAC), and as he could not attend the same due to his illness, he requested to give him a chance to participate in the DDAC meeting. According to the petitioner, while the matter stood thus, the Corporation intimated the petitioner that the industrial land and building of his unit had been sold to O.P.4-Bihari Mohapatra at a consideration price of Rs.18,60,000/- on outright purchase basis, by the sale letter dated 22.2.2007 in Annexure-6. The petitioner challenged the aforesaid action of the Corporation in this Court in W.P.(C) No.2583/2007 and this Court disposed of the said writ petition by order dated 26.3.2007 with a direction that on the petitioner making an application in accordance with the O.T.S. Scheme, 2007 within a week, the Corporation would consider the same and till disposal of such application, no coercive action would be taken against the petitioner for recovery of the dues. The petitioner in terms of the said order dated 26.3.2007 offered the application in the prescribed form for O.T.S. on 31.3.2007 along with non-refundable processing charge of Rs.10,000/- and initial deposit of Rs.3,16,850/- but the same was not accepted by the

Corporation though the petitioner was even made to wait till closure of the transaction hours on the plea of pressure of work on the last date of the financial year. Finding no other alternative, the petitioner was constrained to send the application along with the cheques on 2.4.2007 by registered Post from Chandanpur along with a cheque for Rs.3,26,850/- issued by one Satyabrata Mishra covering the processing charge and the initial deposit. According to the petitioner, though he was eligible to be considered under the OTS Scheme, 2007, his case was not taken into consideration under the said Scheme. As per the sale notice in Annexure-3, the offset price for the entire property, i.e., land, building and machinery of the petitioner's unit, was fixed at Rs.82,12,000/-, but after sale of the plant and machinery at Rs.40,66,000/-, the land and building was sold to O.P.4-Bihari Mohapatra at a throw-away price of Rs.18,60,000/- as against the balance offset price of Rs.41,46,000/-. On the own showing of the Corporation, the entire property was sold by sale letters in Annexures-4 & 6 at a total consideration price of Rs.59,26,000/- (i.e. for the land and building at Rs.18,60,000/- and at Rs.40,66,000/-) when the offset price for the property was fixed at Rs.82,12,000/- in the sale notice in Annexure-3. The petitioner has alleged that the Corporation, without giving due publicity to the sale of land and building, in order to secure best price, sold the same to O.P.4 at a throw-away price of Rs.18,60,000/- and at a much lower price than the balance off-set price of Rs.41,46,000/- when the price of such property was at least Rs.85.00 lakhs, and without affording any opportunity to the petitioner to match the offers of O.P.4. Accordingly, the petitioner has prayed to direct the O.Ps. to accept from him the price at which the land and building was sold to O.P.4, i.e., Rs.18,60,000/- and give possession to him after cancelling such sale. Further, the fate of the amount of Rs.40,000/- deposited towards the O.T.S. vide receipt dated 6.9.2005 issued by the Corporation in Annexure-10 is not known to him.

The sum and substance of the petitioner's contention is that the land and building in question has been sold to O.P.4 at a price which is much less than the offset price fixed by the Corporation and the sale has been effected in favour of O.P.4 illegally and in connivance among the officials of the Corporation and O.P.4 and in a surreptitious manner and in the process he has been defrauded. Further, the Corporation had not given him any information before selling the aforesaid property to O.P.4, even though he was vitally interested in the same for which principles of natural justice had been violated.

3. While issuing notice to the O.Ps., a collateral Bench of this Court by its order dated 26.4.2007 had directed maintenance of status quo in respect

of possession of the petitioner's land and building and restrained the Corporation from taking any coercive action against the petitioner.

4. A counter affidavit has been filed by the O.P. nos.1 to 3, i.e., and Corporation and its officials, taking a stand that the petitioner has filed the writ petition suppressing material facts and relied upon certain documents which are forged and fabricated. The Corporation has denied to have received any application from the petitioner with the required fee of Rs.3,26,850/- until filing of the counter affidavit. According to the Corporation, prior to the date of filing of the writ petition as well as the application for interim order, i.e., 25.4.2007, it had delivered possession of the property to O.P.4 on 14.3.2007 after realization of the entire sale consideration, basing on the sale letter in Anexure-6. The fact of delivery of possession was also intimated to the petitioner vide letter dated 19.3.2007. Thereafter, the deed of conveyance was executed by O.P.2 in favour of O.P.4 on 17.4.2007 and the same was registered. So, according to the Corporation, the interim order passed on 26.4.2007 in Misc. Case No.5140/2007 had become infructuous as O.P.4 is in possession of the assets sold since 14.3.2007. Apart from justifying the sale, the Corporation has indicated that on 26.7.2006 the Corporation published a sale notice in the local daily, "The Samaj" inviting offers from the bidders/tenders for purchase of the land and building of the petitioner's unit on 4.8.2006 through the D.D.A.C. meeting. The loanee and the guarantors were given notice for settlement of their dues by appearing in the DDAC meeting on 4.8.2006 or to participate in the sale and purchase to match the highest offer. In response to the aforesaid notice, in the DDAC meeting held on 4.8.2006 the offers received from one Saroj Panda and O.P.4 were revised to Rs.15.00 lakhs and Rs.15.50 lakhs respectively. Since the said offers were below the offset price fixed earlier, the D.D.A.C. referred the matter to the Board and the Board authorised the M.D. to explore the possibility of enhancement of the same. Accordingly, on 30.12.2006 the Managing Director of the Corporation invited Bihari Mohapatra, O.P.4, who had submitted revised offer of Rs.15.50 lakhs, for negotiation but he did not appear. Again on 27.1.2007 another sale notice was published in Oriya daily, "The Samaj" inviting offers from the tenderers/bidders for purchase of the land and building of petitioner's unit on 7.2.2007 through DDAC meeting vide Annexure-A/2 and the petitioner and other Directors were intimated by letter dated 29.1.2007 to appear in such meeting for settlement of loan dues or to match highest offer, vide Annexure-B/2. O.P.4, who had earlier given a lesser offer, finally raised his offer to Rs.18,60,000/-. The petitioner and his other Directors were absent on call, for which the aforesaid property was sold to O.P.4 at Rs.18,60,000/-. According to the Corporation, the petitioner was negligent in

attending the DDAC meeting and the Branch Manager had issued an intimation to him inviting OTS-07 showing the account position as on 31.12.2006 signed by him on 31.3.2006, vide Annexure-9 series. Besides this, the Branch Manager, Puri had also supplied prescribed form in three sheets to the petitioner, which was received on 31.3.2007 by Sri Manoj Sahoo, son of the petitioner, and a Director. So there is nothing to show that the Branch Manager had refused to accept the form of the petitioner. The Branch Office of the Corporation received a registered letter from the petitioner on 3.4.2007 and when the envelope was opened, the Branch Manager, O.P.2 found only photocopy of a certified copy of the order dated 26.3.2007 passed in W.P.(C) No.2583/2007. The photocopy of the cheque, which was produced before this Court, according to the Corporation, was not received. According to the Corporation, after realization of Rs.59.26 lakhs towards the sale price, the petitioner had to deposit the balance amount outstanding against him and he was entitled to apply for the balance outstanding amount after sale for settlement under OTS Scheme,2007 and as per the Corporation, the allegation that no sufficient publicity was given is not correct as the Corporation had published the sale notices in the newspapers and had conducted DDAC meetings on eight occasions for sale of the industrial land and building giving sufficient opportunity to the petitioner which he failed to avail.

As to deposit of Rs.40,000/- by the petitioner, the O.Ps. have stated that the fact of adjustment of the said amount towards the loan amount was intimated to the petitioner by letter dated 3.11.2005 (Annexure-G/2). As against the balance offset price of Rs.39,19,000/-, it is stated in para-15 of the counter affidavit that the Corporation could not get a buyer beyond the sale price of Rs.18,60,000/- in spite of repeated attempts, for which with the approval of its Board, the Corporation sold the land and building at a lesser price than the offset price on 7.2.2007 vide Anenxure-6.

5. O.P.4 has filed his separate counter affidavit supporting the stand taken by the other O.Ps. in their counter affidavit justifying the sale of the land and building in his favour. O.P.4 has also stated therein that on enquiry he found that the cheque obtained by the petitioner from Sri Satyabrata Mishra for Rs.3,26,000/- was not genuine and a false affidavit has been filed in that respect.

6. It may be stated here that this Court issued notice for personal appearance in this regard. It is admitted that the cheque was given by Satyabrata Mishra but there was no balance in his bank account. Additional affidavit to that effect has been filed by Sri Pankaj Kumar Mahapatra, son of O.P.4.

7. Be that as it may, on perusal of the entire gamut of the facts and circumstances of the case, we find that the Corporation at different points of time had given opportunity to the petitioner to appear before the DDAC meeting for settlement of the loan account or to participate in sale and purchase to match the highest offer but the petitioner did not avail the same and on the contrary has taken a plea before this Court that he had not received any such notice. Apart from that, when an opportunity was afforded to the petitioner to avail the benefit of O.T.S. Scheme, 2007, he submitted such application along with a cheque covering the amount of processing charge and the initial deposit issued by one Satyabrata Mishra without having cash balance in his account. This being the conduct of the petitioner, we are of the view that the petitioner was not financially equipped to avail the benefit of O.T.S. Scheme and was even not in a position to deposit only a sum of Rs.3,26,850/- and therefore, he tried his best to see that the effort of the Corporation to sell the property and realize its dues gets frustrated.

8. Apart from that, questions arise whether with all the defaults and omissions on the part of the borrower, could the Corporation sell the property below the offset price or less than its market value and whether the Corporation had any responsibility to find out the best buyer and get the best deal and whether any effort has been made by the Corporation in that respect.

9. Admittedly, the off set price of the land, building and machinery of the petitioner-unit was fixed by the Corporation at Rs.82,12,000/- in its sale notice dated 13.1.2006 in Annexure-3. The plant and machinery was sold to one Jitendra Pratap as is shown in the letter dated 23.2.2006 at a consideration price of Rs.40,66,000/- on outright purchase vide Annexure-4. After the sale of plant and machinery at Rs.40,66,000/-, the balance amount of Rs.41,46,000/- remained to be realized as on 23.2.2006. This is the offset price of land and building. In other words, the Corporation could not have sold the land and building below the offset price. But fact remains that the same was sold to O.P.4 at a much lesser price of Rs.18,60,000/- vide Annexure-6 on 22.2.2007, i.e., nearly one year after the publication of the sale notice dated 13.1.2006. Annexure-4 is the letter dated 23.2.2006 issued to one Jitendra Pratap by the Branch Manager, Puri Branch, wherein it was indicated the sale price of the assets would be Rs.40,66,000/- on outright purchase basis. Annexure-6, which is the letter dated 22.2.2007 issued by the same Branch to Sri Bihari Mohapatra, O.P.4, shows that the same had been issued one year after issuance of Annexure-3 thereby reducing the purchase of the assets to Rs.18,60,000/-. There is nothing in the counter affidavit filed by the Corporation to show how the property worth Rs.41,46,000/- was sold to O.P.4 at a drastically reduced price of

Rs.18,60,000/-. The counter affidavit filed by the Corporation shows that prior to the sale notice dated 13.1.2006 published in Oriya daily "The Samaj" on 14.1.2006 (Annexure-3), notice was issued to the petitioner for settlement of the loan dues but he was absent on call. This was disputed by the petitioner. In response to the sale notice dated 27.1.2007 (Annexure-A/2), no new offer was received in the DDAC meeting held on 7.2.2007 and Sri Bihari Mohapatra, O.P.4, being represented by his son, Sri Pankaj Mohapatra, took part in the negotiation and offered Rs.18,60,000/-. It is also indicated therein that in the DDAC meeting held on 4.8.2006, two offers were received- one from Saroj Panda, who initially offered Rs.5.00 lakhs and revised his offer to Rs.15.00 lakhs, and the other from Bihari Mohapatra (O.P.4), who initially offered Rs.10.25 lakhs and subsequently revised to Rs.15.50 lakhs. As both the revised offers were below the offset price fixed earlier, the Committee decided to refer the matter to the Board of the Corporation for appropriate decision. After the Board authorized the Managing Director to explore the possibility of enhancing the offer price further, the Managing Director of the Corporation invited O.P.4 for negotiation on 30.12.2006. But O.P.4 was absent on that date, for which the sale notice dated 27.1.2007 was re-advertised in "The Samaj" on 28.1.2007 (Annexure-A/2), in which it was indicated that the E.M.D. would be Rs.1,96,000/- but no offset price had been fixed. There is no explanation as to when the Corporation went for the second advertisement for sale of the property in question after the bidder, Bihari Mohapatra, did not turn up to participate in the negotiation. It would have been open to everybody to participate in the bid and there is nothing in the counter to show if there was any depreciation in the value of the property for which it went below the offset price so indicated in the sale notice dated 13.1.2006 and was reduced to Rs.40,66,000/- vide Annexure-4 and later on no offset price was indicated in the sale notice. As it appears, the O.P.-Corporation had not acted fairly in effecting sale of the land and building to O.P.4. There is nothing on record to show as to how the property worth Rs.41,46,000/- came down to Rs.18,60,000/- and was settled in favour of O.P.4.

In this regard, we may refer to a decision in the case of **Chairman and Managing Director, SIPCOT Vrs. Contromix (P) Ltd.,** 8(1995) 4 SCC 595, wherein the Supreme Court held that in the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. Public auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price. But many times it may not be possible

to secure the best price by public auction when the bidders join together so as to depress the bid or the nature of the property to be sold is such that suitable bid may not be received at a public auction. In that event, any other suitable mode for selling of property can be by inviting tenders. In order to ensure that such sale by calling tenders does not escape attention of an intending participant, it is essential that every endeavour should be made to give wide publicity so as to get the maximum price. These are aspects which the Corporations have to keep in view while dealing with disposal of seized units.

The aforesaid decision has been relied upon by the Supreme Court in the case of **Haryana Financial Corporation & another vrs. Jagdamba Oil Mills & another**, (2002) 3 SCC 496.

10. It is true that in the present case the petitioner was neither able to re-pay the loan dues nor availed the opportunity offered by the Corporation to participate in the bid to match the best offer. But at the same time, the Corporation should not have sold the petitioner's property at a throwaway price. The last sale notice dated 27.1.2007 in Annexure-A/2 to the counter affidavit was published on 28.1.2007. The date of the Default-cum-Disposal Advisory Committee (DDAC) meeting was fixed to 7.2.2007 at 11 a.m. at the Bhubaneswar Branch of the Corporation. This shows that ten days' time was given to collect the prescribed tender application form from the concerned Branch Office on payment of Rs.400/- and to submit the same by 5 p.m. of 6.2.2007. That means, only nine days were left for the intending bidders to submit their bids. At the same time, as the affidavit shows, the Corporation had also invited the previous bidders, who had failed to increase their offers, to participate in the sale and compete with the bidders. We are unable to understand how in an open tender, negotiation was made and that too without re-assessing the market value of the property in question at that point of time and how the same was sold at Rs.18,60,000/-, when the offset price of the property was fixed at Rs.41,46,000/-.

11. In our considered opinion, in a most arbitrary and illegal manner the Corporation has sold the land and building of the industrial unit of the petitioner at a rate, which is less than 50% of the offset price. The notice for auction sale of the property should have been published by the Corporation giving sufficient time to the intending bidders to participate in the bid and negotiation should not have been held behind the back of the petitioner. It, therefore, appears that favour has been shown to O.P.4 by some of the Corporation officials to sell the property of higher value at a meager amount of Rs.18,60,000/-. Hence, we declare that the sale of the land and building of

the industrial unit of the petitioner made by the Corporation in favour of O.P.4 is contrary to the interest of the Corporation as well as the petitioner, who is the loanee, and it has been done in an illegal manner, as indicated above. Accordingly, we set aside the said sale, vide Annexure-6.

Since the said sale has been made on 7.2.2007, a chance should be given to O.P.4 to deposit the balance amount of Rs.22,86,000/-, which is the differential value of the property in question, i.e., offset price minus the price paid by O.P.4, within a period of one month from today. If the said amount is deposited by O.P.4, the Corporation shall execute a fresh deed in favour of O.P.4, failing which the Corporation shall take over possession of the property and put the same to auction afresh by giving wide publication within a period of two months thereafter.

With the aforesaid observations/directions, the writ petition is disposed of. No cost.

Write petition disposed of.

**2011 ( II ) ILR- CUT- 983**

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

W.P.(C ) NO.14223 OF 2006 (Decided on 19.08.2011)

**PRADIPTA KUMAR PATTNAIK** ……Petitioner.

*.Vrs.*

**CHAIRMAN, ORISSA BRIDGE & CONSTRUCTION CORPN. LTD. & ORS**. ….. …Opp.Parties.

**SERVICE – Termination – Inquiry conducted and report submitted – Disciplinary authority before accepting the inquiry report has not issued notice to the petitioner to make his submissions not only in respect of the findings of the inquiry officer but also in respect of the punishment proposed.**

**In this case petitioner retained the Government money with him till he was found to have misappropriated the same – Held, punishment of dismissal from service is converted to compulsory retirement.**

(Para 5,6)

**Case law Referred to:-**

(2000) 10 SCC 280 : (Asst. General Manager, S.B.I.,-V-Thomas Jose & Anr.)

For Petitioner - M/s. Aswini Kumar Mishra, Jeydev Sengupta, Dinesh Kumar Panda, Gopal Sinha & Amrit Mishra.

For Opp.Parties - M/s. Suvashish Patnaik, S.Mohanty, D.Chotray & B.Maharana (for O.P.2)

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***L. MOHAPATRA, J***. The petitioner in this writ application prays for setting aside the order dated 29.8.2003 in Annexure-9 in which the Chairman, Orissa Bridge and Construction Corporation Ltd. has terminated the services of the petitioner on the ground of misappropriation of Government fund and other charges.

2. The petitioner was initially appointed as Junior Assistant by order of the Managing Director of the Corporation on 29.8.1984. He was posted in the office of the Senior Project Manager, Bhubaneswar. In June 2003, he was intimated by the Managing Director of the Corporation that on reconciliation of Toll Account, it was noticed that an amount of Rs.79.087.50 collected by the petitioner had not been deposited in the bank for the period

from 7.3.2003 to 5.5.2003 when he was in-charge of Rampella Toll Gate, Rengali. In the said letter, he was directed to explain the unauthorised retention of Toll revenue for such a long period. It was also directed in the said letter to deposit the entire amount of toll revenue laying with him in a single instalment immediately. Further he was directed to submit his explanation with sufficient reasons for unauthorised retention of toll revenue in hand and as to why it will not be treated as temporary misappropriation of Government money, failing which, it will be presumed that the petitioner has nothing to defend his case and action as deemed fit will be taken against him. After receipt of the letter, the petitioner deposited a sum of Rs.30,088/- in cash towards part deposit against the total amount of Rs.79,087.50. By letter dated 25.6.2003 the Managing Director of the Corporation intimated the petitioner to deposit the balance amount of Rs.48,999.50 and again intimated the petitioner as to why he has not submitted his explanation for unauthorised retention of Government money with him, failing which, action will be initiated against him. Thereafter, proceeding was initiated against him on the allegation of misappropriation of Government revenue, negligence in discharging the duties by non-depositing the Toll revenue collected during his incumbency as Toll in-charge and disobedience of office instructions.

3. In reply to the charge, the petitioner in Annexure-8 submitted that the memorandum of charge is vague and prayed for supplying a copy of the charge in proper form. In Annexure-9 the impugned order was passed by the Chairman terminating the services of the petitioner. Thereafter, the petitioner submitted an appeal in Annexure-10 against the order of termination before the appellate authority but the order of punishment having been passed by the appellate authority, the appeal was not disposed of.

4. Learned counsel appearing for the petitioner submitted that before the order of punishment was imposed the petitioner had not been supplied with a copy of the inquiry report and was not given an opportunity of making his submissions with regard to findings in the inquiry report as well as the proposed punishment. It was also contended by the learned counsel for the petitioner that the Chairman being the appellate authority could not have passed the order of punishment.

Shri Pattnaik, learned Counsel appearing on behalf of the Corporation submitted that the charge with regard to misappropriation was admitted by the petitioner and, therefore, it was not felt necessary to supply him with a copy of the inquiry report.

5. Undisputedly, in Annexure-4, the Managing Director of the Corporation by letter dated 5.6.2003 intimated the petitioner that he had not deposited a sum of Rs.79,087.50 for the period from 7.3.2003 to 5.5.2003 when he was in-charge of Rampella Toll Gate, Rengali. In the said letter, the petitioner was also directed to submit his explanation. In reply to the said notice, in Annexure-5 the petitioner intimated the Managing Director that he had already deposited a sum of Rs.30,088/-. In view of the above conduct on the part of the petitioner relating to misappropriation of Government revenue was practically admitted. The charge having been admitted, no fruitful purpose would have been served had the petitioner been given an opportunity to meet the findings of the Inquiry Officer. However, the requirement of law is that before the disciplinary authority accepts the inquiry report, a notice to show cause is required to be issued to the delinquent officer to make his submissions not only in respect of the findings of the Inquiry Officer but also in respect of the punishment proposed. Admittedly, the disciplinary authority has not issued any notice to show cause to the petitioner. After receipt of the inquiry report, he was not supplied with the inquiry report. On this ground alone, we could have remitted the matter back to that stage. However, the petitioner having been admitted the charge as stated earlier, no fruitful purpose would have been served by issuing him a copy of inquiry report.

So far as quantum of punishment is concerned, the petitioner having not been given an opportunity of hearing, we could have remitted the matter back to the disciplinary authority for consideration of quantum of punishment to be imposed after hearing the petitioner.

6. Learned counsel appearing for both parties submitted that since the entire matter is before the Court, instead of remitting the matter back to the disciplinary authority, the Court may decide the quantum of punishment required to be imposed. Shri Mishra, learned counsel appearing for the petitioner drew attention of the Court to a decision of the of the Hon'ble Supreme Court in the case of ***Asst. General Manager, S.B.I. Vrs. Thomas Jose and another*** reported in (2000)10 Supreme Court Cases 280. In the said case, an employee of the Bank was dismissed from service on account of his misconduct for withdrawing money unauthorisedly from customers account. The Hon'ble Supreme Court modified the punishment and directed that the concerned officer would not be entitled to increments for a substantial period of ten years with all the cumulative consequences and would not also be entitled to back wages.

The different in this case is that the petitioner retained the money with him till he was found to have misappropriated the same. Therefore, we are of the view that an order for compulsory retirement will be the appropriate punishment. We accordingly convert the punishment of dismissal from service to compulsory retirement.

With the above modification in the order of punishment imposed by the Chairman in Annexure-9, this writ application is disposed of.

Writ petition disposed of.

**2011 ( II ) ILR- CUT- 987**

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

CRA.21 OF 2002, JCRA.27,65 OF 2002 (Decided on 16.9.2011)

**TUNU @ JAGA @ JAGANNATH**
**@ AMITABHA DAS & ORS.** ……Appellants.

*.Vrs.*

**STATE OF ORISSA** **…….**Respondent.

**CRIMINAL TRIAL – Circumstantial evidence – Appellant Santosh was in visiting terms to the house of the deceased being a friend of her brother – On the date of occurrence the deceased was alone at home – On that day at 9 A.M. P.W.3 had seen two of the appellants going towards the house of the deceased and at 11 A.M. P.W.2 had seen all the appellants jumped over the boundary wall of the deceased and ran away in different directions – Soon after the appellants left, P.W.2 saw smoke coming out of that house and fire Brigade Officers reached the spot and found the deceased lying dead – One of the appellants also gave recovery of a pillow which was used for gagging the mouth of the deceased.**

**Held, all these circumstances clearly point at the guilt of the appellants without leaving any room for entertaining doubt.**

(Para 11)

For Appellants - M/s. Chandan Panda , Rajesh Panda.
M/s. Srinivas Mohanty, S.Routray, N.Tripathy.

For Respondent - Addl. Standing Counsel

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***L.MOHAPATRA, J.*** All the three criminal appeals arise out of the judgment and order dated 01.3.2002 passed by the learned Addl. Sessions Judge, Angul in S.T No.116 of 2001 / 8 of 2001 convicting the appellants for commission of offences under Sections 302 / 376 (2) (g) / 450 / 201 of I.P.C. For conviction under Section 302 of I.P.C., all the appellants have been sentenced to imprisonment for life; for conviction under Section 376 (2) (g) of I.P.C. all the appellants have been sentenced to undergo imprisonment for ten years; for conviction under Section 450 of I.P.C. all the appellants have been sentenced to imprisonment for three years and for conviction under Section 201 of I.P.C. they have been sentenced to imprisonment for one year each. All the sentences have been directed to run concurrently.

2. The case of the prosecution is that on 23.10.2000, on which date Laxmipuja was being celebrated, the deceased was all alone in the quarter near the Post Office. Her parents had gone to Bhubaneswar for treatment of her brother and her uncle had also left for village. The appellant-Santosh Kumar Swain, who was supervising the construction work nearer to the house of the victim, knew that the deceased was alone in the house. On the date of occurrence some persons nearby the house of the deceased noticed smoke coming out of the said quarter and when they went near the quarter, they found the deceased-Liza @ Rosalin was burnt and lying dead in the said quarter. The informant, who is the uncle of the deceased suspecting that the deceased had been raped and killed, reported the matter before the police and investigation was taken up. In course of investigation, the appellant-Amitabha Das gave recovery of a pillow, which is alleged to have been used to kill the deceased. On completion of investigation charge sheet was submitted against all the appellants for commission of the aforesaid offences.

3. The prosecution in order to prove the charges examined as many as twenty-two witnesses but none was examined on behalf of the appellants.

The plea of the appellants was that they were not in Angul on the date of occurrence.

4. Though twenty-two witnesses were examined on behalf of the prosecution, there being no eyewitnesses to the occurrence reliance was placed by the prosecution on circumstantial evidence. P.W.19, the doctor, who conducted the postmortem examination, was of the opinion that the deceased had died a homicidal death and the burn injuries were postmortem in nature. He also opined that the injury no.6 is an indication that the deceased had been subjected to rape. P.Ws.4 and 5 deposed that there was no mark of struggle at the spot where the deceased was lying dead with burn injuries. P.Ws.1, 2, 4, 5, 6 and 7 stated that near the quarter where the deceased was staying, construction of a Telephone Exchange was going on and the appellant-Santosh Kumar Swain was supervising the said work. These witnesses have also stated that appellant-Santosh Kumar Swain was frequently coming to the house of the deceased and had become friendly with the brother of the deceased. P.W.2, a Home Guard stated to have seen the other two appellants namely Babloo and Tuna frequently visiting Santosh and similar evidence was also given by P.W.6. P.Ws.4 and 5 stated that on the date of occurrence they were absent at home since they had taken their son to Bhubaneswar for treatment. P.W.3 stated to have seen the appellants coming towards the house of the

deceased and P.W.2 stated to have seen the appellants going out of the house where the deceased was staying, at about 11.00 A.M.

5. Relying on the evidence of these witnesses, the trial court found that all the three appellants are friends and appellant-Santosh Kumar Swain knew that the deceased was alone in the house. They were seen going towards the house of the deceased soon before the occurrence and they were also found running away from the house at about 11.00 A.M. Sometimes, thereafter fire was noticed by some witnesses coming out from the said house and the deceased was found lying dead with burn injuries. While in police custody one of the appellants namely-Amitabh Das also gave recovery of the pillow, which was used for killing the deceased. Having found the above circumstances existing against the appellants, learned Addl. Sessions Judge, found the appellants guilt of the charges and convicted them thereunder.

6. Sri Srinivas Mohanty, learned counsel appearing for one of the appellants and Ms. Panda, learned counsel engaged by the Court for other two appellants assailed the impugned judgment on the ground that in absence of any direct evidence the prosecution is required to prove the circumstances to a extent where it completes a chain pointing at the guilty of the accused and does not leave any room to entertain a doubt with regard to involvement of the appellants in commission of the alleged offences. According to learned counsel appearing for the appellants, the only evidence available against the appellants is that all the three appellants were seen by P.W.2 running away from the quarter, where the deceased was staying, at about 11.00 A.M on the date of occurrence. Except this piece of evidence there is no other evidence to connect the appellants with the alleged offences. It was also contended by learned counsel for the appellants that the circumstances on which the trial court based the order of conviction do not conclusively point at the guilt of the appellants leaving no room for doubt. Therefore, once doubt is created in the mind of the Court with regard to actual involvement of the appellants in commission of the alleged crime, the benefit doubt must be extended to the appellants.

7. Learned counsel appearing for the State heavily relied on the circumstances on the basis of which the trial court has recorded an order of conviction. According to learned counsel for the State the evidence adduced by the prosecution though circumstantial in nature does not leave any room to entertain a doubt.

8. In absence of any direct evidence admittedly the prosecution in this case has relied upon circumstantial evidence. It is therefore, necessary for the Court to look into the entire evidence and find out as to whether the circumstances existing against the appellants clearly indicate their involvement in commission of the alleged crime or not.

We would, therefore, like to deal with the evidence of witnesses, who are relevant for the purpose of the case.

P.W.2 is a Home Guard and he was on duty on the date of occurrence at the Telephone Exchange Office. He in his deposition stated that construction of a new building was going on in the premises of the Telephone Exchange Office and appellant-Santosh Kumar Swain was supervising the said work. The said appellant was staying in a temporary shed constructed in that premises and the other two appellants were frequently visiting Santosh. On the date of occurrence, he was on duty from 6.00 A.M to 2.00 P.M. At about 11.00 A.M he saw Nepali and Tuna jumping the compound wall of the deceased and running towards Hemasarpada. Santosh jumped the wall and ran towards bus-stand. Half an hour thereafter he saw smoke coming out from the house of the deceased and the Fire Brigade Officers went inside the house and informed this witness that the deceased died due to burn injuries. Some other persons also gathered near the spot. The next day he informed about the incident to the parents of the deceased. Nothing material has been brought out in cross-examination of this witness.

P.W.3 is another witness, who has stated that he was working at Lokanath Variety Store located at Bus-stand of Angul. On the date of occurrence Nepali was sitting in front of the said shop. At about 9.00 A.M Santosh came there and both of them talked with each other and thereafter they went towards the Post Office.

9. On analysis of evidence of these two witnesses, it is clear that two of the appellants namely Nepali and Santosh were seen by P.W.3 going towards the Post Office i.e. towards the house of the deceased and P.W.2 had seen all the three appellants jumping over the boundary wall of the quarter, where the deceased was staying, at about 11.00 A.M and running into different directions. P.W.2 also saw smoke coming out from the said quarter sometime after the three appellants ran away from the spot after jumping over the boundary wall.

10. P.W.4, is the father of the deceased and he in his deposition has stated that the appellant-Santosh Kumar Swain used to come to his house as he was friendly with his son and he used to also watch T.V in his house. On 20.10.2000 he had taken his son to Bhubaneswar for treatment along with another son and wife leaving the deceased and his younger brother Sugriba in the quarter. From the evidence of P.W.4 it is clear that on the date of occurrence the parents and the brother of the deceased were absent at home. Though P.W.4 stated that the deceased was left in the custody of his younger brother-Sugriba, the said Sugriba-P.W.5 in his deposition stated that on 23.10.2000 early morning he had left for Angul and accordingly from the deposition of P.Ws.4 and 5 it is clear that the deceased was all alone in the house on 23.10.2000. The evidence of P.W.4 is also corroborated by the evidence of P.W.6, the brother of the deceased. The evidence of these witnesses also establish that the appellant-Santosh Kumar Swain was regularly visiting the house of the deceased and was watching T.V. P.W.8 is another witness, who has stated that on 01.11.2000 at about 1.00 P.M while in police custody, the appellant-Amitabha led the police party to the spot and pointed out at the pillow by means of which they had strangulated the deceased. The evidence of these witnesses is also not demolished in any way in cross-examination. The other important evidence is that of the evidence of P.W.19, who conducted the postmortem examination. P.W.19 has clearly stated in his deposition that the burn injuries were postmortem in nature and the cause of death was due to asphyxia on account of suffocation. With reference to the injuries, he was also of the opinion that such injuries can be caused if the face is pressed with a pillow. He also stated in his deposition that the injuries sustained by the deceased in her private parts could be caused by rape.

11. Therefore, on analysis of the entire evidence, it is clear that the appellant-Santosh Kumar Swain was in visiting terms to the house of the deceased being a friend of the brother of the deceased and sometimes he was also watching T.V in the house of the deceased. On 20.10.2000 the parents of the deceased along with their two sons had left for Bhubaneswar for treatment of P.W.6, one of their sons. They had left the deceased in the custody of P.W.4, who is the uncle of the deceased. On the date of occurrence early in the morning the uncle of the deceased had left for Angul leaving behind the deceased all alone in the house. At about 9.00 A.M on the date of occurrence P.W.3 had seen two of the appellants namely, Santosh and Nepali going towards the house of the deceased and at 11.00 A.M, P.W.2 had seen all the three appellants jumping over the boundary wall of the house of the deceased and running away in different directions. Soon after the three appellants left the house of the deceased, smoke was

noticed by P.W.2 coming out from the house of the deceased. These circumstances clearly establish that the appellants had gone to the house of the deceased taking advantage of the fact that the deceased was all alone in the house and left the house of the deceased by jumping over the boundary wall at about 11.00 A.M and ran away in different directions. Sometime after they left, smoke was found coming out from the house of the deceased and when the Fire Brigade Officers reached the spot, they found the deceased lying dead with burn injuries. From these circumstances, it can be safely inferred that all the three appellants had entered into the house of the deceased when she was all alone in the house and also left the house of the deceased by jumping over the boundary wall at about 11.00 A.M. In addition to this evidence it is also found that one of the appellants namely, Amitabh Das gave recovery of the pillow in the house of the deceased, which had been used for gagging the mouth of the deceased. All these circumstances taken together clearly point at the guilt of the appellants without leaving any room whatsoever for entertaining a doubt.

12. We, therefore, do not find any infirmity on the findings of the trial court in the impugned judgment holding the appellants guilty of the charges and we also find no merit in anyone of the appeals.

Accordingly all the three appeals are dismissed.

Appeals dismissed.

**2011 ( II ) ILR- CUT- 993**

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

JCRA. NO.98 OF 2000 (Decided on 13.07.2011)

**NEKRU @ ALEKH BEHERA** ……Appellant.

*.Vrs.*

**STATE OF ORISSA** ……Respondent.

**EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.24, 26.**

**Retracted confession – The prosecution through P.Ws. 10 & 14 tried to prove the extrajudicial confession made by the appellant – P.W.10 deposed that at first the appellant told him that he had killed his wife and requested to help him in burning the dead body but subsequently he changed his version and told that some body had committed rape on his wife and there after murdered her – From this it is clear that the appellant retracted from his earlier statement made before P.W.10 – Held, in the instant case there being no other reliable evidence to support the retracted confession it is not safe to convict the present appellant upon such confession.**

(Para 7)

**Case laws Referred to:-**

1.AIR 1993 SC 773 : (Union of India & Ors.-V-J.S.Brar).
2.AIR 1985 SC 866 : (Shrishail Nageshi Pare-V- State of Maharashtra)

For Appellant - Mr. Ramesh Chandra Mohanty.
For Respondent - Mr. Anupam Rath (ASC)

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***PRADIP MOHANTY, J.*** In this appeal from jail, the appellant has assailed the judgment dated 25.01.2000 passed by the learned Additional Sessions Judge, Angul in S.T. No.88A of 1997/88 of 1997 convicting him under Section 302, IPC and sentencing him to undergo imprisonment for life.

**2.** The case of the prosecution in a nutshell is that the informant (P.W.1), who is the brother of the deceased, lodged an FIR before NTPC police station on 01.05.1997 to the effect that his sister (deceased) was given in marriage to the appellant six years prior to that date. On the day preceding to 01.05.1997, he along with his two friends had gone to the house of his sister to see opera at NTPC area. They took their dinner there

and at about 10.30 PM along with the appellant went to see opera at N.T.P.C. area. While the opera was going on, the appellant on the pretext of going to the police station left the place. At about 3.30 AM, the elder father's son of the appellant informed them at opera show about the death of his sister. Immediately, they came to the spot and saw the deceased lying dead on the floor of the house of the appellant. It is also alleged that the appellant was having illicit relationship with another lady of his village and that the appellant and his family members used to torture his sister physically and mentally. As the informant could not get any satisfactory reply from the family members of the appellant, suspecting foul play he lodged the FIR. On receipt of the FIR, the O.I.C, NTPC Police Station (P.W.16) registered the case and proceeded with the investigation. During the course of investigation, he visited the spot, examined the witnesses, held inquest over the dead body and sent the same for post mortem examination. He also seized the wearing apparels of the deceased and the appellant, arrested him and sent the seized incriminating articles to S.F.S.L., Rasulgarh for chemical examination. As per direction of the Superintendent of Police, Angul he made over charge of investigation to the C.I. of Police, Talcher (P.W.13), who on completion of investigation filed charge sheet against the appellant under Sections 498-A/302, IPC.

**3.** On receipt of the charge-sheet, the learned Magistrate took cognizance of the offence and committed the case to the Court of Session. The learned Addl. Sessions Judge framed charge under Sections 498-A/302, IPC against the appellant who pleaded not guilty and claimed to be tried. In order to prove its case, prosecution examined as many as sixteen witnesses including the doctor and the investigating officer, and exhibited twelve documents. None was examined on behalf of the appellant in defence. In his statement under Section 313, Cr.P.C., the appellant took the plea of denial. The learned Addl. Sessions Judge relying on the circumstantial evidence available on record convicted the appellant under Section 302, IPC and sentenced him to undergo imprisonment for life. He, however, acquitted the appellant of the charge under Section 498-A, IPC.

**4.** Mr. Mohanty, learned counsel for the appellant submits that in the instant case there is no eye witness to the occurrence and the trial court has convicted the appellant basing on the circumstantial evidence. The extra judicial confession on which much emphasis has been laid by the trial court to convict the appellant is a very weak piece of evidence. Referring to a judgment of the apex Court in ***Union of India and others v. J.S. Brar,*** AIR 1993 SC 773, learned counsel for the appellant submits that in absence of any other corroborative evidence extra judicial confession cannot form the

basis of conviction. His further submission is that other incriminating circumstances available on record do not complete the chain of circumstances. Therefore, the impugned judgment of conviction and order of sentence are not sustainable in the eye of law and liable to be set aside.

**5.** Mr. Nayak, learned Additional Government Advocate vehemently contends that soon after the occurrence the appellant confessed before P.W.10 that he had killed his wife and requested him to burn the dead body. On the next morning of the occurrence, in the police station the appellant in presence of P.Ws.14 and the police confessed that he killed his wife by throttling her neck. The conduct of the appellant is highly doubtful because while the opera was going on, the appellant left the opera show on the plea that he would go to the police station and during the period of his absence from the opera show death of the deceased occurred. The medical evidence is very clear and cogent that the deceased died due to asphyxia and strangulation and that the injuries found on the neck of the deceased cannot be possible by suicidal hanging. Medical evidence tallies with the oral evidence of P.W.10. For all these reasons, it cannot be said that there is infirmity or illegality in the impugned judgment of conviction and sentence passed by the trial court.

**6.** This Court gone through the LCR minutely. As already stated, P.W.1 is the brother of the deceased and the informant of this case. He deposed that after taking dinner in the house of his deceased sister, he along with his two friends, namely, Siba Behera & Nenkuri Behera, as well as his brother-in-law (appellant) went to Rangabeda to see opera. The appellant and another man did not enter inside the opera hall. The appellant telling them that he was going to the police station left the place with the assurance to come back soon. At about 3.00 AM to 3.30 AM in the night appellant came back and took a seat with them inside the opera show. Thereafter, P.W.2 came and informed that the deceased is in serious condition. Hearing this, he along with the appellant and P.W.2 went to the house of the appellant and by the time they arrived there they found that hands and legs of the deceased were stiff and blood was coming out of her mouth. He asked the inmates of the house of the appellant regarding the death of his sister. As they pleaded ignorance, he went to the police station and lodged the FIR.

P.W.2 is the cousin brother of the appellant. He in his examination-in-chief deposed that as the mother of the appellant requested him, he went to the opera show and informed the incident to the appellant. In cross-examination, he admitted that none was present when the mother of the appellant told him that the wife of the appellant had expired and that he

alone went to the place where opera was going on. P.W.3 is the brother of elder father of the appellant. He deposed that he came to know about the death of the deceased at about 4.00 AM in the night when the mother-in-law of the deceased cried and called them. He went to the house of the appellant and found legature mark on the neck of the deceased. The deceased was lying on the floor of the house and a rope was lying near her. He did not find any injury on the person of the deceased. Thereafter, he sent P.W.2 to call the appellant. He also deposed that he came to know from the family members of the appellant that the deceased committed suicide. In cross-examination he admitted that he saw rope marks on the neck of the deceased. P.W.4 is the mother of the appellant. She deposed that the deceased found dead in her outer room where the deceased and the appellant were residing separately from them. The elder son of the deceased came crying and told her about the incident. She took her grandson with her and went to the room where deceased was lying dead. She further deposed that she found that the deceased had hanged herself by means of a rope. At that time, the appellant along with his brother-in-law (P.W.1) had gone to see the opera show. She immediately cut the rope and went to inform the elder brother of her husband (P.W.3) and nephew (P.W.2). When they came to the spot and found the deceased dead, she lost her sense. In cross-examination, she admitted that she sent her nephew (P.W.2) to call the appellant from the opera show and her nephew alone went there.

P.W.5 is the mother of the deceased. In her evidence she stated that her deceased daughter had married to the appellant six years prior to her death. The appellant and the deceased were staying in one room along with their children. Her deceased daughter had been telling her that the appellant did not like her. The appellant wanted to marry a girl of village Rangabeda two months prior to the death of the deceased. The appellant developed intimacy with that girl when he went to his sister's house at Rangabeda. She was informed about the incident by Nenkuri (P.W.6) and Siba of their village. By the time she reached at the spot, the dead body of the deceased had already been sent to the hospital for post-mortem examination. In cross-examination, she stated that whenever her deceased daughter came to her house told her that the appellant was always doing golmal and assaulting her.

P.W.6 is the co-villager of the informant. His evidence is that in the night of occurrence at about 9.30 AM he himself, Siba, appellant, Pabitra, and Dhuleswar (P.W.1) came to see opera at NTPC. They gave money to the appellant to purchase tickets. But, the appellant brought four tickets for them and did not bring ticket for himself. The appellant did not accompany

them to see the opera show and left the place on the plea that he would go to NTPC police station to see his father who had been arrested by the police. At about 3.30 PM they saw the appellant sitting behind them. After half an hour a co-villager of the appellant came and intimated about the incident.

P.Ws.7 and 9 are witnesses to the seizure of wearing apparels of the deceased and the command certificate under Ext.3. In cross-examination, they have admitted that at the time of seizure no outsider was there. P.W.8 is the Gram Rakhi. He stated that he put his signature on Ext.4, but he had no knowledge about the seizure.

P.W.10 is a co-villager of the appellant. He deposed that after the death of the deceased the appellant came running to him at about 5.00 AM while he was executing a work near NTPC under a petty contractor. At first the appellant told him that he had killed his wife and requested to help him in burning the dead body. Subsequently, he changed his version and told that somebody had committed rape on the deceased and thereafter murdered her. He told the appellant to come to his house and the appellant deed so. Meanwhile, he managed to inform about the incident to police who came and took the appellant from his house. He further deposed that on being called by police he went to the NTPC police station and found Madhusudan Pani (P.W.14) present there along with other persons. The appellant confessed before police in their presence that after committing sexual intercourse twice or thrice on the deceased, he throttled the throat of the deceased and murdered her. In cross-examination, he admitted that none else was present there when the appellant confessed his guilt before him near the work site. He further admitted that he was pulling on well with the appellant Nenkuri alias Alekha prior to the incident.

P.W.14 is another co-villager of the appellant. He deposed that at the relevant time he was P.C.C. member of congress party. While he was talking with one Santosh Pradhan under whom appellant was working for election propaganda of congress party, on account of faith on him the appellant told after going 6 to 7 cubits with him that somebody raped and murdered his wife and that some wine bottles were lying near the dead body. He advised the appellant to go to his house to guard the dead body. On the next day morning, he went to the police station being called by police where the appellant confessed before him and police that he throttled the neck of his wife and killed her. In cross-examination, he also clarified the above fact.

P.W.11 is the doctor who conducted post-mortem examination on the dead body of the deceased and found the following injuries:

"(i) Legature mark and bruise on the neck. Bruise mark 1" x 1/2" transversely placed 1" above the left clavicle.

(ii) Another bruise ¼" x ¼", half inch below the lateral to the first injury, and

(iii) Legature mark ¾" width parallel to the mandible over the thyroid cartilage 4" length."

He opined that the cause of death was due to asphyxia as a result of strangulation. In cross-examination, he admitted that the injuries could not be possible by hanging by rope or by suicidal handing.

P.W.12 is a witness to the inquest and proved the inquest report (Ext.2) and his signature (Ext.2/2). P.W.13 is the C.I. of police who simply submitted the charge sheet against the appellant under Sections 302/498-A, IPC. P.W.15 is the doctor who examined the appellant and found no mark of injury on his body. In the conclusion he deposed that absence of smegma suggested occurrence of sexual intercourse within 24 hours. P.W.16 is the I.O. who registered the case, took up investigation, examined the witnesses, held inquest over the dead body of the deceased and sent the same for post mortem examination. He also seized the wearing apparels of the appellant and the deceased and sent the same to S.F.S.L., Rasulgarh for chemical examination.

**7**. The analysis of evidence made above would go to show that in this case there is no eye witness account to implicate the appellant with the murder of the deceased. The trial court, as is evident from the impugned judgment, has convicted the appellant basing on the circumstantial evidence available on record. Extrajudicial confession said to have been made by the appellant is one of the circumstances on which much emphasis has been given by the trial court. The prosecution through P.Ws.10 and 14 has tried to prove such extrajudicial confession. This Court carefully scrutinized the evidence of these two witnesses. P.W.10 deposed that at first the appellant told him that he had killed his wife (deceased) and requested to help him in burning the dead body but subsequently he changed his version and told that somebody had committed rape on his wife and thereafter murdered her. From this, it is crystal clear that the appellant retracted from his earlier statement made before P.W.10. A retracted confession is of no value, except as a reassurance when reliable evidence has already been adduced on behalf of the prosecution, as held by the apex Court in ***Union of India and others v. J.S. Brar,*** AIR 1993 SC 773 referring to the judgment rendered in ***Shrishail Nageshi Pare v. State of Maharashtra***, AIR 1985 SC 866. In the

instant case, there is no other reliable evidence to support this retracted confession. The other witness (P.W.14) stated that on the next morning of the occurrence he had gone to NTPC police station being called by the police. The appellant confessed before him and the police that he had killed his wife. Such confession is inadmissible in the eye of law being hit by Section 25 of the Indian Evidence Act. The plea of the appellant for remaining absent from the opera show gets support from the evidence of P.W.6 who has categorically deposed that on the occurrence night after giving food the deceased told them that her father-in-law had been arrested by the police. P.W.5 although in her evidence deposed that she found piercing of knife blow on the left side chest of her deceased daughter, the post-mortem doctor (P.W.11) has not deposed about any such injury on the chest. The evidence of the prosecution witnesses suffers from material contradictions and infirmities. There is no other reliable circumstance except the retracted confession of the appellant said to have been made before P.W.10 and it is not safe to convict the present appellant basing upon such retracted confession. For all these reasons, this Court holds that the circumstances adduced in this case do not conclusively prove the guilt of the appellant and there are missing links in the chain of circumstances.

**8.** In the result, the Jail Criminal Appeal is allowed and the judgment dated 25.01.2000 passed by the learned Additional Sessions Judge, Angul in S.T. Case No. 88A of 1997/88 of 1997 convicting the appellant under Section 302 IPC and sentencing him to undergo imprisonment for life is set aside. The appellant-Nekuri alias Alekha Behera be set at liberty forthwith, unless his detention is required otherwise.

Appeal allowed.

**2011 ( II ) ILR- CUT- 1000**

**M.M.DAS, J.**

O.J.C. NO. 1244 OF 1995 (Decided on 22.09.2011)

**CHIEF ENGINEER, ROURKELA**
**SITE OFFICE** ……Petitioner.

.Vrs.

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

**INDUSTRIAL DISPUTES ACT, 1947-(ACT NO.14 OF 1947) – S.25-FFF.**

**Retrenchment of workman – Industrial dispute raised – Tribunal held retrenchment of workman is illegal and directed for his reinstatement – Management challenged the award on the ground that the workman was working in the petitioner-company in its Rourkela site office and its case covered under the provisions of Section 25-FFF of the Act and for non-compliance of the said provision the said award is liable to be set aside.**

**In this case there is no material to show that the site office of the petitioner-company at Rourkela was a distinct venture undertaken by the petitioner-company and it had a distinct beginning and an end and such site was not setup for a particular venture for being closed down after completion of the project or enterprise in order to attract Section 25-FFF of the Act.**

**Held, the management is not protected under the provisions U/s. 25-FFF of the Act, hence this Court does not find any error in the impugned award – Direction issued for reinstatement of the workman with back wages.**

(Para 6,7)

**Case law Referred to:-**
Vol.43 FJR 192 : (Hindustan Steel Ltd.-V- Their Workmen & Ors.)

For Petitioner - M/s. B.B.Ratho, Sr. Advocate
B.N.Rath, R.P.Mohapatra, S.N.Mohapatra, J.Rath, K.R.Mohapatra, B.Senapati, M.R.Panda, S.Ghosh, B.N.Mishra, S.K.Jethy & N.Ratho.

For Opp.Parties - M/s. J.Pattnaik, Sr.Counsel,
H.M.Dhal & A.A.Das (for O.P.2)

***M.M. DAS, J.*** The petitioner is the Chief Engineer at Rourkela Site Office of Metallurgical and Engineering Consultants (India) Limited, who is the employer. The opposite party no.3 in the writ application is the workman. The petitioner has challenged the award dated 15.12.1994 under Annexure – 1 to the writ application passed in Industrial Disputes Case No.31/85 by the Presiding Officer, Industrial Tribunal, Orissa, Bhubaneswar. The petitioner hereinafter referred to as (MECON) was earlier known as Central Engineering and Designs Bureau, which is a Central Government undertaking. It has a Site Office at Rourkela having its Head Office (registered office) at Ranchi. It is stated by the petitioner that in the Rourkela Site Office, the petitioner – company apart from rendering consultancy services to the Rourkela Steel Plant also, at times, undertakes engineering construction/erection works of the Steel Plant on contract basis. The opposite party no.3 admittedly was under the employment of the petitioner and raised an industrial dispute. On failure of conciliation and submission of failure report, a reference was made to the Presiding Officer, Industrial Tribunal, Orissa, Bhubaneswar as under:-

> "Whether the retrenchment of Sri Ajay Kumar Sahu, Chaukidar by the Management of Metallurgical and Engineering Consultants (India) Limited, Rourkela with effect from 31.12.1983 is legal and/or justified ? If not what relief Sri Sahu is entitled to ?"

2. The said reference on being registered as I.D. Case No.31/95 and notices being issued, the opposite party no.3 – workman filed his claim/statement and an additional written statement and the management – petitioner filed its written statement. The Presiding Officer by his award dated 15.12.1994, after hearing the case on the reference, on framing the issues came to the findings that the reference is maintainable, the case of the management is not protected by the provisions under Section 25 – FFF of the Industrial Disputes Act and the provisions of Section 25 – F of the Act has not been complied with, while terminating the services of the workman with effect from 31.12.1983. Concluding thus, he held that the retrenchment of the workman is illegal and unjustified. Thus holding, the Presiding Officer coming to the finding that there was regular vacancies available in the office of the Management at Rourkela in 1978 and the case of the workman was not considered to be appointed to such post for regularization in service or even as a temporary or casual employee, the management has also violated the provisions of Section 25 – G of the Act. Ultimately it was directed in the award for reinstatement of the workman in service with full back wages.

3. Mr. Ratho, learned counsel for the petitioner raised the solitary question of law that the facts of the present case is squarely covered under

the provisions of Section 25 – FFF of the I.D. Act, 1947 and not those contained in Section 25 – F of the Act governing the case of retrenchment. In support of this submission, he relied upon the decision in the case of ***Hindustan Steel Limited v. Their Workmen and others*** Vol. 43 FJR 192. To substantiate his argument, he referred to various exhibits as well as oral evidence adduced before the Tribunal and submitted that the workman was not terminated on 31.12.1983, as it is the admitted case of both the parties that during conciliation proceeding as per the contention of the management, the DLO advised him to continue in service and to grant retrenchment compensation until he is retrenched. According to him, the workman being allowed to continue after 31.12.1983 and retrenchment compensation having been paid to him, the case cannot come under the provisions of Section 25 – F of the Act. Alternative contention advanced by Mr. Ratho was that even for the sake of argument, if it is accepted that the workman was terminated on 31.12.1983, his appointment being purely temporary and for a specific period, there was automatic cessation of service, which did not need compliance of any provision of the I.D. Act. Other contentions raised by Mr. Ratho, being questions of fact, this Court is not inclined to enter into the same in this writ application for issuance of a writ of certiorari, as this Court cannot act as an appellate authority over the impugned award and re-appreciate the evidence adduced before the Presiding Officer.

4. In reply to the above contention, Mr. J. Pattnaik, learned senior counsel appearing for the workman, on the other hand, contended that there is no iota of material available on record to show that the workman was allowed to continue after 31.12.1983. He drew the attention of this Court to the findings of fact by the Industrial Tribunal in the impugned award, where the Tribunal has found that the sole witness examined on behalf of the management, namely, M.W. 2 did not state anything in his evidence that at the stage of conciliation, the workman was communicated an order extending his service. He further submitted that on the date of termination of the workman, i.e., 31.12.1983, Section 2 (oo) (bb) was not in the Statute, which were brought by way of amendment with effect from 18.08.1984 by Act 49 of 1984 and, hence, this provision can be of no assistance to the management, which contention was also repelled by the learned Tribunal. Mr. Pattnaik further submitted that no material was produced by the management to show compliance of the provisions of Section 25 – F of the Act, before the Tribunal and thus, the Tribunal has rightly come to the conclusion that the said provision of the Act was violated by the management.

5. In the case of Hindustan Steel Limited (supra) no doubt, the Supreme Court on the facts of the said case quoting Section 25 – F as well as Section 25 – FFF in the said judgment held as follows :-

> "The word undertaking as used in section 25 – FFF seems to us to have been used in its ordinary sense connoting thereby any work, enterprise, project or business undertaking. It is not intended to cover the entire industry or business of the employer as was suggested on behalf of the respondents. Even closure or stoppage of a part of the business or activities of the employer would seem in law to be covered by this sub-section. The question has indeed to be decided on the facts of each case……..."

6. Even applying the above ratio to the facts of the present case, it would be seen that there is absence of material to show that the Site Office of the petitioner – company at Rourkela was a distinct venture undertaken by the petitioner – company and it had a distinct beginning and an end. Such Site Office was apparently not set up for a particular venture for being closed down after completion of the project or enterprise. Thus, the above ratio in the aforesaid decision laid down by the Supreme Court, cannot be made applicable to the facts of the present case.

7. I have found that the Presiding Officer in the impugned award, has meticulously analyzed the materials and evidence produced before him as well as various case laws cited before him and has rightly come to the conclusion that the termination of the opposite party no.3 – workman with effect from 31.12.1983 was illegal and unjustified. I also do not find any error in the direction issued by the learned Tribunal in the impugned award to reinstate the workman – opposite party no.3 in service with full back wages.

8. In the result, therefore, the writ application, being devoid of merit, is dismissed, but in the circumstances without cost.

Writ petition dismissed.

**2011 ( II ) ILR- CUT- 1004**

**M.M.DAS, J.**

F.A.O. NO.427 OF 2006 (Decided on 25.10.2011)

**MANORAMA NATH** ……Petitioner.

*.Vrs.*

**UNION OF INDIA** ……. Opp.Party.

**RAILWAYS ACT, 1989 (ACT NO.24 OF 1989) – Ss.123 (c) (2), 124-A.**

**Untoward incident – Scope of – Husband of the appellant died due to electrocution having come in contact with an electric pole inside the railway platform – Held, it can be construed to be an untoward incident U/s. 123 ((c) (2) of the Railways Act, though technically the deceased did not meet his death due to accidental falling from a train carrying passengers.**

**Held, impugned award passed by the learned Tribunal is set aside – Direction issued to the respondent-railways to pay compensation of Rs.4,00,000/- as per the schedule in the Railway Accidents and untoward incidents (Compensation) Rules, 1990.**

(Para 9,13,14)

**Case law Referred to:-**

.2003 (3) TSC 187 : (Nridhanya Devi-V- Union of India)

For Appellant - M/s. S.P.Mishra, Sr. Counsel
B.K.Mohanty, R.Mohanty, S.S.Chhualsingh & P.K.Bhuyan.

For Respondent - M/s. D.N.Mishra & S.K.Panda.

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***M. M. DAS, J.*** The claimant-appellant filed an application before the Railway Claims Tribunal, Bhubaneswar under section 16 of the Railway Claims Tribunal Act, 1987 for award of compensation on account of death of her husband-Batakrushna Nath, who died on 26.08.2000 at Kapilas Road Railway Station. The Tribunal having rejected such application by order dated 02.03.2006 passed in O.A. No.31 of 2001, the appellant has preferred the present appeal.

2. The appellant's case before the Tribunal was that the deceased came to Kapilas Road Railway Station to proceed to Cuttack for business purpose. He purchased a ticket bearing no.33834 at about 6.45 A.M. on the

fateful day and waited for the arrival of the train. As the train was getting delayed, he made enquires and was told that the train was running late. The train arrived 25 minutes late and was expected to leave after five minutes. But, it again got delayed in the said Railway Station allegedly for some electrical problems. The deceased was at the door of the compartment to board the same. He was trying to get inside and he came in contact with naked electric wire and was electrocuted, as a result of which, he sustained burn injuries and was thrown outside the bogie due to the electric shock. On account of the hue and cry raised by the passengers, the train stopped after 100 meters. The deceased was taken to SCB Medical Collect and Hospital, Cuttack by the GRP and was declared dead.

3. The railway authorities filed their written statement before the Tribunal denying the assertions made in the claim application and, inter alia, stating that the deceased was not a bona fide passenger of any running train carrying passengers and the alleged accident does not come under the purview of "untoward incident". It was further stated that on 26.08.2000 at about 6 A.M. one person died outside the platform no.4near the board showing the name of the station due to the electric shock from a electric pole and the brother of the deceased has submitted an F.I.R. with the GRP to that effect. The Booking Office at Kapilas Road Station is on Platform No.1. There is no electrical system as well as electrical multiple unit train at this station. Thus, it was pleaded that the claimant has made a false allegation of electrocution inside the compartment.

4. Evidence was led by the claimant-appellant as well as the respondent-Railways. Documents were exhibited, such as, Post Mortem Report, inquest report, the letter requesting for Post Mortem, the F.I.R. lodged by the brother of the deceased, Xerox copy of the ticket no.33834 from Kapilas to Cuttack in second class ordinary compartment, the final report of the police and the certificate of death. The appellant stated in the evidence on affidavit that her husband was a bona fide passenger of Howrah-Puri passenger on 26.08.2000. He died in the vicinity of railway area and inside the platform having valid train ticket. He was a hawker and used to travel daily, by train, for business purpose. On the date of accident, he had told the appellant that he was proceeding to Cuttack.

5. The leaned Tribunal on analyzing the evidence adduced by both the parties came to a finding that the deceased died on the platform due to electrocution by coming in contact with an electric pole erected on platform no.4 and but not as a result of falling down from the compartment due to electrocution. According to the Tribunal, the case does not attract the

provision of section 124 of the Railways Act, 1989 and, therefore, the claim is not entertainable.

6. At the outset, the learned counsel for the respondent-Railways urged that the claim is one under section 124-A of the Railways Act, 1989 for compensation on account of untoward incident and untoward incident does not cover such an incident by which the husband of the appellant died.

7. Mr. S.P. Mishra, learned senior counsel appearing for the appellant, on the contrary, submitted that even admitting the finding of facts by the learned Tribunal, it would be seen that the accident by which the husband of the appellant died will come under the definition of untoward incident for which the respondent is liable to pay compensation to the appellant.

8. It is, therefore, now an admitted case that the deceased died due to electrocution on the platform of Kapilas Road Railway Station on 26.08.2000 on account of electrocution having come in contact with an electric pole inside the platform. For deciding the present case, it would be apt to quote section 124-A of the Railways Act, which is as under.

> "[124A. Compensation on account of untoward incident- When in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or the dependant of a passenger who has been killed to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident:

Provided that no compensation shall be payable under this section by the railway administration if the passenger died or suffers injury due to-

(a) Suicide or attempted suicide by him;

(b) Self-inflicted injury;

(c) His own criminal act;

(d) Any act committed by him in a state of intoxication or insanity;

(e) Any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident.

Explanation- For the purpose of this section, "passenger" includes-

(i) a railway servant on duty; and
(ii) a person who has purchased a valid ticket for traveling by a train carrying passengers, on any date or a valid platform ticket and becomes a victim of an untoward incident.]"

9. Untoward incident has been defined in Clause-(c) of section 123 of the Railways Act as follows:

> "123. Definitions- xxx xxx xxx
> [(c) "untoward incident" means-
>
> (1 ) (i) the commission of a terrorist act within the meaning of sub-section (1) of section 3 of the Terrorist and Disruptive Activities (prevention) Act, 1987 (28 of 1987); or
>
> (ii) the making of a violent attack or the commission of robbery or dacoity; or
>
> (iii) the indulging in rioting, shoot-out or arson,
>
> by any person in or on any train carrying passengers, or in a waiting hall, cloak room or reservation or booking office or on any platform or in any other place within the precincts of a railway station; or
>
> (2) the accidental falling of any passenger from a train carrying passengers.]"

If at all the death of the husband of the appellant can be construed to be an untoward incident, it can only be under Sub-clause-(2) of Clause-(c) of section 123 of the Railways Act.

10. It is needless to mention that the provision for compensation in the Railways Act is a beneficial piece of legislation and such legislation should always receive a liberal and wider interpretation and not a narrow and technical one. With this in mind, the facts of this case should be examined to arrive at a conclusion as to weather the respondent would be liable to pay compensation for the death of the deceased.

11. At the outset, it would be seen that a ticket number was given by the claimant, which was stated to have been purchased by the deceased. The witness examined on behalf of the respondent before the Tribunal was the best person to produce materials to show that such a ticket was not sold on the date of the accident. Even a Xerox copy of the ticket was produced by the claimant before the Tribunal as would be evident from the impugned judgment even though purchase of such ticket was not mentioned in the evidence on affidavit filed by the claimant-appellant. In the case of ***Nridhanya Devi V. Union of India,*** 2003 (3) TSC 187 relied upon by the appellant, the Gauhati High Court was dealing with an appeal against the order of the Railway Claims Tribunal, where the claim application was dismissed primarily on the ground that the deceased died in a bus accident and not railway accident and the facts of the said case disclosed that on account of flood the passengers in Kamrup Express could not be carried beyond Gouripur in the District of Dhubri and the Railway Authorities had to carry the passengers by certain buses including the bus in which the deceased was traveling on the date of the accident, which met with an accident with another bus resulting the death of two persons including the son of the claimant. The Gauhati High Court on such facts came to the conclusion as follows:-

> "In the light of the aforementioned provisions and the points raised, we are of the considered view that the claimant is entitled to the grant of compensation on account of the death of her son. There cannot be any dispute that accident means an accident of the nature which has been described under section 124. However, a combined reading of all the provisions reproduced above leaves no manner or doubt that if the accident of a bus hired by the railway authorities takes place, it would be, for the purpose of compensation, termed as a railway accident. Section 124 lays down that if an accident occurs in the course of working a railway, the railway administration shall be liable to pay compensation to such extent as is prescribed. Section 2 defines certain words. In its sub-section (31), Clause (e) as has been reproduced above clearly defines as to what does railway mean. Railway includes all vehicles which are used on any road for the purpose of traffic of a railway or hired or worked by a railway. In the instant case, the bus in question having been hired by the railway for carrying the passengers, the bus would be deemed to be included in the vehicles of the railway. If section 124 is read alone without reading section 2(31) (e), the counsel for the Railways would probably be correct in his argument but no harmonious construction being given to both the provisions of sections 124 and 2(31) (e), the

> necessary and inevitable result which follows is that an accident which has taken place between the bus which is hired by the Railways with another bus it would be called railway accident and nothing more and nothing short".

Holding thus the said High Court allowed the prayer for award of compensation.

12. Mr. S.P. Mishra, learned senior counsel further referred to an unreported decision of the Kerala High Court in the case of ***A Philoma Dya Thressiamma and anr. V. Indian Railway*** delivered on 5th February, 2007 in W.P.(C) No.13658 of 2006, where the Kerala High Court referring to the explanation to section 124A of the Railways Act held that from the said explanation, it is clear that passenger is given a wide meaning to cover even a person who holds a platform ticket, which means that for any person who suffers injuries or death in the railway premises and whose presence is authorized by the railways, the railways is bound to compensate him as a passenger. The Kerala High Court was dealing with the case of a potter who died in the railway station due to an accident on the platform while pulling trolley along with other potters and due to such accident, the deceased died on account of falling on the railway track on which a goods train was passing.

13. Though on the facts of the case before the Gauhati High Court, which was in relation to an accident between two busses, one of which was hired by the railways to carry passengers to the station on principle, I do not agree with the view of the Gauhati High Court that such an accident would come under the Railways Act rather than coming under the Mother Vehicles Act, but, agreeing with the view of the Kerala High Court, I am of the considered opinion/conclusion that the death of the deceased in the instant case would come under the definition of an untoward incident though technically the deceased did not meet his death due to accident falling from a train carrying passengers.

14. In view of the above findings and interpretations, it is apparent that the learned Tribunal went wrong in holding that the incident does not come under the definition of 'untoward incident' and the appellant-claimant is not entitled to any compensation. The said impugned order/award is, therefore, set aside and the appeal is allowed directing the respondent to pay a compensation of Rs.4,00,000/- (Rupees four lakhs) as per the schedule in the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 along with 6% interest thereon from the date of filing of the claim application till the date of deposit, to the claimant-appellant. Such amount shall be

deposited before the Railway Claims Tribunal, Bhubaneswar within a period of eight weeks hence, who shall disburse the same to the claimant on proper identification.

15. The appeal is accordingly allowed, but in the circumstances without cost.

Appeal allowed.

**2011 ( II ) ILR- CUT- 1011**

**R.N.BISWAL, J.**

TRP (CRL.) NO.33 OF 2011 (Decided on 30.09.2011)

**KARTIK PARIMANIK** ……. Petitioner.

*.Vrs.*

**STATE OF ORISSA** …….Opp.Party.

**CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.407.**

**Transfer of Criminal Case – Apprehension of the petitioner that he would not get justice from the trial Court can not be a ground for transfer of the Case.** (Para 10)

For Petitioner - M/s. J.Katikia, A. Mohanty, P.Mohanty, K.B.Pradhan
For Opp.Party - Addl. Standing Counsel

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***R.N.BISWAL, J.*** This petition is filed under section 407 of Cr.P.C. to transfer S.T. Case No.8 of 2011 from the court of Ad-hoc Addl. Sessions Judge (FTC-I), Phulbani to any other court with equal jurisdiction.

2. As per the petition, the petitioner is facing trial for the offence under sections 147/148/427/436/302 read with section 149 of I.P.C. in the aforesaid case. It is alleged that during cross-examination of the I.O. (P.W.7), the learned Ad-hoc Addl. Sessions Judge (FTC-I), Phulbani (hereinafter referred as 'trial court') did not record some answers given by him and declared that since on the self-same evidence an order of conviction had already been recorded against one co-accused in the split up case, it would not help the present accused even if the answer given by the I.O. to the question put by the defence counsel was recorded.

3. It is further alleged in the petition that in his examination-in-chief the I.O. stated that due to blockage of road, he could not proceed to the spot of occurrence immediately after the F.I.R. was lodged. In cross-examination it was elicited from him that at that time there was no blockage of road and the vehicles were plying on the road freely without obstruction. At that time the trial court intervened and reminded the I.O. that he had already stated in his examination-in-chief that there was road block. When the defence counsel confronted some part of the evidence of P.W.1 to the I.O. to impeach the credibility of the latter, the trial court did not record the answer given by the

I.O. Time and again the trial court expressed its view in the open court that no elaborate cross-examination was required because in the split up case one of the accused persons had already been convicted and the petitioner would meet the same fate.

4. It is further alleged that the trial court was annoyed with the petitioner on the wrong notion that he made allegation against it before the District & Sessions Judge, Phulbani during his visit to jail that his case was unnecessarily lingering. In fact during visit of the learned District & Sessions Judge (FTC-I), Phulbani to the jail, the petitioner informed him that his case was lingering due to non-attendance of the prosecution witnesses in spite of issuance of summons, but this was understood otherwise by the trial court.

5. It is further alleged that during his cross-examination, the I.O. challenged the relevancy of each and every question, instead of answering the same. When it was brought to the notice of the trial court, instead of cautioning him, it told that since the I.O. was an young officer the defence counsel should not take cognizance of the same.

6. On 28.7.2011 when the case was taken up at about 11.30 A.M., the trial court told the defence counsel to conclude the cross-examination of the I.O. within half an hour, on the plea that there were eight witnesses in some other cases to be examined, whereas in fact there was no other witness in any other case. It is further alleged that the defence counsel came to know from reliable source that the trial court was annoyed with him, because while he was conducting a case in this court it was asked to give explanation on some points. Under such circumstances, the petitioner apprehends that he will not get justice from the trial court. Hence the petition.

7. Learned counsel appearing for the petitioner submits that justice should not only be done, but should manifestly be seen to be done. In the case at hand, since the trial judge is determined to pass similar order as it passed in the split up case, where one co-accused has been convicted, the apprehension of the petitioner that he will not get justice from the trial court is reasonable. When the trial court did not record the answers given by the I.O. to the questions of the defence counsel and it is under impression that the petitioner made allegation against the trial court, during his visit to the jail, the apprehension of the petitioner that he will not get justice from the trial court became stranger. In addition to all these, the trial court was also annoyed with the defence counsel on the misconception that at his instance this court called for an explanation from it. For all these reasons, the defence counsel did not like to conduct the case and filed a petition, under

Annexure-1 before the trial court to allow him to withdraw from it. So, the learned counsel for the petitioner urged to allow the prayer of the petitioner.

8. Per contra, learned Addl. Standing Counsel contends that as found from Annexure-1, the only allegations made against the trial court are that it interfered with each and every question put by the defence counsel to the I.O; that it did not record the evidence given by the I.O. in respect of some contradictions; that even though the I.O. gave evasive reply or replied out of the record time and again, it did no warn him to maintain decorum of the court which encouraged him to put counter questions to the defence counsel and that it gave indirect hints that the case needed no elaborate cross-examination since in the split up case, the co-accused who were facing trial for the offence under section 436 of I.P.C. had been convicted. According to learned Addl. Standing Counsel the other grounds taken in the petition under section 407 of Cr.P.C. are after thought. The allegations made under Annexure-1 do not indicate that, the trial court is determined to convict the petitioner. He further submits that, as it appears, since in the split up case, the accused persons have been convicted, the petitioner apprehends that he will meet the same fate, for which he has filed the transfer petition.

9. It is found from the certified copy of the deposition of P.W.7, the I.O. that his deposition in examination-in-chief as recorded on 27.7.2011 consists of two pages and two lines only. He was cross-examined in part on that date which was recorded in two and half pages and his further cross-examination was deferred to the next date. On that date his cross-examination was recovered in one page and in course of cross-examination, the learned defence counsel filed a petition under Annexure-1 to allow him to withdraw from the case. So, it can not be believed that the trial court interfered at every stage during cross-examination and did not record some answers given by the I.O. Moreover, the Presiding Officer is not required to record each and every answer irrespective their admissibility and relevancy. It has been endorsed by the trial court below the deposition of the I.O. as follows:

> "The advocate for the accused asked the witness whether in his statement dated 5.10.2008 the informant Naresh Digal had stated before him that the accused Kartika Paramanik and others participated in destroying his house. On perusal of his evidence, a question in this regard was asked to the witness which he denied. Further it appears that the said informant had stated the said fact in his earlier statement recorded on 26.8.2008. As such this question is not entertained."

From this endorsement, it appears that the defence counsel in his cross-examination asked the I.O. whether the informant in his statement recorded on 5.10.2008 stated before him that the petitioner and others participated in demolishing his house. Since the informant in his evidence had admitted not to have stated so before the I.O., the trial court held that the question put to the I.O. was not relevant. I found no illegality in it. If relevant questions were put, but the trial court intervened in the matter, the defence counsel ought to have brought the same to record in writing, but he did not do so. Only because some of the co-accused facing trial under section 436 of I.P.C., got convicted, it does not mean that the petitioner who faces trial under sections 147/148/427/436/302 would also be convicted. In other words when the petitioner is facing trial in five heads of charge, conviction of the co-accused in one head only, would not automatically lead to conviction of the petitioner in all heads or in one head even. So the allegation that the trial court was giving indirect hints to convict the petitioner can not be accepted. Admittedly pecuniary interest is not attributed to the trial court. Even if it is presumed that the trial court did not caution the I.O. (P.W.7) not to put counter question to the defence counsel, such innocent omission on its part, can not give rise a ground to transfer the case to some other court. The other allegations made in the petition under section 407 of Cr.P.C. appear to be after thought.

10. Under such circumstances, it is held that the apprehension of the petitioner that he would not get justice from the trial court is not reasonable. If he apprehends that the co-accused in the split up case have been convicted under section 436 of I.P.C., so he would meet the same fate, such apprehension can be branded as fanciful and imaginary and can not be a ground for transfer of the case.

11. Accordingly, the petition under section 407 of Cr.P.C. is rejected and the TRPCRL stands dismissed.

Application dismissed.

**2011 ( II ) ILR- CUT- 1015**

**R.N.BISWAL, J.**

W.P.(C) NO.11451 OF 2005 (Decided on 19.10.2011)

**INDIAN COUNCIL OF AGRICULTURAL & RESEARCH** …….. …Petitioner.

*.Vrs.*

**P.O.,CGIT-CUM-LABOUR COURT,BBSR & ORS**. ……..…Opp.Parties.

**INDUSTRIAL DISPUTES ACT, 1947 (ACT NO.14 OF 1947) – S.2 (i).**

**Industry – Meaning of – An 'industry' can not exist without Co-operative endeavour between employer and employee – No employer, no industry, no employee, no industry.**

**Whether water Technology Centre for Eastern Region, Bhubaneswar (WTCER in short) an Unit under the Indian Council of Agricultural Research (ICAR in short) is an industry – Besides undertaking research work WTCER undertakes welfare activities and economic adventure – It has more than 1000 acres of land where it grows different variety of crops and vegetables by the help of workmen and sells the same in the open market besides undertaking various project works which fulfils the triple test – Held, WTCER is an 'industry.'** (Para 7)

**Case laws Referred to:-**

1.AIR 1978 SC 969 : (Bangalore Water Supply & Sewerage Board-V-A.Rajjappa & Ors.)
2.AIR 1997 SC 1855 : (Physical Research Laboratory-V- K.G.Sharma)
3.(1998) 3 CALLT.209 HC : (Central Agricultural Research Institute & Anr.-V-The Presiding Officer, Labour Court & Ors.)

For Petitioner - M/s. Akshya Kumar Mishra.
For Opp.Parties - M/s. A.K.Patnaik, GA (C ) P.C.Biswal, GA (C )
Mr. Bijay Ray. M/s. C.Choudhury, B.Mohanty, S.Mohanty, D.R.Das, D.Chhotray, B.Mahara.
M/s. S.Mohanty, S.K.Das, S.Mohapatra.

***R.N.BISWAL,J.*** The only point for determination, in this writ petition is, whether the opp.party-Water Technology Center for Eastern Region,

Bhubaneswar (WTCER in short)is an industry as defined under Section 2(j)of the Industrial Disputes Act,1947 (I.D.Act in short)

2. The factual back-ground leading to filing of the writ petition is that the opp.parties-workmen raised an industrial dispute before the Asst. Labour Commissioner (Central)-cum-Conciliation Officer, Bhubaneswar and the conciliation having been failed, the Govt. of India in exercise of its power under sub-section(1) and sub-section 2 (A) of Section 10 of the I .D. Act vide order dated 2.3.2000 referred the following dispute to the Presiding Officer, Central Government Industrial Tribunal, Bhubaneswar (hereinafter referred as C.G.I.T.) for adjudication.

> "Whether the action of the management of WTCER, Bhubaneswar by changing the employment of the disputants S/Sh. Harihar Kalia, Benudhar Nayak, Ramakanta Samal & Sh. Gumi Dei as so-called contract labourers and afterwards terminating their services is justified? Whether the action of the management of WTCER by not reinstating or by not giving temporary status to the disputants is legal and justified? If not, to what relief the disputants are entitled?

The reference was registered as I.D. Case No.36 of 2000(c). Opp. parties-workmen filed their statement of claim and the petitioner filed written statement. On the basis of pleading of the parties, six issues were framed. As per direction of this Court vide order dated 22.9.2003 passed in W.P.(c)No.7082 of 2003 the Presiding Officer, C.G.I.T., Bhubaneswar took up Issue No.1 - Whether the management is an industry as defined under Section 2(j) of the I.D. Act? As per the statement of claim of the opp.parties-workmen, WTCER is an unit under the Indian Council of Agricultural Research (ICAR in short)which maintains a farm at Deras, Mendhasal to grow different varieties of crops and vegetables, besides undertaking various project works sponsored by different organizations and disseminates the research result to the sponsoring agency for money. Not only the research results, but also different agricultural products are sold at the appropriate market price, as such, the activities of the WTCER are analogous to trade and commerce and accordingly it is an 'industry' as defined under Section 2 (j) of the I.D. Act. On the other hand, in the written statement, petitioner contends that ICAR of which petitioner is an unit is a registered society, its main aim and objective is to do research work on water management for development of agricultural sectors of the nation in discharge of its sovereign function. The mandate of the petitioner Center are:-

i) Act as centre for training in research methodologies and technology update in the area of agricultural water management in the region.

ii) Act as repository of information in the status of agricultural water and management in the eastern region.

iii) Collaborate with the relevant national and inter-national agencies to achieve the above objectives.

iv) Provide consultancy in the field of agricultural water management; and

v) undertake basic and applied research for developing strategies for efficient management on -farm water resources to enhance agricultural productivity on sustainable basis in the eastern region.

According to the petitioner, as per section 2(j) of the I.D. Act WTCER is not an industry.

3. After hearing learned counsel for the parties and relying on the decision of the Apex Court in the case of **Bangalore Water Supply and Sewerage Board** Vs. **A.Rajjappa and others** AIR 1978 SC 969, The CGIT, Bhubaneswar held that though the petitioner is a research oriented organization of Scientists, the scientists themselves cannot carry on their project work without participation of the worker-class-employees. Simply from the mandate of the organization and the infrastructure facilities available in the center, it cannot be said that the activities of the organization are purely seasonal as claimed by the petitioner. It also held that in their counter, the petitioner-management admitted that the opp.parties-workmen were engaged on muster roll(as casual labourers)since the farms operation started in the year 1988 and their jobs have been entrusted to contract agency on 16.12.1990.This indicates that the research work of the institution is being carried on in an integrated manner with the co-operation of the workers as without them the predominating activity and object of the organization can never be reached. The entrustment of the works to a contract agency further indicates that the establishment is not possessed of non-employee character, the menial work performed by these workers and the work done by the scientists being complementary to each other. In this premises, the establishment cannot claim exemption from the operation of Section 2(j) of the I.D.Act. Accordingly, learned Presiding Officer, Industrial Tribunal held that the petitioner-organization by itself may be a research oriented one, but from the factum of engagement of the workers to carry out the basic work to augment the research activities, it can well be said that the

whole undertaking is 'industry' although those who are not workmen by definition may not benefit by the status, vide order dated 29.7.2005. This order has been challenged before this Court in the present writ petition.

4. Learned counsel for the petitioner submits that petitioner is carrying on the activity of research in a systematic manner with the help of its employees. It is not engaged in carrying any business activities. So, it cannot come under the ambit of 'industry' as defined under Section 2 (j) of the I.D. Act. Moreover, as per the amendment of the I.D. Act in the year 1982, research institutes are excluded from the purview of 'industry'. So, the C.G.I.T., Bhubaneswar erred in holding that WTCER is an industry. In support of his submission, he relies on the decision in the case of ***Physical Research Laboratory v. K.G. Sharma***, AIR 1997 Supreme Court, 1855 and the decision in the case of ***Central Agricultural Research Institute and another v. The Presiding Officer, Labour Court and others*** (1998) 3 CALLT, 209, HC.

5. Per contra, learned counsel appearing for the opp. parties-workmen contends that petitioner has a farm at Deras, Mendhasal extending more than 100 acres of land where it grows different variety of crops and vegetables and sales the same in the open market, besides undertaking various project works sponsored by different organizations and disseminates the research result to the sponsored agency for money. So, it fulfils the triple test, viz. (i) systematic activity (ii) organized by cooperation between the employer and employee; iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes and as such comes under the ambit of section 2 (j) of the I.D. Act, as held in the case of ***Bangalore Water Supply and Sewerage Board v. A. Rajappa and others***, (1978) 2 SCC 213.He further submits that clause (c) of Section 2 of Industrial Dispute (Amendment) Act, 1982 wherein the definition of 'industry' has been restructured has not yet come into force. So, the 'industry' as defined under Section 2 (j)in the pre-amended Act is still in force and accordingly, he supports the impugned order as passed by the C.G.I.T., Bhubaneswar.

As per the amendment Act, 1982, the term 'industry' stands redefined as follows:-

> "(j) 'Industry' means any systematic activity carried on by cooperation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants

or wishes (not being wants or wishes which are merely spiritual or religious in nature), whether or not, –
(i) any capital has been invested for the purpose of carrying of such activity; or

(ii) such activity is carried on with a motive to make any gain or profit,

and includes-

xxx xxx xxx

xxx xxx xxx

but does not include-

(1) xxx xxx xxx

(2) xxx xxx xxx or

(3) educational, scientific, research or training institutions; or

xxx xxx xxx
xxx xxx xxx
xxx xxx xxx"

As per this amendment, scientific, research institutions do not come within the ambit of the definition of 'industry'. Basing on this restructured definition of 'industry' the Calcutta High Court in the case of **The Central Agriculture Research Institute and another** Vs. **the Presiding Officer, Labour Court and others** (1998)3 CALLT 209 HC held as follows:-

"The result is that after the amendment a research institute will be outside the scope of the definition of 'industry' in section 2 (j) even if it satisfies the triple tests laid down by the Supreme Court and adopted in the amended definition of section 2 (j). Consequentially once it is found - as it has been - that CARI is a research institute it will be outside the definition of 'Industry' even if it satisfies the triple tests. In other words, now that once it has been found that CARI is a research institute, it does not become necessary thereafter to examine whether it satisfies the triple tests because by legislative definition research institute has been exempted expressly from the pale of the term 'industry'. The conclusion therefore is inescapable that CARI being basically and functionally a research institute, is not an industry and consequently the reference of the matter relating to

> CARI for adjudication under the Industrial Disputes Act and the entire proceedings before the labour court and the award passed therein are all wholly without jurisdiction."

The Central Government appointed the 21st day of August, 1984 as the date on which clause (a), (b) and (d) to (k) of Section 2 and Sections, 3, 4, 5, 6, 8, 9, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21 and 23 of the Industrial Disputes (Amendment) Act, 1982 would come into force. But clause (c) of Section 2 of the said Act which redefined 'industry' has not been included therein. Though asked, learned counsel for the petitioner could not give the date, if any, on which clause (c) of Section 2 of 1982 Amendment Act came into force. So, with due regard, the view taken in the case of Central Agricultural Research Institute (supra), cannot be accepted.

6. The decision rendered by the Apex Court in the case of Bangalore Water Supply (supra) still holds good. If a research institute fulfils the triple tests, as stated earlier, it cannot be exempted from the scope of section 2 (j) of the I.D. Act. As per the case of opp.parties-workmen WTCER undertakes welfare activities and economic adventure. It has more than 100 acres of land where it grows different variety of crops and vegetables by the help of workmen and sells the same in open market, besides undertaking various project works on being sponsored by different organizations and disseminates the research results to the sponsored agencies for money. In other words, in WTCER there is systematic activity, organized by cooperation between the employer and employees for production and distribution of goods and services calculated to satisfy human wants and wishes and as such it would come within the ambit of Section 2(j)of the I.D.Act. It would be profitable to quote the view of the Apex Court taken in this regard in the case of Bangalore Water Supply(supra) which reads as follows:-

> "Does research involve collaboration between employer and employee? It does. The employer is the institution, the employees are the scientist, para-scientists and other personnel. Is scientific research service? Undoubtedly it is. Its discoveries are valuable contributions to the wealth of the nation. Such discoveries may be sold for a heavy price in the industrial or other markets. Technology has to be paid for any technological inventions and innovations may be patented and sold. In our scientific and technological age nothing has more case value, as intangible goods and invaluable services, than discoveries. For instance, the discoveries of Thomas Alva Edison made him fabulously rich. It has been said that his brain had

> the highest cash value in history for he made the world vibrate with the miraculous discovery of recoded sound. Unlike most inventors, he did not have to wait to get his reward in heaven; he received it munificently on this gratified and grateful earth, thanks to conversion of his inventions into money aplenty Research benefits industry. Even though a research institute may be a separate entity disconnected from the many industries which funded the institute itself, it can be regarded as an organization, propelled by systematic activity, modeled on co-operation between employer and employees and calculated to throw up discoveries and inventions and useful solutions which benefit individual industries and the nation in terms of goods and services and wealth. It follows that research institutes, albeit run without profit-motive, are industries."

Moreover, the decision in the case of ***Mgt. of Indian Council of Agricultural Research, Krishi Bhawan, New Delhi and its workmen*** (I.D.No.9182) rendered by the Presiding Officer, Industrial Tribunal No.2, TIS HAZARI Court, Delhi published on February 4, 1988 in the Govt. of India, Delhi Gazette shows that the learned counsel appearing on behalf of ICAR did not press before the Labour Court that ICAR was not an 'industry'. In other words it was admitted that ICAR was an 'industry'. Furthermore, it is found from instruction No.4/85 dated 17.5.1985 of the Chief Labour Commissioner (C), New Delhi addressed to all concerned officers to treat that the Central Government is the appropriate Government in respect of Indian Council of Agricultural Research and its allied institutions in Central Sphere and enforce the provisions of Minimum Wages Act, 1948, Contract Labour(R&A)and entertain Disputes under the Industrial Disputes Act.

All these go to show that WTCER which is an unit of ICAR is an industry.

7. With respect, I am of the view that the case of Physical Research Laboratory (supra), would not be applicable to the present case, because Physical Research Laboratory is an institution under the Government of India's Department of Space which is engaged in pure research in Space and Science. The purpose of the research is to acquire knowledge about the formation and evolution of the universe, but the knowledge thus acquire is not intended for sale.

So, it is held that WTCER is an 'industry' as defined under Section 2 (j) of the I.D. Act, and as such, the writ petition stands dismissed. No cost.

Writ petition dismissed.

**2011 ( II ) ILR- CUT- 1022**

**INDRAJIT MAHANTY, J & H.S.BHALLA, J.**

CRLA.307/2004, GCRLA 35/07 & CRLREV. NO.543 OF 2007
(Decided on 18.11.2011)

**ATMARAM SAHU & ANR.** … …….Appellants.

.*Vrs.*

**STATE OF ORISSA** …….Respondent.

**(A) PENAL CODE, 1860 (ACT NO.45 OF 1860) – S.304-B.**

**Cruelty or harassment conceived of in Section 304-B could be not only by the husband of the deceased but also by any relative of the husband.**

**In the present case there is no evidence regarding any demand of dowry or harassment by accused Atmaram, husband of the deceased but the demand of dowry made by the father of Atmaram – Held, accused Atmaram is guilty of an offence U/s.304-B I.P.C.**
(Para 26,27)

**(B) INDIAN PENAL CODE, 1860 (ACT NO.45 OF 1860) – S.304-B r/w Section 113-B of Evidence Act.**

**Dowry death – The term "soon before" in Section 304-B I.P.C. has not been statutorily designed and it would depend upon the circumstances of each case and no strait-jacket formula has been laid down as to what would constitute a period "soon before" the occurrence – Held, there must be existence of a "Proximate and live link" between the effect of cruelty based on dowry demand and concerned death.** (Para 23)

**(C) CRIMINAL TRIAL – Trial Court held the death was homicidal and not due to suicidal hanging on the ground that the deceased being a literate person should have left behind a fare well note ascribing reasons for taking such extreme step and why the deceased did not commit suicide by jumping into the well located near the bath room which are purely presumptive in nature and based on conjecture and surmises – In the other hand the evidence of the I.O. coupled with the seizure of steel pipe and a saree allegedly used in course of suicidal hanging clearly establish that the death of the deceased was not homicidal but due to antemortem hanging – Held, no amount of**

**hypothesis or guess work is permissible in course of a Criminal trial – Appellant-Atmaram is acquitted of the offence U/s.302 I.P.C.**

(Para 19)

**Case laws Referred to:-**

1.AIR 1968 SC 1273 : (Mohd. Usman-V- The State of Bihar)
2.1936 (3) All ER 36 : (Attygalle-V- Emperor)
3.AIR 1936 Privy Council 289 : (Stephen Seneviratne-V-The King)
4.AIR 2000 SC 2324 : (Kans Raj-V-State of Punjab)
5.AIR 2010 SC 2839 : (Ashok Kumar-V-State of Haryana)
6.AIR 2009 SC 1454 : (Tarsem Singh-V-State of Punjab)

For Appellants - M/s. G.K.Mohanty, B.C.Ghadei, D.Mishra, B.Nayak, N.A.Khan & G.P.Samal.
For Respondent - Mr. K.K. Mishra, Addl.Govt. Adv.

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***I. MAHANTY, J.*** Late Chitranjan Sahu, his wife Pratima Sahu, their son Atmaram Sahu and daughters Pranami and Kautuki faced trial for offences under Sections, 304-B, 498-A, 302 and 34 I.P.C. as well as under Section 4 of the D.P. Act for the death of the wife of appellant-Atmaram, namely, Ratnaprava @ Kalyani. While deceased-accused-Chitranjan Sahu passed away in course of the trial, his son Atmaram was convicted under Section 302 I.P.C. and sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/-, in default, to undergo R.I. for one year more but acquitted from charges under Sections 304-B, 498-A and 34 I.P.C.. Appellant-Pratima was convicted under Section 4 of the D.P. Act and sentenced to undergo R.I. for one year and to pay a fine of Rs.5000/-in default to undergo R.I. for two months more. In so far as Pranami and Kautuki are concerned, the learned trial court acquitted them of all charges.

*2.* Criminal Appeal No. 307 of 2004 came to be filed by the appellant Atmaram Sahu son of late Chitranjan Sahu and his mother Pratima Sahu, seeking to challenge their conviction under Section 302 I.P.C. and Section 4 of the D.P. Act, respectively, vide judgment dated 28.9.2006 passed by the learned Additional Sessions Judge, Talcher in S.T. Case No. 39-A of 1996.

*3.* The State of Orissa filed a leave to appeal (i.e. CRLLP No.30 of 2005) and on leave being granted, the same was registered as GCRLA No.35 of 2007, seeking to set aside of the impugned judgment and order dated 28.9.2004 passed in S.T. Case No.39-A of 1996, and to convict all the accused persons as per the charges framed against them in course of the trial.

*4.* The informant-Narayan Patra (father of the deceased-Kalyani) came to file a petition which is registered as Criminal Revision No.543 of 2007. All these matters being inter-connected, were heard along with the criminal appeal filed by the convicted persons, as well as, Government Criminal Appeal. Accordingly, all the aforesaid matters were taken up for hearing together and disposed of by this common judgment.

5. At the outset, it is important to note herein that the informant-Narayan Patra, who was heard in this matter on several occasions, raised various objections regarding the composition of the Bench which was constituted on the directions of the Hon'ble Chief Justice to hear this matter and the said objections came to be considered and have been duly rejected by separate orders which would speak for themselves. Although the conduct of the informant-Narayan Patra who was appearing in person was unbecoming and provocative, this Court decided not to take any action against the informant keeping in view the fact that the informant had lost his eldest daughter and was in great emotional distressed. Keeping the aforesaid circumstances in view, this Court proceeded to hear all parties to the proceeding.

6. The case of the prosecution is that, the appellant-Atmaram Sahu (son of the deceased-accused-Chitaranjan Sahu) had married to the deceased Ratnaprava @ Kalyani (daughter of Narayan Patra) in accordance with the Hindu rites on 27.5.1994. Ratnaprava @ Kalyani passed away on 15.6.1995 and U.D. Case No.4 of 1995 was registered at Talcher P.S. based upon the information given by the deceased-accused-Chitaranjan Sahu at about 2.15 P.M. on the same day. Inquest was duly performed on the body of the deceased-Kalyani and thereafter, post-mortem was conducted by Dr. Loknath Acharya (P.W.9). After completion of the post-mortem, the body of the deceased-Kalyani was handed over to the family members and on the same night, the deceased was cremated at Talcher.

7. The informant-Narayan Patra returned from Talcher along with one Sansarabindu Prusty-P.W.14 (Maternal uncle of accused-Atmaram) to Cuttack and spent the night in his house and on the next day early morning, left for his own house at Bhubaneswar. It appears from the evidence of Sansarbindu Prusty, that since the informant had left his house without any intimation he send a letter (Ext.6) to the informant, expressing his grief over the death of Kalyani. This letter was hand delivered and the informant replied to the aforesaid letter (under Ext.K), expressing his grave doubt over the circumstances that led to his daughter's demise, which is noted hereunder:-

" xx xx xx the unhappiness thing is - since doubts were raised in my mind, I have decided to lodge a case in consultation with a lawyer to unearth the truth. The main ground of doubts is as to why they did not bring my daughter to Cuttack and kept it there. Second reason is as the father, I have a responsibility to know the truth by lodging cases."

8. The informant sent various communications to various authorities indicating his suspicion over the circumstances of his daughter's death and on 19.6.1995, the Circle Inspector of Police came to the residence of the informant, where he presented a written report which was treated as F.I.R. The relevant portion of the F.I.R. is extracted herein below:

*" xx xx xx On last 15.6.1995, Sri Sansarbindu Prusty (Maternal uncle of Atmaram) intimating that Sri Chittaranjan Sahu is seriously ill, took me to Talcher. I reached the house of my daughter's father-in-law at around 2 P.M. and saw that my daughter had died and her dead body was kept on a veranda. I shouted at the sight and when I enquired about it, Chittaranjan Sahu told me that in the early morning Kalyani fell in the Bathroom and died. He also disclosed that doctor had come and examined the said deceased Kalyani. But I did not find any injury on the head or hand of my daughter. But there was ligature mark on the neck of the deceased. Hence doubts were raised in my mind and I asked them to hand over the dead body for her examination and postmortem in the SCB medical College and hospital. But they did not agree with me and intimated to the local police station. Doctor conducted postmortem.*

*xx xx xx xx xx*

*While staying in my house, my daughter used to disclose her unhappiness before us. Her two younger sister-in-law and mother-in-law use to torture her for not taking T.V., Scooter and Grinder. She was compelled to cook food. They do not allow her to take rest. They also use to speak ill of Kalyani so that she is abused by her husband. Last time she had disclosed about the torture by her sisters-in-law and husband and was reluctant to go to her father-in-law's house.*

*Last time I had been to her on 1.4.1995 with clothes for her birth day. When she cried in front of me, it created apprehension in my mind and I met with her mother-in-law, father-in-law and the husband and brought her to my house on 2.4.1995. Reaching home my daughter cried before me after disclosing the torture meted by the*

*sisters-in-law, mother-in-law and the husband under intoxication and disclosed not to go their place.*

*But on 21.4.1995 her husband and her mother-in-law came and by assuring us of no problem, took her to their house. Under such circumstances it is not believable that she has died on 15.6.1995 by falling in the bathroom for the following reasons:*

1. *Why they did not take her to the hospital*
2. *Why they did not take her to Cuttack hospital*
3. *My daughter was quite hale and hearty and was suffering from no illness.*
4. *There was no injury on her head but there was ligature mark on her neck*
5. *She was not allowed to write letters. They use to go through the letters of my letter and the same is sent along with the letter of her husband. As a result she was not able to intimate her unhappiness.*
6. *Whenever she discloses about her in-law's house, she also asks not to intimate to others. So she always talk good of her in-laws family members. She use to tell us that if the facts about her in-law's family will be disclosed before others, it will hamper their respect and prestige and she will be more tortured by the member of her in-law family.*
7. *But the sisters-in-law and mother-in-law of my daughter use to torture her and being influenced by them her husband also use torture and assault Kalyani and they have ultimately killed her. But in order to hide the crime they have put string around her neck to give an impression that she has committed suicide. But being apprehensive of being get caught they have taken the plea that she has died on falling in the bathroom.*
8. *Out of the persons assembled at the spot some one was saying that because of their restrain to wait till arrival of deceased's father, they have not been able to cremate the deceased otherwise they were in a mood to cremate the deceased in his absence.*
9. *The sisters-in-law were in the habit of telling lies to the husband of Kalyani so that Kalyani is abused by her husband.*

*Hence, the husband, mother-in-law and sisters-in-law of my daughter by torturing Kalyani had ultimately killed her and have tried to give it a*

*colour of suicide. But having failed in their attempts to get rid of the crime they have disclosed that the deceased has died by falling on the bathroom. Chittaranjan Sahu is also concerned in the crime.*

*xx xx xx* ”

9. The trial court framed six points for determination and answered in the following manner:

(i) Whether deceased Kalyani died within 7 years of her marriage?
Ans: Yes.

(ii) Whether death of the deceased Kalyani was due to antemortem hanging or a homicidal one?
Ans.: Homicidal

(iii) Whether deceased Kalyani was subjected to ill treatment physically and mentally due to non-payment of cash of Rs.50,000/- towards remaining dowry articles.
Ans: Yes.

(iv) Whether on 15.6.95 the accused persons in furtherance of their common intention committed dowry death of the deceased?
Ans: No.

(v) Whether the accused persons in furtherance of their common intention committed murder of deceased Kalyani?
Ans: Yes – Atmaram Sahu

(vi) Whether the accused persons in furtherance of their common intention had demanded dowry before the marriage, at the time of marriage and after the marriage?
Ans: Yes.

In the light of the findings as noted hereinabove, it becomes highly essential first of all to deal with Point No.2, i.e. whether the death of the deceased Kalyani was due to antemortem hanging or a homicidal one.

10. The informant-Narayan Patra submitted as follows:

(i) The prosecution had succeeded in establishing the fact that deceased Kalyani died a homicidal death and that it has been established by the circumstantial evidence that the accused Atmaram

has committed the murder of the deceased by "throttling". The other accused persons assisted accused Atmaram, in the above act. Accused Atmaram therefore, is liable to be convicted u/s.302 I.P.C. and other accused persons are liable u/s.302 I.P.C. with the aid of section 34 I.P.C.

(ii) It was next contended that prosecution has succeeded in establishing the fact that the accused persons in furtherance of their common intention had caused dowry death. Hence they are liable to be convicted u/s.304-B I.P.C.

(iii) Further, he contended that there is sufficient evidence on record to hold that the accused persons had ill-treated the deceased demanding cash of Rs.50,000/- in lieu of other dowry articles. Hence they are liable to be convicted u/s.498-A I.P.C.

(iv) Further, it was submitted that accused persons had demanded dowry before the marriage, at the time of marriage and after the marriage. Hence, they are also liable to be convicted u/s.4 of the D.P.Act.

11. In this respect, the trial court in Paragraph-40 came to a conclusion that various circumstances noted in Paragraph-39 thereof go against the theory of antemortem hanging and conduct of the accused persons in the matter of dealing with such a delicate matter and came to find that the death of deceased-Kalyani was not due to antemortem hanging and hence, homicidal in nature. To reach the aforesaid conclusion, the trial court has narrated the circumstances in Paragraph-39 which are extracted hereinbelow:

> *"39. On the other hand, from the following circumstances and conduct of the accused persons, it can not be said that death of the deceased was due to antemortem hanging.*
>
> *(i) None of the family members of the accused has seen the deceased in a hanging position. On the other hand deceased accused Chitaranjan lodged written report the copy of which has been marked as Ext.39 stating that on 15.6.1995 at about 6.30 A.M. he saw the deceased lying on the floor facing upwards. Further, he has stated that the deceased met an accidental death due to fall on the bath room. The above circumstance goes to show that there was no such case of antemortem hanging of the deceased.*

*(ii) In case of suicide resorted to by literate persons it is but natural that they leave behind farewell note stating about the reason for resorting to the extreme action. The deceased was a final year law student. Her father was a service holder. There is absolute no reason as to why she would commit suicide as life is most precious. Thus, absence of a farewell note is against the claim of antemortem hanging.*

*(iii) Hanging is a common form of suicide among men. Women generally resort to drowning or self immolation. When there was a well on the way to the bath room of the Court yard of the accused persons, the reason of victim's preference to hanging is not believable.*

*(iv) If it was a case of ante-mortem hanging there is absolute no reason as to why no outsider was called to be a witness to the above fact.*

*(v) Talcher Police station is situated at a distance of 100 meters from the house of the accused persons. If it was a case of suicidal hanging accused persons could have called any police officer to the spot, soon after discovery of the dead body in the bath room of the accused persons and there would have been opportunity to the police to effect seizure of the instruments used in antemortem hanging.*

*(vi) Bail petitions were also filed before the Hon'ble Court vide Ext.25 and 26. The accused persons could have disclosed in the bail petitions about the cause of death of the deceased due to antemortem hanging. But it was mentioned in the bail applications that the deceased died falling on the bath room. The accused persons therefore suppressed the real cause of death of the deceased.*

*(vii) Accused persons came to know about the death of the deceased in the early morning. They could have intimated the father of the deceased over telephone, if it was a case of suicidal. Even Sansarbindu Prusty Maternal uncle of accused Atmaram who had gone to call the informantfrom Bhubaneswar did not disclose the death news. From the above conduct of the accused persons, it can be inferred that it was not a case of antemortem hanging.*

*(viii) As per the evidence of the I.O. and spot map there were five bath rooms in a row. Each of the bath room was divided by partition walls of height of 6 feet 10 inches. When the partition walls were of low height, the deceased could not have preferred the bath room as a*

*place for commission of suicide as there was possibility of other family members coming to know about such a fact at the time of preparation.*

*(ix) Deceased accused Chitaranjan lodged the report at the P.S. on 15.6.05 basing on which U.D. Case No.4 dated 15.6.95 was registered. The inquiring Officer could have effected seizure of the alleged G.I. Pipe and cotton saree used in hanging on 15.6.95. What was the occasion for the inquiring officer to effect seizure of a G.I. Pipe and cotton saree after three days of the incident on production by the accused persons. It is, therefore, conspicuous that when the accused persons managed to procure a P.M. report telling about the death of the deceased due to antemortem hanging, on 17.6.5 such a pipe and cloth were shown to be used by the deceased in commission of suicide. From the above conduct of the accused persons and inquiring officer it is patent that they have managed to give a colour of antemortem hanging of the deceased which was not at all true.*

*(x) The G.I. pipe is six to seven feet in length and two inches in diameter. It is not an ordinary P.H.D. fitting of the bath room. Such pipes have also not been put on other partition walls of the remaining four bath rooms. There is absolutely no reason as to why such a big size G.I. Pipe had been put on the partition walls of the bath room of the deceased. It appears that when there was no scope for committing suicide by hanging in the bath rooms, such an idea was introduced to give a colour to the death of the deceased as antemortem hanging. The idea of putting such a big size pipe is to show that it could carry the weight of the deceased who was of a strong and stout body. More over when the alleged G.I. Pipe was at a height of six and half feet height, it was not possible for committing suicide by hanging from such a G.I. Pipe with the help of a cloth as legs would touch the floor if one would remain in a hanging position by using a cloth. Thus the idea projected by the defence that it is a case of antemortem hanging is not acceptable.*

*(xi) Ordinarily, there would be injuries on the body of a person when he prefers death by antemortem hanging. When there was no external injury on the body of the deceased, it is against the theory of antemortem hanging."*

12. Thereafter in Paragraph-44 of the judgment, the trial court summarized the reasons as to why it came to the conclusion that the death of the deceased is "homicidal" and the same are noted herein below:

> "*44. The learned counsel for the defence further pointed out that as there was no sign of violence on the body of the deceased, it could not be a case of death by throttling. But if the wind pipe is compressed so suddenly to conclude the passage of air altogether, the individual would render powerless to call for assistance and becomes insensible and may die instantly. In the present case the deceased was the own wife of accused Atmaram. The incident happened in the night while she was sleeping in her bed room with accused Atmaram. If a husband with the intention of killing his wife would put his hand around the throat, there would be no scope for resistance for a wife as it is a friendly hand and she had no knowledge about the ulterior motive behind such posture. Hence, absence of signs of violence on the body of the deceased is not a ground to negative the theory of death by throttling. The death of the deceased is homicidal due to the following reasons:-*
>
> *i) P.M. Hypothasis was present over back. It is therefore, a symptom of homicide.*
>
> *ii) There were bruises on both sides of the neck which is possible by the pressure of fingers. The above symptoms is possible by throttling.*
>
> *iii) The deceased died due to asphyxia and shock which are also due to throttling.*
>
> *In addition to the above findings from post mortem appearance, the circumstances established in the case also point out a case of homicidal death.*
>
> *Prosecution therefore, has succeeded in establishing the fact that death of deceased Kalyani on 15.6.95 was a homicidal one".*

13. Learned Additional Sessions Judge, Talcher in paragraph-61 of the judgment placed reliance on Section 106 of the Evidence Act and noted that the "last seen theory" comes into play in the present case since the deceased Kalyani was last seen alive in the company of the accused Atmaram in their bed room, after dinner on the night of 14.6.1995 and "since accused Atmaram and deceased had slept together in their bed room on that night prior to the deceased being found dead in the morning of 15.6.95. In the above facts and circumstances, it was reasonable to ask the accused to

disclose as to who killed her when she was with him in his bed room on that night. It was further held that, it was for the accused Atmaram to show that "ANY PERSON OTHER THAN HIM WAS RESPONSIBLE FOR THE DEATH OF THE DECEASED."

14. It becomes relevant to take note of the cause of death as noted in the postmortem report.

"*Death is due to asphyxia and shock caused by antemortem hanging"*.

Apart from the above opinion as sought from the doctors who carried out postmortem examination i.e., the cause of death and their answers to the queries made by the Investigating Officer are quoted hereunder for reference:

> "*On 11.9.95 in reply to the querry of the I.O. it was furnished after examination of referring to the report and the Material objects that the ligature mark found on the neck of the deceased Kalyani @ Ratnaprava Sahu was continuous covering three sides of the neck i.e. Anteriour and both lateral sides. It was also obliquely and the mark was interrupted posteriourly where the knot was supposed to remain. The impression of the knot was not clear because of the interruption of thick toft of the hair. The margins of the mark was congested and on dissection of the base of the mark showed dry glistening and parthment white tissue which proved antemortem hanging. Also we opined that the death of the deceased was caused by hanging (knot strangulation) which was suicidal in nature due to (a) ligature mark was continuous and was placed obliquely over the neck (b) the mark was not situated below the thyroid cartiledge and (e) there was no external violence about the body of the deceased. This is that report which has been marked as Ext.10. This is my signature which has been marked as Ext.10/3.*
>
> *Further, in reply to the query of the I.O. we also opined that the ligature mark found on the neck of the deceased Kalyani might be possible with the saree M.O.I. This is the report which has been marked Ext.11. Ext.11/2 is my signature therein. Further, in connection of further query by the Investigating Officer, I along with Dr. L.N. Prasad examined the P.M. report in presence of Prof. R. Dash, head of the Deppt. F.M & T replied that there was no antemortem feature relating to gagging or existence of the injury on or around the mouth and nostril of the deceased. We did not agree with the proposition of the I.O. that the deceased was first gagged*

*and then hanged as the ligature mark found around the neck of the deceased was antemortem in nature. This is the report marked Ext.12. Ext.12/2 is my signature therein.*

15. From the records of the case, it appears that late accused-Chitaranjan had sought for immediate medical assistance on 15.6.95 itself, i.e. in the morning on the death of Kalyani.

Dr. Sidheswar Mishra (P.W.6) stated that he was a private medical practitioner at Talcher and on 15.6.1995 at about 7.20 A.M. one Sankalpa Sahu had come to call him to attend his sister-in-law Kalyani at his residence. He claims to have rushed to residence of the deceased and found that she (Kalyani) had already expired and also noticed a red colour ligature mark on her right side neck. He suspected that this was a case of suicidal hanging and he advised the family members to inform the police whereafter he had left the house.

Dr. Lokanath Acharya (P.W.9), Sub-divisional Medical Officer, Talcher had also approached through one Sankalpa Sahu and one Bajrang Agarwalla at 7.15 A.M. on 15.6.1995 and requested to come to the house of late-Chitaranjan Sahu. He further stated that he had been to the house of the accused persons and on hearing that the patient had already died, he returned back.

16. Thereafter it appears that one Sansarabindu Prusty (P.W.14) (brother of accused appellant-Pratima and maternal uncle of appellant-Atmaram) stated that he had been informed early morning on the date of death of Kalyani and on the request of deceased-Chittaranjan had gone to the house of Narayan Patra (informant-P.W.11) and told him to accompany him to Talcher since Chitaranjan Sahu had requested him over telephone to bring Narayan Patra to Talcher. He has further stated that on 15.6.1995 at about 7.00 A.M. to 8.00 A.M. Chitaranjan had intimated to him over telephone to come Talcher as the condition of the deceased-Kalyani was serious for which he requested him to come with the father of Kalyani (Narayan Patra-P.W.11). He further stated that after reaching to the house of Narayan Patra on 15.6.1995, he told Narayan Patra with regard to illness of Kalyani and requested to accompany him to Talcher and said about the information by which he had received from Chitaranjan Sahu.

17. On their arrival at the house of Chitatranjan, when they asked about the gathering, late Chitranajan told – “Kalyani had committed suicide and Narayan Patra was present at that time and both of them went to see the dead body.” The dead body was lying on the veranda of the bed room of

house of late Chitaranjan. Chitaranjan told that he was waiting for Narayan Patra to arrive before going to police station for lodging of the F.I.R. as Kalyani had committed suicide. But Narayan Patra suggested not to report about the incident as it would affect the prestige of both the families. Thereafter some discussions were made between Narayan Patra and Chitaranjan Sahu and both of them went to the police station to lodge F.I.R. to the effect that Kalyani died due to falling in the bathroom. He further stated that after U.D. case was registered pursuant to the information provided by late Chitaranjan Sahu, when police came to the house of Narayan Patra and asked him whether he had any complaint, Narayan Patra told that they were godly persons and he had no grievance against them concerning the death of Kalyani nor he did make any complaint before the police about any demand of dowry or subjecting deceased Kalyani to any ill-treatment. He further stated that Narayan Patra had returned to Cuttack along with him on that night at 11.00 P.M.

18. The evidence as narrated hereinabove as well as the statement recorded under Section 161 Cr.P.C. of late Chitaranjan Sahu recorded by the police in the connected U.D. case clearly indicate that the alleged place or location of death of Kalyani was in the bathroom from which location the deceased had been brought to the veranda of the ground floor. Thereafter medical assistance was quickly sought for and two doctors i.e. P.Ws.6 & 9 were called to the house of late Chitaranjan for medical treatment of deceased Kalyani. Thereafter late Chitranjan asked his brother-in-law Sansarabindu Prusty who was residing at Cuttack to go to Bhubaneswar to collect Narayan Patra and to come immediately to Talcher On the arrival of Narayan Patra at Talcher, after some discussions late Chitranjan Sahu went to the police station to lodge a report regarding death of Kalyani along with Narayan Patra (informant).

19. The aforesaid facts coupled with the evidence of Investigating Officer (P.W.17)to the seizure of steel pipe as well as a saree allegedly used in course of suicidal hanging, clearly establish the fact that death in question was antemortem hanging and suicidal in nature. No amount of hypothesis or guess work is permissible in course of a criminal trial. The reasons noted at paragraph-39 of the judgment of the trial court as noted herein above are clearly hypothesis and based on surmises and conjectures. As to why a literate person who committed suicide has not left behind a farewell note ascribing a reason for resulting to such extreme action is of no real consequence and is illustrative of the purely presumptive nature of the conclusion arrived at by the trial court. Further, as to why the deceased did not commit suicide by jumping into the well located near the bathroom is clearly conjecture or surmise.

All the reasons noted in paragraph-39 including as to why the appellant had not indicated in the bail petition moved before this Court as to the cause of death of the deceased, is again matters of pure conjecture and surmise. We are afraid the grounds stated in paragraph-39 by the trial court to arrive at a conclusion that the death of the deceased was homicidal and not due to antemortem hanging are based on pure conjecture and surmises and, therefore, cannot be upheld and consequently, acquit the appellant-Atmaram Sahu of the alleged offence under Section 302 I.P.C.

20. Further, Section 106 of the Evidence Act was relied upon by the trial court in the present case. It is a well settled principle of law that Section 106 of the Evidence Act is an exception to Section 101 which lays down the general rule that the burden of proof in a criminal case on the prosecution and Section 106 is not intended to relief the prosecution of its duty.

The Hon'ble Supreme Court in the case of **Mohd. Usman v. The State of Bihar,** AIR 1968 SC 1273 in which case on the date of occurrence, four minor children were killed who had been employed by the accused for manufacture of explosives. Hon'ble Supreme Court came to hold that, the onus was on the prosecution and the prosecution had to prove all the ingredients of the offence, and Section 106 of the Evidence Act did not absolve the prosecution from proving its case. If Section 106 of the Evidence Act was interpreted otherwise by the trial court, it would lead to a conclusion that, the burden lies on the accused to prove that he did not commit murder because he can know better than he whether he did or did not. The Privy Council refused to consider Section 106 to mean that the burden lies on an accused person to show that he did not commit the crime for which he has tried. In **Attygalle v. Emperor**, 1936(3) AII ER 36 and **Stephen Seneviratne v. The King,** A.I.R. 1936 Privy Council 289. Therefore, it is clear that the trial court has erred in law by seeking to apply Section 106 of the Evidence Act to the present case since the same has no application whatsoever to the fact situation that arises for consideration in the present case.

21. Now it become necessary to deal with Section 304-B of the Indian Penal Code. The trial court has dealt with the said issue while dealing with the point nos. 3 and 4 in its judgment and essentially after perusing the evidence of P.Ws. 11, 12 and 13 coupled with the letters between the accused-Atmaram and his wife-Kalyani. Learned Sessions Judge came to a finding that the deceased had not been subjected to any ill-treatment or harassment demanding dowry or cash of Rs.50,000/- soon before her death. He further came to a finding that sporadic incidents of giving a slap by the accused-Pratima (mother-in-law) to the deceased or throwing of the food plate by accused-Pranami in a state of anger did not constitute cruelty or

harassment within the meaning of the definition of the term cruelty and harassment contained in Section 498-A I.P.C.. In view of the aforesaid finding the learned Sessions Judge concluded that the prosecution had miserably failed to establish the most essential ingredients of Sections 304-B and 498-A I.P.C.

22. It is well settled in law by a catena of decisions of the Hon'ble Apex Court and in the case of **Kans Raj v. State of Punjab**, AIR 2000 SC 2324 in order to convict under Section 304-B I.P.C. for an offence of dowry death, the prosecution is required to prove that:

(a) the death of a woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstances;

(b) such death should have occurred within 7 years of her marriage;

(c) the deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;

(d) such cruelty or harassment should be for or in connection with the demand of dowry; and

(e) to such cruelty or harassment the deceased should have been subjected soon before her death.

23. On a conjoint reading of Section 113-B of the Evidence Act and Section 304-B of the Indian Penal Code, there must be material to show that "soon before her death", the victim was subjected to cruelty or harassment and further that, the prosecution has to rule out the possibility of a natural or accidental death so as to bring the victim's death within the purview of "death occurrence otherwise than in normal circumstances". The term "soon before" in Section 304-B I.P.C. has not been statutorily designed and it would depend upon the circumstances of each case and no strait-jacket formula has been led down as to what would constitute a period of "soon before" the occurrence. Yet, it is well settled in law that there must be existence of a "proximate and live link" between the effect of cruelty based on dowry demand and concerned death.

24. In the present case, learned Sessions Judge on perusing the oral and documentary evidence on record came to hold that the evidence of P.Ws. 11, 12 and 13 shows that it is the deceased-accused-Chitaranjan Sahu who expressed the desire to take a scooter, colour TV, refrigerator, washing machine, steel almirah, sofa set, double bed, Alana and dressing table as dowry for the marriage apart from 10 Varis of pure gold in shape of

ornaments. Such a demand by the deceased–Chitaranjan continued after the marriage and on the 4th day of marriage when P.W.11 (informant) had been to the house of the accused persons carrying the dowry articles it was the deceased-accused-Chitaranjan Sahu who had asked the informant for payment of Rs.50,000/-. The learned Sessions Judge found that it is the consistent plea of the above three witnesses that it is the only deceased-accused-Chitaranjan who was present at the time of payment of Rs.50,000/- towards the dowry articles. The learned Sessions Judge further discussing the evidence of P.W.11 found that although the informant had voluntarily given Rs.50,000/- to the accused-Atmaram Sahu expressing that there was no necessity for payment of the above amount and further, the trial court found that on 21.4.1995 i.e. the date on which Kalyani returned to her matrimonial home and on 15.6.1995 there appears to have been no further demand of dowry and the last letter (ten days prior to her death) written by the deceased-Kalyani to her sister indicates that everything was good in her matrimonial house.

25. In the light of the aforesaid facts, learned Sessions Judge came to hold that the prosecution had failed to establish the most essential ingredients of Sections 304-B and 498-A I.P.C.

The Hon'ble Supreme Court in the case of **Ashok Kumar v. State of Haryana**, AIR 2010 SC 2839 came to hold that the expression "soon before death" cannot be given restricted or a narrower meaning and should be understood in their plain language and with reference to their meaning in common parlance. In the case of **Tarsem Singh v. State of Punjab**, AIR 2009 SC 1454, the legislative object in providing such a radius of time by treating the words "soon before her death" is to only emphasize the idea that her death should in all probabilities have been the aftermath of such cruelty or harassment. In other words, there should be a reasonable, if not direct nexus between her death and the dowry related cruelty or harassment inflicted on her. The period, what is the reasonable time, is vary from case to case and depends upon the facts of each case, the conduct of parties, the impact of cruelty and harassment inflicted to the deceased with regard to the demand of dowry. Section 304-B I.P.C. contains the deeming provision or of presumptive clause and the legislature had applied to the provision of Section 304-B I.P.C. where other ingredients of Section 304-B are satisfied and that, even the husband or relative shall be deemed to have caused her death.

26. In view of the facts as noted hereinabove and the judgment of the Hon'ble Supreme Court as referred hereinabove, in our considered view the finding of the trial court on Section 304-B I.P.C. cannot be supported.

Clearly, the trial court fell into error in this regard, since the learned Sessions Judge has himself found that the dowry harassment had been meted out to the deceased-Kalyani by deceased-accused-Chitaranjan and the said deceased-accused had made the demand to the informant-Narayan Patra, prior to the marriage, after the marriage and had continued thereafter. The cruelty or harassment conceived of in Section 304-B could be not only by the husband of the deceased but also by any relative of the husband. In the present case, since the trial court came to a finding that the father of Atmaram (husband) had continuously harassed the deceased-Kalyani and her father with demand of dowry, the said ingredient of Section 304-B I.P.C., in our view, has been clearly satisfied. Even though no specific evidence is available on record regarding the demand of dowry or harassment by the accused-Atmaram, in our considered view, the legislative intent behind Section 304-B I.P.C. introducing the deeming clause or presumptive clause comes into operation in the present case, even though in the present case there is no evidence regarding any demand of dowry and/or harassment for such matters by Atmaram (husband) appellant herein, yet, the demand of dowry made by the deceased–accused-Chitaranjan Sahu (father of Atmaram), in our considered view, is adequate for the purpose of Section 304(B) I.P.C. Kalyani had been married to Atmaram on 27.5.1994 and passed away on 15.6.1995 and her death was suicidal in nature, inter alia, by the harassment caused to her for non-fulfillment of dowry demand by the deceased-accused-Chitaranjan Sahu. On perusing the evidence on record all the necessary following ingredients of Section 304-B I.P.C. are clearly satisfied.

a) The death of Kalyani had occurred otherwise than under normal circumstance i.e. suicidal hanging;

b) such death occurred within seven years of her marriage (marriage-27.5.1994 & death-15.6.1995);

c) Kalyani had been subjected to cruelty or harassment by deceased-accused-Chitaranjan Sahu, who was the father of husband-Atmaram Sahu (appellant herein);

d) such cruelty or harassment by deceased-accused-Chitaranjan Sahu on deceased-Kalyani was in connection with the demand of dowry; and

e) such cruelty or harassment had been meted out to the deceased soon before her death and although the last demand by deceased-accused-Chitaranjan Sahu was approximately two months prior to Kalyani's death, we are of the considered view that the same did constitute cruelty or harassment soon before her death in the circumstances of this case.

27. Accordingly, we hold the appellant-Atmaram Sahu guilty of an offence under Section 304-B of the Indian Penal Code.

Insofar as Appellant No.2 (Pratima Sahu) is concerned, she had been found guilty under Section 4 of the D.P.Act and had been sentenced to R.I. for one year and fine of Rs.5000/-, in default, R.I. for two months more. We are of the considered view that the aforesaid conviction is sustainable in law, but since the Appellant-Pratima Sahu is in advanced age of about 66 years and also, in the meantime, she has been widowed, the end of justice would be best met if the sentence imposed on her is reduced to the period of R.I. for one month along with imposition of fine of Rs.5000/-.

Insofar as accused persons Pranami Sahu and Kautuki Sahu are concerned they had been acquitted of charges under Sections 302, 304-B and 498-A I.P.C. and after hearing the learned counsel for the parties and on perusing the evidence on record, we find no justifiable reason to interfere with such acquittal and accordingly, affirm the same.

28. In view of the facts and law discussed hereinabove, we allow the Criminal Appeal No.307 of 2004 in part and set aside the conviction in respect of the appellant-Atmaram Sahu under Section 302 I.P.C. Consequently, also partly allow the Government Criminal Appeal No.35 of 2007 and Criminal Revision No.543 of 2007 by holding the appellant-Atmaram Sahu guilty of an offence under Section 304-B I.P.C. and sentence him to undergo R.I. for a period of ten years. The period undergone by the appellant-Atmaram Sahu be set off.

Criminal Appeal No. 307/04 allowed.
GOVT.CRLA No. 35/07 partly allowed.
CRLREV No.543/07 partly allowed.

**2011 ( II ) ILR- CUT- 1040**

**ARUNA SURESH, J.**

W.P.(C) NO. 8277 OF 2010 (18.11. 2011)

**MATANGINI ROUT @ GIRI** ……Petitioner

*.Vrs.*

**STATE OF ORISSA & ORS.** ……Opp.Partie

**EDUCATION – Anganwadi worker – Minimum qualification is matriculation from Board of Secondary Education (B.S.E) Orissa – Petitioner claims that she passed "Prathama" from Hindi Sahitya Sammelan Allahabad which is equivalent to Matriculation – B.S.E., Orissa did not declare "Prathama" as equivalent to matriculation – Government letter Dt.8.9.1994 with reference to letter No.2318 EYS Dt.23.2.1981 declaring Prathama as equivalent to matriculation are declared to be fake and forged papers.**

**Held, 'Prathama' qualification from Hindi Sahitya Sammelan Allahabad is not equivalent to matriculation from Board of Secondary Education, Orissa.**

For Petitioner - Mr. D.K.Mohapatra.
For Opp.Parties - Mr. S.Das, Addl. Govt. Advocate (for Op.No.1 to 3)
Mr. Bhimasen Sahoo (Op. No. 4)

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Under challenge in this writ is the order of the Sub-Collector, Balasore dated 22.4.2010 whereby he directed the CDPO, Baliapal to take steps for disengagement of the petitioner with further direction to engage Smt. Namitarani Das, if she was found suitable as per the selection list, in Langaleswar-V (Cinema Bazar) Anganwadi Centre within 15 days of the receipt of the order.

In brief, case of the petitioner is that in pursuance of an advertisement, she had filed her application for the post of Anganwadi Worker at Langaleswar-V Anganwadi Centre. Petitioner possessed requisite qualification of 'Prathama' from Hindi Sahitya Sammelan, Allahabad. After the selection process was complete, she was found to be the most eligible candidate and was accordingly issued an engagement order dated 8.1.2010 (Annexure-4). Petitioner joined her post on 15.1.2010. Along with her joining report, she had submitted the requisite certificates. She was also allowed to undergo training on pre-integration skill held on 24.3.2010 vide letter dated 20.3.2010. Aggrieved by the appointment of the

petitioner as Anganwadi Worker in the aforesaid centre, respondent no.4 Smt. Namita Rani Das made a representation to the Sub-Collector alleging that the petitioner's certificate from Allahabad Hindi Sahitya Sammelan was not equivalent to High School certificate examination and, therefore, she did not fulfill the requisite educational qualification for selection and accordingly, her selection was illegal. Respondent no.4, Namita Rani Das's representation was considered as an appeal by the Sub-Collector and it was registered as SSW Misc. Case No.29 of 2010. He allowed the appeal and ordered disengagement of the petitioner and engagement of respondent no.4, Namita Rani Das. Aggrieved by the order of the Sub-Collector, this petition has been filed.

Mr. D.K. Mohapatra, learned counsel for the petitioner has submitted that vide notification dated 21.11.2006 Prathama examination conducted by Hindi Sahitya Sammelan, Allahabad was considered and recognition was granted to 'Prathama' examination being conducted by Hindi Sahitya Sammelan as equivalent to pass in matriculation for a further period of three years from 27.10.2007 to 26.10.2010 by Government of India, Ministry of Resource Development Department of Higher Education for the purpose of employment under the Central Government for the post for which the minimum qualification is a pass in matriculation. He has urged that in view of this notification, petitioner had the requisite qualification for consideration of her candidature for the post of Anganwadi Worker. He has argued that petitioner was rightly found eligible and being most meritorious was appointed as Anganwadi Worker in the aforesaid Centre. He has further argued that one Ranjan Kumar Patra and some other candidates having similar qualification as that of the petitioner are pursuing higher studies and they have been given admission by the Universities/Colleges accepting the certificate of Prathma issued by Hindi Sahity Sammelan as equivalent to pass in High School certificate conducted by the Board of Secondary Education. It is also the case of the petitioner that Sub-Collector did not ask the State Government to verify about the qualification acquired from Hindi Sahitya Sammelan, Allahabad if was accepted by State Government not only in the Government matters but also for employment but, has proceeded with the assumption that the certificate of Prathama qualification obtained by the petitioner from Hindi Sahitya Sammelan was not equivalent to the High School Certificate examination of the Board. Learned counsel for the petitioner has referred to letter NO.XVIIE (H)-21/29/3218/EYS dated 23.2.1981 to emphasis that the State Government had accepted the examination conducted by Hindi Sahitya Sammelan as equivalent to any examination like HSC/IA/BTC/CT for the propose of employment. Therefore, according to him, the order of the Sub-Collector being violative of this notification is bad in law and deserves to be set aside.

Mr. S. Das, Learned Additional Government Advocate for the respondents has submitted that Government of Orissa, did not accept 'Prathama' qualification of Hindi Sahitya Sammelan as equivalent to High School certificate and therefore, the Sub-Collector was right when he ordered disengagement of the petitioner and engagement of respondent no.4. He has further argued that the copy of the letter dated 23.2.1981 is forged and fabricated document as the original does not exist in the office record and that the letter dated 8.9.1994 was recalled on 21.6.2000.

Notification dated 21.11.2006 was published by the Governement of India, Ministry of Human Resources Development Department of Higher Education whereby provisional recognition granted to the Prathama examination being conducted by Hindi Sahitya Sammelan, Allahaband for the purpose of employment under the Central Government for the post for which the desired qualification is a pass in matriculation was extended for a further period of three years from 27.10.2007 to 26.10.2010. Thus, it is clear that this notification granted recognition to the Prathama examination conducted by Hindi Sahitya Sammelan, Allahabad as equivalent to matriculation for the purpose of employment under the Central Government for the post for which the requisite qualification was a pass in Matriculation. This notification cannot be made applicable in the State of Orissa unless its application is extended by the Government of Orissa to its State, or another notification is issued by the State Government in similar terms. However the government had neither extended the notification dated 21.11.2006 to the State of Orissa nor issued any other notification in similar terms.

Petitioner has placed reliance on the letter dated 8.9.1994 to claim her certificate of Prathama issued by Sahitya Sammelana as equivalent to High School certificate for employment, its equivalence having been recognized by the Education Department, Government of Orissa.

Perusal of this letter indicate that it was issued in reference to a Government letter no.3218 EYS dated 23.2.1981 regarding recognition of Hindi examination conducted by Kendriya Hindi Sansthan, Agra and Hindi Sahitya Sammelan, Allahbad for employment and general education . As per Clause(B) sub-Claus(i) of this letter Prathama has been considered as equivalent to HSC . However, the existence of the letter no.3218 EYS dated 23.2.1981 allegedly issued by the Government is in dispute. If no such letter was issued by the Government, then letter dated 8.9.1994 cannot be enforced against the respondents.

Learned Additional Government Advocate has placed on record communication dated 3.8.2011 annexed with another letter dated 21.6.2000

to demonstrate that no such letter dated 23.2.1981 was issued from file No. XVII-E(H)-21/79 and that letter dated 8.9.94 was obtained fraudulently on the basis of fake and forged copy of GO No.3213/EYS dated 23.2.1981.

Letter No.IISME-90/2000/17351/dated 21.6.2000 issued by the Department of School & Mass Education, Government of Orissa addressed to the Director, Secondary Education, Orissa and Director, Elementary Education, Orissa by G.N. Mohanty, I.A.S, Additional Secretary to Government reads as follows :-

"In continuation of this Department letter No.34498 dated 2.11.1995 on the above subject, I am directed to say that (i) this Department has never declared examinations conducted by Hindi Sahitya Sammelan, Allahabad as equivalent to any examinations like H.S.C/I.A/B.T.C/C.T for the purpose of employment. Such claim has been made on the basis of letter no.3118/EYS dt.23.2.81 purported to have been issued from file NO.XVII-E(H)-21/79 However, no such letter has been issued from the said file. The said file has been closed and consigned to records on 7.8.80 and as such there was no scope of issue of any letter from that file in 1981 as claimed.

(ii) The alleged Government letter No.XVIIE(H)-21/79/3218/EYS dated 23.2.81 is therefore fake and forged paper and invalid

(iii) It appears that letter number 3HT/VI/100-94/36224 dated 8.9.94 of the Deputy Director (Hindi and Sanskrit) and letter No.IVE-HI-20/92/50711 dated 12.11.92 of the Deputy Secretary to Government, Education Department has been obtained fraudulently on the basis of the fake and forged copy of G.O. No.3218/EYS dated 23.2.81 even though no such letter has been actually issued by the Court.

(iv) Hence, G.O. NO.3218/EYS dated 23.2.81 allegedly approving the examinations of Hindi Sahitya Sammelan, Allahabad as equivalent to C.T. and other qualifications is a fake and forged paper and subsequent letters of Depurty Director & Deputy Secretary referred in paragraph (iii) above are also not valid, being based on fake letter."

Perusal of the aforesaid letter clearly indicate that letter dated 23.2.81 which is basis of circular/notification no.36224 dated 8.9.94 issued by Director of Secondary Education, Orissa was fraudulently obtained on the basis of fake and forged copy of the letter dated 23.2.1981.

As per letter no.38005 dated 3.8.2011 received by Mr. S. Das, Additional Government Advocate, the notification dated 8.9.1994 had been

withdrawn vide letter dated 21.6.2000 that no such letter dated 23.2.1981 was issued from file No. XVII-E(H)-21/79. It reads:-

> "Inviting a reference to the letter No.35446 dt.2.8.11 of Advocate General, Orissa Cuttack on the subject cited above, I am directed to say that the circular/Notification No.36224 dt.8.9.94 of the D.S.E. (O) is not in force as per G.O. No.17351/SME dt.21.6.2000 communicated to all Inspector of Schools vide memo No.3257 dt.11.7.2000 of Directorate of Secondary Education, Orissa, Bhubaneswar."

Therefore, letter dated 8.9.1994 was not inforce when the petitioner was selected and appointed as an Anganwadi Worker on 8.1.2010

A similar question had arisen in various writ petitions titled as Miss Baijayanti Jena & others Vs. State of Orissa and others (35 cases with different titles)which were clubbed together and were disposed of vide one common order dated 6.5.1997 passed by the Division Bench of this Court. While considering the question of existence of letter dated 23.2.1981 approving equivalency of Sikshya Bisarada of Hindi Sahitya Sammelan, Allahabad as equivalent to BTC/CT of Orissa reliance was placed on the Government letter dated 2.11.1995 wherein it was held that there was no such Government order dated 23.2.1981. The Court concluded that the letter dated 23.2.1981 was forged and fabricated documents with following observations:-

> "9. We have bestowed our serious and anxious consideration to the submissions of the counsel for the parties. We have perused all the documents referred to by the counsel for the parties. It is now an admitted fact that the original letter no.3281/EYS dated 23.2.1981 (disputed letter) is not forthcoming. In all the cases the petitioners have filed copies of that letter. Neither the office copy of the said letter nor any note is available in the file referred to in the said letter. In one of the copies of the said letter another file number was mentioned. No such file is available in the record of the Secretariat. In the copy of the said letter found from the office of the Director, Employment, there were unusual discrepancies as has been explained by the Deputy Secretary in his affidavit dated 3.5.1997. In the circumstances, doubt expressed by the State Government about the authenticity of the said letter cannot be faulted with. We have not been able to persuade ourselves to believe as to how the State Government would be benefited or it would be put to any advantageous position by disputing issuance of the so-called

> Government letter NO.3218/EYS dated 23.2.1981. As it appears to us, the matter was going on in a cavalier way and the scope to unearth origin of the so-called Government letter arose only when the Additional Secretary to the Government in the Department of School and Mass Education attended a meeting at Calcutta where in it was commented that the State Government was not justified in declaring equivalence of the certificate of Sikshya Bisarad of Hindi Sahitya Sammelan, Allahabad to that of B.T.C/C.T. of Orissa. After his return, the Additional Secretary got the matter verified with reference to the records and when it was found that no such Government letter was over issued, the impugned letter was issued stating, inter alia, not to take cognizance of the certificate of Sikshya Bisarad issued by the Hindi Sahitya Sammelan, Allahabad."

Once it is held that the letter dated 23.2.1981 is a forged document and was not issued by the Government, the letter dated 8.9.1994 obviously was obtained by playing fraud upon the Department on production of fake and forged copy of the letter dated 23.2.1981. Had the said letter been issued, it would have found place in the record of the office. The Sub-Collector had considered the Central Government notificated dated 21.11.2006 and it observed that notification no.143 dated 17.3.2009 of the Board of Secondary Education, Orissa did not declare the education qualification of Prathama examination conducted by Hindi Sahitya Sammelan, Allahabad as equivalent to the High School certificate examination. He rightly held that the notification of the Central Government dated 21.11.2006 was meant for employment under the Central Government for which the desired qualification was pass in matriculation. However, no action was taken by the State Government in pursuance of the notification dated 21.11.2006. He also considered the minimum educational qualification required for the post of Anganwadi Worker as matriculation pass in Orissa or any equivalent examination as per the latest Government guidelines communicated vide G.O letter no. 145/SWCD dated 2.5.2007 of W & CD Department, Orissa. Guidelines dated 2.5.2007 did not indicate that Prathama qualification from Hindi Sahitya Sammelan was equivalent to High School Certificate examination certificate issued by the Board of Secondary Education, Orissa. I find myself agreement with the finding of appellate authority.

Under the facts and circumstances of the case and in view of my discussion as above, I find no infirmity or illegality in the impugned order of the Sub-Collector, Balasore passed in SSW Misc. Case No.29 as it is just and proper and needs no interference.

Consequently, the petition being without any merit is hereby dismissed.

Writ petition dismissed.

**2011 ( II ) ILR- CUT- 1047**

**S.C. PARIJA, J.**

W.P.(C) NO.18599 OF 2011 (Decided on 01.11.2011)

**ASHOK KUMAR MISHRA** **……**Petitioner.

*.Vrs.*

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

**(A) EDUCATION – Admission to Ist year MBBS Course – Information Brochure published by Orissa JEE 2011 – Clause-4.2 of the Information Brochure prescribed the lower age of 17 years and upper age of 25 years – Petitioner's application accepted and in the entrance test he became a rank holder in the merit list but he was debarred to participate in the counselling as his age found to be more than 25 years – Hence the writ petition.**

**In order to maintain quality education MCI as well as the State Government can prescribe minimum eligibility criteria for regulating admission to medical colleges.**

**In the present case although the MCI under its Regulation has not prescribed any upper age limit of 25 years, the minimum eligibility criteria fixed by the Orissa JEE, 2011 under Clause 4.2 of the Information brochure for regulating admission to MBBS course in the state cannot be said to impinge or adversely affect the norms prescribed by the MCI – Held, no illegality can be said to have been committed by the Orissa JEE in prescribing the upper age limit of 25 years as the minimum eligibility criteria for admission to Ist year MBBS course and the impugned Clause 4.2 of the Information Brochure does not suffer from any infirmity.** (Para 22)

**(B) EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.115.**

**Estopel – Petitioner at the time of filling up the application form for appearing in the Orissa JEE-2011 was fully aware of the minimum eligibility criteria i.e the lower age of 17 years and the upper age limit of 25 years prescribed under Clause 4.2 of the Information Brochure for admission to Ist year MBBS Course – Wrongly allowing the petitioner to appear in the entrance examination, in spite of the fact that he was over age, which is admittedly a mistake of fact, cannot give any legal right to the petitioner to claim admission to the MBBS Course in**

**violation of the norms prescribed – Held, the petitioner can not be permitted to take the plea of estoppel and seek admission as of right.**
(Para 21)

**Case laws Referred to:-**

1.AIR 1987 SC 400 : (Dr. Ambesh Kumar-V-Principal, L.L.R.M. Medical College, Meerut)
2.AIR 1999 SC 2894 : (Dr. Preeti Srivastava & Anr.-V-State of M.P. & Ors.)
3.AIR 2004 SC 1861 : (State of Tamil Nadu-V-S.V.Bratheep)
4.AIR 2011 SC 1429 : (VisveswarayaTechnological University & Anr.-V-Krishnendu Haldar & Ors.)
5.2011(4) SCALE 578 : (Mahatma Gandhi University & Anr.-V-Jikku Paul & Ors.)

For Petitioner - M/s. A.K.Mohapatra, N.C.Rout, S.K.Padhi, S.K.Mishra & A.H.Khadanga.
For Opp.Parties- Addl. Govt. Advocate (for Opp.Party Nos.1 & 4)
M/s. S.Palit, A.K.Mahana, A.Mishra & d.N.Pattnaik (for Opp.Party No.2)
M/s. R.C.Mohanty, K.C.Swain & S.Mohanty (for Opp.Party No.3)

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***S.C. PARIJA, J.*** This writ petition has been filed challenging the upper age limit of 25 years prescribed by the Orissa Joint Entrance Examination-2011, ('Orissa JEE-2011' for short) as the minimum eligibility criteria for admission to 1st year MBBS Course.

**2.** The case of the petitioner is that pursuant to the Information Brochure published by the Orissa JEE-2011, inviting applications from the candidates for admission to 1st year MBBS Course, the petitioner applied for the same in the prescribed format accompanied by requisite documents. The date of birth of the petitioner is 10.05.1984. Though, clause-4.2 of the said Information Brochure published by the Orissa JEE-2011 prescribed the upper age limit of 25 years as on 30.12.2011, the petitioner's application was accepted by the Orissa JEE-2011 and he was issued with admit card for appearing in the entrance examination. Accordingly, the petitioner appeared in the entrance examination held by Orissa JEE-2011 and was ranked 141 under general category and 36 under the Green Card holder category in the merit list. Subsequently, when the petitioner approached the Orissa JEE-2011 for issue of rank card, so as to enable him to participate in the counselling for taking admission in 1st year MBBS Course, he was informed that as his age is above 25 years, as on 31.12.2011, he cannot be

permitted to participate in the counselling as per clause-4.2 of the Information Brochure.

**3.** Learned counsel for the petitioner assails the reasonableness and legality of clause-4.2 of the Information Brochure published by Orissa JEE-2011, on the ground that as the Medical Council of India ('MCI' for short) has framed Regulations on Graduate Medical Examination, 1997, with the previous sanction of the Central Government, in exercise of its power under Section 33 of the Indian Medical Council Act, 1956, prescribing minimum age of 17 years, as on 31st December of the year of the entrance examination for admission to MBBS Course, the prescription of upper age limit of 25 years by the Orissa JEE-2011 is improper, illegal and without jurisdiction. In this regard, it is submitted that as the MCI is the apex body constituted by the Central Government under the provisions of the Indian Medical Council Act, 1956, for regulating admission to MBBS Course and the said MCI having framed Regulations for that purpose, with the approval of the Central Government, prescribing minimum age of 17 years, for admission to MBBS Course, it is not open for the State Government or the Orissa JEE-2011 to prescribe a different or additional eligibility criteria by way of upper age limit of 25 years. Further, the petitioner has filed copies of the prospectus of some universities and institutions of other States to show that no such upper age limit has been prescribed for admission to MBBS Course and therefore the impugned action of the Orissa JEE-2011 in prescribing upper age limit of 25 years is unreasonable and illegal.

**4.** Learned counsel for the petitioner has referred to two candidates, namely, Sonali Subhadarsini and Jana Ranjan Nayak, who according to the petitioner were more than 25 years of age and have been allowed to take admission in the 1st year MBBS Course, while denying similar benefit to the petitioner. This, according to the petitioner is discriminatory and amounts to arbitrary exercise of power by the Orissa JEE-2011. It is the further plea of the petitioner that as the Orissa JEE-2011 had allowed the petitioner to appear in the entrance examination and he had been allotted with a rank, as per the merit list, they are estopped from refusing admission to the petitioner in the 1st year MBBS Course.

**5.** Learned counsel for the Orissa JEE-2011, opposite party no.2, with reference to the counter affidavit filed submits that clause-4.2 of the Information Brochure published by the Orissa JEE-2011 clearly stipulated that a candidate seeking admission to 1st year MBBS Course must be below 17 years and not above 25 years as on 31.12.2011. The petitioner, whose date of birth, as per his birth certificate was 10.05.1984, having applied for

appearing in the entrance examination for admission to MBBS Course as per the said Information Brochure, was fully aware that he was not eligible. It is submitted that though the petitioner had furnished his birth certificate, due to inadvertent oversight, he had been allowed to appear in the entrance examination, though he was not eligible. Subsequently, during verification of the application forms of the candidates, when it came to the knowledge of the Orissa JEE-2011 that the petitioner's date of birth, as per his birth certificate is 10.5.1984 and is aged more than 25 years, he has not been issued with the rank card and not permitted to participate in the counselling for admission to 1st year MBBS Course. Accordingly, it is submitted that allowing the petitioner to appear in the entrance examination being a mistake of fact, which was due to inadvertent oversight, the petitioner cannot claim any benefit for the same as of right.

**6.** Learned counsel for the Orissa JEE-2011 further submits that as the Information Brochure published by the Orissa JEE-2011 has been formulated by the Policy Planning Body, constituted by the State Government under Section 4(1) of the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007, for regulating admission to Engineering/Technology, Medicine/Dentistry, Pharmacy, etc. in exercise of its powers under Section 4(6) of the said Act, which authorizes the Policy Planning Body to determine the eligibility criteria for admission, the same cannot be said to be without authority of law. It is pleaded that similar upper age limit of 25 years had also been prescribed by the Orissa JEE-2011 for the previous two years, i.e., 2009 and 2010 and the same has been continued in the present academic year 2011. It is further submitted that similar upper age limit of 25 years has been prescribed for the candidates appearing in the All India Pre-Medical/Pre-Dental Entrance Examination-2011, conducted by the Central Board of Secondary Education and 15% of the seats in Medical and Dental Colleges of the State are reserved for such candidates and therefore the fixation of upper age limit by the Orissa JEE-2011 cannot be said to be arbitrary or illegal.

It is further pleaded by Orissa JEE-2011 that the lower age limit of 17 years and upper age limit of 25 years, as on 31.12.2011, allows a candidate after passing +2 examination, 8 years and as many chances to apply and qualify for MBBS Course and therefore the fixation of upper age limit of 25 years by the Orissa JEE-2011 cannot be said to be an unfair and unreasonable restriction.

**7.** As regard the power of Orissa JEE-2011 to prescribe upper age limit in addition to what has been prescribed by the MCI in its Regulations,

learned counsel submits that as no upper age limit for candidates seeking admission to MBBS Course has been prescribed by the MCI, the State is not denuded of its power to fix such upper age limit, especially when the same does not adversely affect the norms laid down by the MCI. It is accordingly submitted that the fixation of upper age limit of 25 years is an additional eligibility criteria prescribed by the State Government, for maintaining high standard of medical education in the State and to regulate admission to MBBS course by short listing the applicants in an effective manner, when there are more applicants than available seats.

**8.** Coming to the plea of the petitioner that admissions have been given to two over aged candidates, the Orissa JEE-2011 has explained in its counter affidavit that with regard to the candidate, namely, Sonali Subhadarsini, her date of birth as per her birth certificate is 30.12.1986 and so her age as on 31.12.2011 was 25 years and 01 day. As the time of birth is not mentioned in the birth certificate, she has been given the benefit of doubt of one calendar day. As regard the other candidate, namely, Jana Ranjan Nayak, the same has been stoutly denied by the Orissa JEE-2011.

**9.** The MCI-opposite party no.3 in its counter affidavit has stated that the MCI has framed Regulations on Graduate Medical Education, 1997, in exercise of its power under Section 19A read with 33 of the Indian Medical Council Act, 1956, with the prior approval of the Central Government, for maintaining high standard of medical education in the country. It is further stated in the counter affidavit that the MCI has prescribed the minimum age of 17 years as on 31$^{st}$ December of the year of the entrance examination as the eligibility criteria for admission to MBBS Course and the same cannot be treated as exhaustive and it is open for the State to prescribe further condition of eligibility in exercise of power vested in it under Entry 25 of the Concurrent List (List III) of the Constitution. Accordingly, it is submitted by learned counsel for the MCI that the State is empowered to impose additional eligibility criteria which are not contrary to and in derogation of the eligibility criteria prescribed by the MCI.

Learned Addl. Government Advocate with reference to the counter affidavit filed by opposite party no.4 reiterates the stand taken by the Orissa JEE-2011 and submits that as the State Government has the power to prescribe additional or further eligibility criteria for admission to 1$^{st}$ year MBBS Course, which are not in conflict with the norms fixed by the MCI under its Regulations, the upper age limit of 25 years prescribed by the Orissa JEE-2011 cannot be faulted.

**10.** The State Government enacted the Orissa Professional Educational Institution (Regulation of Admission and Fixation of Fee) Act, 2007 (the 'Act' for short) to provide for the regulation of admission, fixation of fee, prohibition of capitation fee, reservation in admission and for other measures to ensure equity and excellence in professional educational institutions and for matters connected therewith or incidental thereto.

Section 3 of the Act provides for the method of admission in professional educational institutions, which reads as under :

> "Subject to the provisions of this Act, admission of students in all private professional educational institutions, Government institutions and sponsored institutions to all seats including lateral entry seats, shall be made through JEE conducted by the Policy Planning Body followed by centralized counselling in order of merit, in accordance with such procedure as recommended by the said body and approved by the Government."

Section 4 of the Act deals with composition and functions of the Policy Planning Body and sub-section (1) thereof provides as follows:

"4 (1) The Government shall constitute a body to be known as the Policy Planning Body consisting of following members nominated by it, namely:-

"(a) The Secretary to Government, Industries Department, who shall be the Chairperson ;

(b) The Secretary to Government, Health and Family Welfare Department;

(c) The Secretary to Government, Higher Education Department;

(d) Vice-Chancellor, BPUT;

(e) A person having experience in administering admission and examination of a joint entrance in professional education;

(f) Director, Medical Education and Training, Orissa ;

(g) Director, Technical Education and Training, Orissa, who shall be the Member-Secretary; and

(h) Two members from the Orissa Legislative Assembly to be elected from among themselves."

Sections 4 (6) and (7) of the Act reads as under:

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

(a) regulate the admission;

(b) formulate policy guidelines for holding JEE;

(c) constitute one or more sub-committees for efficient discharge of its functions in the matter of examination and admission;

(d) formulate and recommend the reservation policy to Government for approval, which shall be with regard to reservation of seats in favour of Scheduled Castes, Scheduled Tribes, SEBC, green card holders, Ex-servicemen, sports persons and physically handicapped persons;

(e) determine the eligibility criteria and qualifying examination required for admission; and

(f) perform such other functions as may be prescribed.

(7) The Policy Planning Body shall supervise and guide the entire process of admission of students to the Government Institutions, private professional educational institutions and sponsored institutions with a view to ensuring that the process is fair, transparent, merit-based and non-exploitative."

**11.** On a perusal of Clause 4.2 of the Information Brochure published by the Orissa JEE-2011, it is seen that the State has prescribed minimum eligibility criteria for admission to 1st year Medical Stream (MBBS/BDS), prescribing lower age limit of 17 years and upper age limit of 25 years as on 31.12.2011 with upper age limit relaxation by 3 years for SC/ST candidates. Clause 4.2 of the Information Brochure reads as under :

"4.2 For admission to 1st Year Medical Stream (MBBS/BDS)

(i) Pass in 10+2 or appearing in 2011 examination of CHSE, Orissa or equivalent, with Physics, Chemistry & Biology (Botany and Zoology) with at least 50% marks in aggregate (Physics, Chemistry & Biology taken together) for general category candidates and 40% marks in aggregate for SC/ST candidates. For candidates seeking admission through JEE to Govt. and Private Colleges the candidate must be a permanent native of Orissa. They

are to submit the Permanent nativity Certificate (Appendix-I) at the time of counselling.

AGE: The lower age shall be 17 years as on December 31, 2011. The upper age shall be 25 years as on December 31, 2011. The upper age limit may be relaxed by three years for SC/ST candidates."

**12.** The question which now falls for consideration is whether the State can prescribe eligibility criteria/qualifications in addition to those laid down by the MCI in its Regulations, for admission to MBBS Course.

**13.** In the case of ***Dr. Ambesh Kumar –vrs.– Principal, L.L.R.M. Medical College, Meerut***, AIR 1987 SC 400, the Supreme Court considered the question whether the State can impose qualifications in addition to those laid down by the MCI and the Regulations framed by the Central Government. Hon'ble Court held that any additional or further qualification which the State may lay down would not be contrary to Entry 66 of List I since additional qualifications are not in conflict with the Central Regulations but designed to further the objective of the Central Regulations, which is to promote proper standards. The Hon'ble Court proceeded to observe as under :

"xx xx xx. The State Government by laying down the eligibility qualification, namely, the obtaining of certain minimum marks in the M.B.B.S. examination by the candidates has not in any way encroached upon the Regulations made under the Indian Medical Council Act nor does it infringe the central power provided in the Entry 66 of List I of the Seventh Schedule to the Constitution. The order merely provides an additional eligibility qualification. xx xx xx"

**14.** As regards the scope of the Entries in the Constitution arising under Entry 66 of List I and Entry 25 of List III of the Seventh Schedule to the Constitution was examined in great detail by a Constitution Bench of the Supreme Court in ***Dr. Preeti Srivastava and Anr. –Vrs– State of M.P. and Ors***, AIR 1999 SC 2894. After adverting to these two Entries in the Seventh Schedule, the Supreme Court held as under:

"Both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List I which deals with laying down standards in institutions for higher education or research and scientific and

technical institutions as also coordination of such standards. A State has, therefore, the right to control education including medical education so long as the field is not occupied by any Union legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Governments. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List I. Secondly, while considering the cases on the subject it is also necessary to remember that from 1977, education including, inter alia, medical and University education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254.

It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are covered only by Entry 25 of List-III. Norms of admission can have a direct impact on the standards of education. Of course, there can be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under Entry 66 of List-I. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications, in addition to those prescribed under Entry 66 of List-I. This would be consistent with promoting higher standards for admission to the higher educational courses. But any lowering of the norms laid down can and does have an adverse effect on the standards of education in the institutes of higher education."

**15.** In ***State of Tamil Nadu –Vrs– S.V.Bratheep***, AIR 2004 SC 1861, the question for consideration was whether it was permissible for the State Government to prescribe higher qualifications for purposes of admission to the Engineering Colleges than what had been prescribed by the AICTE. The Supreme Court came to find that Entry 25 of List III and Entry 66 of List I have to be read together and it cannot be read in such a manner as to form an exclusivity in the matter of admission but if certain prescription of standards have been made pursuant to Entry 66 of List I, then those standards will prevail over the standards fixed by the State in exercise of powers under Entry 25 of List III, insofar as they adversely affect the

standards laid down by the Union of India or any other authority functioning under it. Therefore, what is to be seen is whether the prescriptions of the standards made by the State Government is in any way adverse to, or lower than, the standards fixed by the AICTE. Hon'ble Court taking note of its earlier decisions, observed as follows:-

> "xx xx xx. The standards fixed should always be realistic which are attainable and are within the reach of the candidates. It cannot be said that the prescriptions by the State Government in addition to those of AICTE in the present case are such which are not attainable or which are not within the reach of the candidates who seek admission for engineering colleges……Excellence in higher education is always insisted upon by series of decisions of this Court including Dr. Preeti Srivastava's case. If higher minimum marks have been prescribed, it would certainly add to the excellence in the matter of admission of the students in higher education.
>
> Argument advanced on behalf of the respondents is that the purpose of fixing norms by the AICTE is to ensure uniformity with extended access of educational opportunity and such norms should not be tinkered with by the State in any manner. We are afraid, this argument ignores the view taken by this Court in several decisions including *Dr. Preeti Srivastava case that the State can always fix a further qualification or additional qualification to what has been prescribed by the AICTE and that proposition is indisputable. The mere fact that there are vacancies in the colleges would not be a matter, which would go into the question of fixing the standard of education. Therefore, it is difficult to subscribe to the view that once they are qualified under the criteria fixed by AICTE they should be admitted even if they fall short of the criteria prescribed by the State.*"[

**16.** In the case of ***Visveswaraya Technological University & Anr. – Vrs– Krishnendu Haldar & Others***, AIR 2011 S.C.1429, similar question again came up for consideration as to whether the State Government/ University could fix a eligibility criteria higher than those prescribed by the AICTE and whether the eligibility criteria for admission to Engineering courses stipulated under the Statutory Rules and Regulations of the State Government/University could be relaxed or ignored and the candidates who do not meet such eligibility criteria can be given admission on the ground that a large number of seats have remained unfilled in professional colleges, if such candidates possess the minimum eligibility criteria prescribed under the norms of AICTE. In the said case, the State of Karnataka had fixed

higher eligibility criteria than those prescribed by the AICTE. The Hon'ble Court after referring to its various earlier decisions on the issue, has come to hold as under:-

> "The object of the State or University fixing eligibility criteria higher than those fixed by AICTE, is two fold. The first and foremost is to maintain excellence in higher education and ensure that there is no deterioration in the quality of candidates participating in professional Engineering courses. The second is to enable the State to shortlist the applicants for admission in an effective manner, when there are more applicants than available seats. Once the power of the State and the Examining Body, to fix higher qualifications is recognized, the rules and regulations made by them prescribing qualifications higher than the minimum suggested by AICTE, will be binding and will be applicable in the respective State, unless the AICTE itself subsequently modifies its norms by increasing the eligibility criteria beyond those fixed by the University and the State. xx xx xx."

Hon'ble Court further held :

"(i) While prescribing the eligibility criteria for admission to institutions of higher education, the State/University cannot adversely affect the standards laid down by the Central Body/AICTE. The term 'adversely affect the standards' refers to lowering of the norms laid down by Central Body/AICTE. Prescribing higher standards for admission by laying down qualifications in addition to or higher than those prescribed by AICTE, consistent with the object of promoting higher standards and excellence in higher education, will not be considered as adversely affecting the standards laid down by the Central Body/AICTE.

(ii) xx xx xx.

(iii) The fact that there are unfilled seats in a particular year, does not mean that in that year, the eligibility criteria fixed by the State/University would cease to apply or that the minimum eligibility criteria suggested by AICTE alone would apply. Unless and until the State or the University chooses to modify the eligibility criteria fixed by them, they will continue to apply inspite of the fact that there are vacancies or unfilled seats in

any year. The main object of prescribing eligibility criteria is not to ensure that excellence in standards of higher education is maintained.

(iv) The State/University (as also AICTE) should periodically (at such intervals as they deem fit) review the prescription of eligibility criteria for admissions, keeping in balance, the need to maintain excellence and high standard in higher education on the one hand, and the need to maintain a healthy ratio between the total number of seats available in the State and the number of students seeking admission on the other. If necessary, they may revise the eligibility criteria so as to continue excellence in education and at the same time being realistic about the attainable standards of marks in the qualifying examinations."

Hon'ble Court proceeded to observe as follows:

"No student or college, in the teeth of the existing and prevalent rules of the State and the University can say that such rules should be ignored, whenever there are unfilled vacancies in colleges. In fact the State/University, may, in spite of vacancies, continue with the higher eligibility criteria to maintain better standards of higher education in the State or in the colleges affiliated to the University. Determination of such standards, being part of the academic policy of the University, are beyond the purview of judicial review, unless it is established that such standards are arbitrary or 'adversely affect' the standards if any fixed by the Central Body under a Central enactment. The order of the Division Bench is therefore unsustainable."

**17.** The vexed question of whether the State Government/University can prescribe additional eligibility norms over and above the minimum eligibility criteria prescribed by the AICTE, for admission to Engineering course again came up for consideration before the apex Court in a very recent case of ***Mahatma Gandhi University and Anr. –Vrs– Jikku Paul and Ors.,*** 2011 (4) SCALE 578, wherein the Hon'ble Court has affirmed and reiterated the views taken in Visveswaraya Technological University (supra)

**18.** On an analysis of the various decisions cited above and the principles decided therein, the legal position that emerges is that both the MCI as well as the State Government can prescribe minimum eligibility criteria for regulating admission to Medical Colleges, in order to maintain the

quality of education and ensure excellence in higher education, which is in national interest. The State Government can prescribe additional norms to shortlist the applicants in an effective manner, when there are more applicants than available seats. However, the norms prescribed by the MCI cannot be impinged or adversely affected by the State while prescribing additional qualifications or criteria.

**19**. In the instant case, as the MCI under its Regulations has not prescribed any upper age limit for admission to MBBS Course, the upper age limit of 25 years prescribed by the Orissa JEE, 2011 as the minimum eligibility criteria under Clause 4.2 of the Information Brochure, for regulation admission to MBBS Course in the State, cannot be said to impinge or adversely affect the norms prescribed by the MCI.

**20.** As regard the plea of the petitioner that the fixation of upper age limit of 25 years by the Orissa JEE-2011 is unfair and unreasonable, the same cannot be accepted as, by prescribing the lower age of 17 years and the upper age limit of 25 years, a candidate after passing his +2 examination is provided with sufficient opportunity to apply and qualify for MBBS Course.

**21.** Coming to the other contention of the petitioner that he having been allowed to appear in the entrance examination and allotted with a rank in the merit list prepared by the Orissa JEE-2011, he should be permitted to take admission in the 1st year MBBS Course, the same is erroneous and misconceived, inasmuch as, wrongly allowing the petitioner to appear in the entrance examination, inspite of the fact that he was over age, due to inadvertent oversight, which is admittedly a mistake of fact, cannot give any legal right to the petitioner to claim admission to the MBBS Course in violation of the norms prescribed. Moreover, as the petitioner at the time of filling up the application form for appearing in the Orissa JEE-2011, was fully aware of the minimum eligibility criteria prescribed under Clause 4.2 of the Information Brochure, for admission to 1st year MBBS Course, he cannot be permitted to take the plea of estoppel and seek admission as of right.

**22.** For the reasons as aforesaid, no impropriety or illegality can be said to have been committed by the Orissa JEE-2011 in prescribing the upper age limit of 25 years as the minimum eligibility criteria for admission to 1st year MBBS Course and therefore the impugned clause 4.2 of the Information Brochure does not suffer from any infirmity.

The writ petition being devoid of merits, the same is accordingly dismissed. No cost. Writ petition dismissed.

**2011 ( II ) ILR- CUT- 1060**

**B.K.PATEL, J.**

CRLREV NO.287 OF 2002 (Decided on 27.10.2011)

**KISHORE BHOI** …….Petitioner.

*.Vrs.*

**STATE OF ORISSA** **……**Opp.Party.

**CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.154.**

**Delay in lodging F.I.R. – Offence U/s. 436 I.P.C – Five days delay remained unexplained – House of P.W.1 is alleged to have burnt but F.I.R. is silent regarding her presence at the spot – P.W.2 the informant deposed that she does not know how the house was burnt and she cannot say who set fire to their house – Evidence of P.W.2 is not only inconsistent but also prevaricating – Both the Courts below have failed to take note of such infirmities – Held, impugned judgments passed by the learned Courts below are set aside.** (Para 6)

For Petitioner - M/s. S.Jena, L.Jena & B.Parida.
For Opp.Party - M/s. B.P.Pradhan, (Addl. Govt. Advocate)

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***B.K. PATEL, J.*** In this revision, petitioner has assailed legality of the judgment dated 1.7.2002 passed by the learned First Additional Sessions Judge,Puri in Criminal Appeal No.17/20 of 1999/1998 confirming the judgment dated 29.10.1998 passed by the learned Asst. Sessions Judge-cum- C.J.M.,Puri in S.T. Case No.54/234 of 1997, by which the petitioner was convicted and sentenced to undergo R.I. for 5 years and also to pay of Rs.5000/-, in default, to undergo R.I. for six months, under Section 436 of the I.P.C.

2. Informant (P.W.2) has three sons namely, Rabi, Kishore (petitioner) and Surendra(P.W.3). P.W.1 Mani Bhoi is P.W.3's wife whereas P.W.6 Chandala Dei is Rabi's wife. Prosecution case is that there was partition of the lands and dwelling house amongst the three brothers. However, as the petitioner tried to dispose of his share of dwelling house, there was dispute between him and his brothers. Occurrence took place at about 3.30 P.M. on 17.7.1996. When P.W.3 was absent from his house, petitioner demanded P.W.2 to handover documents relating to the house. When she refused, petitioner abused her in obscene language and gave fist and kick blows. On protest being raised by P.W.2, petitioner got furious and set fire to P.W.3's

dwelling house. In spite of attempts made by informant and co-villagers to extinguish fire, two rooms were completely burnt. On the basis of written report submitted at Kumbharpara P.S., F.I.R. Ext. 3 was registered. In course of investigation, I.O. P.W.7 examined witnesses and effected seizure of documents and other articles. On completion of investigation charge-sheet was submitted against the petitioner for commission of offences under sections 436 and 323 of the I.P.C

3. Defence plea was one of complete denial.

4. In order to substantiate the allegations the prosecution examined 7 witnesses and placed reliance on documents marked Exts. 1 to 5. P.Ws. 4 and 5 are witnesses to seizure of document under seizure list Ext.1. No evidence, oral or documentary, was adduced from the side of the defence. Placing reliance on the testimonies of P.Ws. 1 and 2 trial court convicted and sentenced the petitioner for commission of offence under section 436 of the I.P.C. which has been upheld by the appellate court.

5. In support of the revision, it was submitted by the learned counsel for the petitioner that the F.I.R. was admittedly lodged on 22.7.1996. Prosecution has not adduced any explanation for the inordinate delay in lodging of the F.I.R. long five days after the occurrence. It was argued that delay in lodging the F.I.R. assumes importance in view of prevaricating statements made by P.W.2 in her testimony in court. Neither in the F.I.R. nor in the evidence of P.W.2 there is indication of presence of P.W.1 at the scene of occurrence. P.W.1's testimony is not at all consistent with the nature of allegations made by her in her police statement. Both the courts below have utterly failed to consider such vital infirmities in the evidence while recording conviction against the petitioner.

Learned counsel for the State supported the impugned judgments.

6. It is evident from the materials on record that inordinate delay in lodging of the F.I.R. by P.W.2 in the Police Station five days after the occurrence remains unexplained. No doubt petitioner is informant P.W.2's son. However, allegations in the case relates to setting the house belonging to P.W.3, who is also P.W.2's son, to fire. In the F.I.R. P.W.2 alleges that before setting fire to the house, petitioner abused P.W.2 in filthy language and assaulted her by means of fist and kick blows. P.W.2 does not make any allegation of assault on her while deposing in court. P.W.2 begins her evidence by deposing that she does not know how the house was burnt. In cross-examination also she testifies that she cannot say who set fire to their house or how it was burnt. However, at the same time she alleges that when she was alone present in the house petitioner asked her to give

documents relating to the house. Instead of explaining delay in lodging the F.I.R. P.W.2 deposes that she reported about the occurrence at the Police Station on the same day. Therefore, evidence of P.W.2 is not only inconsistent with the contents of the F.I.R. Ext.3 but also is prevaricating. Both the courts below appear to have failed to take note of such vital infirmities in the evidence of P.W.2.

Now coming to the evidence of P.W.1, whose house is alleged to have burnt, it has been rightly pointed out that the F.I.R. is all together silent regarding her presence at the spot at the time of occurrence. P.W.1 alleges that petitioner demanded her and P.W.2 to give the documents relating to their house. However, it has been brought out in evidence that P.W.1 had not stated before the I.O. P.W.7 that petitioner asked her also to give documents relating to the house. P.W.2 makes positive assertion that none else was present in the house when the occurrence took place. Contrary to the uncontroverted materials on record, P.W.1 testifies that P.W.2 reported the matter at the police station on the date of the occurrence. Both the courts below have not considered the discrepancies in the evidence of P.W.1 also.

7. Thus, judgments passed by the appellate court as well as trial court suffer from perversity of non-consideration and non-appreciation of materials circumstances. Upon consideration of infirmities and discrepancies pointed out above, this Court is of the view that the prosecution has failed to substantiate the allegations made against the petitioner beyond reasonable doubt.

8. Accordingly, revision is allowed. Judgments passed by the learned First Additional Sessions Judge,Puri in Criminal Appeal No.17/20 of 1999/1998 and the learned Asst. Sessions Judge-cum- C.J.M., Puri in S.T. Case No.54/234 of 1997 are set aside.

Revision allowed.

**2011 ( II ) ILR- CUT- 1063**

**B.K.NAYAK, J.**

O.J.C. NO.242 OF 2001 (Decided on 19.08.2011)

**PREMANANDA NAYAK & ORS**. ……. Petitioners.

.*Vrs.*

**BISWAMBAR NAYAK (DEAD) & ORS.**
**(represented through L.Rs)** ……...Opp.Parties.

**CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 32, RULE 3.**

**Exparte preliminary decree against minor defendants – Minor defendants represented by GAL – GAL filed written statement taking formal objections without raising any specific plea resisting the plaintiffs claim – GAL had the discretion to act in a manner which would best serve the interest of the minors – So absence of GAL during exparte hearing of the suit cannot be said that the GAL was grossly negligent - Held, the decision of the revisional authority that the GAL on behalf of minor defendants having not participated in the exparte hearing of the suit and the trial Court having not appointed another GAL as required under Order 32 Rule 11(2) C.P.C., the exparte preliminary decree was a nullity and therefore the final decree proceeding was not maintainable was not correct, hence quashed.**

(Para 8,9)

**Case law Relied on:-**

AIR 1959 Kerala 169 : (Raman Gangadharan & Ors.-V-Raman Narayanan & Ors.)

**Case laws Referred to:-**

1.AIR 1969 Orissa 52 : (Manoranjan Samanta Kumar-V-Brundabati Veergam)
2.AIR 1968 SC 954 : (Ram Chandra Arya-V-Man Singh & Anr.)
3.53 (1982) CLT 509 : (Bhagabat Sahu-V- Parbati Samal & Ors.).
4.AIR 1953 TRA-CO 450 : (Thomman Thommankunji & Ors.-V- Junjummeethiyan Kochukunjali Nayana)

For Petitioners - M/s. Manoj Mishra, S.K.Pradhan & P.K.Das
For Opp.Parties - M/S. P.Kar, a.K.Mohanty, G.P.Kar, J.D.Behera, M.R.Satpathy.

***B.K.NAYAK, J.*** Whether an ex-parte preliminary decree for partition passed against minor defendants, who were represented by GAL, is a nullity and whether a final decree proceeding to make such preliminary decree final

can be challenged as not maintainable on such ground are the questions that arise for determination in this writ petition.

2. The undisputed facts are that T.S. No.42 of 1959 was filed in the court of learned Civil Judge (Junior Division), Kendrapara by Krushna Nayak, the predecessor in interest of the present petitioners and his brother Biswanath Nayk claiming partition of their half share in the suit properties. Defendant nos.9 and 10 to the suit were minors and they were represented by GAL, who filed a written statement on behalf of the said minors. The suit was ultimately heard ex-parte and ex-parte preliminary decree was passed against the defendants including minor defendant nos.9 and 10. Plaintiff no.1 having died after passing of the preliminary decree, his legal heirs, the present petitioners, filed petition for making the preliminary decree final. Defendant no.8 and legal representatives of defendant no.1 filed their objection to the application for final decree stating that the final decree proceeding is not maintainable inter alia on the ground that the preliminary decree was a nullity as minor defendant nos.9 and 10 were not properly represented. The trial court by its order dated 01.07.1999 came to hold that the GAL of minor defendant nos. 9 and 10 filed written statement in which the plaintiffs' claim of half share in the suit properties has not been denied and that even though an ex-parte decree was passed the same cannot be said to be nullity. Accordingly, the trial court rejected the objection filed by defendant no.8 and legal heirs of defendant no.1. The said order of the trial court was challenged before the learned Additional District Judge, Kendrapara in Civil Revision No.33 of 1999. The revisional court allowed the Civil Revision and set aside the order of the trial court holding that the GAL on behalf of minor defendants having not participated in the ex-parte hearing of the suit and the trial court having not appointed another GAL as required under Order 32 Rule 11 (2), C.P.C., the ex-parte preliminary decree was a nullity and, therefore, the final decree proceeding was not maintainable. For giving such finding the revisional court placed reliance on the decisions reported in AIR 1969 ORISSA 52; ***Manoranjan Samanta Kumar v. Brundabati Veergam*** and AIR 1968 SC 954; ***Ram Chandra Arya v. Man Singh and another.*** The order passed by the revisional court has been assailed in this writ petition.

3. In assailing the impugned order the learned counsel for the petitioners contends that the decision of this Court in the ***Manoranjan Samanta Kumar*** (supra) and that of the apex Court in the case of ***Ram Chandra Arya*** (supra) relate to cases where the guardian of the minor defendants did not appear at all and, therefore, there was total non-representation of the minor defendants for which the decree was held to be nullity for which it could be set aside in appropriate proceeding and such

decree was inexecutable. His contention is that the facts of the present case are completely different inasmuch as the GAL was duly appointed by the court for minor defendant nos.9 and 10 and the GAL filed a written statement but considering that there was no substantial defence to be raised did not participate in the ex-parte hearing of the suit and this cannot be said to have rendered the preliminary decree a nullity. It is submitted that Order 32 Rule 11(2), C.P.C. has no application in the present case. He has relied on several decisions including a decision of this Court reported in 53 (1982) CLT 509; ***Bhagabat Sahu v. Parbati Samal and others****;* where this Court took note of the decision in the case of ***Manoranjan Samanta Kumar*** (supra) and made a distinction between a case where there is total non-representation of the minor defendants and a case where a properly constituted guardian was appointed, who represented the minors for some length and ultimately allowed the suit to proceed ex-parte against the minors finding that there was no substantial defence to be raised on their behalf.

4. Order 32, Rule 3, Civil Procedure Code requires that where the defendant is a minor, the Court, on being satisfied of the fact of such minority, is to appoint a proper person to be guardian for the minor for the suit. The provision is mandatory in nature and if the suit continues without the minor being represented and decree is passed therein, it would be a clear case of the decree being a nullity. But, what would be the consequence where a guardian has been duly appointed for the minor, who acts for some time and then omits to take steps. The issue has been answered by this Court in the case of ***Bhagabat Sahu*** (supra) which arose on an application under Section 47, C.P.C. challenging execution of decree passed against minors, who were represented by their mother guardian, who appeared and took steps and participated in the final decree proceeding for some time and thereafter did not take any step resulting in an ex-parte decree final being passed. In the circumstances, this Court held as under:

> "Order 32, Rule 3, Civil Procedure Code requires that where the defendant is a minor, the Court, on being satisfied of the fact of minority, is to appoint a proper person to be guardian for the suit for such minor. This provision was obviously applicable to the facts of this case. The Court had done its duty in ensuring that the minor children of the original defendant were appropriately represented by their natural guardian. If the final decree proceeding had been allowed to continue without the legal representatives of the defendant being represented, possibly it would be a clear case of the decision being a nullity. It is open to a guardian representing the interests of the minors after he or she is aware of the scope of the litigation while

> acting prudently not to contest the lis. This would be certainly a matter of prudent management of the minors' interests and, therefore, a matter within the competence of the guardian. Once the defendants are appropriately impleaded and represented, the duty under Rule 2 of Order 32, Civil Procedure Code would come to an end and the proceeding before the Court must be taken to have been duly constituted. A distinction must be drawn between a case where the minors are not adequately represented from the commencement and the proceeding at its inception, therefore, is a nullity and a case where the minors are adequately represented and there is a duly constituted proceeding where the guardian acts for some time and then omits to take steps."

In coming to the aforesaid conclusion, this Court took note of the earlier decision in ***Manoranjan Samanta Kumar*** (supra) and distinguished the same as because that was a case where there was total non-representation of the minors, who were sued through their mother guardian, who did not at all appear either for herself or on behalf of the minors on receipt of summons. Therefore, that was a case of total non-representation inasmuch as the mother guardian having failed to appear on behalf of the minors no step at all was taken by the court to appoint a properly constituted guardian for the minors.

5. Similarly, the decision reported in ***AIR 1968 SC 954*** cited by the learned counsel for the opposite parties relates to a case where in a suit a decree was obtained against a lunatic without appointment of GAL and the decree in the suit was put to execution and the property of the judgment-debtor was sold, it was held by the apex Court that the decree was a nullity and therefore sale of the lunatic's property in execution was void. This was also a case of total non-representation of the lunatic in violation of Order 32 Rule 15, C.P.C. Evidently, therefore, this decision has no application to the facts of the present case.

6. In the case reported in AIR 1953 TRA-CO. 450; ***Thomman Thommankunji and others v. Kunjumeethiyan Kochukunjali Nayana***, where the mother of minor defendants was appointed as GAL and remained ex-parte in trial stage and ultimately a decree was passed against the minor, it was held by the Division Bench that if the guardian after being appointed had no valid defence on behalf of the minors it would be unnecessary for her to enter appearance and raise untenable contention. If she had no contention to offer and she remained ex-parte, that would not make the decree invalid.

7. The Madras High Court in the decision reported in AIR 1981 MADRAS 217; ***Saradamani v. Rajendran***, where the mother guardian representing the minor defendant in a suit for partition remained ex-parte and ultimately an ex-parte decree was passed, held as under :

> "In the present case, there is no controversy about the respective shares allotted to the plaintiff and the 5th defendant. That being so, the mere fact that the guardian had allowed the suit to be determined ex-parte cannot be regarded as amounting to gross negligence on the guardian's part. The petitioner cannot, therefore, ask for a declaration that the decree itself was a nullity."

8. A Division Bench of the Kerala High Court in the decision reported in AIR 1959 KERALA 169; ***Raman Gangadharan and others v. Raman Narayanan and others*** held as under :

> "…It cannot be said that in very case the guardian representing the minor defendant is bound to enter appearance and to contest the suit by filing written statement. The guardian has a discretion to act in a manner which will best serve the interests of the minor. The guardian can certainly refrain from contesting the suit where it is clear that there is no valid defence to be raised on behalf of the minor. To contest the suit merely for the sake of contest, will not be to advance the interest of the minor…"

9. As appears from the records of the present case, the plaintiffs' suit was for partition of their moiety in the suit properties. Admittedly, the other adult defendants remained ex-parte and ultimately suffered the ex-parte decree, evidently because they did not have any substantial defence to make. The GAL for minor defendant nos. 9 and 10 filed the written statement (Annexure-1) taking formal objections that there was no cause of action for the suit and that the suit was not maintainable. Merely, a general plea of denial of plaint allegations was taken without raising any specific plea resisting the plaintiffs' claim probably because there was no substantial defence to raise on behalf of the minors, particularly when the other adult defendants also remained ex-parte. In such circumstances, the GAL had the discretion to act in a manner which would best serve the interest of the minors. Therefore, for the absence of the GAL during ex-parte hearing of the suit, it cannot be said that the GAL was grossly negligent. In the circumstances, it cannot be said that the preliminary decree was a nullity on the ground of non-representation of minor defendant nos.9 and 10. The impugned revisional order is, therefore, indefensible.

10. Taking a cue from the impugned order, the learned counsel for the opposite parties contends that the trial court while passing the preliminary decree has violated the mandatory provision of Order 32 Rule 11 (2), C.P.C., since the GAL did not participate in ex-parte hearing and, therefore, the minors cannot be said to have been properly represented in the suit.

11. Rule 11 of Order 32 provides as under :

> "**11. Retirement, removal or death of guardian for the suit-** (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.
>
> (2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place."

Sub Rule 2 of Rule 11 as seen above enjoins a duty on the court to appoint a new guardian where the earlier guardian for the minor retires, dies or is removed by the Court. Retirement as contemplated under sub Rule 1 of Rule 11 is a conscious voluntary act on the part of the GAL expressing desire before the Court not to continue with guardianship of the minors. Removal of a guardian is within the discretion of the Court when the Court becomes satisfied that the guardian does not do his duty or there is other sufficient ground. Mere, non-performance of duty by a guardian would not be a ground for his removal by the court in each and every case. The discretion of the court has to be exercised keeping in view the facts and circumstances of each case. Where it is made to appear to the court that the minor has a substantial defence to make and unless proper contest is made by the guardian, valuable rights and interest of the minor is going to be defeated or affected, the Court may in its discretion remove the guardian for non-performance of his duty. But where there is no substantial defence to make, as in the case where adult co-defendants whose interests are not adverse to the minors and rather identical to them are not entering contest as because there is no real contest to be made, the non-performance on the part of the guardian for minors may not be a ground for his removal. Therefore, it cannot be said that non-performance of duty by the guardian in each and every case would be a ground for his removal or it would tantamount to non-representation of the minor. The contention raised by the learned counsel for the opposite parties has, therefore, no force.

12. In view of my finding in paragraph-8 above the other question, whether the maintainability of final decree proceeding can be challenged on

the ground that the preliminary decree was a nullity for non-representation of minor defendants is not considered necessary to be decided.

13. In the light of the discussions made above, I allow the writ petition and quash the impugned revisional order under Annexure-3. No costs.

Writ petition allowed.

**2011 ( II ) ILR- CUT- 1070**

**B.K.NAYAK, J.**

W.P.(C) NO.12843 OF 2010 (Decided on 19.08.2011)

**JASOBANTI MAHAKUD** ……..Petitioner.

.*Vrs.*

**RAMESH PADHAN & ORS.** …….Opp.Parties.

**SPECIFIC RELIEF ACT, 1963 -(ACT NO. 47 OF 1963 )S.19 r/w Order 1 Rule 10 CPC.**

**Suit for Specific performance of contract for sale – Present O.P.1 filed petition for impletion of party in the suit on the ground that he is the youngest son of defendant-No.1 and the suit property being ancestral property he has interest there in and as such he is a necessary party – Trial Court allowed his prayer on the ground that though he is a stranger to the contract but he has interest in the land in question – Hence this writ petition.**

**Specific performance can not be enforced against a person who is not a party to the contract – A stranger to the contract for sale claiming independent title is not a necessary party – Held, the Opp.Parties, being neither a necessary party nor a proper party to the suit for specific performance of contract for sale the impugned order passed by the trial Court impleding him as a party to the suit is quashed.**

**Case law Relied on :-**

AIR 2005 SC 2813 : (Kasturi-V-Iyyamperumal & Ors.)
AIR 1996 SC 2755

**Case laws Referred to:-**

1.2008(II) OLR 747 : (Panjum Bibi @ Ramjan Bibi & 7 Ors.-V-Najma Alim & Anr.)
2.AIR 1984 Punjab & Hariyana 365 : (Atul Sharma & Anr.-V-Gurinder Singh & Ors.)
3.AIR 1976 m.p.148 : (Panne Khushali & Anr.-V-Jeewanlal Mathoo Khatik & Anr.)
4.AIR 1964 SC 1385 : (Balmukund-V-Kamalawati & Ors.)

For Petitioner - Mr. Gautam Misra.
For Opp.Parties - M/s. Bichitra Narayan Satpathy, G.Pati & S.Padhee

***B.K.NAYAK J.*** Order dated 06.07.2010 passed by the learned Civil Judge (Senior Division), Bargarh in C.S.No.75 of 2008 allowing impletion of opposite party No.1 as a party-defendant in the suit has been assailed by the plaintiff in this writ petition.

2. The plaintiff's suit is one for specific performance of contract for sale of the suit property and in the alternative to refund the advance amount along with interest, on the assertions that the defendant No.1 is the karta of his joint family and defendant Nos. 2 to 4 are his sons and that in a family partition the suit property fell to the share of defendant No.1 and that defendant Nos. 1 to 4 being in need of money for repayment of loan and development of cultivation jointly executed an agreement for sale of the suit land in favour of the husband of the plaintiff after receiving an advance consideration of Rs.67,500/-. During his life time the husband of the plaintiff-petitioner requested defendant Nos. 1 to 4 to receive the balance consideration and to execute the sale deed and after his death the plaintiff made similar requests, but the defendants denied execution of the agreement.

Defendant Nos.1 to 4 filed their joint written statement denying the plaint assertions and further contending that they have never executed any agreement for sale, but on the other hand borrowed a sum of Rs.50,000/- from plaintiff's late husband with condition to repay the same with interest and that on different occasions they have repaid more than the amount due in shape of paddy.

In the suit the present opposite party No.1 filed a petition under Order 1 Rule 10 C.P.C. to be impleaded as a party defendant stating that he is the youngest son of defendant No.1 and the suit property being his ancestral property, he has interest therein and therefore he is a necessary party to the suit.. The said petition has been allowed by the Court below holding that the land in question bears interest of the petitioner (present opposite party No.1) and though he may be a stranger to the contract, he cannot be said to be the stranger to the consideration under the agreement to sell.

3. Learned counsel for the petitioner relying on the decision of the Apex Court reported in **AIR 2005 SC 2813 ( Kasturi –v.-Iyyamperumal and others) and AIR 1996 S.C. 2755** and the decision of this Court reported in **2008 (II) OLR 747 (Panjum Bibi alias Ramjan Bibi & 7 others-v.-Najma Alim & another)** has contended that in the suit for specific performance of contract for sale the lis between the purchaser and the vendor shall only be gone into and it is not open to the Court to decide whether a 3rd party to the

contract has acquired any title and possession of the property in question, which is not relevant for the decision in the suit for specific performance of contract for sale. According to him, this is so because the enforceability of the contract between the parties to the contract is only to be gone into in the suit for specific performance and any other person claiming title to the property if allowed to be added, the scope of the suit for specific performance would be enlarged and it would be practically converted to a suit for title.

The learned counsel for opposite party No.1 placing reliance on a single Bench decision of Punjab & Hariyana High Court reported in **AIR 1984 Punjab & Hariyana 365 (Atul Sharma and another-v.-Gurinder Singh and others)** has submitted that in a suit for specific performance of contract for sale, a non-contracting coparcener in respect of the property can be impleaded as a party.

4. In the case of Kasturi (supra) where in a suit for specific performance of contract for sale, a third party to the contract claiming to have independent title and possession over the contracted property filed an application to be impleaded as party, the apex Court negated his claim holding that a stranger to the contract for sale claiming independent title is not a necessary party because the plaintiff has no right to relief against such party in respect of the controversies involved in the suit. Further taking note of Section 19 of the Specific Relief Act, 1963 the Court held that specific performance cannot be enforced against a person who is not a party to the contract or who is not claiming under such party but claiming independent title. Regarding the question whether he is a proper party the Court observed as under :

> "10. As noted herein earlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of a contract for sale. For deciding the question who is a proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for

title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all……..."

5. Interpreting the scope of sub Rule(2), Order 1 Rule 10 of C.P.C., the apex Court further observed as under :

> "15. That apart, from a plain reading of the expression used in sub-rule (2), Order 1, Rule 10 of the CPC "all the questions involved in the suit" it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiff/appellant and the defendants inter se or questions between the parties to the suit and a third party. In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the plaintiff/appellant on one hand and Respondent Nos.2 and 3 and Respondent Nos. 1 and 4 to 11 on the other. This addition, if allowed, would lead to a complicated litigation by which the trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all, affect the right, title and interest of the respondent Nos.1 and 4 to 11 in respect of the contracted property and in view of the detailed discussion made hereinearlier, the respondent Nos.1 and 4 to 11 would not, at all, be necessary to be added in the instant suit for specific performance of the contract for sale."

In giving such interpretation the apex Court also laid emphasis on the principle that the plaintiff is dominus litis and in a suit for specific performance of contract for sale, he cannot be forced to add party against whom he does not want to fight unless it is a compulsion of the rule of law.

6. This Court in the case of Panjum Bibi alias Ramjan Bibi (supra) has observed as follows:

> "7. While considering the application for impleadment under Order 1 Rule 10 CPC, the Court must keep in mind that plaintiff is the sole architect of his plaint and he has a right to choose his own adversary against whom he seeks relief. Mere apprehension of any

party that the plaintiff and defendant of the suit may collusively get their suit decided remains unfounded as whatever may be the judgment and order in a suit it cannot be binding on him as he was not a party in the suit. Such judgment or order shall have no legal effect so far as the person who is not a party in the case is concerned. Impleadment may be necessary to avoid multiplicity of the suit, but it cannot be the sole ground. Facts and circumstances of the case must show that unless a person is impleaded in the suit there is likelihood of further litigation in the same matter on the same issues. The plaintiff being the master of the suit cannot be compelled to file the same against whom he does not wish to fight and against whom he does not claim any relief. It is only in exceptional circumstances where the court finds that addition of new party is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties it will added him as party.

For the aforesaid observation the Division Bench placed reliance in the case of Kasturi (supra).

7. A Full bench of the Madhya Pradesh High Court in the decision reported in **AIR 1976 M.P. 148 : Panne Khushali & another –v.-Jeewanlal Mathoo Khatik & another**, have held that a non-contracting coparcener or co-owner of property cannot be added as a party to the suit for specific performance of contract for sale filed against the parties to the contract since such coparcener/co-owner is neither a necessary party nor a proper party to such suit.

8. In the case of **Atul Sharma**, (supra) cited by the learned counsel for opposite party No.1 a single bench of Punjab & Hariyana High Court allowed the petition for impletion of a coparcener as party to the suit for specific performance of contract for sale placing reliance in the decision reported in **AIR 1964 S.C. 1385 (Balmukund-v.-Kamalawati and others).** On perusal of Balmukund's case it is found that the Supreme Court was not dealing with the question of addition of party to a suit for specific performance under Order 1 Rule 10(2) C.P.C.. That was a suit for specific performance filed against all the joint owners of property even though only one of the joint owners (karta) had contracted to sell. The non-contracting defendants resisted the suit on the ground that the agreement for sale was not for benefit of estate of the joint family. Parties having entered into such contest, the Courts were called upon to decide the question whether the contract for sale was for the benefit of estate of the joint family. Rather in the

said decision the Supreme Court in para 11 of the judgment have said that Pindidas (the Karta who entered into the contract) was bound by the contract and the plaintiff would have been entitled to relief to the extent of his share in accordance with the provision of Section 15 of the Specific Relief Act, 1877, which now corresponds to Section 12(3) of the present Act of 1963.

9. In the case in hand, the petitioner in his petition under Order 1 Rule 10 C.P.C. filed before the trial Court has not challenged the execution of the agreement for sale by opposite party Nos. 2 to 5 on the ground that the proposed sale was not for benefit of estate of the family . Besides, the opposite party nos.2 to 5 (defendants) in their written statement have altogether denied the execution of the agreement for sale by them. Assuming that the petitioner is the son of defendant No.1, his claim to have interest in a coparcenery property is independent of the claim of defendant No.1 and he does not claim under defendant No.1, as has been held by the Full Bench of M.P. High Court in **(Panne Khushali & another** (supra) and therefore, the decision of the Apex Court in Kasturi (supra) applies with full force to the facts of the case. The petitioner, therefore, being neither a necessary party nor a proper party to the suit for specific performance of contract for sale, the trial Court has erred in allowing impletion of the petitioner.

On the foregoing analysis I allow the writ application and set aside the impugned order under Annexure-4. No costs.

Writ petition allowed.

**2011 ( II ) ILR- CUT- 1076**

**S.K.MISHRA, J.**

C. R NO.101 OF 2007(Decided on 14.07.2011)

**ABHI DEHURY & ORS**. ……Petitioners.

*.Vrs.*

**DAKSHYA DEHURY & ORS**. ……Opp.Parties.

**CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 17, RULE 2,3.**

**Evidence of P.Ws.2 & 3 recorded in the absence of contesting defendants and their advocates dispensing with Cross-examination – Judgment pronounced treating it to be a contested case – Application under Order 9 Rule 13 was rejected and appeal preferred against such order was also dismissed – Hence this revision.**

**The above judgment being exparte, the aggrieved party either to file appeal against such judgment or an application under Order 9, Rule 13 C.P.C. to set aside the said judgment – Impugned orders passed by the Courts below are set aside.** (Para 8,9)

**Case law Referred to:-**

AIR 1987 SC 42 : (Prakash Chander Manchanda & Anr.-V-Smt.Janki Manchanda)

For Petitioner - M/s. P.K.Jena, N.Panda, D.P.Mohapatra.
For Opp.Parties - M/s. D.P.Dhal, S.K.Tripathy, S.K.Das & S.Mishra

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***S.K.MISHRA, J.*** The petitioners assail the judgment dated 23.08.2007 passed by the learned District Judge, Sambalpur in F.A.O. No. 21 of 2005 affirming the order dated 11.03.2005 passed by the learned Civil Judge (Junior Division), Rairakhol in Misc. Case No. 6 of 2003, arising out of Title Suit No.07 of 1999.

2. The facts of the case are undisputed. The present petitioners are contesting defendants in Title Suit No.7 of 1999 of the court of Civil Judge (Junior Division), Rairakhol. The suit was posted to 06.11.2002 for hearing. On that date, the plaintiff was present and adduced evidence. Evidence of P.Ws. 2 and 3 were recorded. Prior to it, the plaintiff was examined and cross-examined. On 06.11.2002, the contesting defendants i.e. the

petitioners were not present in the court. However, the court of original jurisdiction proceeded with the hearing of the case by dispensing with cross-examination of the witnesses in absence of the opponent advocates and parties. Then, after conclusion of trial, the learned Civil Judge (Junior Division) pronounced the judgment on 03.12.2002 in Title Suit No.7 of 1999 treating it to be a contested case. Thereafter, an application was filed by the present petitioners under Order 9 Rule 13 of the Code of Civil Procedure, 1905, hereinafter referred as the "Code", which was registered as Misc. Case No. 6 of 2003. It was disposed of by the learned Civil Judge (Junior Division) on 11.03.2005. Learned Civil Judge held that the judgment passed in the Civil Suit was contested one and, therefore, Order IX, Rule 13 of the Code had no application.

3. The petitioners preferred Appeal before the learned District Judge, Sambalpur, which was registered as F.A.O. No. 21 of 2005. Learned District Judge also concurred with the findings recorded by the learned trial court and dismissed the appeal. Such orders of the learned Civil Judge (Junior Division) and the learned District Judge have been assailed in this Revision.

4. In course of hearing of this Revision petition, learned counsel for the petitioners submitted that the approach adopted by the learned Civil Judge (Junior Division) was erroneous in view of the fact that Clause (c) of Sub-Rule (2) of Rule 1 of Order XVII of the Code do not provide for the procedure to be adopted in absence of the parties to the suit. Rather, Order XVII, Rule 2 of the Code is applicable in this case. Learned counsel for the opposite parties, on the other hand, supported the findings recorded by the courts of Original and Appellate jurisdictions and prayed that the Revision application may be dismissed.

5. It is not disputed that on the date the suit was posted for hearing, the present petitioners, who were defendants 1, 2 and 3, were not present in the court. Rule 2 of Order XVII of the Code provides for the procedure when parties fail to appear on the day fixed. It is apt to quote the same.

> "2. **Procedure if parties fail to appear on day fixed** :- Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.
>
> Explanation- Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party

> fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present."

This provision squarely lays down that if any party remains absent on the date to which hearing of the suit is adjourned, then the Court may proceed to dispose of the suit in one of the mode directed on his behalf by Order IX or make such order as it deems fit.

6. Rule 3 of Order XVII provides that court may proceed notwithstanding either party fails to produce evidence, etc. The same reads as follows:

> "3. **Court may proceed notwithstanding either party fails to produce evidence, etc**.- Where any party to suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default,-
>
> (a) if the parties are present, proceed to decide the suit forthwith, or
>
> (b) if the parties are, or any of them is, absent, proceed under Rule 2."

Rules 2 and 3 of Order XVII provides for distinct and different sets of circumstances. Rule 2 applies where an adjournment has been generally granted and not for any specific purpose. Rule 3 applies where the adjournment is given for one of the purposes mentioned in said Rule, i.e. for production of witnesses or to cause attendance of witnesses or to perform any other act necessary to the further progress of the suit. Under Rule 2, court is empowered to dispose of the suit in any one of the modes specified under Order IX. Rule 2 applies only when any of the parties fails to appear at the hearing, whereas Rule 3 shall also apply where the parties appear but have committed default in production of witnesses/evidence etc. Under Rule 3, if the suit is posted for a particular purpose like production of evidence etc and one of the parties remained absent, then the court may proceed under Rule 2 of Order XVII of the Code. So, net result on a conjoint reading of Rules 2 and 3 of Order XVII is that, whenever a suit is posted for hearing or for a specific purpose and one of the parties remains absent, then the Court has to proceed as per Rule 2 by taking any sort of recourse open to it under Order IX of the Code.

7. In a similar case in **Prakash Chander Manchanda and another v. Smt. Janki Manchanda**, AIR 1987 SC 42; Supreme Court has held that if on a date fixed, one of the parties to the suit remains absent and for that party no evidence has been led up to that date, the Court has no option but to proceed to dispose of the matter in accordance with Order XVII, Rule 2 i.e. in any one of the modes prescribed under Order IX of the Civil Procedure Code. Such observations of the Supreme Court are squarely applicable to the case at hand.

8. In this case, the learned Civil Judge proceeded to dispose of the suit as a contested one instead of resorting to Order IX of the Code. In spite of such disposal, the judgment is an ex parte one. Hence, the aggrieved party has two options; firstly, he may file an appeal against such judgment. Secondly, he may file an appropriate application under Order IX Rule 13 of the Code to set aside the judgment. The defendants having preferred an application under Order IX, rule 13 of the Code, the learned Civil Judge should have entertained the same and allowed the petitioners to examine all such witnesses and produce such documentary evidence to establish the plea that they were prevented by sufficient cause from appearing in the Court on the date posted for hearing. The court of original jurisdiction having failed to do so, this Court has no hesitation to hold that the procedure adopted by the learned Civil Judge (Junior Division), which has been upheld by the learned District Judge is erroneous and requires interference of this Court.

9. Accordingly, the Revision Application is allowed. The order dated 03.12.2002 passed by the court of Civil Judge (Junior Division), Rairakhol in Misc. Case No.6 of 2003 and the concurring judgment of the learned District Judge are hereby set aside. The matter is remanded to the court of Civil Judge (Junior Division), Rairakhol for fresh adjudication. The parties shall be allowed to adduce evidence in support of their respective clauses in the proceeding under Order IX, rule 13 of the Code. The parties are directed to appear before the learned Civil Judge (Junior Division), Rairakhol on 17.08.2011. No costs.

Revision allowed.

**2011 ( II ) ILR- CUT- 1080**

**B.K.MISRA, J.**

W.P. (C) NO.26831 OF 2011 (Decided on 24.11.2011)

**SUKANTI PATTNAIK** …….Petitioner.

*.Vrs.*

**SAILENDRA NARAYAN SINGH & ORS.** ……Opp.Parties.

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

**Amendment of plaint – Suit pending for more than 32 years – Evidence not yet adduced in the suit – After Hal settlement and publication of Hal record of right petition for amendment was filed to incorporate them in the description of the property of the plaint –If the amendment will be allowed it with not change the nature and character of the suit rather it will facilitate the Court to arrive at a just decision in the case – Held, application for amendment is allowed subject to payment of cost of Rs.10,000/- to the Opp.Parties.** (Para 13,17)

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

**Amendment of pleadings – While dealing with an application under Order 6 Rule 17 C.P.C. the Court has to bear in mind the following points namely :-**

**(i) Whether the amendment sought is imperative for proper and effective adjudication of the case ?**
**(ii) Whether the application for amendment is bona fide or mala fide ?**
**(iii) The amendment should not cause such prejudice to the other side which can not be compensated adequately in terms of money;**
**(iv) Refusing amendment would in fact lead to injustice or lead to multiple litigation;**
**(v) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case ? and**
**(vi) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.** (Para 8)

**Case laws Referred to:-**

1.2009 (II) OLR (SC) 815 : (Revajeetu Builders & Developers-V- Narayanaswamy & Sons & Ors.)
2.AIR 2000 SC 614 : ( B.K.N. Pillai-V- P.Pillai & Anr.)
3.2009 (II) OLR (SC) 880 : (Surender Kumar Sharma-V- Makhan Singh).
4.(2005) 13 SCC. 89 : (Sajjan Kumar-V- Ram Kishan).
5.(Vol.1998(2004) CLT 612 (SC) : (Pankaja & Anr.-V-Yellappa (D) by Lrs. & Ors.)

For Petitioner - Mr. S.P.Misra, P.C.Mohapatra, S.C.Samantaray, B.D.Sahoo, R.C.Pattnaik, Advs.
For Opp.Parties- Mr. B.H.Mohanty, D.P.Mohanty, R.K.Nayak, T.K.Mohanty & P.K.Swain,Advs.

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***B. K. MISRA, J*** The petitioner in this writ petition has challenged the legality of the order of the learned Civil Judge (Sr.Divn.) 1st Court, Cuttack dated 20.9.2011 (Annexure-3) in C.S.(I) No. 256 of 1979, where, the prayer of the present petitioner for amendment of the plaint was rejected.

2. The case of the petitioner is that her mother Rajani Rani Samantsinghar had filed T.S. No. 256 of 1979 against the original defendants Puspendra Kumari and two others for specific performance of contract and also for permanent injunction. During pendency of the suit since the original plaintiff died, the present petitioner being the only daughter was substituted. Similarly, on the death of defendant Nos. 1 and 2 during pendency of the suit, they were substituted by the legal heirs namely, defendant Nos. 2(a) to 2(h) and defendant No.2 (b) and defendant No.3 died as bachelors in the year 1998 and 2003 respectively. But though substitutions were allowed by the court but those were not incorporated in the cause title of the plaint. It is also the case of the petitioner that inadvertently the Schedule-A of the original plaint could not be given and description of the property of Schedule-B had been given according to the Sabik Settlement. After the Hal Settlement and publication of the Hal record of right it is felt necessary to incorporate them in the description of the property of the plaint. Besides that there are certain typographical mistakes and those are to be incorporated by way of amendment in the plaint and also for amplification which could not be pleaded due to inadvertence.

3. The present Opposite Parties who are defendants in the court below objected to the prayer of the amendment as sought for by the petitioner on the ground that the purpose of filing the amendment petition was only to cause delay in disposal of the suit and also to frustrate the direction of this

Court for disposal of the suit by a specified date. It is also the case of the defendant that the present petitioner has no locus standi to introduce facts by way of amendment which were never raised by the original plaintiff and more over the proposed amendments would completely change the nature and character of the suit.

4. By the impugned order at Annexure-3, the learned Civil Judge (Sr.Divn.) 1st Court, Cuttack, disallowed the prayer of the present petitioner who was the plaintiff in the suit.

5. Learned counsel appearing for the petitioner by placing reliance on several decisions of the Apex Court and this Court contended that the proposed amendments would in no way change the nature and character of the suit. On the other hand the amendments would facilitate the Court to arrive at a just decision of the case and the Court should not have adopted a too technical approach in the matter and when evidence has not yet been led by the parties, delay cannot be a ground for disallowing the prayer for amendment.

6. There is no dispute to the settled position of the law that the Court's jurisdiction to allow the amendment of pleading is wide enough and also to permit amendment in cases where there has been substantial delay in filing of such amendment application. It is the trite law that the Court must bear in mind that if the proposed amendment would really sub-serve the ultimate cause of justice and avoid further litigation, the same should be allowed but each case has to be decided on its factual background.

7. The learned counsel appearing for the opposite parties contended that the suit in question is of the year 1979 and the parties are litigating since then and the matter had also been taken to the Apex Court, therefore, it cannot be said that the petitioner or her mother were not cognizant of the facts prior to making prayer for incorporating them by amending the plaint including the description of the suit property. It was vociferously urged by the learned counsel for the opposite parties that in the garb of amendment to the plaint, deliberate attempt has been made by the plaintiff to introduce new facts which would completely change the nature and character of the suit and the delay which had occurred in seeking amendment of the plaint shows the mischief game plan of the petitioner to drag on the litigation and the trial court had rightly disallowed the prayer of the petitioner for amendment and therefore, the order dated 20.9.2011 at Anexure-3 should not be interfered with.

8. Broadly speaking while dealing with an application filed under Order, 6 Rule, 17 of the Civil Procedure Code (for short, the C.P.C.), the Court has to bear in mind the following points namely:-

(i) Whether the amendment sought is imperative for proper and effective adjudication of the case ?

(ii) Whether the application for amendment is bona fide or mala fide ?

(iii) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(iv) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(v) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case ? and

(vi) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

(2009 (II) OLR (SC)-815, **Revajeetu Builders & Developers V. Narayanaswamy & Sons & Others**.

9. Upon hearing the learned counsel for the respective parties, I perused the petition filed under Order 6, Rule 17 of the C.P.C. (Annexure-1) as well as the proposed amendments sought for by the present petitioner (plaintiff in court below) along with the objection filed by the opposite parties 2 (a), 2 (c) to 2 (h) (Annexure-2) as well as the impugned order at Annexure-3.

10. On perusal of the impugned order at Annexure-3, it appears that the learned Civil Judge (Sr.Division) 1st Court Cuttack, was not inclined to allow the proposed amendment as sought for by the plaintiffs only on the ground that there was long delay in making the prayer for amendment of the plaint and by the proposed amendment, a new schedule and new facts are going to be incorporated in the plaint which would change the nature and character of the suit. There would be also further delay in disposal of the suits which is pending for more than 32 years.

11. Admittedly, the parties have not yet adduced evidence in Title Suit No. 256 of 1979 and evidence is yet to commence. The suit has a chequrred

carrier and there are two other suits also namely Title Suit No. 287 of 1978 and Title Suit No. 221 of 1979 which were heard analogously but judgments could not be pronounced as the Hon'ble Court in Civil Revision No. 321 of 1984 had given a direction that hearing of the suit i.e. Title Suit No. 256 of 1979 be taken up after T.S. No. 221 of 1979 and T.S. No. 287 of 1978 and the judgments in all the three suits are to be delivered on one date. There was also a direction to the Civil Judge (Sr.Divison), 1st Court, Cuttack in W.P.(C) No. 15515 of 2009 to dispose of the suits by the end of December, 2010. The present intervenor i.e. Labangalata Naik has already been impleaded as defendant No.4 in the suit and she is the decree holder in respect of the suit land. In course of hearing, the learned counsel appearing for the opposite parties contended that with regard to the proposed amendment at Point Nos. 1, 2, 3- I to V, VIII, X, XI they have no objection if those amendments are incorporated to the plaint as those are formal in nature. But serious objections were raised with regard to the proposed amendment as per 3-IX, 3-XII and 3-XIII. As according to the opposite parties if such amendments to the plaint would be allowed that would completely change the nature and character of the suit.

12. I have perused the plaint. The suit admittedly is filed for specific performance of contract. After carefully examining the materials on record and after going through the application for amendment of the plaint, it appears that the question of change the nature and character of the suit does not arise at all even if the proposed amendments are allowed. The suit would remain a suit for specific performance of contract. If such an application for amendment of the plaint has been filed belatedly but for deciding the real controversy between the parties, the delay cannot come on the way as the Courts exit for doing full and complete justice and whatever delay that has occasioned and for the latches in praying for amendment the party against whom the amendment is to be allowed can be compensated by cost or otherwise. (**AIR 2000 S.C. 614, B.K.N.Pillai –v- P. Pillai and another, 2009 (II) OLR (SC) 880, Surender Kumar Sharma –v- Makhan Singh)**.

13. Now coming to the point that by changing the description of the suit plot i.e. with regard to the description of Sabik Khata and plot number by the proposed amendment of the plaint it is seen that the description of the property in Schedule-B of the plaint was given according to Sabik settlement particulars. It is to be remembered that the suit has been filed in the year, 1979. There is no controversy that the Hal Settlement Operation in Cuttack Town was over during pendency of the suit and new record of right has come into existence and therefore, for proper and effective adjudication and

to set at rest the real controversy between the parties, proper description of the suit land according to Hal Settlement are to be given and by doing that no prejudice would be caused to the opposite party-defendants even though such amendment has been sought for belatedly. (**2005) 13 S.C.C. 89 (Sajjan Kumar –v- Ram Kishan**).

14. In the instant case, as I find the amendments which have been sought for that would further elucidate the facts which are there in the original plaint and the parties have already known the case which they are contesting.

15. It is the settled position of law that if granting of an amendment really sub-serve the ultimate cause of justice and avoids further litigation, the same should be allowed in spite of delay and latches in moving the amendment petition (**Vol.1998 (2004) CLT 612 (S.C.) Pankaja and another –v- Yellappa (D) by Lrs. and others**.

16. There is no controversy with regard to the position of law as envisaged in Order, 6 Rule, 2 of the C.P.C. that the material facts are to be pleaded and not material particulars. If materials facts are there on record, those can be supplemented during evidence by keeping in mind this position of law.

The proposed amendment of the plaint and incorporation of facts in Para 13 of the Plaint is to the effect that:-

> "It may be noted that Ramesh Chandra Pattnaik husband of the plaintiff who is the son-in-law of the original plaintiff was present when the original plaintiff paid a sum of Rs.2000/- to the original defendant No.1 on 10.4.77 and Ajay Jagadev Mohapatra instead of issuing a fresh receipt for that amount made necessary corrections in the first receipt as stated above and passed on the same to the original plaintiff."
>
> And
>
> In the first line substitute "Ajay Jagadev Mohapatra" in place of "defendant No.3."

In my considered view, the said facts can be established by adducing evidence by the plaintiff.

17. For the reasons aforesaid, the application for amendment of the plaint as filed by the petitioner stands allowed except Item Nos.3-IX subject to payment of cost of Rs.10,000/- (Rupees ten thousand) to the opposite parties which shall be deposited within two weeks from the date of supply of certified copy of this order. In default of such payment of cost, the application for amendment of the plaint shall stand rejected. The learned Court below shall afford opportunity to the opposite parties (Defendants) in filing the additional written statement, if they so desire after the amendments are carried out and all endeavour should be made by the learned Civil Judge (Sr.Divn.), 1st Court, Cuttack for disposal of the matter by end of 1st quarter, 2012. The parties are directed to co-operate with the hearing of the suit and no unnecessary adjournment shall be given in the suit and hearing should be taken up on day to day basis and priority should be given for disposal of the suit which is of the year, 1979.

18. In the aforesaid premises, the impugned order dated 20.09.2011 at Annexure-3 stands modified and the writ petition stands disposed of.

Writ petition disposed of.