V. GOPALA GOWDA, CJ.

MACA NO. 482 OF 2000 (Dt.11.05.2012)

MANORAMA RANA & ORS. ……. Appellants

.Vrs.

SIKANDAR KHAN & ANR. ……Respondents

A. MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – Ss. 2 (21), 3 & 149(2).

"Light motor vehicle" means a transport vehicle or Omnibus the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which does not exceed 7,500 kilograms.

In this Case the Vehicle involved in the accident is a Mini Truck – Tribunal holding that the driver did not possess effective and valid licence, there is violation of the terms and conditions of the policy and fixed liability on the owner to pay the compensation – Hence this appeal.

Advocate for the owner placed form of renewal issued under Rule 67 of the Orissa Motor Vehicle Rules, 1940 showing that laden weight of the vehicle in question is 5300 kgs which falls within the definition of "Light Motor Vehicle" – Held, the offending vehicle is a light motor vehicle – Award of the Tribunal imposing liability upon the owner is illegal which is set aside and liability fastened upon the Insurance Company to pay the compensation. (Para 12,13)

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

Death Case – Deceased a mason – Claim for General damages under the Second Schedule – Held, claimants entitled to get Rs.40,000/- towards general damages under the Second Schedule i.e. towards loss of love and affection, loss of estate and funeral expenses along with the compensation awarded. (Para 10)

Case laws Referred to:-

1.AIR 2009 SC 3104 : (Smt. Sarla Verma & Ors.-V- Delhi Transport Corpn. & Anr.)
2.2006(II) TAC 1(SC) : (National Insurance Co.Ltd.-V-Kusum Rai & Ors.)
3.(2001)4 SCC 342 : (New India Assurance Co., Shimla-V- Kamla & Ors.)

4.AIR 2004 SC 1531 : (National Insurance Co.Ltd.-V-Swaran Singh & Ors.)
5.AIR 1994 SC 1631 : (General Manager, Kerala Road Transport Corpn. Trivandrum -V- Mrs. Susama Thomas & Ors.)

For Appellants - M/s. B.K.Mohanty, N.Patnaik, S.Patra.
For Respondents - M/s. S.S.Rao, (for Res.No.1)
M/s. Surath Ray, A.A.Khan, A.Ghose & S.K.Mishra (for Res.No.2)

V. GOPALA GOWDA, C.J. Aggrieved by the judgment dated 6.7.2000 passed by the Second Motor Accident Claims Tribunal (SD), Berhampur in M.A.C. No. 706 of 1998, fastening the liability upon the owner to pay the compensation awarded, the claimants have filed the present appeal seeking for allowing the appeal and awarding just and reasonable compensation by enhancing the same, urging various facts and grounds in support of the appeal.

2. In the impugned judgment, the factual undisputed facts have been adverted, therefore, there is no need for this Court to repeat the same in this judgment.

On 4.5.1998 at about 5.30 A.M. while the husband of the first claimant-deceased Subash Rana was going towards Hatapada on a cycle from his house on his left side, the Mini Truck bearing registration number OR 07 6424 came from Digapahandi side with high speed being driven in a rash and negligent manner anddashed against the deceased, as a result of which the deceased died at the spot. Hence the claim petition was filed by the wife and the children.

3. The owner of the vehicle filed written statement but did not appear at the time of hearing.

4. The Insurance Company also filed written statement denying the averments made in the claim petition including the validity of the driving licence of the driver who was driving the offending vehicle at the time of accident in terms of section 3 of the Motor Vehicles Act, 1988. Mr. Ray, learned counsel for the insurance company-respondent no.2 contended that the accident was not intimated to the Insurance Company by the owner. The offending vehicle was insured with respondent no.2 and the cover note no.16111 vide policy no. 192/1998 was valid from 16.5.1997 to 15.5.1998 is not in dispute. The case went for trial. On behalf of the claimants two

witnesses were examined and seven documents were marked and exhibited. Ext.1 is the plain paper copy of F.I.R., Ext.2 is the certified copy of F.I.R., Exts.3 & 4 are the certified copies of seizure lists, Ext. 5 is the certified copy of post-mortem report, Ext.6 is the certified copy of final form and Ext.7 is the photocopy of schedule of insurance of the offending vehicle. On behalf of the respondent no.2-Insurance Company none were examined. Only the certified copy of D.L. No. 110/95 issued by the R.T.O., Gajam was marked as Ext.A on behalf of respondent no.2.

5. Learned Member of the Tribunal answered the contentious point in favour of the claimants and accepting the Ext.A, the cetified copy of driving licence of the driver who drove the vehicle, held that he did not possess effective and valid driving licence for which there is violation of the terms and conditions of the policy by the owner in entrusting the vehicle to a driver who did not possess effective and valid driving licence. Therefore, the liability cannot be fastened upon the Insurance Company. Accordingly the Tribunal has fastened the liability upon the owner while answering issue no.3. Correctness of the same is questioned by Mr. Mohanty, learned counsel for the appellants and Mr. Rao, learned counsel for the owner placing strong reliance upon sub-section (21) of section 2 of the M.V. Act defining 'light motor vehicle'. Mr. Rao has also placed reliance upon 'form of renewal' issued under rule 67 of the Orissa Motor Vehicle Rule, 1940 in favour of the owner, respondent no.1 to show that laden weight of the vehicle in question is 5300 Kgs. which falls within the definition of 'light motor vehicle'. Therefore, fastening the liability upon the owner while answering issue no.3 in favour of the claimants, is erroneous in law. Therefore, he requested to shift the liability upon the Insurance Company.

6. Learned counsel for the apellants contended that the Tribunal having accepted the case pleaded by the claimants that the deceased was a mason, he was earning Rs. 100/- per day, erred in law in taking the income at Rs. 70/- per day, in absence of evidence regarding the income and determined the loss of dependency at Rs. 2,09,000/-. It is contended that in absence of the evidence regarding the annual income produced by the claimants for determination of the just and reasonable compensation under the head loss of dependency, as per the provision under section 163-A of the M.V. Act, it should have taken at Rs. 40,000/-. That apart in view of the decision of the apex Court in the case of *Smt. Sarla Verma and others v. Delhi Transport Corporation and another*, AIR 2009 SC 3104, the correct multiplier should be 15 and not 12 as has been applied by the Tribunal which is an erroneous approach leading to award inadequate compensation. It is further contended that the Tribunal has deducted 1/3rd out of the

monthly income for the purpose of determination of compensation which is not correct. As per the decision of the apex Court in the case of *Smt. Sarla Verma (supra),* 1/5th should have been deducted for that purpose. It is further contended that the Tribunal without taking the aforesaid relevant aspect of the matter, into consideration, though it has come to the conclusion that the accident took place due to the rash and negligent driving of the driver of the offending vehicle, erroneously recorded a finding that he did not possess an effective driving licence to drive the vehicle ignoring sub-section (21) of section 2 of the M.V. Act, and passed the impugned award which is not just and reasonable and prayed for awarding the just and reasonable compensation.

On the otherhand, Mr. Ray, learned counsel for the Insurance Company sought to justify the finding recorded by the Tribunal fastening the liability upon the owner as the same is based on legal evidence, Ext.A. He further contended that the same is in accordance with the provision under section 3 of the M.V. Act. In support of his submission he has placed reliance upon the decision in the case of *National Insurance Co. Ltd. v. Kusum Rai and others*, 2006(II) TAC 1 (S.C.) wherein the Tribunal referring to the decision of the apex Court in the case of New India Assurance Co., Shimla v. Kamla and others, (2001) 4 SCC 342, held that the Insurance Company cannot get rid of its third party liability as the said question arises only between the owner of the vehicle and the insurance company but directed that the insurance company can recover the amount from the owner of the vehicle.

7. The vehicle involved in the case of Kusum Rai (supra), was being used as a taxi. Therefore, after referring to the decision in *National Insurance Co. Ltd. v. Swaran Singh and others*, AIR 2004 SC 1531, section 3 of the M.V. Act and definition of sub-section (2) of section 10 of the M.V. Act, the apex Court on facts having found that the driver of the offending vehicle was not in possession of a valid and effective driving licence, held the Insurance Company liable to pay the compensation but did not interfere with the award but directed the insurance company to recover the amount from the owner. With reference to the facts of the said case, I am of the opinion that the same has no application to the present case. Therefore, Mr. Ray further submitted that claim of the claimants itself is only Rs. 2,50,000/- and the Tribunal awarded Rs. 2,09,000/- with 9% interest, on appreciation of legal evidence, which is exhorbitant and takes care of the compensation claimed by the claimants. Hence this appeal for enhancement need not be entertained and prayed for dismissal of the same.

8. With reference to the aforesaid rival legal contentions, the following points arise for consideration of this Court.

(i) Whether the appellants are entitled for enhanced compensation ? If so, what amount ?

(ii) Whether fastening the liability upon the owner placing reliance upon Ext.A not noticing section 2 (21) of the M.V. Act, is legal and valid ?

(iii) What order ?

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

10. It is an undisputed fact that the accident took place on 4.5.1998 and the vehicle involved had been dirven by the driver of the owner-resondent no.1. The finding of fact is recorded by the Tribunal that the deceased was a mason and the fact that he was earning Rs.130/- per day, was not accepted by the Tribunal in absence of production of documentary evidence in that respect and has taken the income of the deceased only at Rs. 70/- per day. In absence of the documentary evidence in support of the annual income, the Tribunal should have taken into considration the structural formula which is provided in the Schedule to section 163-A of the M.V. Act inserted by way of an amendment to the Motor Vehicles Act, 1988 with effect from November, 1994. In the facts and circumstances of the case, the Tribubnal ought to have taken Rs. 3,000/- as the income of the deceased per month arriving at the annual income at Rs. 36,000/-. If the annual income is taken at ` 36,000/-, after deduction of 1/3rd, therefrom, for persoal expenses, the contribution to the family would come to Rs.24,000/-. In view of the decision of the apex Court in the case of ***Smt. Sarla Verma and others v. Delhi Transport Corporation and another***, AIR 2009 SC 3104, the Tribunal should have applied the correct multiplier of 15 and the multiplier 12 applied by Tribunal, is not legally correct. Therefore, taking the annual income at Rs. 36,000/- and deducting 1/3rd, therefrom, towards own expenses of the deceased, the annual dependency would come to Rs..24,000/- and applying 15 multiplier, the loss of total dependency would come to Rs. 3,60,000/-. In view of the decision of the apex Court in the case of *General Manager, Kerala Road Transport Corporation, Trivandrum v. Mrs. Susama Thomas and others*, AIR 1994 SC 1631, the claimants are entitled to Rs. 40,000/- towards loss of love and affection, loss of estate and funeral exenses and I so direct. Therefore, the claimants are entitled to

compensation at Rs. 4,00,000/-, same being the just and reasonable compensation.

11. Mr. Ray, learned counsel for the Insurance Company contended that interest awarded by the Tribunal at the rate of 9%, is in the higher side and payed for awarding lower rate of interest. Therefore, instead of 9% interest, the Insurance Company is directed to pay the compensation with interest at the rate of 6% from the date of claim till the date of payment.

Accordingly first point is answered in favour of the claimants.

12. In so far as second point is concerned, fastening the liability upon the owner is not legally correct in view of sub-section (21) of section 2 of the M.V. Act upon which reliance is rightly placed by the learned counsel for the appellants. Sub-section (21) of section 2 of the M.V. Act reads as follows :
"(21)"light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7500 Kilograms."

13. The laden weight of the vehicle which is involved in the accident is at 5300 Kgs. and to substantiate his contention, learned counsel for the appellants has produced the xerox copy of form of renewal of permit dated 25/7/1997 granted by the Secretary, R.T.O., Ganjam, Chatrapur. In this view of the matter, the offending vehicle is a 'light motor vehicle' as per the above definition and for which driver had possessed a valid driving licence in respect of the 'light motor vehicle'. Therefore, it canot be said that any illegality has been committed in authorising the driver to drive the offending vehicle. Reliance placed upon section 3 of the M.V. Act and the decision of the apex Court in the case of Kusum Rai (supra), wherein referring to its earlier decisions and interpreting section 149(2) of the M.V. Act, the apex Court held that the liability under section 149(2) should be fastened upon the Insurance company. Of course in the said decision having regard to the facts of the case, right has been given to the Insurance Company to recover the amount of compensation payable to the claimants, from the owner. In the case on hand that opportunity need not be given to the Insurance Company for the reason that Annexure-A is a valid driving licence given to the driver to drive 'light motor vehicle' and the offending vehicle in question is a 'light motor vehicle' which is a finding recorded by me on the basis of the definition of the statutory provision under sub-section (21) of section 2 of the M.V. Act. Section 3 of the M.V. Act must be read together with sub-section (21) of section 2 of the M.V. Act. This aspect of the matter has not been taken into consideration by the Tribunal while awarding compensation

fastening the liability upon the owner. That is an erroneous approach by the Tribunal which is liable to be set aside and is accordingly set aside. Compensation awrded in this case, is fastened upon the Insurance Company having regard to the undisputed fact that the offending vehicle was insured with the insurer-respondent no.2. Therefore, the second point is answered in favour of the claimants and the owner.

14. For the reasons stated above, the appeal is allowed. The impugned judgment of the Tribunal is hereby modified by awarding compensation at ` 4,00,000/- with 6% interest from the date of claim till the date of payment. It is further directed that out of the total amount payable including interest, 40% shall be equally apportioned among the claimants and the remaining amount of 60% with interest shall be equally divided and deposited in the name of each of the claimants separately in shape of fixed deposit in any nationalised bank of choice of the claimants for a period of five years. The entire exercise shall be completed within four weeks from the date of receipt of this judgment. The interest that may be earned on the Fixed Deposits, as directed above, shall be permitted to be withdrawn by the claimants for being utilised for their family expenses. If the claimants require the amount ordered to be kept in fixed deposit or any portion thereof for the family necessity or any other developmental purpose of the family, they are at liberty to file application before the Tribunal which shall be considered and disposed of as expeditiously as possible.

The appeal is accordingly allowed on the aforesaid terms.

Appeal allowed.

2012 (II) ILR - CUT- 888

V. GOPALA GOWDA, CJ.

M.A NO. 236 OF 1994 (Dt.06.07.2012)

AHALYA BEHERA & ORS. ……..Appellants.

.Vrs.

INSPECTOR GENERAL OF POLICE, CTC. & ANR. …….Respondents

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

Annual income of the deceased – Deceased was aged about 42 years and earning Rs.50/- to 60/- per day – No document is produced in support of the annual income of the deceased – Tribunal should have taken into consideration the structural formula which is provided in the schedule to Section 163-A of the M.V. Act 1988 by way of amendment w.e.f. 14th November, 1994 – Held, the income of the deceased per month is taken at Rs.1800/- arriving at the annual income at Rs.21,600/- and after deduction of 1/3rd there from for personal expenses the contribution to the family would come to Rs.14,400/- P.A.

(Para 12)

Case laws Referred to:-

1.2011(I) TAC 213 : (Mst. Rani Khinchi & Ors.-V-Kaluram & Ors.)
2.96(2003)CLT 509 : (Divisional Manager, Orissa Forest Development Corporation Ltd. Bolangir-V- Shila Sharma & Anr.)
3.AIR 2009 SC 3104 : (Smt. Sarla Verma & Ors.-V-Dekhi Transport Corporation & Anr.)
4.AIR 1994 SC 1631 : (General Manager, Kerala Road Transport Corporation, Trivandrum-V- Mrs. Susama Thomas & Ors.)

For Appellants - M/s. P.C.Mohanty, A.K.Dalai, A.Mohanty, C.R.Patnaik & L.M. Nanda.
For Respondents - Mr. R.K.Mohapatra,Govt. Advocate.

V. GOPALA GOWDA, C.J. Aggrieved by the judgment dated 4.1.1994 passed by the Second Motor Accident Claims Tribunal (SD), Berhampur in M.A.C. No. 397 of 1991, dismissing the claim filed by the claimants, the present appeal has been filed by the claimants seeking for allowing the

appeal and awarding just and reasonable compensation, urging various facts and grounds.

2. In the impugned judgment, the undisputed facts have been adverted. Therefore, there is no need for this Court to repeat the same in this judgment.

On 15th October, 1991 at about 12 noon while the husband of the first claimant-deceased Niranjan Behera was coming from Karachuli to his village Biranchipur on a cycle in his left side, the Truck bearing registration number OAG 1830 being driven in a rash and negligent manner came from his behind and knocked him down on the road in between Karachuli and Baghua, as a result of which he sustained severe bodily injuries. Immediately he was admitted in the hospital and in spite of treatment, he succumbed to the injuries. Hence the claim petition was filed by his wife and children.

3. The respondents filed joint written statement denying the averments made in the claim petition and the liability to pay any compensation. Their stand was that one Bijaya Kumar Swain was returning from Karachuli driving the offending vehicle carrying policemen towards Buguda Police Station in a normal speed and blowing horn. At that time the deceased having failed to control the cycle due to the rough road, came in contact with the offending vehicle for which he fell down and sustained bodily injuries. Later on he succumbed to the said injuries in the hospital. On the basis of the report lodged by the ASI, Kishore Kumar Pradhan, Buguda P.S. Case No. 148 of 1991 was registered, the matter was investigated and final report was submitted to the effect that there was no culpable negligence on the part of the driver.

4. On behalf of the claimants, two witnesses were examined and three documents were marked and exhibited. Appellant no.1-widow of the deceased examined herself as P.W.1 along with one Nalinikanta Behera (an eye witness) as P.W.2. Ext.1 is the certified copy of the plain paper F.I.R., Ext.2 is the formal F.I.R., Exts.3 is the certified copy of post-mortem report. On behalf of the respondents, the driver of the offending vehicle was examined as the sole witness but no document was exhibited.

5. The Tribunal framed four issues and answered the same against the appellants. Neither the evidence of the witnesses examined on behalf of the appellants nor respondents, were given any weightage by the Tribunal. However, the case pleaded by the respondents was accepted. It was

observed that the accident occurred due to the negligence of the deceased who was riding on a cycle on the fateful day. Though the final report was submitted to the effect that there was no negligence on the part of the driver of the offending vehicle, the same was not protested by the claimants. Therefore, it was presumed that the claimants have nothing to say in that respect. The Tribubnal has observed that though P.W.2 was examined by the police with regard to the accident, the certified copy thereof was not filed. Had such statement been filed, the circumstances under which the final report was submitted, could have been judged.

6. Learned counsel for the apellants contended that the Tribunal has committed gross error in making a nil award. He further contended that while disbelieving the evidence of the driver, the sole witness examined on behalf of the respondents, the Tribunal should not have disbelived the claimants. That apart, disbelieving the evidence of P.W.2 who has categorically stated that he was examined by the police with regard to the accident, and relying on the police papers, the Tribunal dismissed the claim application which is not sustainable in the eye of law. It is contended that the deceased was a mason and he was getting engagements regularly.

7. In support of the case of the appellants, decisions in ***Mst. Rani Khinchi and others v. Kaluram and others***, 2011(1) TAC 213 and ***Divisional Manager, Orissa Forest Development Corporation Ltd. Bolangir v. Shila Sharma and another,*** 96(2003) CLT 509 were relied on.

8. No counter-afidavit is filed.

9. With reference to the aforesaid rival legal contentions, the following points arise for consideration of this Court.

(I) Whether the findings recorded by the Tribunal are erroneous ?

(ii) Whether the offending vehicle (truck) bearing registration number OAG 1830 was being driven in a rash and/or negligent manner and caused death of Niranjan Behera ?

(iii) Whether the petitioners are entitled to compensation and if so, what should be the quantum thereof ?

(iv) Whether the claim is entertainable as against all or any of the respondents ?
(v) To what relief ?

10. The first two points are required to be answered in favour of the claimants for the following reasons.

11. It is an undisputed fact that the accident took place on 15th October, 1991. The rejection of the claim petition is solely for the reason that the negligence on the part of the driver of the offending vehicle could not be proved but there was negligence on the part of the deceased. The finding of fact recorded by the Tribunal is contrary to the facts of the case and the legal evidence available on record. That apart, the finding recorded on the question of negligence believing the interested testimony of the driver (R.W.1) is contrary to the decisions (supra). Therefore, the rejection of the claim petition is vitiated in law. Since the first point is answered in favour of the claimants, just and reasonable compensation is to be awarded in favour of the claimants, the widow and the children of the deceased who were minor at the time of death of their deceased-father.

12. Learned counsel for the appellants contended that the deceased was a mason. He was aged about 42 years and earning Rs. 50/- to Rs.60/- per day. However, no document is produced in that regard. In absence of any documentary evidence in support of the annual income of the deceased, the Tribunal should have taken into considration the structural formula which is provided in the Schedule to section 163-A of the M.V. Act inserted by way of an amendment of the Motor Vehicles Act, 1988 with effect from 14th November, 1994. In the facts and circumstances of the case, the income of the deceased per month is taken at Rs. 1800/- arriving at the annual income at Rs. 21,600/-. If the annual income is taken at Rs. 21,600/-, after deduction of 1/3rd therefrom for personal expenses, the contribution to the family would come to Rs. 14,400/-. In view of the decision of the apex Court in the case of ***Smt. Sarla Verma and others v. Delhi Transport Corporation and another***, AIR 2009 SC 3104, multiplier of 15 is applied. Therefore, taking the annual income at Rs. 21,600/- and deducting 1/3rd therefrom towards own expenses of the deceased, the annual dependency would come to Rs.14,400/- and applying 15 multiplier, the loss of total dependency would come to Rs. 2,16,000/-. In view of the decision of the apex Court in the case of ***General Manager, Kerala Road Transport Corporation, Trivandrum v. Mrs. Susama Thomas and others***, AIR 1994 SC 1631, the claimants are entitled to Rs. 40,000/- towards love and affection, loss of estate and funeral exenses and I so direct. Therefore, the claimants are entitled to the total compensation of Rs. 2,56,000/-, same being the just and reasonable compensation.

13. For the reasons stated above, the impugned judgment is set aside, the appeal is allowed. The State is directed to pay the amount of

compensation of Rs. 2,56,000/- as awarded hereinabove, with 6% interest from the date of claim. It is further directed that out of the total amount of compensation including interest, 50% shall be equally apportioned among the three claimants and the remaining amount of 50% shall be equally divided and deposited in the name of each of the claimants separately in shape of fixed deposit in any nationalised bank of the choice of the claimants for a period of five years. The entire exercise shall be completed within four weeks from the date of receipt of this judgment. The interest that may be earned on the Fixed Deposits, as directed above, shall be permitted to be withdrawn by the claimants for being utilised for the welfare of the children and also for development of the family. They are also at liberty to withdraw the amount that is ordered to be deposited in the nationalised bank, if the same is required and established before the Tribunal by filing an application that the amount or a portion of the same is required for the family necessity or any other developmental purpose.

Appeal allowed

2012 (II) ILR - CUT- 893

V. GOPALA GOWDA, CJ.

ARBP NO. 51 OF 2010 (Dt.20.07.2012)

M/S. SWASTI TRADERS ……..Petitioner

.Vrs.

IVRCL INFRASTRUCTURES & PROJECTS LTD. & ANR. ……Opp.Parties

ARBITRATION & CONCILIATION ACT, 1996 (ACT NO.26 OF 1996) – Ss. 7(4) (c), 11(4) (a) & 11 (6).

Appointment of Arbitrator – Indian Oil Corporation entrusted construction work to Opp.Parties who in turn entrusted some work to the petitioner – Dispute arising between the parties – Petitioner issued letter Dt.15.09.2010 requesting Opp. Parties to appoint one of the persons named in the letter as Arbitrator – Letter received by the Opp.Parties – Reply sent by Opp.Parties returned unserved – There is an agreement in terms of Section 7 (4) (c) of the Act between the parties – Demand made in the demand notice Dt.15.09.2010 has not been acted upon or replied within 30 days as required U/s.11(4)(a) of the Act – Held, it would be just and proper for this Court to appoint an Arbitrator to adjudicate the dispute between the parties – The cost of arbitration shall be borne by the petitioner and if he succeeds, that will be levied upon the Opp.Parties. (Para 9)

Case laws Referred to:

1.AIR 1999 Karnataka 291 : (Smt. Elizabeth Mathew-V- Prof. S.K.Narayana & Anr.)
2.AIR 1983 Orissa 29 : (State of Orissa & Ors.-V-B. C. Pasayat & Anr.)
3.2008(2) Arb.LR 321 (Bombay) : (Jeweltouch (India) Pvt. Ltd.-V- Naheed Hafeez Quraishi (Patrawala) & Ors.)

For Petitioner - M/s. C.R.Lenka & N.R.Rout.
For Opp.Parties - M/s. Rakesh Sharma, S.R. Singhsamanta, P.R. Patnaik.

GOPALA GOWDA, C.J. This petition is filed by the petitioner seeking for appointment of an Arbitrator under section 11(6) of the Arbitration & Conciliation Act, 1996.

2. The relevant facts are stated for the purpose of deciding the rival legal contentions urged in this case with a view to find out as to whether the petitioner is entitled for appointment of an Arbitrator.

3. The undisputed fact is that the petitioner is a proprietorship firm carrying on business within the territorial jurisdiction of this Court. Indian Oil Corporation, a giant public sector company, entrusted the work of construction of quarters, executive hostel and guest house at their refinery project near Paradeep to the O.Ps. The opposite parties in turn, entrusted a part of the said work to the petitioner through Letter of Intent dated 12.1.2007 (Annexure-1). After completion of the work final bill for Rs. 66,06,822/- against which running payment for Rs. 37,26,261/- was made and balance amount of Rs. 28,80,561/- remained outstanding due to be paid by the respondents, was submitted.

4. It is the case of the petitioner that on account of breach of contract committed by the opposite parties, the petitioner suffered huge loss and he was forced to sign the final bill which was prepared on 13.11.2008. The same has not been paid till today. It is the further case of the petitioner that certain deductions by the opposite parties were made from the bills submitted by the petitioner without his knowledge and they stopped payment of his dues, illegally. The petitioner was asked to come over to Calcutta office of the opposite parties. Though the petitioner had gone to their office at Kolkata on three occasions, i.e., on 15.10.2009, 10.12.2009 and 29.12.2009, no settlement was reached between them. Therefore, the petitioner issued letter dated 15.9.2010 (Annexure-2) requesting to appoint one of the persons named in the letter as Arbitrator. The same was received by the opposite parties as per the A.Ds. (Annexure-3 series). It is further contended that in the absence of clause in the agreement, as per the provision under section 7(4)(c) of the Arbitration and Conciliation Act, 1996 the matter has to be referred to the Arbitrator. In support of such submission, he placed reliance upon the decisions in ***Smt. Elizabeth Mathew v. Prof. S.K. Narayana and another***, AIR 1999 Kranataka 291, ***State of Orissa and others v. B. C. Pasayat and another***, AIR 1983 Orissa 29 and ***Jeweltouch (India) Pvt. Ltd. v. Naheed Hafeez Quraishi (Patrawala) and others***, 2008(2) Arb.LR 321 (Bombay). He has submitted that he has not received the letter produced at Annexure-A to the counter-statement. Therefore, after expiry of 30 days of the receipt of notice (Annexure-2), non-acceptance of the request made by the petitioner for appointment of an arbitrator and there being a clause in the agreement between the parties to the effect that in case of any dispute of any claims

regarding execution of the work, that itself must be considered to be an agreement under section 7(4)(c) of the Act.

5. The opposite parties have filed counter-affidavit denying various petition averments. It is contended that vide letter dated 19.10.2010 (Annexure-A) the claim of the petitioner for appointment of an Arbitrator was denied stating that there is no arbitration clause in the agreement. The letter was sent by registered post with A/D which was returned unserved as the petitioner did not receive the same. Thereafter the said notice dated 19.10.2010 was sent through 'under certificate of posting' which was acknowledged by the petitioner. Since the opposite parties have denied the contention urged in the demand notice that there was agreement for arbitration of any dispute regarding execution of the work between the parties, vide Annexure-A sent within thirty days from the date of receipt of the notice (Annexure-2), therefore, the decisions upon which reliance is placed, are not applicable to the fact situation for the reason that in those cases there was a communication which was not denied in the demand notice and the contention that there was an agreement between the parties regarding arbitration of the dispute between the parties. Therefore, the petition is not maintainable. The petitioner has filed rejoinder affidavit on 16.3.2012 along with two documents, Annexures 4 & 5. As could be seen from Annexure-5 letter dated 26.4.2011, the opposite party-company has requested to confirm the balance of Rs. 4,12,278.52/- (Cr) due to be paid to the petitioner as on December 31, 2010 to their Statutory Auditors, Chaturvedi & Partners, Chartered Accountants. In that view of the matter, prayer is made for appointment of an Arbitrator to settle the dispute.

6. With reference to the above said rival legal contentions, the following points would arise for consideration of this Court.

(i) whether communication of appointment letter vide Annexure-2, has to be treated as an agreement between the parties regarding arbitration vide Annexure-A reply notice dated 19.10.2010 sent Under Certificate of Posting on 12.11.2011 with an endorsement that there was/is a valid service and the service is within thirty days as required under section 11(4)(a) of the Arbitration Act ?

(ii) whether the petitioner is entitled for appointment of an arbitrator ?

7. The aforesaid points are required to be answered in favour of the petitioner for the following reasons.

Point nos.1 & 2 are answered together as inter-related. It is an undisputed fact that there is an agreement between the parties to execute the civil work for construction of the quarters as mentioned in the case and the petitioner has executed the work and also submitted final bill. He has received Rs.37,26,261/-.As the final bill was not paid, by letter dated 15.9.2010 the petitioner prayed for appointment of Arbitrator. He has specifically stated in the demand notice that under section 7(4)(c) of the Act, the dispute is to be referred to the arbitrator under the Act suggesting the names of three persons which includes names of senior advocate, retired judicial officer of this Court. The same has been acknowledged by the opposite party.

8. As stated in the counter-affidavit, the letter dated 19.10.2010 was sent to the petitioner by the opposite parties by registered post with acknowledgement due. As could be seen from the xerox copy produced today along with memo, the said letter addressed to the petitioner which is given by them in reply vide Annexure-A, returned with an endorsement "Not known. So returned to sender". The correctness of the endorsement need not be examined in this case. The fact remains that the reply has not been served upon the petitioner. In that view of the matter, the letter sent by them in the same address through under certificate of posting dated 12.11.2000, could not be said to have been served. Apart from the legal position, reply notice sent by certificate of posting cannot be construed as a valid service.

9. It is a fact that the reply sent by registered post with A/D returned unserved. In that view of the matter, it cannot be said that reply to the petitioner's letter dated 18.9.2010 was sent within thirty days. After expiry of thirty days, the petitioner is justified in approaching this Court for appointment of an arbitrator under section 11(6) of the Act on the ground that there is an agreement in terms of section 7(4)(c) of the Act between the parties, that has not been replied to the notice demanding appointment of an Arbitrator within thirty days which is an undisputed fact. So the demand made in the demand notice Annexure-2 dated 15.9.2010 has not been acted upon or replied within 30 days. Therefore, the said point is required to be answered in favour of the petitioner. Learned counsel for the petitioner has placed reliance upon the aforesaid decisions and the provision under section 7(4)(c) of the Act, which fact is not disputed. Therefore, it would be just and proper for this Court to appoint an Arbitrator to adjudicate the dispute between the parties. But having regard to the facts and circumstances of the case, the cost of arbitration shall be borne by the petitioner. If he succeeds, that will be levied upon the opposite party. Accordingly, the petition is allowed and Mr. S.F. Ahmed, former District

Judge is appointed as the Arbitrator to decide the dispute between the parties. The arbitrator so appointed shall enter upon the reference within a period of six weeks from the date of communication of the order. The fee and other charges of the arbitrator will be fixed by the arbitrator himself. After entering upon the reference, the arbitrator shall decide the dispute between the parties within a period of six months.

Registry is directed to communicate the order to the arbitrator appointed immediately.

Application allowed.

2012 (II) ILR - CUT- 898

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

W.P.(C) NO. 29714 OF 2011 (Dt.18.07.2012)

SANOJ PODH ……..Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp.Parties

SERVICE LAW – Government notification Dt.16.06.1980 – In view of the notification where the Government servant appears in the examinations for appointment to a new post in the same or other department through proper channel and on selection if he/she is asked by the new employer to resign from the previous post for administrative reasons the benefit of past service can be given to such employee.

In this case the petitioner has applied through proper channel and on selection and appointment he prayed the previous employer to relieve him from the post in order to join the new assignment in the judgeship of Sambalpur – Although he has not been asked by the new employer to resign so as to join the new post the representation submitted by the petitioner to his earlier employer to relieve him from duties and to permit him to join in his new post can be treated as formal resignation for administrative reasons – Held, the Govt. notification is applicable to the case of the petitioner to claim his entitlement of protection of pay as well as past service rendered in the judgeship of Ganjam-Berhampur – Impugned orders are quashed – Direction issued to O.P.2 & 3 to protect the pay of the petitioner and allow him the benefit of past service rendered in the judgeship of Ganjam-Berhampur but the petitioner can not claim seniority.

(Para 8,9,10)

For Petitioner - M/s. Dr. B.R.Sarangi & S.N. Jena.
For Opp.Parties - Mr. R.K.Mohapatra, Govt. Advocate.

V. GOPALA GOWDA, C.J. This writ petition has been filed by the petitioner, who is at present working as a Junior Stenographer in the judgeship of Sambalpur, questioning the correctness of the rejection of his representation dated 29.4.2010 by the O.P. No.2 communicated to the petitioner by the O.P. No.3 vide order dated 1.7.2011 (Annexure-14) with

regard to grant of protection of his pay as well as past service rendered in his previous place of posting i.e. in the judgeship of Ganjam-Berhampur.

It is further prayed to quash the order dated 1.7.2011 under Annexure-14 and to issue a writ of mandamus directing the opposite party No.2 for protection of his pay as well as past service for his future benefits.

2. The case of the petitioner in nutshell is that pursuant to an advertisement issued in the year 2008 by the District & Sessions Judge, Ganjam-Gajapati-Berhampur for filling up of the post of Junior Stenographer he applied for the said post, appeared in the examination along with other candidates and as he came out successful in the process of selection, he was appointed temporarily as Junior Stenographer in the pay band of Rs.5200-20,200 (Grade Pay Rs.2400/-) per month with usual D.A. and other allowances as admissible from time to time and posted as such in the court of Civil Judge (Jr. Divn.), Aska vide order of the District Judge, Ganjam dated 5/6th January, 2009 and accordingly he joined in the said post. While the petitioner was continuing as such in the judgeship of Ganjam-Berhampur, an advertisement was issued by the District & Sessions Judge, Sambalpur in the month of November, 2009 for recruitment to the post of Junior Stenographer. In the said advertisement it was mentioned that the candidates who are in Govt. employment are required to apply through proper channel. Accordingly, petitioner offered his candidature through proper channel and his application was routed through the District Judge, Ganjam and sent to the District Judge, Sambalpur for consideration for appointment to the post of Junior Stenographer. Thereafter, the petitioner was called for along with other candidates to appear in the examination which was scheduled to be held on 7.3.2010. Petitioner appeared in the recruitment examination and on being duly selected for the post of Junior Stenographer, the District Judge, Sambalpur issued appointment order dated 23.03.2010 in favour of the petitioner and he was directed to join in the judgeship of Sambalpur on 5.4.2010 positively. In compliance to the order of appointment, petitioner prayed to the District Judge, Ganjam to relieve him from his duties to enable him to join in the judgeship of Sambalpur. Accordingly, petitioner was relieved from his duties vide office order dated 3.4.2010 from the judgeship of Ganjam-Berhampur and the same information was also communicated to the District Judge, Sambalpur. As per the appointment order petitioner joined in the judgeship of Sambalpur on 5.4.2010 as a Junior Stenographer. Even though the petitioner rendered service in the Judgeship of Ganjam for more than one year, neither credit of his past service nor pay protection has been granted in the judgeship of Samblapur. Therefore, he made a representation dated 29.4.2010 to the

Judge in-charge of Accounts, Sambalpur judgeship seeking protection of pay and past service which he rendered in the Ganjam-Berhampur judgeship. However, the same has been rejected by the opposite party No.2 vide impugned order under Annexure-14. Hence this writ petition.

3. Dr. Sarangi, learned counsel for the petitioner submits that the petitioner served more than a year in the judgeship of Ganjam, Berhampur and got one increment in his scale of pay. As per the requirement he has submitted his application for the post of Jr. Stenographer in the judgeship of Sambalpur through proper channel and after issuance of appointment order by the District Judge, Sambalpur he has been duly relieved from the judgeship of Ganjam and joined in the judgeship of Samblapur. Further, the District Judge, Ganjam has also sent his Service Book, LPC indicating the last pay drawn at his old station and GIS information to the District Judge, Sambalpur. However, the O.P. Nos. 2 and 3 without applying their mind in proper perspective rejected the representation of the petitioner without granting the benefit as prayed, which is violative of the principles of service jurisprudence. It is also submitted that petitioner may not claim or get the seniority, but his protection of pay and service rendered in the judgeship of Ganjam cannot be taken away for his future service benefits. Therefore, it is prayed that the petitioner may be granted the benefits as prayed for in this writ petition.

4. On the other hand Mr. Mohapatra, learned Government Advocate, placing reliance upon the counter filed by the opposite parties, particularly the averments made at paragraph 7 of the counter, submits that the representation of the petitioner has been rejected by the District Judge, Samblapur on proper application of mind and as per the Government of Odisha, Finance Department Office Memorandum No. 31504/F dated 16.06.1980. It is submitted that if the petitioner could have resigned from his earlier post in the judgeship of Ganjam and joined in the judgeship of Sambalpur, his pay could have been protected. But the petitioner has been relieved from the judgeship of Ganjam and has joined in the judgeship of Samblapur, therefore he cannot be granted the relief as prayed for. Hence, learned Govt. Advocate prayed for dismissal of the writ petition.

5. Dr. Sarangi, learned counsel for the petitioner traversing the said contention submits that the O.P. Nos. 2 and 3 have not gone through the said circular dated 16.6.1980 carefully and wrongly interpreting the same the representation of the petitioner has been rejected. It is submitted that the submission of the opposite parties to the effect that on the basis of the said circular the petitioner is not entitled the benefit is not at all correct,

rather on the basis of the said circular petitioner is entitled to get the benefit for the reason that by careful reading of the said circular it speaks otherwise.

6. With reference to the aforesaid rival legal contentions urged on behalf of the parties, the following points would arise for consideration of this Court.

(i) Whether the petitioner is entitled for the protection of pay and past services for the period of service rendered by him in the judgeship of Ganjam-Berhampur ?

(ii) What order ?

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

It is not disputed by the opposite parties that petitioner has rendered service in the judgeship of Ganjam-Berhampur as a Junior Stenographer from 19.01.2009 to 03.04.2010. As per the terms and conditions in the advertisement issued by the O.P. No.2 for the post of Jr. Stenographer, he applied through proper channel and after appearing in the recruitment test, being found suitable, he got selected for the post of Jr. Stenographer in the judgeship of Sambalpur and appointment order dated 23.3.2010 was issued by the O.P. No.2 in his favour under Annexure-6. As the petitioner was serving under the establishment of District Judge, Ganjam, he requested the competent authority to relieve him from his duties. Accordingly, the competent authority relieved him from his duties enabling him to join in the judgeship of Sambalpur and thereafter he has joined in his new place of posting. The stand taken on behalf of the opposite parties, that as the petitioner has not submitted his resignation and he has only been relieved from his duty his previous service rendered cannot be taken into consideration and protection of pay cannot be granted, is wholly untenable in law. The opposite parties-authorities have not properly taken into consideration the intent of the aforesaid circular of the Government dated 16.6.1980 and have rejected the representation of the petitioner wrongly interpreting the same. The Notification No. 31504/F dated 16.6.1980 reads thus :

> "The question whether the benefit of past service for the purpose of fixation of pay can be given to Government servants who resign their posts before taking up appointments in new posts in the same or another Department/ Organisation has been under the consideration of the State Government. Normally the benefit of past

service is not allowed in the cases where service has been terminated by resignation, removal or dismissal. It has, however, been noticed that in several cases employees are called upon to resign their posts before taking up appointments in new posts offered to them as a result of examinations conducted by Service Commissions, Boards etc. Representations and claims are made by such employees for protection of their past service and pay in the new posts. In consideration of the existing employment situation, Government are of the view that denial of protection in such cases would bring avoidable financial hardship to the employees. It has, therefore, been decided that in the cases where Government servants take examinations conducted by Service Commissions, Boards, etc. for appointment to new posts or where they apply for posts in the same or other Departments through proper channel and on selection are asked to resign posts for administrative reasons the benefits of service may, if not otherwise inadmissible under the Rules, be given to them for fixation of pay in the new post treating the resignation as a technical formality."

8. By careful reading of aforesaid Notification of the Government, it is clear that normally the benefit of past service was not allowed in the cases where the employee's service had been terminated on his resignation, removal or dismissal to join a new post in other establishment. However, by that Notification, Government has decided that where the Government servant appears in the examinations for appointment to a new post, applying for the said new post, in the same or other department through proper channel and on selection if he/she is asked by the new employer to resign from the previous post for administrative reasons, the benefit of past service can be given to such employee.

9. In the instant case the petitioner has applied through proper channel and on selection and appointment he prayed the previous employer to relieve him from the post in order to join the new assignment in the judgeship of Sambalpur. He has not been asked by the new employer to resign so as to join the new post, therefore, he has been rightly relieved from his duties in the judgeship of Ganjam-Berhampur to join in the judgeship of Sambalpur. By no stretch of imagination can it be said that person who has applied through proper channel and on being selected joined the new posts after duly been relieved from the previous employer cannot be given credit of past service and pay protection and the employee who has resigned from the earlier post only can be given the protection of service/pay. If such an interpretation is given, as has been done by the

O.P. No. 2, the aforesaid Notification would become futile and such interpretation is wholly misconceived and untenable in the eye of law. Further, it would not be out of place to mention that the representation submitted by the petitioner to his earlier employer to relieve him from duties and to permit him to join in his new post can also be treated as formal resignation for administrative reasons, which would also be in conformity with the later part of the said Notification. Therefore, the aforesaid Notification of the Government is very much applicable to the case of the petitioner to claim his entitlement of protection of pay as well as past service rendered in the judgeship of Ganjam-Berhampur.

10. For the reasons stated supra, the rejection of the representation of the petitioner dated 29.4.2010 by the opposite party No. 2 is bad in law. Hence the impugned rejection order under Annexure-14 is liable to be quashed and is accordingly quashed. Opposite party Nos. 2 and 3 are directed to protect the pay of the petitioner and allow him the benefit of past service rendered in the judgeship of Ganjam-Berhampur. However, petitioner cannot claim the seniority. As the petitioner has joined in the judgeship of Sambalpur on 5.4.2010 and in the meanwhile more than two years have elapsed, aforesaid direction be complied with by the O.P. Nos. 2 and 3 within a period of four weeks from the date of receipt of a copy of this order.The writ petition is accordingly allowed. Rule is issued.

Writ petition allowed.

2012 (II) ILR - CUT- 904

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

W.P. (CRL.) NO. 519 OF 2011 (Dt.18.05.2012)

GANGADHAR PRADHAN ……..Petitioner

.*Vrs.*

RASHMIBALA PRADHAN ……Opp.Parties

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 (ACT NO.43 OF 2005) – S. 12.

Application U/s.12 of the Act - Maintainability – Held, allegation that the Act applies only prospectively i.e. from the date it came into force i.e. on 26.10.2006 is wrong – Since the Husband of O.P. has a right in the joint family property after his death the O.P. acquired such right – Lower Courts have rightly granted monthly maintenance to the O.P. till she gets a share in the petitioner's property – Application U/s.12 of the Act is maintainable. (Para 18,20,22)

Case law Referred to:-

(2008)4 SCC 649 : (Vimlaben Ajitbhai Patel-V-Vatslaben Ashokbhai Patel).

For Petitioner - M/s. Girija Shankar Mohanty, S.P.Swain & S.K.Nayak.

For Opp.Party - None

B.N.MAHAPATRA, J. This Writ Petition has been filed challenging correctness of the order dated 16.04.2011 passed by the learned Additional Sessions Judge, Nayagarh in Criminal Appeal No.44 of 2010 whereby the order dated 07.09.2010 passed by the learned S.D.J.M., Nayagarh in CMC No. 116 of 2007 has been modified with a direction to the appellant-petitioner to pay a sum of Rs. 1000/- towards monthly maintenance to the respondent-opposite party keeping all other conditions of the order unaltered.

2. Bereft of unnecessary details, the facts and circumstances giving rise to the present writ petition are as follows:

Opposite party-Rashmibala Pradhan had filed an application bearing CMC No.116 of 2007 under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, "Act, 2005") before the learned

S.D.J.M., Nayagarh, who vide order dated 30.01.2008 directed the petitioner to pay monthly maintenance of Rs.300/- to opposite party until she is given her legitimate share in the joint family properties of the petitioner. Being aggrieved, the petitioner filed Criminal Appeal No.20 of 2008 before the learned Additional Sessions Judge, Nayagarh, who set aside the order of the learned S.D.J.M., Nayagarh with a direction to dispose of the case afresh after giving opportunity to both parties to adduce evidence. After hearing the parties and taking into consideration the evidence adduced by them, the learned S.D.J.M., Nayagarh vide order dated 07.09.2010 enhanced the monthly maintenance to Rs.1,500/- in favour of opposite party until there is partition among the co-shares providing definite share to the opposite party in the properties of the petitioner. Being aggrieved by the said order of the learned S.D.J.M., Nayagarh, the petitioner again filed an appeal bearing Crl. Appeal No.44 of 2010 before the learned Additional Sessions Judge, Nayagarh, who after hearing both parties directed the petitioner vide order dated 16.04.2011 to pay a sum of Rs.1000/- as monthly maintenance to the opposite party keeping all other conditions imposed by the learned S.D.J.M., Nayagarh unaltered. Hence, the present writ petition.

3. Mr. G.S. Mohanty, learned counsel appearing on behalf of the petitioner submitted that the petitioner is the father-in-law of opposite party. The husband of opposite party died on 11.07.2006 due to Brain Fever and Malaria. Opposite party lodged an F.I.R. before the I.I.C., Nayagarh Police Station on 28.09.2006 on the basis of which P.S. Case No. 259 of 2006 corresponding to G.R. Case No. 463 of 2006 under Sections 498-A/506/34 I.P.C read with Section 4 of the D.P. Act was registered against the petitioner and other in-laws. While the said case was pending before the learned S.D.J.M., Nayagarh, the opposite party filed a petition under Section 12 of the Act, 2005. It was submitted that the petitioner is an old man, who does not have any source of income other than cultivation of his ancestral lands. The annual income from the agricultural land is insufficient to maintain his family. Therefore, the direction given by the learned Additional Sessions Judge, Nayagarh to pay monthly maintenance of Rs.1000/- is not justified and legal. The learned Court below has made an error by awarding maintenance to opposite party even though the opposite party had not made any such prayer in her petition bearing Crl. Misc. Case No.116 of 2007. The application under the provisions of Section 12 of the Act, 2005 is not maintain able against the petitioner and his son as the alleged domestic violence took place prior to 26.10.2006, i.e. on the date on which the Act, 2005 came into force.

Despite notice none appeared for opposite party.

4. In the present case, the following questions fall for consideration by this Court:

(i) Whether the application of opposite party under Section 12 of the Act, 2005 is maintainable before the S.D.J.M., Nayagarh as the allegation against the petitioner and his son was made prior to 26.10.2006 on which date the Act, 2005 came into force and the said Act has not been given retrospective effect ?

(ii) Whether learned Additional Sessions Judge is justified to direct the petitioner to pay monthly maintenance of Rs.1,000/- to opposite party ?

5. Since both the questions are interlinked, they are dealt with together.

6. The Act, 2005 has been enacted to provide for more effective protection of the rights of women guaranteed under the Constitution, who are victims of violence of any kind occurring within the family and for matter connected therewith or incidental thereto.

It is very much necessary to know the statements of object and reasons for enactment of the Act, 2005.

"STATEMENT OF OBJECT AND REASONS

Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (C E D A W) in it's General Recommendation No. XII (1989) has recommended that State Parties should act to protect women against violence of any kind especially that occurring within the family.

2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498A of IPC. The Civil Law does not however address this phenomenon in its entirety.

3. It, is therefore, proposed to enact a law keeping in view of the Rights guaranteed under Articles 14, 15 and 21 of the Constitution to provide for a remedy under the Civil Law which is intended to protect

the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

4. The Bill, *inter alia,* seeks to provide for the following:-

(i) It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any relative of the husband or the male partner, it does not enable any family relative of the husband or the male partner to file a complaint against the wife or the female partner.

(ii) It defines the expression "domestic violence" to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

(iii) It provides for the rights of women to secure housing. It also provides for the right of a women to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

(iv) It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.

(v) It provides for appointment of Protection Officers and registration of non-governmental organizations as service providers for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe, shelter, etc.

5. The Bill seeks to achieve the above objects. The notes on clauses explain the various provisions contained in the Bill."

7. Now, the question arises as to whether the petition filed under Section 12 of the Act, 2005 is maintainable in respect of cause of action arose prior to the date, i.e., 26.10.2006, when the Act, 2005 came into force. It was argued that G.R. Case No. 463/2006 as well as Criminal Case bearing No. CMC 116 of 2007 arose out of the same cause of action. The opposite party had filed FIR before the IIC, Nayagarh P.S. on 28.09.2006 vide PS Case No. 259/2006 corresponding to G.R. Case No.463/2006 under Sections 498(A)/ 506/34 IPC read with Section 4 of the D.P. Act against the petitioner and other in-laws. The said cases are pending before the learned S.D.J.M., Nayagarh.

Thus, according to the petitioner, since the Act, 2005 came into force with effect from 26.10.2006, the domestic violence, if any occurred prior to that date the opposite party is not entitled to get any relief under the Act, 2005 as the Act, 2005 has no retrospective operation. The Act should be applied prospectively, i.e., from the date of its coming into force on 26th October, 2006. Act of domestic violence prior to 26.10.2006 shall be governed by the provisions of the Indian Penal Code.

8. The term "domestic violence" as defined under Section 3 of the Act, 2005 is extracted below:

> "**3. Definition of domestic violence**.-For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it –
>
> (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or abuse and economic abuse; or
>
> (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
>
> (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.-For the purposes of this section,-
(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse" includes-

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) "economic abuse" includes-

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.-For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration."

9. "Aggrieved person" as defined under Section 2(a) means any woman who is, or has been, in domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

10. The definition of "Respondent" as contained in Section 2(q) is that any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under the Act, provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

11. Under the Scheme of the Statute if an aggrieved person is subjected to domestic violence she can present an application to the Magistrate seeking one or more reliefs under the Act. Besides, aggrieved person, a Protection Officer or any other person on behalf of the aggrieved person can also present an application to the Magistrate seeking one or more reliefs under the Act.

12 Sub-section (2) of Section 12 provides a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent.

13. Section 20 of the Act, 2005 provides (i) while disposing of an application under sub-section (1) of Section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to.- (a) the loss of earnings; (b) the medical expenses; (c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and (d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force. Monetary relief granted under this section shall be adequate, fair and

reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

14. Section 22 deals with Compensation orders. It provides, in addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress caused by the acts of domestic violence committed by that respondent.

15. Section 23 provides power to pass interim and ex parte orders.

16. Section 31 of Act, 2005 provides for penalty for breach of protection order by respondent. A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

17. As it appears from the order dated 30.01.2008, passed in CMC 116/2007 the opposite party in her petition under Section 12 of the Act, 2005 sought for following reliefs:-

(a) direction to the respondent to give return of "Streedhan" properties, viz, a sum of rs.45,000/- given as dowry at the time of her marriage, gold ornaments worth Rs.65,000/- belonging to her,

(b) an order of restraint prohibiting the respondents from alienating the properties, more fully described in Schedule 'A' of the petition; and

(c) a direction to give possession of the said properties to her.

18. Relief claimed in the petition filed under Section 12 of the Act 2005 is civil in nature. Till date of filing of the petition under Section 12, the petitioner (opp. party herein) was not granted any of the reliefs sought for in her petition under Section 12 of the Act, 2005. Therefore, it is a continuous act of deprivation of petitioner's right. Admittedly, she was not given her share in joint family properties by the present petitioner. Thus, it is a continuous cause of action for which the petition filed under Section 12 of Act, 2005 claiming the above reliefs is maintainable and the prohibition of Act, 2005 are squarely applicable to the present case.

19. As it appears, the criminal cases referred to above have been filed under the Indian Penal Code and the Dowry Prevention Act. Those cases

have nothing to do with the petition filed under Section 12(1) of the Act, 2005.

20. In view of the above, the plea of the petitioner that the petition filed by the opposite party under Section 12 of the Act, 2005 is not maintainable on the ground that the Act, 2005 applies only prospectively, i.e., from the date of coming into force on 26th October, 2006 is totally misconceived and not sustainable in law.

21. Now, the question arises as to whether the courts below are justified to grant monthly maintenance till the present opposite party gets her share in joint family properties.

While dealing with the right of maintenance under the Act, 2005, the Hon'ble Supreme Court in the case of ***Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel, (2008) 4 SCC 649*****,** held that the Act, 2005 provides for a higher right in favour of the wife, who not only acquires a right to be maintained but also thereunder acquires a right of residence which is a higher right. However, the said right as per the legislation extends only to joint properties in which the husband has a share.

22. In the instant case, admittedly, the husband has a right in the joint family properties. After death of her husband on 11.07.2006 due to Brain Malaria, opposite party has acquired such right. Since she has not been given her share in the joint family properties, the lower courts have rightly granted monthly maintenance to opposite party till she gets a share in the petitioner's properties.

23. As the petitioner has not given to opposite party her share in the joint family properties in question, the opposite party is entitled to get maintenance till she gets her share in the said properties. In absence of getting a share in the ancestral joint family properties, she is deprived of her economic and financial resources to which she is legally entitled to get.

24. In view of the definition of 'domestic violence' given in Section 3 of the Act, 2005 and Explanation (iv) explaining the economic abuse, the Courts below are fully justified to grant monthly maintenance to the respondent (opposite party herein) till she gets her share in the ancestral joint family properties. Considering the present standard of living, award of maintenance @ Rs.1000/- (rupees one thousand) per month by the Additional Sessions Judge, Nayagarh cannot be said to be on the higher side.

25. In the facts situation, we do not find any infirmity or illegality in the order dated 16.4.2011 passed by the learned Additional Sessions Judge, Nayagarh warranting interference of this Court. Accordingly, the writ petition is dismissed.

Writ petition dismissed.

2012 (II) ILR - CUT- 914

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

W.P.(C) NO. 13120 OF 2009 (Dt.31.07.2012)

SHANTILATA PATTANAIK ……..Petitioner

.Vrs.

M/S. SWAMINATHAN RESEARCH FOUNDATION & ANR. ……..Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART.14, 21.

Sexual harassment at work place – Petitioner complained against her male colleague – Complaint committee found his conduct as unbecoming but revoked his order of suspension and allowed him to work in the same place where as petitioner was transferred to Kerala – Subsequently petitioner's request to extend her leave was rejected and she was removed from service – Writ petition filed – Held, action of O.P.2 is malafide – Order of transfer and order of termination quashed – O.P.2 directed to re-instate the petitioner with full arrear salary.

(Para 16,17,18)

Case law Relied on:-

(2005)8 SCC 314 : (Srikantha S.M. -V-Bharath Earth Movers Ltd.).

Case laws Referred to:-

1.AIR 1997 SC 3011 : (Vishaka-V-State of Rajasthan)
2.AIR 1999 SC 625 : (Apparel Export Promotion Council-V-A.K.Chopra)
3.AIR 1999 SC 753 : (U.P. State Co-operative Land Development Bank Ltd.-V- Chandra Bhan Dubey & Ors.).

For Petitioner - Mrs. Sujata Jena.
For Opp.Parties- Mr. L.Samantray.

B.N.MAHAPATRA,J. In this writ petition the petitioner has prayed for quashing of the order of termination dated 12.08.2008 (Annexure-8) issued by opposite party No.2-Executive Director, M/s. Swaminathan Research Institute, Chennai and for a direction to the opposite parties to pay all her service benefits.

2. Petitioner's case in a nut shell is that she joined the office of opposite party No.1-M/s Swaminathan Research Foundation, represented by its

Chairman, AT: 3rd Cross Street, Paramani Institutional Area, Chennai (for short, 'the Foundation') on 01.12.2005 as a Genetic Literacy Programme Facilitator in its Jeypore Office, Odisha. Opposite party No.1 being a Research Foundation is an autonomous non-profiting trust registered in the year 1988 at Delhi. Its aim and objective is to organize research and training to promote a job-led economic growth strategy in rural area. The Foundation is recognized as a Post Graduate Research Centre by the University of Madras, Anna University, Chennai and the Osmania University, Hyderabad since 1990. It is getting grant from Government of India and State of Tamil Nadu including many other international funding agencies. Being satisfied with the performance of the petitioner, she was reappointed as a Research Fellow and posted as a Scientist in the project, namely, Quantitative Assessment and Mapping of Plant Resources of Eastern Ghats. While working as such on 12.12.2007, when she went to the library for returning the books issued to her, one Mr.Nihar Ranjan Parida, Technical Assistant of Project Medicinal Plants closed the door and sexually molested her. She was not expecting such behaviour from him and was unable to decide what to do. However, she was able to escape from his clutches and ran outside the room. Thereafter, with a heavy heart she returned to her house and decided to complain the matter to opposite Party No.2-Executive Director of opposite party No.1-Foundation and accordingly sent the complaint through email dated 13.012.2007.

3. On 14.12.2007, through email she got the reply from the opposite party regarding receipt of her complaint and in the said letter she was requested to go to Chennai for about 10 days so as to enable him to know about the matter in detail and to finalize the procedure for further action. Petitioner had also received a letter from the Executive Director asking her to come over to Chennai immediately on duty; she was also assured in the said letter that her complaint will be dealt with promptly and seriously. As directed by opposite party No.2, the petitioner went to Chennai on 16.12.2007. She was not allowed to come to Jeypore and directed to stay there. A complaint committee was constituted and the proceeding was conducted on 07.02.2008 at Chennai. In course of hearing of the proceeding, she was informed by the Committee that the person against whom she had complained had also made a complaint against her. But the petitioner had neither been provided with a copy of the complaint nor she was allowed to see the same. The petitioner also requested the Complaint Committee for permission to take assistance of a lawyer to conduct the proceeding which was refused. In course of the proceeding she was harassed by the Committee members by putting her humiliating questions. Therefore, she wrote a letter dated 09.02.2008 addressing to the Executive Director of

opposite party No.1 Institution stating therein about the manner in which the proceeding was conducted and the way she was humiliated. Finally, the Committee disposed of the complaint on 14.05.2008 by giving a finding that the conduct of Mr.Nihar Ranjan Parida was unbecoming but the complaint made against Saujundra Swain was not found to be proved.

4. Before passing of the final order on 14.05.2008, the petitioner was transferred on 05.04.2008 from Biju Pattanaik Medical Plant Garden, Jeypore to Community Agro-Bio-Diversity Centre, Kalpata, Kerala which was communicated to the petitioner vide letter dated 07.04.2008. On receipt of the said letter dated 07.04.2008, the petitioner requested the opposite parties to grant leave from 05.04.2008 to 09.04.2008 stating therein about her personal problem for which she was not in a position to join in Kerala immediately. Further case of the petitioner is that accused persons, namely, Sri Swain and Sri Parida, who were suspended soon after lodging of the complaint, were reinstated in service with all financial benefits at Jeypore and the petitioner was transferred from Jeypore to Kerala. In order to overcome the trauma and frustration, she requested to extend her leave so as to enable her to join at Kerala. But vide letter dated 14.05.2008 she was intimated about rejection of her request for further extension of leave period and was also warned that unless she joined within seven days, disciplinary action for termination of her from service will be initiated. Thereafter, vide letter dated 12.08.2008 her service was terminated. After this incident, her father had developed heart problem and her brothers and sisters have also been harassed in the locality being instigated by the two accused persons who are involved in the case. She had complained this matter in the local Police Station, Jeypore on 02.06.2008 requesting the Police for protection of their life and property.

5. On receipt of the order of termination, she sent several letters to the opposite party to pay her legitimate dues but there was no response. On 09.01.2009, she sent a notice through her Advocate to the opposite party stating therein to pay her service benefits amounting to Rs.1,87,600/- and since the same did not yield any result, she has filed this writ petition.

6. Mrs. Sujata Jena submitted that after filing of the complaint, she was not only harassed but also humiliated in the office as well as in the locality where she is staying at the instance of accused persons who also belonged to the same locality. Despite the specific guidelines formulated in the case of ***Vishaka Vs. State of Rajasthan***, reported in AIR 1997 SC 3011 and subsequent decision in ***Apparel Export Promotion Council v. A.K. Chopra***, AIR 1999 SC 625, opposite parties had not constituted proper

committee to deal with the complaint of sexual harassment to women at work place till 2008. After filing of the complaint her case was conducted at Chennai in stead of Jeypore where the occurrence took place. The petitioner also has been physically and mentally harassed by the opposite parties in transferring her from Koraput to Kerala. The opposite parties instead of solving her problem further harassed the petitioner, who is an unmarried girl belonging to low economic class of the society. Thus, the petitioner had been deprived of her right to work and earn her livelihood with dignity guaranteed under Article 21 of the Constitution of India. The action of opposite parties not allowing the petitioner to take help of the lawyer and terminating her service is not legal and valid.

7. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *U.P. State Co-operative Land Development Bank Ltd. v. Chandra Bhan Dubey and others*, reported in AIR 1999 SC 753 Mrs. Jena submitted that the opposite parties are amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India.

8. Mr. L.Samantray, learned counsel appearing for the opposite party Nos.1 and 2, submitted that the opposite party Foundation Trust was founded on 17.05.1988 and the Trust Deed was executed at New Delhi. As per clause-11(v) of the aims and objectives of the Trust, the power vests with it to appoint and at its direction remove or suspend officers, clerks, servants and then employees for the purpose of carrying out the objects of the Trust and from time to time determine their powers and duties and to fix their salary and other emoluments. As per the appointment letter dated 12.06.2007, the petitioner and one Kartik Charan Lenka were appointed as Scientist as per the selection made by the Selection Committee meeting held on 31.05.2007. In the said appointment letter it was stipulated that the appointment shall be for a period of one year and will be countermanded with the project. They shall be paid a consolidated amount of Rs.8,000/- per month and will not be eligible for any other monetary benefits. As per the terms of appointment, both the petitioner and Kartik Charan Lenka, who belonged to the same cadre were paid Rs.8,000/- per month as would be clear from copies of pay slip for the months of September, 2007 and October, 2007. As per the Notification No.2010/IFD/Dir(F)/Misc./12 dated 09.07.2010, the Government of India in the Ministry of Science and Technology issued revised guidelines for emoluments and other service conditions for research personnel employed in R and D programmes of the Central Government Department/agencies. As per the said Notification one has to possess NET or GATE qualification to claim the revised emoluments. In the present case, the petitioner has only M.Sc. qualification. It was further

submitted that as per the advertisements made by different Government Organizations and Universities for research fellows the qualification of NET or GATE is mandatory for getting the revised emoluments. Therefore, the petitioner is not entitled to get the revised scale of pay as claimed by her. Mr.Samantray also submitted for dismissal of the writ petition.

9. On the rival contentions raised by the parties, the following questions fall for consideration by this Court.

(i) Whether the order dated 18.08.2008 terminating service of the petitioner is legal and valid?

(ii) Whether the petitioner is entitled to get the revised scale of pay, as claimed by her?

10. Question No.1 is with regard to the legality of the termination order 18.08.2008. Undisputedly, the petitioner while working in the organization of the opposite parties complained before opposite party No.2 through e-mail on 13.12.2007 stating therein that on 12.12.2007 when she went to the library to return the books issued to her, one Mr.Nihar Ranjan Parida, Technical Assistant of Project Medicinal Plants closed the door and sexually molested her. She was not expecting such behaviour from him. However, she was able to escape from his clutches and ran outside the room. In the said letter she requested to take necessary action in the matter. On receiving such complaint vide letter dated 24.12.2007 the petitioner was asked to go to Chennai for ten days for a personal hearing and finalization of the procedure for further action. Another e-mail letter of even date was sent to the petitioner asking her to come over to Chennai immediately on duty. She was also intimated to come prepared to stay at the headquarters in Chennai to give assistance in a library related project which was to be completed immediately.

11. Now the question arises as to whether this action of opposite party is desirable and permissible when an unmarried girl in an establishment is sexually harassed by a male colleague in Jeypore, Odisha. The petitioner, who belongs to the State of Odisha, on complaint of sexual harassment immediately was asked to come to Channei on duty and work there. The action of the opposite party amounts to arbitrary and unreasonable. It is also not disputed that a Complaint Committee had been constituted and the proceeding was conducted on 07.02.2008 at Chennai and while the proceeding was pending, the petitioner was transferred on 05.04.2008 from Biju Pattanaik Medical Plant Garden, Jeypore to Community Agro-Bio-Diversity Centre, Kalpata, Kerala which was communicated to the petitioner

vide letter dated 07.04.2008 issued by opposite party No.2. The sequence of events shows that immediately after the petitioner sent the complaint of sexual harassment opposite party No.2 asked her to go to Chennai and thereafter during pendency of proceeding transferred her to Kerala. This action of opposite party No.2 itself shows his mala fide intention and such action is totally detrimental to the interest of the petitioner, the victim lady.

12. The Hon'ble Supreme Court in Vishaka's case (supra) suggested some guidelines which are reproduced below:-

> "16. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Art. 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Art. 141 of the Constitution.
>
> The guidelines and norms pre-scribed herein are as under:-
>
> Having regard to the definition of 'human rights' in S. 2(d) of the Protection of Human Rights Act, 1993, Taking note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time. It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:
>
> 1. Duty of the Employer or other responsible persons in work places and other institutions:

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. Definition :

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as :

a) physical contact and advances;

b) a demand or request for sexual favours;

c) sexually coloured remarks;

d) showing pornography;

e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps :

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings :

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action:

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government department concerned of the complaints and action taken by them.

The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Workers' Initiative :

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness :

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. Third Party Harassment :

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women.

These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly.
Order accordingly."

13. It is also not in dispute that the Complaint Committee gave a finding that the conduct of Mr.Nihar Ranjan Parida was unbecoming but the complaint made against Saujundra Swain was not found to be proved. Despite such finding, the suspension order passed against Mr.Parida was

revoked and he was allowed to work in Biju Pattanaik Medical Plant Garden, Jeypore whereas the victim-girl was transferred to Kerala. It is important to mention here that the petitioner victim girl has never requested the opposite parties to transfer her from Jeypore, Odisha either to Chennai or Kerala. Thus, action of the opposite party clearly reveals that the guidelines of the Hon'ble Supreme Court in ***Vishaka's case (supra)*** have not been followed. Further, the request of the petitioner to extend the leave was rejected arbitrarily by the opposite parties and she was removed from her service vide order dated 18.08.2008. The guidelines and the norms prescribed in ***Vishaka's case (supra)*** have not been implemented by the organization of opposite parties. This is certainly unfortunate. The entire episode shows how opposite party No.2 has acted illegally and contrary to the guidelines/suggestions laid down in Vishaka's case supra.

In view of the above, we have no hesitation to hold that the service of the petitioner has been illegally terminated by the opposite parties vide their order of termination dated 18.08.2008, which is liable to be quashed.

14. The second question is with regard to payment of the petitioner's salary as per the revised scale of pay. Petitioner's specific case is that the employees similarly situated in similar posts doing similar nature of work were paid higher salary than the petitioner. To illustrate, the petitioner has brought to the notice of this Court the cases of two employees, namely Kartik Charan Lenka and Manjulaxmi A.S. Opposite party No.2 has filed counter affidavit annexing therein the salary particulars of Sri Lenka and Ms. Manjulaxmi A.S.. As per Anenxure F/2 series annexed to the affidavit of opposite party No.2, Sri Lenka during the period 01.04.2010 to 31.03.2011 was paid basic salary of Rs.13,000/-. From October, 2010 to December, 2010 and from January, 2011 to March, 2011 he was paid basic salary of Rs.18,000/-. Ms. Manjulaxmi was paid basic salary of Rs.13,000/- from April 2010 to 31st March, 2011. Mr. Lenka was paid basic salary for the period from 01.04.2009 to 31.03.2010 (@ Rs.12,000/- from April-June, 2009 and @Rs. 13,000/- from July, 2009 to March, 2011). Ms . Manjulaxmi was paid Rs.12,000/- for the period from April, 2009 to June, 2009 and from July, 2009 to March, 2010 she was paid basic salary of Rs.13,000/-. Mr. Kartik Charan Lenka for the period 01.04.2008 to 31st March, 2009 was paid with the basic salary of Rs.8,000/- per month from April, 2008 to July, 2008 and Rs.12,000/- per month from August, 2008 to March, 2008. Ms Manjulaxmi was getting Rs.8,000/- as basic salary for the period April, 2008 to July, 2008 and Rs.12,000/- for the period August, 2008 to March, 2009. Mr.Lenka was paid basic salary of Rs.6,500/- for the period April, 2007 to July, 2007 and Rs.8,000/- from August 2008 to March, 2009. Similarly Ms. Manjulaxmi was

paid Rs. 6,500/- in August, 2007 and from September, 2007 to March, 2008 she was paid Rs.8,000/- per month.

15. The transfer order as well as the termination order is not bona fide. This is not at all expected from an employer and this will break down the moral courage of other women employees in the institution, which will ultimately culminate in unsatisfactory performance.

16. The petitioner has never expressed her unwillingness to work in the organization. In the peculiar circumstance of sexual harassment, she only sought for leave but her service was terminated for no fault of her. Therefore, she is entitled to get all her arrears of salary and other emoluments including increments and other pecuniary benefits as the opposite party No.2 has arbitrarily terminated her service on account of which she has been forced to remain unemployed.

Our above view gets support from the decision of the Hon'ble Supreme Court in ***Srikantha S.M.V.Bharath Earth Movers Ltd, (2005) 8 SCC 314***, wherein it is held as under:-

> "The next question is, as to what benefits the appellant is entitled to. As he withdrew the resignation and yet he was not allowed to work, he is entitled to all consequential benefits. The learned counsel for the respondent Company no doubt contended that after 15.01.1993, the appellant had not actually worked and therefore, even if this Court holds that the action of the respondent Company was not in consonance with law, at the most, the appellant might be entitled to other benefits except the salary which should have been paid to him. According to the counsel, the principle of "no work, no pay" would apply and when the appellant has admittedly not worked, he cannot claim salary for the said period.
>
> 29. We must frankly admit that we are unable to uphold the contention of the respondent Company. A similar situation had arisen in *J.N.Srivastava* and a similar argument was advanced by the employer. The Court, however, negatived the argument observing that when the workman was willing to work but the employer did not allow him to work, it would not be open to the employer to deny monetary benefits to the workman who was not permitted to discharge his duties. Accordingly, the benefits were granted to him. In *Shambhu Murari Sinha II* also, this Court held that since the relationship of employer and employee continued till the employee attained the age of superannuation he would be entitled to "full salary and allowances" of the entire period he was kept out of service. In

> *Balram Gupta* in spite of specific provision precluding the government servant from withdrawing notice of retirement, this Court granted all consequential benefits to him. The appellant is, therefore, entitled to salary and other benefits."

It is not the case of opposite parties that the petitioner engaged herself in any gainful employment after termination of her service.

17. Since the opposite parties in their affidavit admitted that the petitioner and one Kartika Charan Lenka were appointed as Scientists as per the selection made by Selection Committee held on 31.05.2007 the petitioner is entitled to get salary at par with Mr.Lenka.

18. In the result, we allow the writ petition, quash the impugned order dated 12.08.2008 (Annexure-8) terminating the service of the petitioner and direct the opposite parties to reinstate the petitioner with full salary and other service benefits within six weeks from the date of receipt of a copy of this order. We further direct that she must be paid arrears of salary at par with Mr. Kartik Charan Lenka from the date of termination to date within a period of eight weeks from today.

Writ petition allowed.

2012 (II) ILR - CUT- 926

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

O.J.C. NO. 7464 OF 2000 (Dt.17.09.2012)

PARADEEP PHOSPHATES MAZDOOR UNION & ANR. ……..Petitioners

.Vrs.

STATE OF ORISSA & ANR. …….Opp.Parties

A. CONTRACT LABOUR (REGULATION & ABOLITION) ACT, 1970 (ACT NO. 37 OF 1970) – S.10(1).

Contract labour – Prohibited by state Government – Workers Completed 15 years service in the DAP Plant of P.P.L. – Despite the same P.P.L. (O.P.2) continued to treat the workers as contract labourers in its DAP Plant – Held, the work being perennial in nature direction issued to P.P.L. to regularise the workers engaged in its DAP Plant. (Para 8)

B. CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – S.11.

Res judicata – O.P.2 raised that Central government is the appropriate government and not the State Government – In earlier writ petitions between the self same parties neither the O.P. nor any other petitioners raised the question that the State government is not the appropriate Government – Held, the contention that the Central government is the appropriate Government is hit by the principles of res judicata as provided under Explanation IV of Section 11 of the Code. (Para 7)

Case law Referred to:-

AIR 2001 SC 352 : (Steel Authority of India Ltd. & Ors.-V-National Union Water Front Workers & Ors.)

For Petitioners - M/s. S.K.Mishra, P.K.Mohapatra & R.R.Mishra.

For Opp.Parties - Govt. Advocate (for O.P.No.1)
M/s. Ganeswar Rath, S.Mishra, A.K.Panda, S.R.Mohanty & T.K.Praharaj (for O.P.No.2).

S.K.MISHRA, J. The Paradeep Phosphates Mazdoor Union represented though its General Secretary has filed this writ application seeking a

direction from the Court to comply with the notification issued by the State Government on 28.04.2000 for abolition of contract labour in respect of the workers in DAP Plant-Cleaning of granulation dry section, cleaning in combustion chamber etc.

2. The petitioner is a trade union representing the workers has taken up its cause and filed this writ application seeking enforcement of the aforesaid order and to give regular employment to the persons working in the said work of the establishment. Annexure-1 contends the names of the workers in DAP plant of opposite party no.2 for over 14 years uninterruptedly without any break in service. They have been engaged through Contractors appointed for the purpose from time to time. It is further borne out from the records that though the Contractors have changed the employees are continuing the work irrespective of change of contractors. In the meantime, those persons have completed about 15 years of service in the particular establishment. Considering the fate of such persons and several such other workers engaged in different establishments of opposite party, the Union took up the matter for prohibition of contract labour system in different establishment of the Paradeep Phosphates Ltd. and for regularisation of such employees in terms of Section 10 (1) of the Contract Labour (Regulation and Abolition) Act, 1970. After much deliberation and in active participation of the opposite party no.2, decision has been taken by the State Advisory Contract Labour Board in its 21st meeting dated 03.06.1999 and 10.06.1999, wherein the State Advisory Board has already recommended for prohibition of Contract Labour system in 16 areas of opposite party no.2.

While the mater stood thus, the Government of Orissa in Labour and Employment Department has already come out with a Notification dated 28.04.2000 prohibiting employment of contract labour in the works in Paradeep Phosphates Ltd., particularly in the DAP Plant. The Union submits that once there is a prohibition of competent authority for not engaging contract labourers in the particular work in the particular establishment, the only course left with the establishment is to straight away treat the persons concerned as the regular employees of the particular establishment and the relationship between contractor and the contract labourers ceases automatically at the moment when there is an order prohibiting employment of contract labour in particular work of a particular establishment. Thus, the only course open for the management is to regularize the employees of the establishment, who are working under the Contractor. In spite of such an order of the Government of Orissa, opposite party no.2 i.e. the Paradeep Phosphates Ltd. has not acted upon the same and has continued to treat

them as a contract labourer and thereby they are being exploited and hence, this writ application.

3. Opposite party no.2 has filed a detailed counter affidavit. Two aspects that are raised in this case are: firstly, the State Government is not the appropriate Government for the purposes of the Act. It is contended that the Central Government is the appropriate Government and, as such, the Notification issued by the State Government is not binding upon the opposite party no.2. Secondly, it is contended that all the works of the DAP plant has not been ordered for abolition of contract labour. It is, therefore, the stand of the opposite party no.2 that the relief prayed for by the petitioner cannot be granted.

4. In the case of **Steel Authority of India Limited and others v. National Union Water Front Workers and others**, *AIR 2001 SC 352,* the Supreme Court has held that while deciding the question as to which Government is the appropriate Government, it is to be kept in mind that the Central Government will be the appropriate Government under the CLRA Act and Industrial Disputes Act provides that the industry in question is carried on by a Central Government company/an undertaking under the authority of the Central Government. Such an authority, it is further ruled in the aforesaid case, may be conferred either by a Statute or by virtue of relationship of principal and agent or delegation of power. Where the authority is to carry on any industry for or on behalf of the Central Government is conferred on the Government company/any undertaking by the Statute under which it is created, no further question arises. But, if it is not so, the question that arises is whether there is any conferment of authority on the Government company undertaking by the Central Government to carry on the industry in question. This is a question of fact to be ascertained on the facts and in the circumstances of each case.

5. Though it is averred by the opposite party no.2 that the appropriate Government is the Central Government for being a control over the Undertaking, the same has not been demonstrated by the opposite party before the Court. It is also not the case of the opposite party no.2 that the authority to carry on any industry for and on behalf of the Central Government is conferred by any statute under which the establishment has been created. Thus, it appears that the appropriate Government is not the Central Government in this case.

6. Additionally, it is brought to the notice of the Court that on earlier occasions, another writ application has been filed bearing O.J.C. No. 2751

of 2000, which was disposed of on 24.06.2003, wherein the present parties were also parties. This Court disposes of the said writ application with the following order :

> "7. There is no dispute that the State Advisory Contract Labour Board recommended to the State Government to abolish contract labour system in sixteen areas of Paradeep Phosphates Limited, but in the Government notification dated 28.04.2000 only one area has been mentioned. On reading of the note and order of the Minister extracted above, we are inclined to hold that the Government has not fully considered the recommendation. Therefore, in the interest of justice, the matter needs reconsideration.
>
> 8. For the reasons aforesaid, we direct the State Government (opposite party no.1) to reconsider the recommendation of the State Advisory Contract Labour Board with regard to abolition of contract labour in respect of 15 other areas left out by it and take appropriate decision according to law within four months of receipt of this order."

7. It is apparent from the record that the opposite party no.3 has not taken stand that the State Government is not the appropriate Government in that case. Rather, the proprietary of the State Advisory Contract Labour Board was contested. Thereafter, in W.P.(C) No. 13791 of 2005, which was disposed of by this Court on 05.07.2012 and the selfsame question regarding the implementation of the recommendation of the State Advisory Contract Labour Board has been considered. In both the aforesaid writ applications, the opposite party neither contended nor any of the petitioners raised the question that the State Government is not the appropriate Government. Accordingly, this Court comes to the conclusion that the plea taken by the opposite party no.2 that the appropriate Government is not the State Government is hit by the principles of *res judicata* as provided under Explanation IV of Section 11 of the Code of Civil Procedure, 1908. Explanation IV provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Therefore, this Court is of the opinion that the issue of appropriate Government and the contention that the Central Government is the appropriate Government is hit by the principles of *res judicata.*

8. The second contention is that the said Notification vide Annexure-4 has not abolished all the workers of the DAP plant. It is borne out from Annexure-4 that the DAP plant-Cleaning of granulation dry section, cleaning

in combustion chamber is perennial activity, which has been brought under the purview of prohibited categories of employment in the Act. Therefore, this Court directs that the opposite party no.2 shall regularize the workers engaged in the DAP plant. Such a direction is based on the assumption in the sense that the job is done by a set of workers uninterruptedly for a period of 15 years or more, though it shall be presumed that such work is perennial in nature and the opposite party cannot take advantage of the labourers by engaging them through Contractors especially in view of Annexure-4.

Accordingly, the writ application is allowed. Opposite party no.2 is directed to enforce the Annexure-4 with retrospective effect i.e. from the date of notification dated 28.04.2000 within a period of six weeks of communication of the order.

Writ petition allowed.

2012 (II) ILR - CUT- 931

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

W.P.(CRL.) NO. 1096 OF 2011 (Dt.05.10.2012)

ARUN KUMAR BUDHIA .....Petitioner

.Vrs.

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

A. **CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.154.**

F.I.R. – Supply of copy of F.I.R. to the accused or to their relatives by the police – No provision in Cr.P.C. or in G.R. & C. O. (Cri.) – Writ petition filed for a direction – Held, the accused is entitled to get a copy of the F.I.R. at an earlier stage than as prescribed U/s.207 Cr.P.C. – The accused may apply for certified copy of F.I.R. through his agent and can get it within 24 hours from the concerned police officer and within two working days from the concerned Magistrate - Direction issued for uploading the F.I.R. on the website of Odisha Police w.e.f. 31st January, 2013. (Para 11)

B. CONSTITUTION OF INDIA, 1950 – ARTS. 21, 22 & 226.

Writ petition in the nature of P.I.L. – Prayer made for supply of copy of F.I.R. by the police to the accused or to their relatives – Authenticated copy required for protecting their right to life and personal liberty – Held, direction issued for supply of copy of F.I.R. to the accused or to their relatives either from the P.S. or from the Court as per the modalities fixed. (Para 11)

For Petitioner - M/s. Goutam K. Acharya, K.M.Patra, P.K.Das, S.K.Behera, K.G Hadai, J.K.Mohapatra and Miss. R. Nayak.

For Opp.Parties - Government Advocate(for Opp.Parties 1 & 2)
Mr. S.D.Das, Asst. Solicitor General (for Opp.Party No.3).

S.K.MISHRA, J. In this writ petition, the petitioner has prayed for issuance of a writ of mandamus to the State of Odisha to make provision for supply of copy of F.I.R. registered by the police to the accused persons

and/or their relatives and to direct the Odisha Police to upload the F.I.Rs. in their website within a reasonable time after registration.

2. The petitioner is an Advocate and has filed this writ petition in the nature of a public interest litigation to solve the difficulties faced by the accused persons, who were named in the F.I.R. registered against them in receiving copy of the F.I.R. for seeking appropriate relief for protecting their right to life and personal liberty. It is brought to the notice of the Court that most of the times the accused named in the F.I.R. is not aware of lodging an F.I.R. or contents thereof and, therefore, without an authenticated copy of the same, he faces handicap in moving appropriate applications before the Courts for protecting his liberty.

3. The State has filed a counter affidavit and in the said counter affidavit, the State has sought to bring to the notice of the Court that there is no provision in the Criminal Procedure Code or in the G.R. & C.O. (Crl.) to provide copies of the F.I.R. to the accused by the Police Officers.

4. In order to appreciate the contentions raised by the learned counsel for the petitioner, it is appropriate to take note of various provisions those are applicable. Section 154 of the Code of Criminal Procedure, 1973, hereinafter referred as the 'Code' for brevity, provides for information in cognizable cases. Section 154 of the Code is quoted below:

> "154. **Information in cognizable cases :-** (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.
>
> (2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.
>
> (3) Any person aggrieved by a refusal on the part of the officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a

cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

5. Section 154 of the Code provides for information as to the cognizable cases and investigation of such cases, whereas Section 156 of the Code provides for police officer's power to investigate cognizable cases. After investigation, final report is submitted by the police to the Magistrate having territorial jurisdiction.

6. After completion of investigation and submission of charge-sheet, before trial, the accused is entitled to copies of the police report as provided in Section 207 of the Code. The said Section reads as follows:

"207. **Supply to the accused of copy of police report and other documents.-** In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173;

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing

the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

7. Section 207 of the Code therefore mandates that after completion of investigation and submission of final form before the learned Magistrate, it is the duty of the learned Magistrate to furnish the accused a free copy of the documents, which includes police report, F.I.R., statements recorded under Sections 161 and 164 of the Code etc. However, this provision comes into play only after the investigation is over and after submission of the final form. Prior to that, there is no provision under the Code for an accused to be supplied with a copy of the F.I.R. It is argued at length that in absence of the copy of the F.I.R., the very right of the accused to get himself defended cannot be fulfilled as he is not in a position to know the nature of the allegation, so that he will approach the appropriate forum for obtaining necessary relief for protecting his right and liberty.

8. Article 21 of the Constitution of India clearly provides for protection of life and personal liberty, which is quoted below:

"21. **Protection of life and personal liberty.-** No person shall be deprived of his life or personal liberty except according to procedure established by law."

Thus, it is luculent that Article 21 of the Constitution of India provides for protection of citizens' life and personal liberty and it can be only curtailed by due procedure established by law. Thus, if a person is accused of committing a crime and there is chance of being apprehended by the police, he has a right to have an information about the allegations against him even at the initial stage of investigation. The Constitution of India provides in Article 22 regarding protection against arrest and detention in certain cases, which is quoted below:

"22. **Protection against arrest and detention in certain cases.-**

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

4. No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of Clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

5. When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

6. Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

7. Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

9. Thus, Articles 21 and 22 provides that the liberty of a citizen cannot be interfered or curtailed lightly by the authorities. So it is to be determined, whether at the stage of initial investigation, the accused has a right of receiving information regarding the accusation or allegation made against him. In this case, learned counsel for the petitioner has relied upon the case of **Its own motion through Mr. Ajay Chaudhury v. State,** in W.P.(Crl.) No. 468 of 2010, which has been disposed of by a Division Bench of the Delhi High Court. In the said case, Hon'ble Mr. Justice Dipak Mishra, the Chief Justice, as his Lordship was then, has taken into consideration a large number of cases and rules, and has come to the conclusion that the accused is entitled to receive a copy of the F.I.R. even from the police. In this regard, His Lordship has also held after taking into consideration a number of reported cases that F.I.R. is a public document and, therefore, a person, who is in custody of the same, has the liability to give a copy thereof to the person who has interest in the same or whose interest is adversely affected by the same.

10. In that view of the matter, having gone through the case of Delhi High Court, we are of the considered opinion that similar order should be passed with regard to supply of copies of the F.I.R. to the accused in the State of Odisha also.

11. Thus, we allow the writ application and direct that :

(i) The accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C.

(ii) An accused who has reason to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report can submit an application through his representative/ agent for grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the court. On such application being made, the copy shall be supplied within twenty-four hours.

(iii) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Code.

(iv) The copies of the F.I.Rs., unless reasons recorded regard being had to the nature of the offence that the same is sensitive in nature, should be uploaded on the Odisha Police website or by the district police website, as the case may be, within twenty-four hours of lodging of the F.I.R. so that the accused or any person connected with the same can download the F.I.R and the appropriate application before the Court as per law for redressal of his grievances.

(v) The decision not to upload the copy of the F.I.R. on the website of Odisha police/District police office shall not be taken by an officer below the rank of Deputy Superintendent of Police or Assistant Commissioner of Police, as the case may be, and that too by way of a speaking order. A decision so taken by the DSP/ACP shall also be duly communicated to the Magistrate having jurisdiction.

(vi) The word 'sensitive' apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore would also include concept of privacy regard being had to the nature of the F.I.R.

(vii) In case a copy of the F.I.R. is not provided on the ground of sensitive nature of the case, the person aggrieved by the said action, after disclosing his identity, can submit a representation with the Commissioner of Police/Superintendent of Police of the District, who shall constitute a committee of three high officers and the committee shall deal with the said grievance within three days from the date of

receipt of the representation and communicate it to the aggrieved person.

(viii) The Superintendent of Police shall constitute the committee within eight weeks from today.

(ix) In cases wherein decisions have been taken not to give copies of the F.I.Rs. regard being had to the sensitive nature of the case, it will be open to the accused/his authorized representative to file an application for grant of certified copy before the court to which the F.I.R. has been sent and the same shall be provided in quite promptitude by the concerned court not beyond three days of the submission of the application.

(x) The directions for uploading the F.I.R. on the website of Odisha Police shall be given effect from 3Ist January, 2013.

A copy of this order be handed over to the Government Advocate for early consideration. Copies of this order shall be circulated to all the Commissioners of Police, all the Deputy Commissioners of Police and all the Superintendents of Police. Registry of the Court is also directed to supply copies of this order to all the cognizance taking Magistrates and District Judges. The writ petition is allowed with the above observations.

Writ petition allowed.

2012 (II) ILR - CUT- 939

B. P. DAS, J & M. M. DAS, J.

W. P. (C) NO. 8797/2004 & O.J.C. NO.6721/1999 (Dt.11.10.2012)

TAPAN KUMAR DAS & ANR. .....Petitioners

.Vrs.

COMMISSIONER, CUTTACK MUNICIPAL CORPORATION & ORS. ..... Opp.Parties

CONSTITUTION OF INDIA, 1950 – ARTS.21, 48-A, 51-A (g), & 226.

P.I.L. – Cuttack is an old city of the State – Lack of proper drainage system – Big water-bodies, tanks, ponds and rain water catching areas are filled up by builders and private individuals – Destruction of natural water resources – City suffered water logging even on small rain fall – Health hazard due to overflowing of septic tank and drain water – Hence the writ petition.

Held, State government to protect natural resources which have direct link to environment – Direction issued to preserve all water bodies, Jalasayas existing in the City which should not be allowed to be converted in to homestead – Preservation of water bodies will be helpful in recharging ground water on which entire Cuttack City depends for drinking water purposes – Any decision taken by the Collector regarding change of classification/kissam of lands from Jalasaya to homestead shall be allowed after the same is approved with reasons by the committee formed with the Chairmanship of RDC (CD) Cuttack – The committee shall also make enquiry regarding any change of classification of lands recorded as Jalasaya during operation of the order of status quo Dt.08.04.2005 passed in OJC. No.6721/1999 – State Government may adopt the above directions in respect of Cuttack City for other Ciites of the State.

(Para 13,14)

Case laws Referred to:-

1.(1997)3 SCC 549 : (Animal & Environment Legal Defence Fund-V- Union of India) AIR 1997 SC 1071

2.(1997)3 SCC 715 : (M.C. Mehta (Badkhal & Surajkund Lakes Matter)- V- Union of India)

3.(2006)3 SCC 549 : (Intellectuals Forum-V- State of A.P.).

4.AIR 2005 Madras 311: (L. Krishnan-V- State of Tamil Nadu).

For Petitioner - M/s. G.A.R. Dora, Sr.Advocate, G.Rani Dora, J.K.Lenka, P.R. Dash (Amicus Curiae).

For Opp.Parties - M/s. Sisir Das, A.G.A (O.Ps.2 & 5)
Pradipta Mohanty (O.P.1)
Dayananda Mohapatra (O.P.4)
M/s. J.Patnaik, Sr.Advocate
B.Mohanty (O.Ps.3 & 6), P.K.Rath (O.P.7).

B. P. DAS, J. Petitioner-Tapan Kumar Das, since dead, claiming himself to be the Secretary of Kazibazar Adipitha Puja Committee, and a public spirited citizen and concerned with the welfare of the locality, filed W.P. (C) No.8797 of 2004 in the nature of public interest litigation for a direction to the Cuttack Municipal Corporation to stop release of foul smelling septic tank and drainage water to the street. His main allegation was that water logging and release of foul smelling septic tank and drainage water to the street are causing pollution hazards in the locality mainly due to filling up of a portion of a big tank located behind the Amala Club at Kazibazar on Hal plot no.537 under Hal Khata no.195 in Cuttack Town, Unit No.14, with an area of Ac.3.182, by a builder, who has purchased the same and has carved out housing plots with a view to sell the same to different persons. According to the petitioner, generally rain-water as well as the domestic waste water from the houses in the surrounding area is discharged to the aforesaid tank. Because of filling up of the said tank, the entire area has been flooded with filthy water from drains and septic tanks causing health hazards and the residents of that area are neither able to move out from their houses nor remain inside due to the foul smell emitted from such stagnated filthy water. That apart, the students of the schools located in and around that area are facing immense difficulties during rainy season to attend their schools due to water logging. It has also been alleged that the State Govt. and the Cuttack Municipal Corporation (CMC) have illegally granted permission to fill up the aforesaid water body and have not made any arrangement for the due discharge of such water. Therefore, a prayer has been made to direct the authorities of the State Govt. as well as the CMC to ensure that the domestic waste water discharged from the surrounding houses does not flow to the street and alternative arrangement is made for discharge of such water.

This Court by its order dated 15.10.2004 allowed impletion of the Tahasildar, Sadar, Cuttack, and certain private individuals as opposite parties and issued notice to the said parties. On going through the copy of the report of the Municipal Commissioner of the CMC submitted to the

Registrar, Orissa Human Rights Commission, on the self-same grievance, which was produced by the learned counsel for the CMC for perusal of the Court, and considering the facts and circumstances of the case, this Court while requiring the Collector and the Tahasildar to produce the relevant records pertaining to the aforesaid tank directed maintenance of status quo in respect of the tank in question. That apart, the Cuttack Development Authority (CDA) was directed not to grant any permission for construction of house on the aforesaid plot without leave of the Court and to publish a notice to that effect in the newspapers. The authorities of the CMC and the CDA were also directed to take appropriate steps against the persons responsible for causing nuisance in the locality by initiating criminal proceedings in accordance with law. Direction was also given not to fill up the tank on the aforesaid plot by sand or otherwise either by opposite parties 3, 6 and 7 or any other person or agencies. The CMC was also directed to take effective steps and ensure that hygienic condition is maintained in the locality to prevent epidemic which was apprehended by the local residents.

During pendency of the writ application, the petitioner died and this being a public interest litigation, Shri P. R. Dash, a member of this Bar, was allowed to pursue the writ application.

2. When the aforesaid W.P. (C) No.8797/2004 was pending, on 8.4.2005 this Court considering the submission made at the Bar in the on-going public interest litigation relating to Cuttack City, i.e., O.J.C. No.6721/1999, that during last five years big tanks in the city, which were recorded as Jalasaya/tanks in the Records of Rights, were rapidly being filled up and converted to homestead without effecting any change in the classification of the lands in the revenue records and without obtaining permission from the competent authority, and that the CDA without following the provisions of the building regulations and properly examining the matters has been permitting constructions on such lands for some obvious reason, passed order for maintenance of status quo as existed on that date in respect of the tanks recorded as such in the RORs and called upon the Collector, Cuttack, to furnish list of tanks recorded as such in the RORs and available in Cuttack City, the number of such tanks in existence and the number of tanks filled up. He was also directed to indicate whether for change of classification of the lands from tanks to homestead, any permission is required and, if so, whether such permission has been accorded. The District Administration including the Police Administration was directed to ensure compliance of the order of status quo. Thereafter by order dated 15.4.2005 the Tahasildar, Sadar, Cuttack, was directed to furnish a report to the Superintendent of Police, Cuttack, indicating if the work of filling

up of Jalasayas/Tanks is being done and/or any construction is being made thereon.

3. Since the grievance ventilated by the learned members at the Bar in the on-going public interest litigation, i.e., O.J.C. No.6721/1999, regarding illegal filling up of large number of water bodies/tanks in the city and construction of buildings thereon for human settlements without changing the classification of the lands to homestead and the allegation made in W.P.(C) No.8797/2004 regarding filling up of the tank in Kazibazar were common, both the writ applications were heard together to examine the question whether the filling up of the water bodies/tanks classified as 'Jalasayas' in the revenue records without changing the classification to homestead, is legal and justified and whether the water bodies/tanks, which are the natural water storage resources in the city, are required to be preserved, protected and maintained for the purpose of re-charging of water and for improving the underground water level and also for providing drainage during high rain falls in order to save the city from water-logging and with a view to maintain ecological balance keeping in view the rapid increase in the density of population day-by-day so also the pressure on lands for human habitation.

4. So far as tanks are concerned, the age-old method of irrigation by tanks, as prevailed in ancient India, continued as a predominant mode of irrigation almost till our independence. Every village had at least one community tank, Zamindars possessed privately-owned tanks. No temple was conceived without a tank. Private tanks and tanks belonging to temples were zealously guarded. But in post-independence days, such disciplined use and maintenance of community tanks have disappeared totally and the tanks got neglected and finally became unusable and ultimately got converted into virtual swamps. Tanks are useful for recharging of wells and for providing drainage during high rain-falls. Cuttack, the premier town of Orissa, today gets seriously water-logged even with 5-6 cm of rain because almost all the ponds and most of the low-lying areas have been reclaimed for habitation. This is the observation made in the Report on State of Environment in Orissa-I (Water Resources) prepared by Dr. R. C. Das, Chairman of then State (Prevention and Control of Pollution) Board, now State Pollution Control Board, Odisha.

5. Before examining the aforesaid question, it would be appropriate to indicate herein the topography of Cuttack City, which is situated between two rivers, namely, Mahanadi and its tributary Kathajodi. In this regard we think it proper to quote hereinbelow the observations made about Cuttack City in the book titled "Memoirs of a Bengal Civilian" written by John Beames, who was

the Magistrate and Collector of Cuttack and was also the Commissioner of the Orissa Division comprising Balasore, Cuttack and Puri from 1873 to 1875 :

> "This great city of Cuttack, the capital of a large and isolated province, was a curious study. So many little worlds lived side by side, understanding each other very imperfectly, disliking each other often very heartily, and yet all dwelling peaceably on the whole under the strong hand of British law and order. Its situation was peculiar and, in many respect, inconvenient. The Mahanadi, an immense river more than two miles broad, issues from the hills and divides into two great streams, which in their turn divide lower down into several others, so that all this part of Central Orissa is, in fact, the delta of the Mahanadi, a triangle, each of whose sides is about a hundred miles in length. At the apex of this triangle, which points to the west, lies the city. The site was in fact chosen for purposes of defence by the King of Orissa in the sixteenth century when his country was invaded by the Mohommedans. He left his former capital Chaudwar (Chaudwar = four gates), the ruins of which are still visible on the northern bank of the river, and pitched his 'camp' (in Sanskrit and Oriya, Kataka) between the two sheltering arms of the mighty river. Here he built a great fortress called Barobati which still stands, though in ruins, and the rest of the apex was occupied by the houses of the townspeople."

Cuttack is one of the oldest cities in the country. Established in 989 AD, Cuttack was the seat of Government of Orissa for close to a thousand years before its burgeoning size forced the creation of a new capital at Bhubaneswar in 1948. The city is now popularly called as 'Millennium City'. Being a very old city, it has very little scope for expansion and off late it became the victim of unauthorized encroachers and mushroom growth of unauthorized religious institutions on public roads/public places so also unauthorized encroachment of public roads by adjacent land owners. Even the lands along the banks of Mahanadi and Kathajodi rivers, which belong to the State Govt. as well as the lands earmarked for different developmental projects including housing projects of the C.D.A., have not been spared from encroachment. The existing drainage system in the city, which runs in a serpentine manner through its lanes and by-lanes, has served the city for more than 150 years but there was no improvement to the same excepting bare maintenance and desiltation by the civic body because of large scale encroachment of Govt. lands made on both sides of the main storm water channels which was ultimately removed in 1999 with the intervention of this Court to facilitate proper desiltation and improvement. The mushroom growth

of encroachments, which remain as before, are possible due to lack of vigil on the part of the revenue authorities and with the connivance of such authorities, who have allowed encroachments of Govt. lands on both sides of the main storm water channels, which were also made encroachment-free. Rapid growth of population in the city and rise in the demand for land and construction of multi-storied buildings have led to disappearance of tanks, which were being used as the means to accommodate the excess rain water in the city and to lessen the pressure from the existing dilapidated and old drains. That apart, Cuttack city being a traditional town, the tanks/water bodies were being used as bathing places and some times as the places for recreation and refreshment until the unscrupulous builders' lust for land targeted the water bodies and started filling up of the same with the connivance of certain revenue authorities, who have no love and lust for the future development of the city and its citizen except their personal benefits.

6. Learned counsel for the petitioners alleged that Cuttack, which is the premier city of Odisha, very often gets seriously water-logged and drainage problem crops up even during small rain-falls because large number of big water bodies/tanks, which were used as storage of rain-water and were otherwise providing drainage during high rain-falls and were also used for re-charge of ground water, have been reclaimed and converted by private individuals into residential areas for human habitation as well as builders for commercial use. It was also alleged that due to water-logging, the capacity of the main storm water channels being not adequate for discharge of the accumulated water, the people of the city are made to face numerous problems arising therefrom including health hazards, like water-born diseases. The existing old drainage system in the city has not been improved and there is very little scope for improvement of such system.

7. It may be stated at the cost of repetition that this Court by its order dated 8.4.2005 passed in O.J.C. No.6721/1999 called upon the Collector, Cuttack, to furnish a list of tanks recorded as such in the RORs and as to how many of such tanks are in existence and how many of them have been filled up. The Collector was also required to indicate whether for change of classification of the land recorded as Jalasaya to homestead, any permission is required and if so whether such permission has been accorded. This Court also directed for maintenance of status quo as on that date in respect of the tanks recorded as Jalasayas in the RORs. The District Administration including the Police Administration was directed to ensure compliance of the order of status quo. From the order dated 29.4.2005 it appears that this Court took a serious note of the fact that the Tahasildar applying section 8A of the Orissa Land Reforms Act had permitted conversion of tanks to

homestead in the city area. As the same was a matter of grave concern for the State and the public at large, this Court called upon the Secretary to Govt. in Revenue Department to appear in Court in person along with the Tahasildar for clarification. On 18.5.2005 the Secretary, Revenue Department, appearing before this Court along with the A.D.M. and the Tahasildar, Sadar, Cuttack, disclosed that some private tanks in the city, which had no utility, have been filled up and converted to homestead lands. He, however, stated that section 8A of the O.L.R. Act is not applicable for change of classification of the lands for which necessary clarification in this regard has already been issued by the Revenue Department to the Tahasildars in the State. He further stated that there are certain tanks in the city which are being used by the general public and those tanks are necessary to be maintained for public use. Considering the aforesaid facts, the Secretary, Revenue Department, was directed to inform this Court after consulting the Housing and Urban Development Department the number of tanks/Jalasayas existing in the city, be it public or private, and are actually required for public use and necessary to be maintained as such. In terms of the aforesaid order, the Revenue Department in consultation with the H. & U.D. Department formulated a scheme for protection and proper utilization of 73 tanks out of which 26 belonged to Govt. and rest 47 belonged to private persons and the High Power Committee constituted under the chairmanship of the Principal Secretary, Revenue Department, with the Director of Municipal Administration, Commissioner, CMC, Vice-Chairman, CDA, Collector, Cuttack, Tahasildar, Sadar, Cuttack, and certain other officials as members, decided as follows :

(I) The Collector, Cuttack, in consultation with CMC and CDA will formulate scheme in respect of each used tank and submit report to Govt.

(ii) Govt. tanks should be handed over to CMC as well as CDA for use and proper maintenance.

(iii) The CMC shall insist the owners for proper maintenance of private tanks.

(iv) In case the private tanks or Govt. tanks lost its characteristics, action should be initiated by the Tahasildar for change of classification of the Tank/Jalasayas under rule 34(e) of Orissa Survey & Settlement Rules, The private land owners shall be asked to submit the proposal to Tahasildar accordingly.

Despite the aforesaid order, during pendency of this proceedings, certain persons in connivance with some subordinate revenue authorities

tried to fill up their tanks violating the order of status quo for which this Court by its order dated 18.4.2007 directed the Committee constituted under the chairmanship of the R.D.C. (CD) for the purpose of eviction and demolition to look into the aforesaid aspect and submit a report as to the procedure and method that would be adopted for maximum utilization of private and Govt. tanks and also to inform whether the tanks which are useful in nature and have been filled up can be retrieved by the Govt. In terms of the aforesaid direction, the RDC convened a meeting of the Committee constituted under his chairmanship on 30.4.2007 wherein the following decisions were taken :

(i) The Collector, Cuttack is instructed to obtain a comparative report based on satellite picture between 1990 and 2006 so as to find out the water-bodies which has been filled up in the meantime. Thereafter, a detailed field check will be made to find out if such filling has been done with permission of competent authority and with proper building plan.

(ii) The CDA authority is instructed to report within 7 days as to how many unauthorized buildings/structures are constructed over Jalasaya Kisam of land without obtaining approval of CDA.

(iii) Action would be initiated against unauthorized buildings/structures constructed over Jalasaya Kisam of land without approval of building plan.

(iv) The Collector, Cuttack is instructed to expedite handing over of possession of remaining tanks to the C.M.C., Cuttack as per Government decision.

(v) The C.M.C. authority is instructed to submit plan for proper maintenance of Jalasayas handed over to them by Revenue Department.

(vi) The C.M.C. authority is also instructed to issue notice to private tank owners as per provisions of the Municipal Act for proper upkeep of the tanks.

(vii) The CDA and CMC authorities will issue public advertisement immediately on non-approval of building plan of Jalasaya Kisam of land and warn general public on this, so that they do not purchase or sell such land for homestead purpose.

Thereafter in terms of the order dated 18.4.2007 passed in O.J.C. No.6721/1999, the R.D.C. (C.D.), Cuttack, by letter no.1246/General & Judl. dated 31.8.2007/1.9.2007 furnished report on verification of Tanks/Jalasayas

on the basis of satellite maps of the years 1990 and 2006 obtained from the Orissa Remote Sensing Application Centre (ORSAC) and the subsequent field verification. It would be appropriate to quote hereinbelow the aforesaid report of the R.D.C. :

> "In compliance to the order of the Hon'ble High Court dated 18.04.2007 in OJC No.6721/1999, the Committee constituted under Chairmanship of Revenue Divisional Commissioner, Central Division, for the purpose of eviction and demolition was asked to report on the following :

i) Details of tanks/Water-bodies existing as on date in Cuttack City;

ii) Details of tanks/water-bodies filled up in the recent past;

iii) Whether such tanks are required to be maintained;

iv) Whether the tanks already filled up and are lying fallow can be retrieved.

In pursuance to the order of the Hon'ble High Court, the Committee met several times and modalities were finalized to comply order of the Hon'ble High Court. It was decided to get information on tanks by using satellite map from Orissa Remote Sensing Application Centre for the year 1990 and 2006. Further, it was decided to verify all the tanks in the field by using Revenue field staff to get accurate picture on the issue.

As per the report of the ORSAC for the year 1990, there were 424 tanks, ponds etc. and 146 water logged and swampy areas in Cuttack City. The satellite map is enclosed as Annexure-1. This list does not include very small water-bodies. In the satellite picture of 2006, it is reported that there are 245 number of tanks/water-bodies and 66 waterlogged swampy areas in Cuttack City. The map is enclosed as Annexure-2. This list also does not include very small water-bodies, which are difficult to locate from the satellite picture.

The Tahasildar, Cuttack was requested to make 100% field verification to find out the present position along with ownership, area and classification of such water-bodies which existed in 1990 and also water-bodies existed in 2006 as per the satellite picture maps and also to find out additional water-bodies if any in the field which has escaped ORSAC report.

Against a list of 245 tanks/water-bodies as reported from the satellite picture of 2006, the Tahasildar has located 65 additional tanks / water-bodies during field verification. Total number of tanks existing as on the date

is 310. The detailed break up of 478 tanks/ water-bodies obtained on superimposition of 1990 and 2006 maps are given below :

Total No. of Govt. Jalasayas/ Waterbodies	Total no. of Private Tanks/ Jalasayas / Water bodies	Total no. of Jalasayas / Water bodies in Cuttack City	No.of Jalasayas/ Water bodies filled up as per physical verification.			Total no. of Jalasayas/ Water bodies existing at Present		
			Govt	Private	Total	Govt	Private	Total
1	2	3	4	5	6	7	8	9
88	390	478	9	159 (126 Fully filled up) + (33 Partly filled up)	168	79	231	310

A detailed report on all 478 number of tanks as submitted by Tahasildar, Cuttack Sadar is enclosed as Annexure-3. A map of super imposition between 1990 and 2006 satellite pictures submitted by Tahasildar, Cuttack is enclosed as Annexure-4. The present position in respect of 310 tanks out of 478 verified is shown as Jalasayas/ water-bodies as per field verification reflected in Col.8 of Annexure-3.

The Committee felt that all the tanks/ water-bodies available physically in Cuttack City should be preserved for future use irrespective of their classification as the water-bodies act as rainwater storage during heavy rainfall. They also help in recharging ground water on which entire Cuttack City depends for drinking water purpose. The swampy water logged areas available at present as per 2006 satellite report are under detailed verification by the Tahasildar, Cuttack. The swampy water logged areas also act as storage for rainwater and also help in recharging ground water. Hence, these areas should also be protected for future irrespective of their classification.

The tanks which have already been filled up, but construction activity has not been taken up, should be kept as such so that it can be used for

water seepage and for improving subsoil water level. It will be practically difficult to retrieve those filled up tanks and excavate ponds again. As reported, the Cuttack Development Authority is not approving any building plan over Jalasaya kissam of land since 2001. Tahasildar is also not allowing conversion of Jalasaya kissam of land in obedience to the Hon'ble High Court's status-quo order passed in 2005. 310 numbers of Tanks/ Jalasayas physically available in Cuttack City as identified by the Tahasildar, Cuttack and through satellite picture may be preserved as such. If there is any other land having Jalasaya kissam which have lost its characteristic in Cuttack City, the Tahasildar, Cuttack may be allowed to change the classification after detailed field enquiry.

It has been reported by the Cuttack Development Authority that 482 cases of unauthorized construction over Jalasaya kissam of land have been detected by them and 165 number of unauthorized construction cases have been booked. The C.D.A. has been advised to go ahead with demolition work of unauthorized construction cases without approval of plan on filled up tank/pond areas."

Thereafter the Commissioner-cum-Secretary, H.& U.D. Department, filed an affidavit explaining the steps taken for maintenance of private water bodies by the Govt. along with the minutes of the meeting held on 3.7.2008 and the decisions taken in the said meeting, as indicated in paragraphs 3, 4 and 5 of the minutes, are extracted hereunder :

"(3) A team comprising representatives of the Revenue Departrment and the Cuttack Municipal Corporation would identify the Private Water Bodies being used by the community which are feasible to be acquired and maintained by the CMC.

(4) The public of the Cuttack City have been made aware by the CMC to refrain from converting the lands characterized as Water Bodies to other purposes in compliance with the orders of the Hon'ble High Court. The matter would be taken up for enforcement by the Cuttack Development Authority and Cuttack Municipal Corporation.

(5) The Revenue Authority would intimate the approximate value of the area under the major private tanks to the H & UD Department so as to take Government orders and financial concurrence on acquiring the land in compliance of the orders of the Hon'ble High Court."

By order dated 9.7.2008 this Court directed compliance of the decisions taken in the aforesaid meeting, more specifically the decision

indicated in paragraph 5, as quoted above. On behalf of the Commissioner-cum-Secretary, H.& U.D. Department, the Under Secretary of the Department filed an affidavit dated 11.12.2008 indicating that in compliance of the direction of this Court dated 9.7.2008 the Department had convened a meeting of all concerned and instructed the CMC and the Revenue Authorities to assess the requirement of acquisition of ponds in the city and accordingly the Collector and District Magistrate, Cuttack, by letter no.805/Res. dated 7.8.2008 addressed to the Commissioner-cum-Secretary, H.& U.D. Department furnished a list of 66 big tanks (Jalasayas) with an area of Ac.46.200 as per satellite map. The approximate value of the aforesaid tanks was indicated to be Rs.52,86,71,250/- as per the benchmark valuation of the scheduled land. In paragraphs 6 and 7 of the aforesaid affidavit it was further disclosed thus :

"6. That it is humbly submitted that the Planning & Co-Ordination Department after careful consideration of proposal, have observed that …..'mere acquisition of Jalasayas is not enough. There should be proper use of these water bodies. The H&UD Department should draw up a scheme in consultation with experts to develop and maintain these Jalasayas. The concern of the Hon'ble High Court is to protect the ecology of Cuttack City. …..'

7. That, for kind appreciation of the Hon'ble Court, it is humbly submitted that the Housing & Urban Development Department, as per the views of the Government in Planning & Co-ordination Department, would take up steps for study and consultation of an expert agency for this purpose, like National Environmental Engineering Research Institute (NEERI), Nagpur and on receipt of a study report, the requisite action would be followed up in compliance to the orders of the Hon'ble Court."

Thereafter the Principal Secretary, H.& U.D. Department, in compliance of the order of this Court dated 5.5.2010 filed affidavit dated 18.5.2010 regarding acquisition of private Jalasayas and maintenance of Govt. ponds in Cuttack City. It would be appropriate to extract hereunder the statements made in paragraphs 1 to 6 of the said affidavit :

"1. That the Hon'ble High Court vide their order dated 05.05.2010 have directed the Principal Secretary, Housing & UrbanDevelopment Department to file an affidavit stating the details of acquisition of private Jalasayas in Cuttack City and maintenance of Govt. ponds for retention of underground water.

2. That it is humbly submitted that on receipt of communication dated 06.05.2010 from the State Counsel, Govt. in Housing & Urban Development Department requested the MunicipalCommissioner, Cuttack Municipal Corporation in letter No.10453/HUD dt.06.05.2010 to furnish the list of private Jalasayas to be acquired on the basis of the report of the 'Advocates' Committee' along with the estimate of the fund for acquisition and preservation of such water bodies.

3. That it is respectfully submitted that in response to the aforesaid communication Cuttack Municipal Corporation furnished the proposal on the basis of the 'Advocates' Committee' Report for acquisition of water bodies with tentative estimate for their renovation and maintenance. Copy of the aforesaid proposals along with Advocates' Committee Report is annexed here as ANNEXURE – E/1.

4. That for the appreciation of the Hon'ble Court, it is humbly submitted that Govt. order have already been obtained for acquisition of 4 (four) numbers of 'Jalasayas' in Cuttack City, spreading over an area of Ac.2.741 Dec. at different locations as recommended by the Advocates' Committee.

5. That it is humbly submitted that since the tentative cost of such acquisition of land would be about Rs.404.00 lakh and estimated cost for preservation and renovation of such tanks would be Rs.34.98 lakh, accordingly, for making necessary provision of funds in the current year Budge Estimate, 2010-11, the file was moved to the Planning & Coordination Deptt. for their concurrence. In the meantime, P. & C. Deptt. have concurred the proposal in principle. Now steps are being taken by the Housing & Urban Development Department for obtaining approval of Finance Deptt. for provisions of the required funds for such acquisition and conservation.

6. That as regards maintenance of ponds over Govt. land, it is humbly submitted that conservation of eight (8) numbers of Jalasayas in Govt. land have been taken up by the Cuttack Municipal Corporation under UIDSSMT Scheme. Rs.533.66 lakh have been sanctioned under the scheme and Cuttack Municipal Corporation have so far utilized Rs.278.944 lakh for the purpose as reported by the Municipal Commissioner, Cuttack Municipal Corporation. Besides that during the year 2009-10, Govt. have sanctioned Rs.40.00 lakh for

protection and conservation of water bodies/Jalasayas existing over Govt. land."

8. From the aforesaid affidavit it clearly appears that the State Govt. has agreed to acquire 4 private Jalasayas in the city for which the Planning & Co-ordination Department has concurred the proposal and H.& U.D. Department has taken step for obtaining approval of the Finance Department for provision of required funds for acquisition and conservation of such tanks. As to maintenance of Govt. tanks, proposal for conservation of 8 Jalasayas had been taken up by the CMC under the UIDSSMT Scheme and Rs.533.66 lakhs have been sanctioned under the said Scheme and the CMC has utilized about Rs.278 lakhs for the purpose till that date. That apart, the State Govt. had also sanctioned Rs.40.00 lakhs for protection and conservation of water bodies/Jalasayas existing over Govt. land.

It also appears that no study report of the NEERI has been produced by the H.& U.D. Department as indicated in the affidavit dated 11.12.2008.

9. The Committee headed by the R.D.C. in the report dated 31.8.2007 has clearly opined that all the tanks/ water-bodies available physically in Cuttack City should be preserved for future use irrespective of their classification as the water-bodies act as rain-water storage during heavy rain-fall and also help in recharging ground water on which entire Cuttack City depends for drinking water purpose.

10. A tendency has now developed, and in the coming days there will be a competition, to draw ground water which will bound to collapse the water based ecological system leading to depletion of ground water level, which is going down every year. The way we are destroying the natural water resources not only in Cuttack City with which we are presently concerned but throughout the country there will certainly be scarcity of water in future. We must remember the fundamental truth that we are the only species in this vast web of life that no animal or plant in nature depends on for its survival – yet we depend on this whole web of life for our survival. We must remember that nature does not depend upon human beings for its survival but human beings depend upon nature for their survival. The world renowned author, Thomas L. Friedman, who has won the Pulitzer Prize thrice being the author of the no.1 international bestseller - "The World Is Flat", in his book titled "Hot, Flat and Crowded", while dealing with the subjects why the world

needs a green revolution and how we can renew our global future, at page 153 has expressed thus :

> "Mindlessly degrading the natural world the way we have been is no different than a bird degrading its own nest, a fox degrading its own den, a beaver degrading its own dam. We can't keep doing that and assume that it is just happening 'over there'. ……. Nature's bounty seemed infinite and all the threats to it either limited or reversible. In the Energy Climate Era, given the accelerating rates of extinction and development, 'later' is going to be removed from the dictionary. Later is no longer when you get to do all those things in nature you did as a kid – on your time schedule. Later is when they're gone – when you won't get to do any of them ever again. Later is too late, so whatever we are going to save we'd better start saving now."

It would not be out of place to excerpt the speech of a twelve-year-old girl of Canada named Severn Suzuki delivered in the plenary session of the 1992 Earth Summit held in Rio de Janeiro of Brazil, which was attended by the Environment Ministers from all over the world, who were listening to her every word with rapt attention. According to Thomas L. Friedman, Suzuki's speech is one of the most eloquent statements he has ever heard about both the strategic and the moral purpose of a real green revolution at the dawn of the Energy-Climate Era from anyone of any age.

> "Hello, I'm Severn Suzuki, speaking for ECO-the Environmental Children's Organization. We are a group of twelve- and thirteen-year-olds trying to make a difference: Vanessa Suttie, Morgan Geisler, Michelle Quigg and me. We raised all the money to come here five thousand miles to tell you adults you must change your ways. Coming up here today, I have no hidden agenda. I am fighting for my future. Losing my future is not like losing an election or a few points on the stock market. I am here to speak for all generations to come. I am here to speak on behalf of the starving children around the world whose cries go unheard. I am here to speak for the countless animals dying across this planet because they have nowhere left to go. I am afraid to go out in the sun now because of the holes in the ozone. I am afraid to breathe the air because I don't know what chemicals are in it. I used to go fishing in Vancouver, my home, with my dad until just a few years ago we found the fish full of cancers. And now we hear of animals and plants going extinct every day – vanishing for ever. In my life, I have dreamt

> of seeing the great herds of wild animals, jungles and rain forests full of birds and butterflies, but now I wonder if they will even exist for my children to see. Did you have to worry about these things when you were my age? All this is happening before our eyes and yet we act as if we have all the time we want and all the solutions. I'm only a child and I don't have all the solutions, but I want you to realize, neither do you….You don't know how to bring the salmon back up a dead stream. You don't know how to bring back an animal now extinct. And you can't bring back the forests that once grew where there is now desert. If you don't know how to fix it, please stop breaking it !" (See Pages 395-396)

11. In this regard let us notice certain judicial pronouncements made by various High Courts as well as the Supreme Court.

The Supreme Court unanimously held in **Animal and Environment Legal Defence Fund v. Union of India, (1997) 3 SCC 549 : AIR 1997 SC 1071; M.C.Mehta (Badkhal and Surajkund Lakes Matter) v. Union of India, (1997) 3 SCC 715, and Intellectuals Forum v. State of A.P., (2006) 3 SCC 549,** that the water bodies are required to be retained and such requirement is envisaged not only in view of the fact that the right to water as also quality life are envisaged under Article 21 of the Constitution of India, but also in view of the fact that the same has been recognized in Articles 47 and 48-A thereof. Article 51-A of the Constitution furthermore makes a fundamental duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife. In **L. Krishnan v. State of T.N., AIR 2005 Madras 311,** a Division Bench of Madras High Court had been dealing with the natural resources providing for water storage facility and in that view of the matter the State was directed to take all possible steps both preventive as also removal of unlawful encroachments so as to maintain the ecological balance.

12. We are, therefore, of the view that there should be sustainable development which means development that meets the needs of the present generations without compromising the ability of the future generations to meet their own needs. We are fully conscious of the necessity of development but the same should not be made or done at the cost of elimination of the water bodies thereby creating serious water-logging problem in the city during rainy season and pushing the future generations to a situation of scarcity of water due to decrease in the ground water level in the absence of harvesting of rain water in a city like Cuttack to absorb the rain water / recharge of water resources / natural water resources, such as

ponds, tanks, water bodies so as to maintain ecological balance. Therefore, the State Govt. cannot absolve its responsibility to protect and maintain the water bodies even belonging to private individuals. There are also big tanks which belong to various deities and private individuals in the city and the State Govt. should come forward to protect and maintain the same also.

13. On going through the affidavit dated 18.5.2010 filed by the Principal Secretary, H. & U.D. Department, indicating the steps taken for providing funds for acquisition, renovation and maintenance of 4 numbers of private Jalasayas and 8 numbers of Jalasayas on Govt. lands in Cuttack City in the first phase as well as the report of the Committee headed by the R.D.C. dated 31.8.2007, we are of the view that the water-bodies/Jalasayas existing in the city need to be preserved and protected and should not be allowed to be converted into homesteads. The affidavit filed by the Secretary, H. & U.D. Department, also shows that the State Govt. is very much alive to the situation regarding filling up of tanks/water-bodies and change of classification of the same to homestead and they are concerned for conservation of such tanks/water-bodies. We hope and trust that the State Govt. would come forward to acquire more and more water-bodies in the city in the next phases.

14. Considering the facts and circumstances of the case, for preservation and conservation of tanks/water-bodies in Cuttack City, and to deal with such tanks/water-bodies, we direct as follows :

(1) The State Govt. shall act upon the report dated 31.8.2007 submitted by the R.D.C. (C.D.), Cuttack, and the affidavit dated 18.5.2010 filed by the Principal Secretary to Govt., H.& U.D. Department, and shall ensure that the steps indicated therein are taken within a period of two years from today.

(2) The R.D.C. (C.D.), Cuttack, under his chairmanship shall form a Committee not exceeding seven members including the Vice-Chairman, C.D.A., Municipal Commissioner, CMC, Cuttack, and an Environmentalist of the State Pollution Control Board, Odisha. Needless to say, the other members of the Committee shall be nominated by the R.D.C. The Committee shall deal with the protection, preservation and conservation of water-bodies in the city and shall take decisions accordingly.

(3) The applications for change of classification/kissam of lands from Jalasaya to homestead shall be processed through the

Tahasildar, Sadar, Cuttack, to the Collector for appropriate orders. The decision of the Collector shall be placed before the Committee as constituted above for approval. Only after approval of the Committee, change of classification/kissam of the land shall be allowed. The Committee shall record the reasons for allowing change of classification/kissam of such lands. However, if the Committee is of the opinion that the lands, which have lost their character as Jalasaya, and those, which are actually not Jalasayas or swampy lands but have been recorded as Jalasaya, change of classification of such lands may be allowed. This shall be effective from the date of the judgment.

(4) The Committee shall also make enquiry, if it is so necessary, to find out whether classification of the lands recorded as Jalasayas has been changed by orders of the Tahasildar during operation of the order of status quo passed by this Court on 8.4.2005 in O.J.C. No.6721/1999. In case it is found that the classification has been changed during continuance of the order of status quo, the same shall be treated as non est in the eye of law.

15. For the aforesaid purpose, Cuttack City shall be construed to be the old Cuttack City comprising the areas shown in the satellite maps of the ORSAC of 1990 and 2006, which have been annexed to the Report of the R.D.C. dated 31.8.2007. It will be open to the State Govt. to adopt the directions given in respect of Cuttack City in the foregoing paragraph for other cities in the State.

16. W.P.(C) No.8797 of 2004 is disposed of with the directions and observations made above. The grievance ventilated by the members of the Bar regarding protection and preservation of Jalasayas in Cuttack City in O.J.C. No.6721/1999 is set at rest with the foregoing directions and observations but the said writ petition shall continue so far as other grievances are concerned.

17. Before parting with the records, we place on record our appreciation for the able assistance rendered by Shri T. K. Mishra, former Chief Secretary, and his successor Shri B. K. Patnaik, Shri Suresh Chandra Mohapatra and Shri P. K. Mohapatra, former R.D.Cs. (C.D.), Cuttack, Shri A.K. Panda, former Secretary, H. & U.D. Department, Shri B. K. Sharma, former Commissioner of Police, Bhubaneswar-Cuttack, Shri Girish S.N., Collector and Distrrict Magistrate, Cuttack, and Shri R. N. Nanda, former Vice-Chairman, C.D.A. and former Municipal Commissioner, C.M.C., for the

noble cause involved in the litigation agitated in 2004. We also place on record our appreciation for the assistance rendered by the members of the Bar especially Shri G. P. Mohanty and Shri K. N. Jena, Members of the Advocates' Committee, Shri P. R. Dash, Amicus Curiae, Shri S. K. Nayak, Senior Advocate, for the C.M.C., Shri Sisir Das, Addl. Govt. Advocate, and Shri Dayananda Mohapatra for the C.D.A..

Writ petition disposed of.

2012 (II) ILR - CUT- 958

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

W.P.(C) NOS .2207/2012, 29737/2011, 7579/2008 & 9406/2008

(Dt.26.06.2012)

DR. SHYAMAL KU. SAHA & ORS. ……...Petitioners

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART.30.

Minority Educational Institution - Stewart Science College, Cuttack – To get protection under Article 30 of the Constitution it needs to be declared as a Minority Educational Institution – It has neither obtained any minority status certificate (MSC) from the National Commission for Minority Educational Institutions as prescribed U/s.11 (f) of the National Commission for Minority Educational Institutions Act, 2004 nor any Court has recognized its minority status – Judgment passed by the learned Single Judge solely basing on the letter of the Director Higher Education Dt.18.03.1983 and the order of the Commission Dt.11.09.2007 which does not relate to Stewart Science College, can not be held to have finally determined the status of the College as Minority Educational Institution – Since Commission has been established to resolve disputes regarding status of an institution claiming to be a Minority Educational Institution it is appropriate that the status of Stewart Science College as Minority Educational Institution ought to be decided by the Commission – Held, management is directed to approach the Commission for obtaining declaration regarding minority status of Stewart Science College, Cuttack – Status quo as on today be maintained till a declaration made by the commission.

(Para 36, 37)

Case laws Referred to:-

1.CLT (2008) Supp.302 : (Governing Body of Stewart Science College & Anr.-V- State of Orissa & Ors.)
2.AIR 2003 SC 355 : (T.M.A. Pai Foundation -V- State of Karnataka)
3.AIR 2005 SC 3226 : (P.A. Inamdar-V- State of Maharastra)
4.AIR 2007 SC 570 : (Secretary, Malankara Syrian Catholoc College-V- T.Jose & Ors.)

5.(2002)2 SCC 497 : (Manager, St. Thomas U.P. School Kerala & Anr.-V- Commissioner & Secy. To General Education Deptt. & Ors)
6. AIR 1968 SC 662 : (Azeez Basha-V- Union of India)
7. AIR 1970 SC 259 : (The Right Rev. Bishop S.K. Patro and others -V- The State of Bihar and Ors.
8. (2007) 1 SCC 386 : (Secy. Malankara Syrian Catholic -V- T. Jose & Ors.)
9. (1995) 3 SCC 434 : (Municipal Corporation for City of Pune and Anr. -V- (Bharat Forge Co. Ltd. and Ors.)
10. AIR 2003 SC 4482 : (South Eastern Coalfields Ltd. -V- State of M.P. & Ors.)
11. (2009) 12 SCC 231: Haryana State Electricity Board & Anr. –vrs.- Gulshan Lal and others :

For Petitoner - : Mr. Jayanta Dash ,Sr. Advocate & Digamber Mishra.
M/s. Manoj Ku. Mishra & D. Mishra M/s. Budhadev Routray, S. Das, S.Jena, P.K. Sahoo & B.B. Routray.

For Opp.Parties : Mr. Ashok Mohanty, Sr. Adv., Advocate General.
Mr. Sangram Das, Addl Standing Council (O.P.1&2)
M/s. B.Mohanty ,T.K.Pattanaik,A.Patnaik,S.Patnaik,
Mr. Ashok Parija (O.P.5&7)
Mr. Sanjit Mohanty ,Sr. Adv. & N.C.Sahoo (O.P.6)
M/s. P.K.Nanda ,K.Behera & S.Mishra (O.P.3)
M/s. B.D.Das,G.Sabar,J.Das & D.P.Jena. T. Padhi (O.P.4)
M/s.S.K.Das,R.N.Mishra-2 & S.K.Mishra (O.P.7)
M/s. B. Routray, D. Mohapatra, P.K. Sahoo, S. Jena
Mr. Aswini Ku. Mishra, M/s. J. Sengupta, D.K. Panda G.Sinha, A. Mishra, S. Mishra
M/s. Jayanta Ku. Rath & D.NRath

B.K. PATEL, J. Adjudication of all these four writ applications depends upon the answer to the common question as to whether Stewart Science College, Cuttack (for short 'the College') is a Minority Educational Institution so as to be entitled to protection under Article 30 of the Constitution of India and Section 2 of the Orissa Education Act, 1969 (for short 'the Act').

2. Article 30 of the Constitution of India reads:

"**Right of minorities to establish and administer educational institutions**.- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

3. Section 2 of the Act reads:

"**Act not to apply to certain institutions**- Nothing contained in this Act shall apply to educational institutions of their choice established and administered by minorities having the right under Clause (1) or Article 30 of the Constitution.

Provided that the State Government may, by notification, apply or adopt to an educational institution established and administered by minorities, such of the provisions of the Act; so however that the rights under Article 30 of the Constitution are not infringed."

4. It is not disputed that Stewart Science College, Cuttack is an Aided Educational Institution within the meaning of Section 3(b) of the Act. The College was established prior to independence. The College is managed by Diocese of Cuttack, Church of North India (CNI), through its Governing Body. All the writ petitioners are working as Readers in the College and they do not belong to Christian Community.

5. In the Writ Petitions petitioners have assailed the Resolutions of Minutes of Eighteenth Ordinary Meeting of the Diocesan Council dated 9th - 11th July, 2007 and the Minutes of the Governing Body of the College dated 6.10.2007 providing the modalities for appointment of Principal of the College to the effect that the Diocese of Cuttack, CNI and the Secretary DEB shall interview and appoint/promote any qualified person as Principal either

from the staff of the same College on the basis of "merit-cum-seniority" or from outside to fill up the vacancy, subject of course to the restrictions regarding qualifications to be followed as prescribed by the State. Also, the petitioners have assailed in Writ Petition nos.2207 of 2012, 7579 of 2008 and 9406 of 2008 appointment/ proposed appointment of the private opposite parties as Principal of the College. Apart from the Management of the College and private opposite parties, State of Orissa in the Department of Higher Education as well as Director, Higher Education have been impleaded as opposite parties.

6. Petitioners' case is that by interim order dated 29.6.2009 passed in W.P.(C) No.7579 of 2008, which is still in force, it was directed by this Court that the senior most Reader of the College shall officiate as the Principal of the College purely on temporary basis but the same shall not confer any right on the officiating Principal. Petitioners are senior approved Readers in the College. Diocese of Cuttack, CNI, a society registered under the Societies Registration Act, has framed Constitution in accordance with which the College is under the management of the Diocese through the Governing Body. The College receives full aid from the State Government. Therefore, provisions of Orissa Education Act as well as Rules, circulars and guidelines framed thereunder are binding in the matter of administration of the College. In fact, Article 7 of the Constitution of the College provides, *inter alia*, that the Governing Body shall exercise powers and discharge the function to ensure that the appointment of teaching and non-teaching staff are made in accordance the provisions made by the Management and in accordance with Act, rules and instructions of the department. The Governing Body is also required to submit reports and returns to the Director, Higher Education, Orissa. Further, Article 15 of the Constitution of the College provides, *inter alia*, that the Governing Body shall exercise such other powers and perform such other functions as may from time to time be assigned by orders of the Government. Not only it has adopted the practice but also Government has issued guidelines to the effect that senior most approved reader of aided college is to be appointed as Principal. In the year 2000 the Governing Body of the College sought for a clarification from the Government with regard to mode of appointment of Principal. In response thereto, it was clarified by letter dated 31.10.2000 of the Director, Higher Education that the posts of Principal in Non-Government Aided Colleges are being filled up from among the Readers taking into consideration their seniority on the basis of approved date of initial joining as Lecturer and their efficiency. Accordingly, one Rabindra Sahoo, Reader in Physics being the senior most Reader in the College was appointed as the Principal. His appointment was approved by the Director, Higher Education under letter dated 18.12.2000 which is

Annexure-5 to W.P.(C) NO.2207 of 2012. It is the further case of the petitioners that from the year 1973, when the College received aid from the State Government, the Governing Body applied and adopted the provisions under the Act as well as Rules and guidelines framed thereunder in the matter of appointment of Principal. It is also pleaded that though Clause-III of Article 6 of the Constitution of the College provides that the Principal shall be Christians appointed by the management, since 1973 till 2008 the then senior most Reader of the College has been appointed as Principal following the norms prescribed by the State Government and during that period no person belonging to Christian Community was appointed as Principal. However, in order to avoid appointment of senior most Reader as Principal, the impugned resolutions were passed declaring that Principal shall be appointed on the basis of "merit-cum-seniority" and in accordance with said resolutions private opposite parties who are junior to petitioners are being appointed as Principal.

7. Further contention of the petitioners is that Stewart Science College is not a Minority Educational Institution. According to them, the College was established by Baptist Missionary Society Corporation, London (BMSC), an overseas club or association in 1944. The present Management has not established the College. The College has not obtained any Minority Status Certificate (MSC) from the National Commission for Minority Educational Institutions (for short 'the Commission') as prescribed under Section 11 (f) of the National Commission for Minority Educational Institutions Act, 2004 (for short 'the 2004 Act'). In absence of any statutory declaration by the Commission, the management cannot claim minority status.

8. Mr. Jayanta Dash, learned Senior Advocate and other learned counsel appearing for the opposite parties reiterated averments made in the Writ Petitions in course of their argument. It was further argued that there being no dispute that BMSC has established the College, there is no scope for the Diocese of Cuttack or the Governing Body to urge that the College was established by any Indian citizen or residents of India belonging to any Minority Community. BMSC was a body incorporated under English Companies Act, 1867 having its registered office at Gloucester, London. The Corporation appointed the Baptist Church Trust Association (BCTA) as the trustee. Subsequently, another deed of transfer styled as transfer deed from trustee to trustee under Article 59 (D) of the Bombay Stamp Act, 1958 and Article 62 (E) of the Indian Stamp Act, 1899 was executed on 15.1.1996. Under the deed, BCTA, a company registered under the Companies Act, 1913 bearing Registration No.651 of 1932-33 transferred the trusteeship to Church of North India Trust Association, another company incorporated

under Section 25 of the Indian Companies Act bearing Registration No.7936 of 1975-76 having its office at New Delhi. All these facts are fortified by the counter affidavit filed on behalf of the Director, Higher Education in W.P.(C) No.7762 of 2004 in which it was categorically averred that the present management had not established the College for which it does not have the right to administer by availing the protection under Article 30 (1) of the Constitution of India. In the present W.P.(C) No. 7579 of 2008 also counter affidavit has been filed on behalf of the Director specifically asserting at paragraph 9 that resolutions passed by the Governing Body and Management in contravention of Government Resolution issued under the Act laying down manner of appointment of Principal in Non-Government Aided Colleges is to be ignored which is illegal and the Management is estopped from deviating from the prescribed rule framed by the Government since the college is receiving grant-in-aid on direct payment scheme. It was further argued that even in the deed of transfer from trustee to trustee Stewart Science College, Cuttack does not form part of the schedule. So far as BMSC is concerned, it was strenuously contended that the same being an alien corporation/ overseas society, cannot claim a fundamental right guaranteed by the Constitution of India. Also, such right cannot be claimed by succession or inheritance. The present management having not established the College cannot claim the right to administer the College to the exclusion of State authority by availing protection under Article 30(1) of the Constitution of India and Section 2 of the Act. In fact, Government of Orissa reconstituted Governing Body of the College in the year 1972 vide letter dated 21.12.72. Therefore, Stewart Science College was treated like any other Non-Government Aided Educational Institution. Neither the Commission nor any Court has recognized minority status of the College.

9. It was also argued that reliance placed by the opposite parties on the decision of this Court in W.P.(C) No.7762 and 7763 of 2004 (**Governing Body of Stewart Science College and another –vrs.- State of Orissa and other reported in CLT (2008) Supp. 302)** rendered by learned Single Judge is misconceived. The decision was rendered on the basis of an erroneous contention to the effect that the Commission has recognized minority status of Stewart Science College. It was argued that the order of the Commission on which the learned Single Judge solely placed reliance related to Christ College, Cuttack only.

10. It was further argued that practice of appointment of Non-Christian Readers as Principal of the College for about last 40 years goes to show that provision under the Constitution of the College for appointment of Christians as Principal is no more adhered to and the provision has fallen into disuse.

Instead norms prescribed by the State Government for appointment of senior most Reader as Principal is being scrupulously followed after the College became an Aided Educational Institution. Learned counsel for the petitioners also drew attention of this Court to the counter affidavit filed by the Management of the College in O.J.C. No.11191 of 2000 to urge that the Management admitted therein that Stewart Science College being an Aided Educational Institution, appointment of Principal was effected on the basis of the direction of the State Government/ Higher Education Department. In course of argument, documents were placed to urge that in spite of availability of Christian candidates, Non-Christian Readers were appointed as Principal. It was further contended that the Governing Body of the College itself does not constitute of Christian members only. There are two teachers' representatives as well as nominees of Vice-Chancellor and Collector.

11. It was further argued that State Government has adopted contradictory and conflicting stands with regard to minority status of the College from time to time. Apart from W.P.(C) No. 7579 of 2008 in W.P.(C) NO.7762 of 2004 in counter affidavit filed on behalf of the Director, Higher Education, Orissa, it was specifically pleaded that the present management or Governing Body having not established the College, cannot claim the protection and administration as envisaged under Article 30 of the Constitution of India.

12. Further contention of the petitioners was that BMSC was registered under the English Companies Act and the corporation is, therefore, an eleemosynary corporation. Referring to Black's Law Dictionary it was argued that such corporations are instituted for the perpetual distribution of the alms or bounty of the founders and they do not perform ecclesiastical functions. Their functions are secular. Therefore, BMSC cannot be stated to have established the College out of any religious motive. It was also argued that neither BMSC nor CNI Trust Association, stated to be predecessors of the Management, being body corporates incorporated under Companies Act, cannot have minority status.

13. Separate counter affidavits have been filed in W.P.(C) No.2207 of 2012 on behalf of the State Government and the Director, Higher Education adopting identical stand that Stewart Science College, Cuttack is an Aided Educational Institution established and administered by the religious minority of Christians under Article 30 (1) of the Constitution of India. Therefore, in view of Section 2 of the Act, provisions under the Act as well as Rules and guidelines made thereunder are not applicable to the College so as to

infringe the independence of the Management to administer in the affairs of the College. Letters indicating manner of appointment of Principal in Aided Educational Institutions were clarificatory in nature and the general principle of appointment of senior most Reader as Principal in Aided Educational Institution has never been treated to be applicable to appointment of Principal in any minority institution. The clarification relates to all other Non-Government Aided Institutions. In the counter affidavit filed in W.P.(C) Nos. 7762 and 7763 of 2004 (supra) inadvertently a plea was taken that Stewart Science College was not protected under Article 30 of the Constitution of India or Section 2 of the Act. However, the College has been treated and recognized by the State Government to be an Aided Minority Educational Institution and protected under Article 30 (1) of the Constitution of India. It is categorically pleaded that the settled position is that freedom to choose the person to be appointed as Principal has always been recognized as a vital facet of the right to administer Minority Educational Institution and the right to choose the Principal is an important part of the right of administration.

14. In the preliminary counter affidavit and further counter affidavit filed by Diocese of Cuttack, CNI, the Management, it is asserted that this Court has declared that Stewart Science College, Cuttack is a Minority Educational Institution entitled to be protected under Article 30 (1) of the Constitution of India in the decision of **Governing Body of Stewart Science College and another –vrs.- State of Orissa and other** (supra). Therefore, the Management has absolute power over the administration of the institution. Constitution of the College registered under the Societies Registration Act expressly stipulates in Clause (III) of Article 6 that Principal of the College shall be Christians. Petitioner no.1 in W.P.(C) No.2207 of 2012 was a signatory to the memorandum of the Constitution in his capacity as Teachers' representative to the Governing Body. Placing reliance on the decisions of the Hon'ble Supreme Court in **T.M.A. Pai Foundation –vrs.- State of Karnataka** : AIR 2003 SC 355, in **P.A. Inamdar –vrs.- State of Maharastra** : AIR 2005 SC 3226 and in **Secretary, Malankara Syrian Catholic College –vrs.- T. Jose & Others** : AIR 2007 SC 570 it has been averred that right to choose Principal of the minority institution comes within the power and authority of the Management and it is part of the right of administration even if the institution is fully aided. In accordance with such settled legal principle the impugned resolutions were passed laying down modalities for appointment of Principal on the basis of 'merit-cum-seniority' from among the Readers of the College. Accordingly, Readers of the College, including petitioner nos.1 to 3 in W.P.(C) No.2207 of 2012 were called to appear in the interview and the said petitioners having been found to be unsuccessful in the selection are prevented from assailing the

impugned resolutions on the ground of acquisance/estoppel. Under the Constitution of the College prescribed authorities have the power of recruitment of teaching and non-teaching staff. In the event there is no eligible Christian candidate available in the College, the said post is to be filled up from among the senior Readers on the basis of 'merit-cum-seniority'. There being an eligible Christian Reader, i.e., opposite party no.7 in W.P.(C) No.2207 of 2012, there is no basis for the petitioners to assail the impugned resolutions or appointment of said opposite party no.7 as Principal. In view of mandate of Article 30 (1) of Constitution of India, State Government or its functionaries have also no authority to encroach upon the Management. The Act is also not applicable to Minority Educational Institution in view of proviso under Section 2 of the Act. It is further contended that dispute in W.P.(C) No.7579 of 2008 relates to inter se seniority between two Readers not belonging to Christian Religion. As the petitioner as well as private opposite party no.7 in the said Writ Petition, who were contenders for seniority in the said Writ Petition, have already retired, the Writ Petition has become infructuous. In view of mandate of Article 30 (1) of the Constitution of India and settled legal position, the Management of the College has laid down policy and modality of appointment of Principal by passing the impugned resolutions which were sent to the Director, Higher Education, Orissa for formal approval. A minority institution may on its own follow the principle or policy formulated by the State so long as the same does not contravene the institution's right to freedom of management. It is for a minority institution to voluntarily follow the principle or policy contained in any Statute or Rules. Decisions of the Management are sent to the State Government for formal approval only. General principles laying down modalities for appointment of Principal in Aided Educational Institutions prescribed by resolutions of the State Government are not binding on the College especially after a policy has been framed by the Management in that respect.

15. It is further averred that all along since the inception of the College the Management has been appointing Principal from Christian Community from the year 1944 to 1971. However, due to non-availability of Reader belonging to Christian Community, Non-Christians were appointed as Principal thereafter. The Rules framed by the Management clearly speak that if no suitable Christian candidate is available, interview shall be conducted among the eligible Readers of the College. Therefore, appointment of opposite party no.7 in W.P.(C) No.2207 of 2012 is in consonance with the Constitution of the College and the policy of the Management. Government of Orissa has also in several communications recognized minority status of the College. In the matter of appointment of

Principal, the sole criteria of the Management is to appoint any Reader as Principal who according to Management is suitable to carry out the objective and the philosophy of the institution.

16. It is categorically pleaded by the management that the College was established by BMSC/ BCTA the predecessor of Diocese of Cuttack, CNI. Diocese of Cuttack, CNI being the successor of the College is managing the institution for more than last four decades. In the Constitution of the College it has been clarified that the College was established in 1944 by BMSC, working in Orissa and its legal successor is the Diocese of Cuttack, CNI with effect from 29th November, 1970 after unification of the Churches in India. The College having been established and maintained by persons from amongst the Minority Christian Community is a Minority Educational Institution within the meaning of Section 2 (g) of the 2004 Act. Section 12(b) of the 2004 Act empowers the Commission to decide on the minority status of an educational institution as an appellate authority against the order of State Government or other authorities. In the present case, the State Government having recognized the College to be a Minority Educational Institution, there is no necessity for obtaining any certificate or clarification regarding minority status of the College from the Commission. It was further contended that at no point of time a Non-Christian Reader was appointed as Principal when a suitable Christian Reader was available for the post. Citing instances, it has been pleaded that Mr. Simon Bihari and Mr. Ashit Kumar Choudhury, who were Christians, were not appointed as Principal as they were not Readers at the time when Non-Christian Principals were appointed. Appointment of opposite party no.7 in W.P.(C) No. 2207 of 2012 as Principal cannot be questioned as not only he is a Christian but also he is a Reader and has been found to be eligible and suitable to be appointed by the Management. Decision of the Management in this regard has already received formal approval of the Government. State Government also has never encroached upon the autonomy of the College by not including the teachers of the institution in the common transfer cadre on the ground that the College is being managed by the Minority Community.

17. Upon reference to copies of voluminous documents obtained from archives, it is contended that the Diocese, the present Management of the College, is a successor of the founder of the College. It is averred that Stewart School is original institution out of which Stewart Science College came into existence as a branch. In the year 1881, in order to cater to the physical, social, intellectual and spiritual growth of the Christian children of resident Europeans and Eurasians in Cuttack, the Stewart School (Protestant European School) was founded by the enterprise and generosity

of Dr.William Day Stewart, the then Civil Surgeon of Cuttack. He constructed the class rooms out of his own fund and developed the School with the help of native Christians of India. In the year 1910, the School was recognized as a higher elementary school, and in the year 1924 the School achieved the standard of Junior Secondary School upon which the Cambridge Syndicate sanctioned the opening of a centre for Cambridge examination in the School. The Higher School Certificate classes, equivalent to the I.Sc., were opened in January, 1943. In the year 1943, possibility of converting the School to an Inter-Science College was explored. After inspection of the School by the Director of Public Instruction of Orissa, the Secretary was authorized to move the Utkal University for affiliation. Ultimately, Stewart Science College was started on 1st July, 1944 when both the School and College were one integral unit. The Baptist Mission, Cuttack Station Committee was in charge of the management of the institutions. In the same year, Academic Council of the Utkal University approved the recognition of the Senior Cambridge Examination. The Baptist Mission, Cuttack Station Committee consisted of twelve members out of which six were resident Indians of foreign origin and six were Indian natives. All the six resident Indian members were received by the English Baptist Church, Cuttack on transfer basis. The Rev.D.T.Roberts worked as Principal till his death on 15th September, 1945 and Mrs.Roberts performed her duties in hostel and the School. Rev. W.W.Winfield was the Secretary of Stewart Science College. The first Governing Body of the Stewart Science College was formed and met on 20th December, 1946 which consisted of both resident Indians and native Indians. Documents received from archives reveal that the Baptist Missionary Society was established in the year 1792 having its Head Office at 44. AJC Bose Road, Calcutta. The Baptist Mission, Cuttack Station Committee was managing the Baptist Mission Society institutions of Cuttack with the participation of native Indians and resident Indians. Thus, there is ample material to prove that Stewart Science College was established by a group of Minority Community of Christians with the local participation of Cuttack Station Committee and Utkal Baptist Central Church Council. The parent Stewart School having been declared by the Commission as a Minority Educational Institution and the Government of Orissa having recognized the Stewart Science College as a Minority Educational Institution, there is no necessity for obtaining any declaration or certificate from the Commission. In the year 2004, while petitioner no. 1 in W.P.(C) No.2207 of 2012 was functioning as a member of the Governing Body of the College, Government superseded the Governing Body. Members of the Governing Body in their meeting held on 10.8.2004 unanimously decided to challenge the order of supersession and, accordingly, W.P. No. 7762 of 2004 was filed before this Court. In the said writ petition, it has been decided by this Court

that the State Government has no authority to interfere with the administration of the College which is a Minority Educational Institution under the Act.

18. Learned Advocate General appearing for the State Government contended that the College has been recognized by the Government as a Minority Educational Institution. Therefore, the College is entitled to the protection of the fundamental right guaranteed under Article 30 (1) of the Constitution of India as well as the protection under Section 2 of the Act. Exercise of right under Article 30 (1) of the Constitution of India includes the freedom to choose Principal of the Institution. Proviso to Section 2 of the Act categorically provides that the State Government may regulate certain affairs of Minority Educational Institutions with the rider that such regulatory powers should not have the effect of infringing the right guaranteed under Article 30 of the Constitution of India. Therefore, even if Stewart Science College is an Aided College, State Government cannot interfere with the right of the Management to choose the Principal as the office of Principal is pivotal to the administration, management and maintenance of the College.

19. Mr. Sanjit Mohanty, learned Senior Advocate and other learned counsel appearing for the Management contended that there is no dispute regarding management of the College by the Diocese of Cuttack which represents members of Minority Christian Community. Baptist Missionary Society, London which had registered Office at Calcutta had founded the Stewart Science College through the local Station Committee at Cuttack involving local participation and foreigner Christian Missionaries residing in India prior to independence. Therefore, it cannot be said that the College was founded by aliens. Placing reliance on the decisions of the Hon'ble Supreme Court in **The Right Rev. Bishop S.K. Patrao and others –vrs.- The State of Bihar and others** : 1969 (I) SCC 863 and in **St. Stephen's College –vrs.- University of Delhi** : (1992) 1 SCC 558, it was argued that even if an institution was founded by foreigners, but if they were residing in India, protection under Article 30(1) of the Constitution of India cannot be denied on the ground that they were not born in India. The College was not directly established by BMSC from England. Records from the archives establish that founder members of the College consisted of six foreigners who were resident Indians and six Indian natives. There was adequate local participation in the establishment of the College. The first Governing Body of the College formed on 20th December, 1946 consisted of foreigners who were residing in India as well as Rev. B.Pradhan and Sri Harihara Mohapatra who were native Indians. Petitioners in this case have raised disputed questions of fact with regard to establishment of College. As held

by the Hon'ble Supreme Court in **Manager, St.Thomas U.P.School Kerala and another vs. Commissioner & Secy. to General Education Deptt. and others** : (2002) 2 SCC 497, such disputed questions of fact cannot be effectively adjudicated by Courts in exercise of writ jurisdiction. Therefore, the petitioners, who have assailed the minority status of the College should approach the Commissioner for ventilating their grievances.

20. It is further argued that the Management of the College never abandoned the practice of appointing eligible Readers belonging to Christian Community as Principal whenever such eligible Readers were available. Mr. Simon Bihari and Mr. Ashit Kumar Chowdhury could not be appointed as Principal as they were not Readers during the period when Non-Christian Principals were appointed in the College.

21. It was further argued on behalf of the Management that initially, Stewart Science College was established as a branch of Stewart School, Cuttack. The Commission has recognized Stewart School as Minority Educational Institution. Government of Orissa also does not dispute the status of Stewart Science College as Minority Educational Institution. Therefore, there is no need for the College to obtain any declaration or MSC from the Commission. BMSC, London which had its registered office at Calcutta with local participation of Cuttack Station Committee of the Baptist Missionary Society established the College. Cuttack Station Committee which was associated with establishment of the College merged with other Station Committees in Orissa. Subsequently, it was named as Orissa Central Council and finally it was renamed as Utkal Christian Church Central Council (UCCCC). UCCCC, which represented Orissa Churches of Baptist Missionary Society origin, merged with CNI in 1970 and became Diocese of Cuttack and Diocese of Sambalpur. Accordingly, they took over the management of the Churches and institutions under UCCCC/BMSC/BCTA and became a provincial constituent body of the BCTA. Thus, it was argued, BMSC, London established the College through Cuttack Station Committee of BMSC. The Christian Missionaries of England residing in India and local Christian residents of Cuttack jointly started the College in 1944 as a branch of Stewart School, Cuttack. BMSC, London appointed BCTA as new Trustee of Churches including the College. The Diocese of Cuttack being a constituent body of the BCTA in Orissa is the sole successor of the Churches and Institutions i.e. BMSC/BMS under its jurisdiction. The claim of Diocese of Cuttack and Diocese of Sambalpur to be the representative bodies of BCTA has been upheld by the Hon'ble Supreme Court of India in Civil Appeal No. 1898 of 1987 arising out of SLP (C) No. 8332 of 1987 and Civil Appeal No. 1899 of 1987 arising out of SLP (C) No. 8384 of 1987 on

the basis of report of Justice R.M.Dutta (Retd.) who was appointed as Special Officer by the Supreme Court to scrutinize the matter. In the background of such factual assertions it was strenuously contended that right to freedom to choose the Principal of the College by the Diocese cannot be a questioned by the petitioners.

22. In support of legal propositions canvassed by them learned counsel appearing for the parties placed reliance on a number of authoritative judicial decisions rendered by Hon'ble Supreme Court and some High Courts. It is well settled that under Article 30 (1), all minorities whether based on religion or language have been guaranteed the right to establish and administer educational institutions of their choice. As has been observed by the Hon'ble Supreme Court in **Manager, St.Thomas U.P.School Kerala and another vs. Commissioner & Secy. to General Education Deptt. and others** (supra), it is not in dispute that Christians form a minority in this country. The right of minorities under Article 30 (1) to establish and administer educational institutions has been judicially construed as defining minority institutions. What is expressed in terms of a right under Article 30(1) in fact describes the institution in respect of which the protection of Article 30(1) can be claimed. It has, therefore, been held that unless the educational institution has been established by a minority, it cannot claim the right to administer it under Article 30(1).

23. Article 30(1) of the Constitution of India has since long been the subject matter of scrutiny and exposition in a number of decisions of the Hon'ble Supreme Court. In **Azeez Basha –vrs. Union of India :** AIR 1968 SC 662, it has been held:

> "(19) xx xx xx xx xx It is to our mind quite clear that Article 30 (1) postulates that the religious community will have the right to establish and administer educational institutions of their choice meaning thereby that where a religious minority establishes an educational institution, it will have the right to administer that. An argument has been raised to the effect that even though the religious minority may not have established the educational institution, it will have the right to administer it, if by some process it had been administering the same before the Constitution came into force. We are not prepared to accept this argument. The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise. The Article cannot be read to mean that even if the educational institution has been established by

somebody else, any religious minority would have the right to administer it because, for some reason or other, it might have been administering it before the Constitution came into force. The words "establish and administer" in the Article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has been established by it. In this connection our attention was drawn to In re; The Kerala Education Bill, 1957, 1957 SCR 995: (AIR 1958 SC 956) where, it is argued, this Court had held that the minority can administer an educational institution even though it might not have established it. In that case an argument was raised that under Article 30(1) protection was given only to educational institutions established after the Constitution came into force. That argument was turned down by this Court for the obvious reason that if that interpretation was given to Article 30 (1) it would be robbed of much of is content. But that case in our opinion did not lay down that the words "establish and administer" in Article 30 (1) should be read disjunctively so that though a minority might not have established an educational institution it had the right to administer it. It is true the Court spoke of Article 30 (1) giving two rights to a minority i.e. (i) to establish and (ii) to administer. But that was said only in the context of meeting the argument that educational institutions established by minorities before the Constitution came into force did not have the protection of Article 30 (1). We are of opinion that nothing in that case justifies the contention raised on behalf of the petitioners that the minorities would have the right to administer an educational institution even though the institution may not have been established by them. The two words in Article 30 (1) must be read together and so read the Article gives the right to the minority to administer institutions established by it. If the educational institution has not been established by a minority it cannot clam the right to administer it under Article 30 (1). We have therefore to consider whether the Aligarh University was established by the Muslim minority; and if it was so established, the minority would certainly have the right to administer it *(sic)."*

It has also been pointed out:

"(25). What does the word "established" in Article 30 (1) mean? In Bouvier's Law Dictionary, Third Edition, Vol.I, it has been said that the word "establish" occurs frequently in the Constitution of the United States and it is there used in different meanings; and five such meanings have been given, namely- (1) to settle firmly, to fix

> unalterably, as to establish justice; (2) to make or form: as, to establish a uniform rule of naturalization; (3) to found, to create, to regulate: as, Congress shall have power to establish post offices; (4) to found, recognize, confirm or admit as, Congress shall make no law respecting an establishment of religion; (5) to create, to ratify, or confirm, as We, the people, etc., do ordain and establish this constitution. Thus it cannot be said that the only meaning of the word "establish" is to be found in the sense in which an eleemosynary institution is founded and we shall have to see in what sense the word has been used in our Constitution in this Article. In Shorter Oxford English Dictionary, Third Edition the word "establish" has a number of meanings i.e., to ratify, confirm, settle, to found, to create. Here again founding is not the only meaning of the word "establish" and it includes creation also. In Webster's Third New International Dictionary, the word "establish" has been given a number of meanings, namely, to found or base squarely, to make firm or stable, to bring into existence, create, make start, originate. It will be seen that here also founding is not the only meaning; and the word also means "to bring into existence". We are of opinion that for the purpose of Article 30 (1) the word means "to bring into existence", and so the right given by Article 30 (1) to the minority is to bring into existence an educational institution, and if they do so, to administer it. We have therefore to see what happened in 1920 and who brought the Aligarh University into existence."

In the above cited decision issue before the Hon'ble Supreme Court was as to whether Aligarh Musilim University was established by the Muslim minority.

24. Admittedly, Stewart Science College was established prior to the enactment of the Constitution of India when there was no settled concept of Indian citizenship. In similar circumstances, in the decision of **St. Stephen's College –vrs.- University of Delhi** (supra), upon reference to the decision of **The Right Rev. Bishop S.K. Patrao and others –vrs.- The State of Bihar and others** (supra) and other earlier decisions, Hon'ble Supreme Court held:

> "28. There is by now, fairly abundant case law on the questions as to "minority"; the minority's right to "establish", and their right to "administer" educational institutions. These questions have arisen in regard to a variety of institutions all over the country. They have arisen in regard to Christians, Muslims and in regard to certain sects

of Hindus and linguistic groups. The courts in certain cases have accepted without much scrutiny the version of the claimant that the institution in question was founded by a minority community while in some cases the courts have examined very minutely the proof of the establishment of the institution. It should be borne in mind that the words "establish" and "administer" used in Article 30 (1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institution. The proof of establishment of the institution, is thus a condition precedent for claiming the right to administer the institution. Prior to the commencement of the Constitution of India, there was no settled concept of Indian citizenship. This Court, however, did reiterate that the minority competent to claim the protection of Article 30 (1) of the Constitution, and on that account the privilege of establishing and maintaining educational institutions of its choice, must be a minority of persons residing in India. They must have formed a well defined religious or linguistic minority. It does not envisage the rights of the foreign missionary or institution, however, laudable their objects might be. After the Constitution, the minority under Article 30 must necessarily mean those who form a distinct and identifiable group of citizens of India. Whether it is "old stuff" or "new product", the object of the institute should be genuine, and not devious or dubious. There should be nexus between the means employed and the ends desired. As pointed out in *A.P. Christian Educational Society* case ((1986) 2 SCC 667) there must exist some positive index to enable the educational institution to be identified with religious or linguistic minorities. Article 30 (1) is a protective measure only for the benefit of religious and linguistic minorities and it is essential, to make it absolutely clear that no ill-fit or camouflaged institution should get away with the constitutional protection."

25. In **The Right Rev. Bishop S.K. Patro and others –vrs.- The State of Bihar and others :** AIR 1970 SC 259, it was held by the Hon'ble Supreme Court:

"19. It is unnecessary to enter upon an enquiry whether all the persons who took part in establishing the School in 1854 were "Indian citizens". Prior to the enactment of the Constitution there was no settled concept of Indian citizenship, and it cannot be said that Christian Missionaries who had settled in India and the local Christian residents of Bhagalpur did not form a minority community.

> It is true that the minority competent to claim the protection of Article 30(1) and on that account the privilege of establishing and maintaining educational institutions of its choice must be a minority of persons residing in India. It does not confer upon foreigners not resident in India the right to set up educational institutions of their choice. Persons setting up educational institutions must be resident in India and they must form a well-defined religious or linguistic minority. It is not however predicated that protection of the right guaranteed under Article 30 may be availed only in respect of an institution established before the Constitution by persons born and resident in British India.
>
> 20. xx xx xx xx xx Art.30 guarantees the right of minorities to establish and administer educational institutions: the article does not expressly refer to citizenship as a qualification for the members of the minorities. xx xx xx xx.
>
> 21. We are also unable to agree with the High Court that before any protection can be claimed under Article 30 (1) in respect of the Church Missionary Society Higher Secondary School it was required to be proved that all persons or a majority of them who established the institution were "Indian citizens" in the year 1854. There being no Indian citizenship in the year 1854 independently of the citizenship of the British Empire, to incorporate in the interpretation of Article 30 in respect of an institution established by a minority the condition that it must in addition be proved to have been established by persons who would, if the institution had been set up after the Constitution, have claimed Indian citizenship, is to whittle down the protection of Article 30 in a manner not warranted by the provisions of the Constitution."

26. Circumstance of receipt of grant-in-aid by the Stewart Science College has been canvassed by the petitioners as a ground to reject the claim of minority status. However, provision under Article 30(2) itself contemplates grant-in-aid to Minority Educational Institution. Also, it is now well settled that receipt of aid does not alter the nature or character of the Minority Educational Institution. In **Secy., Malankara Syrian Catholic –vrs.- T. Jose and others :** (2007) 1 SCC 386, it has been observed and held by Hon'ble Supreme Court at paragraph-17:

> "In T.M.A. Pai ((2002) 8 SCC 481) this Court made it clear that a minority institution does not cease to be so, merely on receipt of aid from the State or its agencies. In other words, receipt of aid does

> not alter the nature or character of the minority educational institution receiving aid. Article 30 (1) clearly implies that any grant that is given by the State to the minority institution cannot have such conditions attached to it which will in any way dilute or abridge the rights of the minorities to establish and administer educational institutions. But all conditions that have relevance to the proper utilization of the aid by an educational institution can be imposed. xx xx xx xx xx."

In the decisions in **T.M.A. Pai Foundation –vrs.- State of Karnataka** (supra) and **P.A. Inamdar –vrs.- State of Maharastra** (supra) also, nature of regulatory control that may be exercised on Aided Minority Educational Institutions by the Government has been pointed out.

27. It has also now been authoritatively well settled that fundamental right guaranteed under Article 30 includes autonomy and independence of a Minority Educational Institution to choose and appoint the Principal. In **Secy., Malankara Syrian Catholic –vrs.- T. Jose and others** (supra), it has been held by Hon'ble Supreme Court:

> "27. It is thus clear that the freedom to choose the person to be appointed as Principal has always been recognized as a vital facet of the right to administer the educational institution. This has not been, in any way, diluted or altered by T.M.A. Pai ((2002) 8 SCC 481). Having regard to the key role played by the Principal in the management and administration of the educational institution, there can be no doubt that the right to choose the Principal is an important part of the right of administration and even if the institution is aided, there can be no interference with the said right. The fact that the post of the Principal/Headmaster is also covered by State aid will make no difference."

28. In the present case, it is not in dispute that the present Management of the Stewart Science College comprising of the Diocese and Governing Body represent a group of Minority Christians. However, petitioners contend that the Management has long since abdicated and abandoned the practice of appointing Christian only as Principal in spite of availability of eligible Christians. It was argued that provision incorporated under Article 6 (III) of the College Constitution for appointment of Christians as Principal has not been followed for about four decades. Therefore, by long disuse of practice the Management has lost the right to freedom of appointing Christians only as Principal. The Management is bound to follow the guidelines prescribed by the State for appointment of senior most approved Reader as Principal of the College as is being done for a considerably long period. It was argued

that in view of doctrine of desuetude even statutory provisions become a dead letter and cannot be followed if the same is not followed for a long period of time. In this context, petitioners placed reliance on the decision of Hon'ble Supreme Court in **Municipal Corporation for City of Pune and Another –vrs.- Bharat Forge Co. Ltd. and others :** (1995) 3 SCC 434 wherein it has been held:

> "34. Though in India the doctrine of desuetude does not appear to have been used so far to hold that any statute has stood repealed because of this process, we find no objection in principle to apply this doctrine to our statutes as well. This is for the reason that a citizen should know whether, despite a statute having been in disuse for long duration and instead a contrary practice being in use, he is still required to act as per the "dead letter". We would think it would advance the cause of justice to accept the application of doctrine of desuetude in our country also. Our soil is ready to accept this principle; indeed, there is need for its implantation, because persons residing in *free* India, who have assured fundamental rights including what has been stated in Article 21, must be protected from their being, say, prosecuted and punished for violation of a law which has become "dead letter". A new path is, therefore, required to be laid and trodden."

29. It is not disputed by the Management of the College that Non-Christians were appointed as Principal from the year 1971 to 2012. However, it was urged that appointment of Non-Christians as Principal in the College was necessitated because of non-availability of eligible Readers belonging to Christian Community. Thus, the Management has raised a controversy which requires adjudication of a disputed questions of fact with regard to availability or non-availability for about 40 years of teachers belonging to Christian Community in the College who could have been appointed as Principal.

30. Moreover, the most controversial issue between the parties in the present case is with regard to establishment of the College. The College was established in the year 1944. As has already been pointed out it has been well settled that the words "establish and administer" in Article 30 (1) must be read conjunctively. Therefore, the Article gives the right to the minority to administer an educational institution established by it. Parties are in agreement that the College was established by BMSC, London. Petitioners' case is that BMSC, London was a body incorporated under the English Companies Act, 1867 having its registered office at Gloucester, London.

BMSC appointed BCTA as a trustee and thereafter BCTA executed another deed of transfer styled as transfer deed from trustee to trustee in favour of CNI Trust Association. According to petitioners BMSC was an eleemosynary corporation not dedicated to ecclesiastical or religious affairs but to secular matters. It is also the case of the petitioners that right of management of the College cannot be claimed by way of succession by body corporates. Moreover, BMSC was an alien corporation/ overseas society. Management does not dispute establishment of the College by BMSC. BMSC, BCTA and CNI are stated to be predecessors of the Diocese of Cuttack. Diocese of Cuttack is managing the College by way of succession for more than last four decades. According to the Management Stewart Science College, Cuttack is an extended branch of Stewart School, Cuttack which was founded by Dr.William Day Stewart. Also, according to the Management BMSC having its Head Office in Culcutta was established in the year 1792. Diocese of Cuttack came to take over management of the College from BMSC, London through the local Station Committee at Cuttack involving local participation, Orissa Central Council, UCCCC, BCTA and CNI. BMSC, London appointed BCTA as a new trustee of Churches including the College. Diocese of Cuttack being a constituent body of the BCTA in Orissa is the sole successor of the Churches and Institutions i.e. BMSC/BMS under its jurisdiction. Thus, parties have raised disputed questions of fact with regard to religious nature of BMSC, London; with regard to origin, genesis and succession of the College and with regard to the claim of the Management to have established the College through its predecessors. Voluminous documents including documents from archives are being relied upon. Therefore, obviously, the claim of the present Management to have established the College as a Minority Educational Institution also requires adjudication of disputed questions of fact.

31. In **Manager, St.Thomas U.P.School Kerala and another vs. Commissioner & Secy. to General Education Deptt. and others** (supra) in which the critical issue to be determined was as to whether the appellant School was established by a minority, Hon'ble Supreme Court has categorically disapproved adjudication of similar disputed questions of facts by Courts in exercise of writ jurisdiction. It has been held:

> "6. At the outset, we record our disapproval of the High Court entertaining the writ application at all. Both the Single Judge and the Division Bench have determined what were clearly disputed questions of fact without the benefit of a full-scale trial. The appellants have drawn our attention to evidence which, according to them, conclusively proves that the School was a minority institution

> and which was not considered by the High Court. We do not propose to commit the same mistake as the High Court. Given the nature of the dispute, the issue of the status of the School should have been left to the fact-finding authorities whether executive or judicial for determination in jurisdictions equipped for the purpose. xx xx xx xx"

Thus, in view of dictum of the Hon'ble Supreme Court it would not be proper on our part to commit error by venturing into deciding disputed questions of fact involving issues like the nature of BMSC, the succession of College by Diocese, the availability or non-availability of eligible Christian Teachers to be appointed as Principal for a long period of about 40 years, etc.

32. Much reliance was placed by the opposite parties on the common judgment of this Court in W.P. (C) Nos. 7762 and 7763 of 2004 (**Governing Body of Stewart Science College, Cuttack and another and Governing Body of Christ College, Cuttack and another –vrs.- State of Orissa and others)** (supra) passed by learned Single Judge, to urge that minority status of the College has been judicially settled. In the said decision it has been held by the learned Single Judge as follows:-

> "10. The main ground on which the State resists the rights of the petitioners to manage the Stewart Science College, Cuttack is that the said College was established in the year 1944 by the Baptist Church Trust Association and its management was handed over to the Diocese of Cuttack, a creature of the Church of North India. Thus according to the opposite parties, the Diocese having not established this College has no right to manage the same. But then according to learned counsel for the petitioners, the Baptist Church Trust Association is the Apex Body of which Diocese of Cuttack is a branch. Be that as it may, the dispute as to whether the Stewart Science College and Christ College are Minority Institutions or not is no longer in dispute, as would be evident from the letter bearing number 4010/83- 16179 dated 18.3.1983 (Annexure-II) issued by the Director of Public Instruction (Higher Education), Orissa, as it then was, addressed to the Secretary to Government of Orissa, Education Department wherein it was clearly mentioned that the Stewart Science College, Cuttack and Christ College, Cuttack being Minority Institutions are not governed under the Orissa Education Act, 1969 and the Rules framed there-under as those two institutions had been established and were being administered by Christian Minority. In spite of the said decision, it appears, the dispute as to whether the

aforesaid two Colleges were Minority Institutions or not cropped up now and then, and the same was referred to the National Commission for Minority Educational Institutions, Government of India. After receiving the said reference notices were issued by the National Commission and after due consideration of the matter, the National Commission, headed by Justice M.S.A.Siddiqui as its Chairman with B.S. Ramoowalia as Member, on 11.9.2007 ordered as follows:-

> "It is stated in Col.9(d) of the Petition that the petitioner-institution has been recognized by the State Government as a Minority Educational Institution. Reliance has been placed on order dated 18.3.83 issued by the Directorate of Public Instruction (H.E.), Orissa. Since the State Government has already recognized the petitioner-institution as a Minority Educational Institution, there is no need to issue another certificate by this Commission in this regard. The petition is disposed of accordingly. Copy of the order be sent to the parties.""

33. It is apparent from the above that the very same question of the Diocese to have not established the College was raised before the learned Single Judge. However, learned Single Judge arrived at the decision basing solely on the letter of the Director, of Public Instruction (Higher Education), Orissa bearing No.4010/83-16179 dated 18.3.1983 and the order of the Commission dated 11.9.2007. So far as order of the Commission is concerned, Annexure-9 to W.P.(C) No.2207 of 2012 fortifies the contention of the petitioners that order of the Commission related to Christ College, Cuttack only. Opposite parties have not placed any material to indicate that the order of the Commission dated 11.9.2007 related to Stewart Science College, Cuttack. So far as the letter dated 18.3.1983 of Director of Public Instruction (Higher Education), Orissa is concerned, the first para of the letter addressed to the Secretary to Government of Orissa in the Education Department reads:

> "I am directed to say that the Stewart Science College, Cuttack and Christ College, Cuttack being Minority Institutions are not governed and or Orissa Education Act, 1969 and rules framed there under as those the Institutions have been established and being administered by the Christian Minority. They are making the appointments of Lecturers by their own selection without taking candidates from the Adhoc merit panel prepared by this Directorate as well as from the Selection Board on the grounds that they are Minority Institutions.

> Although these two Institutions are being managed and administered by the Minority Community, the Staff of the Institutions are receiving direct payment since the date of its introduction in the aided Colleges. In this connection it may be mentioned here that previously Government in their letter No.22369/EYS, dated 27.08.79 had decided that the payment of salaries to the Staff of these two Institutions through direct payment system should be stopped, a copy of the order based on this decision was communicated to both the Institutions in this Directorate Memo No.32484 dtd.25.07.79. But subsequently Government in their No.27085/EYS, dated 03.08.79 have kept the said orders in abeyance and decided that pending finalization of the matter, the existing arrangement for making payment of salaries to the staff directly may continue Govt. order in the matter is awaited."

In the last paragraph request has been made that Government order in the matter may be communicated at an early date. It is also worthwhile to observe that State Government have taken conflicting and contradictory stands with regard to the status of the Stewart Science College in different Writ Petitions. In W.P.(C) No.2207 of 2012 stand of the Government is that Stewart Science College is a Minority Educational Institution entitled to protection under Article 30. However, in W.P.(C) No.7762 of 2004 stand of the Government was that the present Management or Governing Body having not established the College cannot claim the protection of administration of the College as envisaged under Article 30 of the Constitution. In fact, learned Single Judge has categorically observed in the decision extracted above that the main ground on which the State resisted the rights of the Management was that the said College was established by BCTA and its management was handed over to the Diocese and as such the Diocese having not established the College has no rights to manage the institution. Also, in the counter affidavit filed on behalf of Director, Higher Education in W.P.(C) No.7579 of 2008 it has been pleaded that the impugned resolution passed by the Management in contravention of Government Resolution dated 9.3.1999 issued under the Act prescribing that Principals of Non-Government Aided Colleges may be appointed from among Readers/Lecturers (Selection Grade) is to be ignored as the same is illegal and the Management is estopped from deviation from the prescribed Rule framed by the Government since the College is receiving grant-in-aid on direct payment scheme. Vascillating stands of the State Government make the situation worse. Thus, learned Single Judge has not only placed reliance on the order of the Commission which did not relate to Stewart Science College, but also has not taken note of conflicting and contradictory

stands of the State Government. Therefore, judgment passed by the learned Single Judge in **Governing Body of Stewart Science College, Cuttack and another** (W.P.(C) No.7762 of 2004) (supra) cannot be held to have finally determined the status of Stewart Science College as a Minority Educational Institution. Instead of entertaining the writ application, the learned Single Judge ought to have directed to get the dispute adjudicated by competent fact finding authorities in accordance with the mandate of Hon'ble Supreme Court in **Manager, St.Thomas U.P.School Kerala and another vs. Commissioner & Secy. to General Education Deptt. and others** (supra).

34. Law is well-settled that nobody should suffer owing to mistake or erroneous act of the Court. In **South Eastern Coalfields Ltd. –vrs.- State of M.P. and others :** AIR 2003 SC 4482 it has been held by the Hon'ble Supreme Court:

> "26. That no one shall suffer by an act of the Court is not a rule confined to an erroneous act of the court: the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court: the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. xx xx xx xx xx."

Also, in **Haryana State Electricity Board and another –vrs.- Gulshan Lal and others :** (2009) 12 SCC 231 it has been held by the Hon'ble Supreme Court:

> "47. It is a well-settled principle of law that nobody should suffer owing to the mistake on the part of the court in view of the maxim *actus curiae neminem gravabit*. xx xx xx xx xx."

35. In fact the Management asserts to have obtained Minority Status Certificate in respect of Stewart School, of which the College is stated to be a branch, from the Commission which is the competent fact finding authority under the 2004 Act. The declaration brought to the notice of the Court reads:

" GOVERNMENT OF INDIA

NATIONAL COMMISSION FOR MINORITY EDUCATIONAL INSTITUTIONS

F.NO. 1568 OF 2008-3415/-

ON CONSIDERATION OF THE DOCUMENTARY EVIDENCE PRODUCED BEFORE THE COMMISSION, THE COMMISSION IS SATISFIED THAT STEWART SCHOOL, MISSION ROAD, P.O. BUXIBUZAR, P.S. LALBAG, DIST. CUTTACK, ORISSA MANAGED BY THE STEWART SCHOOL, CUTTACK, ORISSA, IS A MINORITY EDUCATION INSTITUTION WITHIN THE MEANING OF SECTION 2 (g) OF THE NATIONAL COMMISSION FOR MINORITY EDUCATIONAL INSTITUTIONS ACT 2004. CONSEQUENTLY, IT IS HEREBY DECLARED THAT THE AFORESAID SCHOOL IS A MINORITY EDUCATION INSTITUTION COVERED UNDER ARTICLE 30 OF THE CONSTITUTION OF INDIA.

GIVEN UNDER MY HAND AND THE SEAL OF THE COMMISSION ON THIS 26TH DAY OF FEBRUARY 2009.

(R.RENGANATH)
SECRETARY"

We fail to understand why the Management of the College has not obtained a similar certificate in respect of the Stewart Science College despite clouds created by litigations from time to time, especially in view of vascillating stands taken by the State Government.

36. Under the 2004 Act the Commission has been established to resolve disputes regarding status of institution claiming to be a Minority Educational Institution within the meaning of Section 2 (g). Functions of the Commission as provided under Section 11 (f) of the Act includes deciding all questions relating to the status of any institution as Minority Educational Institution and declare its status as such. The Commission has been conferred with powers of Civil Court as enumerated under Section 12 (2) and (3) of the Act. Therefore, in view of circumstances narrated above, it is found appropriate that the status of the College as Minority Education Institution ought to be decided by the Commission.

37. Accordingly, we dispose of all the four writ petitions directing the Management to approach the Commission for obtaining declaration regarding Minority Status of Stewart Science College within a period of two months impleading the State Government and petitioners as parties. In case application seeking Minority Status of Stewart Science College as directed is filed before the Commission, we request the Commission to decide the matter on merit expeditiously without being in any manner influenced by any observation made in the decision of learned Single Judge in W.P.(C) Nos.7762 of 2004; **Governing Body of Stewart Science College, Cuttack and another** (supra) or by us in this judgment.

Status quo as on today be maintained till a declaration is made by the Commission provided the Management of Stewart Science College submits the required application within the time granted. In the event of failure on the part of the Management *status quo ante* in the matter of appointment of Principal of the College as was prevailing prior to the passing of the impugned resolutions shall be maintained till the decision of the Commission.

Writ petitions dispoed of.

2012 (II) ILR - CUT- 985

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

JCRLA NO. 108 OF 2006 (Dt.16.08.2012)

JANMAJAYA BHOI …….Appellant

.Vrs.

STATE OF ORISSA …….Respondent

CRIMINAL TRIAL – Conviction U/s.302, 376 (2) (f) I.P.C. – No eye witness to the occurrence – Trial Court convicted the appellant only on circumstantial evidence – From the evidence adduced by the prosecution a strong suspicion arises with regard to involvement of the appellant but such suspicion cannot take place of proof – If there is little doubt in mind, benefit of such doubt must be extended to the appellant – Held, suspicion however strong it may be it cannot take place of proof – This Court acquitted the appellant of the charges by extending the benefit of doubt. (Para 12,13)

Case law Referred to:-

I (2011) CCR 387 (SC) : (Wakkar & Anr.-V- State of U.P.).

For Appellant - Mr. Arun Kumar Das-I
For Respondent - Mr. B.P.Pradhan, Addl. Govt. Advocate

L. MOHAPATRA, J. This appeal arises out of the judgment and order of the learned Additional Sessions Judge (F.T.), Sambalpur in S. T. Case No.35/19 of 2005 disposed of on 19.9.2006. The appellant has been convicted for commission of offence under Section 376 (2) (f) of the Indian Penal Code (in short 'IPC') as well as under Section 302 of IPC. For his conviction under Section 302 of IPC, he has been sentenced to undergo R.I. for life and pay a fine of Rs.5,000/-in default, to undergo further imprisonment for one year and for his conviction under Section 376(2)(f), he has been sentenced to imprisonment for ten years and pay a fine of Rs.1,000/- in default, to further undergo imprisonment for six months. However, both the sentences have been directed to run concurrently.

2. Case of the petitioner is that on 29.6.2004, the deceased, Sasmita Bhoi, a minor girl, along with other children were playing near the village tube-well at about 5.30 P.M. The deceased did not return home in the evening for which the family members of the deceased started searching for

her in the village. Many villagers joined them. In spite of thorough search, the deceased was not found. When the family members of the deceased and the other villagers were searching for the deceased, the appellant came to the village at about 8 p.m. and enquired about the matter and also joined the villagers in search of the deceased. He also dissuaded the villagers not to search for the deceased stating that the deceased might have been taken by a witch and he also advised the villagers not to report about missing of the deceased in the police station. Search also continued but the deceased was not found and only on 1.7.2004 at about 11.00 a.m. the dead body of the deceased was found lying under a Khajuri tree standing in the land of one Saranapanjara Bhoi. Her undergarment and chapel were lying at a distance and a white napkin was wrapped in her neck. P.W.1 thereafter lodged the F.I.R. at 12.30 p.m. on the basis of which investigation was taken up. On completion of investigation, charge sheet was submitted for both the offences and the appellant faced trial for commission of the said offence.

3. In course of trial, the prosecution examined as many as twenty witnesses, but none was examined on behalf of the defence. The plea of defence is complete denial of the prosecution allegation and the appellant also complained of false implication. Out of the twenty witnesses examined on behalf of the prosecution, P.W.1 is the Uncle of the deceased and is the informant in this case. P.Ws.1, 2, 4, 5, 6, 7, 9, 11 and 12 are the witnesses, who stated about searching for the deceased in the village in the evening on the date of occurrence and they have also stated about the conduct of the appellant in dissuading them from going to the police station. P.W.2 further stated about the disclosure statement made by the appellant while in police custody and recovery of the stone at the instance of the appellant. P.W.3 turned hostile. P.Ws.8 and 13 are the two witnesses to seizure and P.W.14 is a Constable, who is a witness to seizure, under Exts.17, 18 and 19. P.W.9 had seen the appellant standing near the place where the deceased and her friends were playing. P.W.10 is the beetle shop owner from whom the appellant had purchased pudia and two chocolates in the evening. P.W.15 is a Cameraman, who had made vediography of the disclosure statement made by the appellant. P.W.16 is the Doctor, who conducted the postmortem examination. P.W.17 is the Police Officer, who initially made a Station Diary Entry with regard to missing of the deceased. P.W.19 is the another the Doctor, who examined the appellant on police requisition and P.Ws.18 and 20 are the two Investigating Officers.

4. The trial court in absence of direct evidence found the appellant guilty of the charges on the following circumstantial evidence:-

(i) The appellant had been last seen with the deceased in the evening on the date on which the occurrence took place.

(ii) The appellant mislead the villagers at the time of search and also dissuaded them not to inform the police.

(iii) The appellant while in police custody not only gave recovery of the stone by means of which the deceased also assaulted but also led the police to both the places where the deceased had been raped and murdered. Conduct of the appellant in purchasing two chocolates from the shop of P.W.10 in the evening was also taken as a circumstance against the appellant.

The trial court also found another circumstance against the appellant with reference to the chemical examination report and it was specifically held by the trial court that the blood stain earth collected by the investigating Officer from both the places contained human blood and no explanation has been offered by the appellant. On the basis of the above circumstantial evidence, the appellant was found guilty of both the charges.

5. Learned counsel appearing for the appellant referring to the evidence of P.W.16, the doctor, who conducted the postmortem examination, submitted that evidence of P.W.16 proves that the deceased had been subjected to rape but the same cannot be attributed to the appellant as P.W.16 also stated that normally there will be injury on the penis, if there is forcible intercourse with a minor girl. P.W.19, the Doctor, who examined the appellant on police requisition, did not find any injury on the private parts of the appellant. Therefore, the allegation of rape made by the prosecution is not established through evidence. So far as allegation of murder is concerned, according to the learned counsel for the appellant, the only evidence is the disclosure statement leading to discovery of a stone by means of which the deceased is alleged to have been killed. Even if any such circumstance has been proved, the trial court in absence of any other circumstantial evidence completing a chain of events, could not have been convicted the appellant on the basis of only one circumstance.

6. Learned counsel for the State, on the other hand, submitted that the circumstances relied upon by the trial court not only complete a chain of circumstances, but also point at the guilt of the appellant without leaving any room for entertaining a doubt. Therefore, there is no reason for this Court to interfere with the finding of the trial court.

7. Undisputedly there is no eyewitness to the occurrence and the prosecution relies on circumstantial evidence. Much reliance was placed by

the prosecution on the evidence of P.W.9, who stated to have seen the appellant with the deceased. P.W.9 deposed that on 29.6.2004 at about 5.30 p.m. to 6.00 p.m. when he came out from his house he saw the deceased playing near the tube well of the village along with other children. The appellant was standing on a verandah near the children at that time. This being the only evidence of P.W.9, it cannot be said that the deceased was seen in the company of the appellant alone previous to the alleged incident. Therefore, such evidence of P.W.9 cannot be used against the appellant to bring in the theory of last seen.

8. P.Ws.1, 2, 4, 5, 6, 7, 9, 11 and 12 are the witnesses, who participated in search of the deceased and also stated about the conduct of the appellant in course of such search. Since evidence of these witnesses in this regard is more or less same, we refer to the evidence of P.W.1 alone. P.W.1 stated that on 29th June, 2004 in the evening after returning from land, they did not find the deceased in the house. They searched for the deceased in the village and when they could not trace her out, other villagers joined them in searching for the deceased. The appellant was not available in the village. At about 8.30 p.m. the appellant came to the village and enquired about the incident. The appellant said that the deceased was taken away by a witch and, therefore there was no necessity to search for her. When they wanted to report about the incident before the police, the appellant advised them not to report. This statement is not only made by P.W.1 but also by rest of the witnesses as stated above. From the evidence of these witnesses, it is clear that when the family members and the villagers started searching for the deceased, the appellant was not in the village and he joined them at 8.30 P.M. It also appears that the appellant told these witnesses that the deceased might have taken by a witch and there is no necessity to report the incident to the police station.

9. So far as absence of the appellant from the village is concerned, from the evidence of P.W.6, it appears that at about 8.30 p.m. when the appellant came to the village and was questioned as to where he had gone, he stated to have gone to Mangalabar Hat (Tuesday Hat). Therefore, the prosecution itself has explained the absence of the appellant in the village at the time of search. So far as other conduct of the appellant in making a statement that the deceased might have been taken away by a witch is not a statement which can be taken as a circumstance available against the appellant. Therefore, the evidence of all the above witnesses do not prove any circumstance which can be used against the appellant.

10. So far as disclosure statement is concerned, only witness examined on behalf of the prosecution is P.W.2. This witness stated in court that on 3rd

July 2004 the Police Personnel of Ainthapali Police Station called him and another to the police station and accordingly they went to the police station and saw the appellant standing before the Officer-In-Charge. Being asked by the police, the appellant confessed his guilty stating that on 29th June at 6.30 P.M. to 7.00 p.m. he gave two chocolates to the deceased near the village tube well and by gagging her mouth with cloth, he lifted the deceased to the paddy field of one Biswanath Guru and under the ridge of the paddy field, he committed rape on the deceased by removing her undergarment. The appellant also confessed that after committing rape, his conscience bit him and he felt that if the deceased is left alive she would inform about the incident before the villagers and, therefore, he killed the deceased by tying her neck by means of while gamuchha. Thereafter he lifted the dead body of the deceased to a place under Palasa tree (Palsa) and struck her head by means of a stone. Thereafter, he again took the dead body of the deceased and kept under a Khajuri tree where from the villagers found the dead body. P.W.2 further stated that the appellant making such statement while in custody led them to the tube well and narrated the incident again. Thereafter he led them to the place of rape where from the police seized blood stains earth and sample earth. Thereafter the appellant led them to the place where he had assaulted the deceased by means of a stone and the police seized blood stains earth and sample earth from that place also. Thereafter the appellant led them to the bank of Harada Jore and gave recovery of the stone by means which he had assaulted the deceased. Lastly the appellant also led them to his own house and brought out a lungi and towel which he had worn at the time of commission of offence. Nothing has been brought out in the cross examination of this witness to discard his testimony. Therefore from the evidence of P.W.2, the prosecution has been able to prove that the appellant made a disclosure statement while in custody in presence of witnesses, the manner in which he committed rape on the deceased and ultimately killed her. He also gave recovery of the stone by means of which it is alleged `that he had killed the deceased. P.W.16, the doctor, who conducted the postmortem examination, found seven injuries and also ligature mark around the neck. He was of the view that injuries were ante mortem in nature and the head injuries might have been inflicted by hard and blunt object like stone. Injuries on mouth and lip might have been caused because of presser exacted on lips. The genital injuries were consistent with forcible penetration with hard object like erectile penis. The ligature mark is ante mortem in nature and consistent with strangulation. Death is due to asphyxia as a result of strangulation which is homicidal in nature. He further opined that the injuries in scalp and fracture of the bone could be possible by the stone seized at the instance of the appellant.

11. Learned counsel appearing for the appellant drew attention of the Court to the evidence of this witness as deposed to paragraph-14 and submitted that as per the version of P.W.16, there will be injury on the penis of an adult if there is forcible intercourse with a minor girl and P.W.19, the doctor, who examined the appellant, did not find any such injury. We are unable to accept such contention of the learned counsel appearing for the appellant as the incident took place on 29th June, 2004 and the appellant was examined by P.W.19 on 5th July, 2004 at least seven days after the incident. The appellant was a married man and, therefore, non-existence of injuries on the private parts seven days after the incident can not lead to a conclusion that she was not raped. On the other hand, the evidence of P.W.16 clearly proves that the deceased had been subjected to rape and murder. P.W.16 also proves that though the death was because of strangulation, there were injuries on the face and head which could be caused by gagging and assault by means of a hard substance like stone. Learned counsel for the appellant in relation to such evidence also referred to the chemical examination report and submitted that no blood was found on the stone and the human blood found in the blood stain earth was not proved to be that of the deceased. There appears to be some substance in such contention of the learned counsel for the appellant as the chemical examination report is silent about the existence of bloodstain on the stone seized at the instance of the appellant and it is also silent as to whether human blood found on the bloodstained earth is that of the deceased or not.

12. On analysis of the evidence of P.W.16, it is proved that the deceased had been subjected to rape. There is no evidence that it is the appellant, who committed the rape.

So far as the offence under Section 302 of IPC is concerned, prosecution has been able to prove that while in police custody, the appellant had shown both the places where he is alleged to have committed rape and murder and also gave recovery of the stone by means of which he has assaulted the deceased. The other circumstantial evidence relied upon by the trial court are not circumstances which could be used against the appellant, except the evidence of P.W.10 to the effect that in the fateful evening the appellant had purchased two chocolates from his shop. We are therefore of the view that prosecution has not been able to prove a chain of circumstances pointing at the guilt of the appellant leaving no scope to entertain a doubt. In this connection, reference may be made to a decision of the Hon'ble Apex Court in the case of ***Wakkar & another Vrs. State of U.P.*** reported in I (2011) CCR 387 (SC). Law is well settled that suspicion however strong it may be, it cannot take place of proof. From the evidence

adduced by the prosecution undoubtedly a strong suspicion arises with regard to involvement of the appellant, but such suspicion cannot take place of proof. If there is a little doubt in mind, benefit of such doubt must be extended to the appellant.

13. We accordingly extend the benefit of doubt and acquit theappellant of the charges. The appeal is allowed and the judgment and order dated 19.9.2006 passed by the learned Additional Sessions Judge (F.T.), Sambalpur in S. T. Case No.35/19 of 2005 convicting the appellant for commission of offence under Sections 302 and 376(2)(f) of IPC is set aside.

It is stated that the appellant is in custody. If that be so, he be set at liberty forthwith, unless his detention is required in any other case.

Apeal allowed.

2012 (II) ILR - CUT- 992

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

DSREF NO.1 OF 2012 & JCRA NO.4 OF 2012 (Dt.14.08.2012)

STATE OF ORISSA …… Appellant

.Vrs.

RANJAN SINGH …….Respondent

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

Disclosure statement – To what extent on facts a particular part of the statement made by the accused is admissible U/s.27 of the Act.

In the present case four severed human heads were recovered from the river suna pursuant to the statement of accused Ranjan Singh.

It is not disputed that there is a great deal of difference between a dead body as an incriminating fact and other articles like weapons of offence as incriminating fact – Severed human heads as found in this case ipso facto proves commission of a crime and discovery of the same at the instance of an accused ipso facto makes the "fact" so discovered incriminating but so far as other articles are concerned until their connection with the crime is proved the fact discovered does not become relevant as incriminating.

If the accused has no explanation to offer as to how he came to know that the severed heads were in a particular place a presumption will be drawn against him that he merely aided in hiding/concealment of the dead body and he would be guilty of an offence U/s.201 I.P.C. and by aid of any presumption the Court cannot travel further beyond the scope of Section 27 of the Evidence Act to hold that, if no explanation leading to innocence is given by an accused, in such a case it may lead to the conclusion that the accused is guilty of the offence of murder – In other words from the factum of discovery of severed heads at the instance of the accused, the Court cannot jump to a conclusion that in view of the self-authorship of the concealment and absence of any exculpatory explanation by the accused, the accused is presumed to have committed the substantive offence of murder – Held, at best in such a situation the accused can be found guilty of offence

U/s.201 I.P.C. for having aided in hiding the dead body etc. – Impugned judgment and order of sentence is set aside. (Para 25,26,28 & 29)

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

Section 27 includes the mental fact of the author/actor, which is his knowledge about the object concealed and the place of concealment – Such knowledge may be direct as done by the accused himself or indirect/hearsay, as heard by him from others about the fact of concealment – When the accused makes his statement without stating that the incriminatory material was concealed by him the possibilities that may arise are

(1) that, the accused himself would have concealed it;

(2) that, he would have seen somebody else concealing it; and

(3) that, he would have been told by another person that it was concealed in the place from where it was discovered.

Held, any fact discovered pursuant to the statement of an accused cannot be stretched beyond his knowledge, i.e. direct or indirect about the object concealed and the place of concealment. (Para 29)

Case laws Referred to:-

1.AIR 1963 SC 200 : (M.G. Agarwal-V- State of Maharashtra)
2.AIR 1982 SC 1157 : (Gambhir-V- State of Maharashtra)
3.AIR 1991 SC 1388 : (Jaharlal Das-V- State of Orissa)
4.(2000)1 SCC 471 : (State of Maharashtra-V-Suresh)
5.AIR 1947 PC 67 : (Pulu Kuri Kottaya-V- Emperor)
6.1990 Cr.L.J. NOC 124 (Kerala) : (Joy @ Job & Anr.-V-C.I. of Police).
7.AIR 1962 SC 1116 : (Udai Bhan-V-State of Uttar Pradesh)
8.AIR 1963 SC 1113 : (Prabhoo-V- State of Uttar Pradesh)
9.AIR 2004 SC 2864 : (Anter Singh-V-State of Rajasthan)
10.AIR 1962 SC 1788 : (K.Chinnaswamy Reddy-V- State of A.P.& Anr.)
11.AIR 1956 SC 54 : (Sanwat Khan-V-State of Rajasthan)
12.2001(8)SCALE 522: (Limbaji & Ors.-V-State of Maharashtra)
13.AIR 1954 SC 39 : (K.Chinnaswami(supra) Trimbak-V-State of M.P.)
14.AIR 1976 SC 483 : (Md. Inayatullah-V- State of Maharashtra).
15.AIR 1971 SC 1871 : (Thimma-V- The State of Mysore).

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

For Respondent - Mr. D.P.Dhal, Advocate.
For Appellant - Mr. Goutam Mishra, Advocate

C.R. DASH, J. Twenty-two accused persons including Ranjan Singh were tried in Sessions Trial Case No.42/52 of 2009 by learned Ad-hoc Additional Sessions Judge (F.T.C.-II), Balasore on the basis of charge under four different heads, i.e. Sections 148/302/149, I.P.C. and Sections 201/149, I.P.C., for committing murder of four persons namely Tia Singh, Surin Singh, Budhini Singh and Sambari Singh and for disposing of the dead bodies to screen themselves from punishment. Ranjan Singh was individually charged further under Section 302, I.P.C. for committing offence of murder on two counts. Learned Trial Court, vide judgment dated 18.02.2012, found Ranjan Singh guilty of the offence under Section 302, I.P.C. on four counts for committing murder of Tia Singh, Surin Singh, Budhini Singh and Sambari Singh and also under Section 201, I.P.C. for causing disappearance of evidence and convicted him thereunder. Other twenty-one accused persons were acquitted of the charge. Vide order of sentence dated 24.02.2012, learned Trial Court passed order sentencing aforesaid Ranjan Singh to suffer death penalty. The Death Sentence Reference by the State and Jail Criminal Appeal by the condemned prisoner Ranjan Singh are directed against the judgment and order of sentence passed by learned Trial Court in the aforesaid sessions trial.

2. A compendium of the prosecution case, as found from the record, is as follows :-

On 27.08.2007, one headless dead body of a female was found trapped in between two spurs situated in the bank of river Suna and in that connection Ayodhya Out-Post Case No.143 of 2007 was registered. The dead body however could not be identified. On 29.08.2007 another headless dead body of a male was traced floating in river Suna near Bharipur under Remuna P.S., and in that connection Remuna P.S. Case No. 99 of 2007 was registered. On the same day, another (third) headless dead body of a female was found floating in river Budhabalanga near Totapal under Balasore Sadar P.S. and in that connection Balasore Sadar P.S. Case No.172 of 2007 was registered. After post-mortem examination, the headless dead bodies were preserved for identification. The police administration while beating about the bush, could only suspect that all the recovered headless dead bodies might have been connected to one case. In course of investigation, police came to know that the offence was committed at Pratappur village under Nilagiri P.S. All the cases were tagged together and the C.I. of Police, Nilagiri (P.W.29) was entrusted with the

charge of investigation of the case. On 31.08.2007 appellant Ranjan Singh and some of the acquitted accused persons namely Anjan Singh, Narottam Singh and Suvendu Satpathy were arrested. Appellant Ranjan Singh, while in police custody, confessed his guilt and led to recovery of the severed heads of four deceased persons packed in a gunny bag from river Suna. The three headless trunks (dead bodies) with their corresponding severed heads and the severed head of the fourth deceased (whose trunk could not be found) were identified by their respective relatives. It came to light during investigation that son of acquitted accused Siba Singh died of snake bite. Suspecting his death to be result of sorcery, appellant Ranjan Singh, who happens to be the nephew of aforesaid Siba Singh, along with acquitted accused Muna Singh and Sambhu Singh called a meeting in village Pratappur on 24.08.2007 evening. All the deceased persons, some of their family members and other villagers were there in that meeting. The deceased persons were confronted about practice of sorcery by them. When they denied, they were assaulted by all the accused persons (charge-sheeted). In course of such assault, appellant Ranjan Singh dealt a blow to the neck of deceased Budhini Singh by a 'Kata' and beheaded her instantly. In similar fashion, he also beheaded deceased Surin Singh. Witnessing such a ghastly scene, the villagers left the meeting place. Then accused persons, namely, Sambhu Singh, Muna Singh, Kala Singh, Shyam Sundar Singh, Tuna Singh along with appellant Ranjan Singh packed the dead bodies of deceased Surin Singh and Budhini Singh in a gunny bag and proceeded towards river Suna flowing nearby their village. Other two deceased persons, viz. Tia Singh and Sambari Singh were asked to follow them. They had no other choice but to follow them. On the way, accused Muna Singh dealt a blow to the neck of deceased Tia Singh by a 'Kata' and beheaded her. On the river bank, Sambari Singh was also beheaded with a 'Kata' by another accused Sambhu Singh. Thereafter, they threw away the weapon of offence ('Kata) and the trunks of the deceased persons into river Suna. They also packed the severed heads of the deceased persons in a gunny bag, put sand into the gunny bag to add weight to it, then tied the gunny bag and threw away the same into the river water. After the incident, none including the relatives of the deceased persons who were present in the meeting, dared to disclose the incident before anybody. The crime however came to be detected in the manner as discussed supra. The C.I. of Police, Nilagiri (P.W.29), on completion of investigation, filed charge-sheet against all the accused persons implicating them in offence punishable under Sections 147/148/302/201/149, I.P.C. showing two of the accused persons, viz., Dasara Singh and Kala Singh as absconders.

3. Trial was taken up by splitting up the case of the absconding accused persons Dasara Singh and Kala Singh. Prosecution examined 29 witnesses to prove the charge against the accused persons. P.Ws. 17, 20, 24, 25 and 26 are stated to be the eye-witnesses to the occurrence. P.Ws. 23, 22 and 19 are the relatives of the deceased persons, who identified the trunks and the severed heads of the deceased persons. P.Ws. 2, 5 and 8 are the witnesses to the recovery of three trunks on 27.08.2007 and 29.08.2007. P.Ws. 9 and 18 are the witnesses to the inquest of the trunks and severed heads of the deceased persons. P.W.14 is an independent witness to the making of confessional statement by appellant Ranjan Singh and recovery of the severed heads at his instance on the basis of such confessional statement. P.W.21 is the photographer of the D.F.S.L., Balasore, who videographed the entire proceeding under Section 27 of the Evidence Act, starting from confessional statement of appellant Ranjan Singh to the recovery of the severed heads of the deceased persons. P.W.12 is the Police Constable, who was engaged for search of the severed heads of the deceased persons in river Suna after the statements made by appellant Ranjan Singh and he also recovered the severed heads of the deceased persons kept tied in a gunny bag from river Suna. P.W.13 is the Revenue Inspector, who had prepared the Spot Map. P.W.11 is the Executive Magistrate, in whose presence recovery of the severed heads of the deceased persons was made and he is also a witness to the inquest over the severed heads. P.Ws. 3, 4, 6, 7 and 10 are the Medical Officers, who conducted post-mortem examination over the trunks and severed heads of the deceased persons. P.Ws. 1, 15, 16, 27, 28 and 29 are the Investigating Officers of the case, out of whom P.W.29 is the principal investigating officer.

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

4. Learned Trial Court, on the basis of recovery of the severed heads of the deceased persons at the instance of appellant Ranjan Singh, held the appellant Ranjan Singh guilty of the offence under Section 302, I.P.C. on four counts and also found him guilty under Section 201, I.P.C. He was accordingly awarded death sentence.

5. Mr. Goutam Mishra, learned counsel appearing for appellant Ranjan Singh in JCRLA No.4 of 2012 and Mr. D.P. Dhal, learned counsel appearing for the respondent Ranjan Singh in DSREF No.1 of 2012, submit that learned Trial Court has basically relied on the evidence under Section 27 of the Evidence Act to sustain the conviction of the appellant Ranjan Singh, but so far as the materials on record and especially the evidence of P.Ws.29, 12 and 14 are concerned, it cannot be held that any fact was discovered

pursuant to confessional statement made by the appellant and the same circumstance cannot be held to be incriminatory as against the appellant. It is also contended that the circumstance of recovery of the severed heads on the basis of purported statement under Section 27 of the Evidence Act is, no doubt, a good piece of corroborative evidence, but such evidence alone cannot be made the basis of conviction so far as offence under Section 302, I.P.C. on four counts is concerned.

Mr. Sangram Das, learned Addl. Standing Counsel on the other hand taking us through the evidence of different witnesses, advanced his submissions supporting the impugned judgment and order of sentence.

6. Admittedly, the case is based entirely on circumstantial evidence. Learned counsels appearing for Ranjan Singh, with all the vehemence at their commands, submit that except recovery of severed heads of four deceased persons allegedly at the instance of Ranjan Singh, there is no other evidence to sustain the charge and the evidence so adduced purportedly under Section 27 of the Evidence Act suffers from infirmities beyond repair. Learned Addl. Standing Counsel on the other hand taking us through paragraph-32 of the impugned judgment, submits that besides the recovery under Section 27 of the Evidence Act, other five circumstances having been relied on by the learned trial court in returning the finding of guilt as against Ranjan Singh, there is no scope to question the justification so far as the impugned judgment is concerned.

7. Hon'ble Supreme Court in the case of **M.G. Agarwal *vs.* State of Maharashtra,** A.I.R. 1963 S.C. 200 has held that it is well established rule of criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction, if it is of such a character that it is wholly inconsistent with the innocence of the accused and consistent only with his guilt. It is further held that if the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. Proceeding further, Hon'ble Supreme Court has ruled that in applying the aforesaid principle it is necessary to distinguish between facts which may be called **primary or basic on the one hand and inference of facts to be drawn from them on the other.** In regard to proof of **basic or primary facts**, the Court has to judge the evidence in the ordinary way and, in the appreciation of evidence in respect of proof of those basic or primary facts, there is no scope for application of doctrine of benefit of doubt.

In the case of **Gambhir *vs.* State of Maharashtra,** A.I.R. 1982 S.C. 1157, Hon'ble Supreme Court has laid down the test of cases based entirely

on circumstantial evidence and have held that when a case rests upon circumstantial evidence, such evidence must satisfy three tests –

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii) circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probabilities the crime was committed by the accused and none else.

Proceeding further, Hon'ble Supreme Court has ruled that the circumstantial evidences, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence.

Same is the view of Hon'ble the Supreme Court in the case of **Jaharlal Das *vs.* State of Orissa,** A.I.R. 1991 S.C. 1388 so far as the test of cases based on circumstantial evidence is concerned. Proceeding further in the case of Jaharlal Das (supra), Hon'ble the Supreme Court has given a note of caution by ruling that in cases depending largely upon circumstantial evidences, there is always a danger that conjecture or suspicion may take the place of legal proof, and such suspicion, however so strong, cannot be allowed to take the place of proof. The Court has to be watchful to ensure that conjectures and suspicion do not take the place of legal proof. The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused.

Bearing in mind the above principles, we proceed to address the evidence obtained on record and the rationale behind the findings by the learned Trial Court.

8. In the present case, in paragraph-26 of the impugned judgment, learned trial court has held thus :-

> "In view of the decisions discussed above, in the instant case, from the discovery of fact, i.e. recovery of severed heads of the deceased

persons packed in a gunny bag from river Suna pursuant to the disclosure statement made by accused Ranjan Singh, it is proved that : (i) That the severed heads of the deceased persons were packed in a gunny bag; (ii) The said gunny bag tied with severed heads of the deceased persons was concealed in the river Suna in the place from where it was recovered; (iii) Accused Ranjan Singh had got the knowledge about the same."

9. Except some decisions on Section 27 of the Evidence Act and the evidence relating to recovery of the severed heads allegedly at the instance of Ranjan Singh, learned Trial Court has discussed no other circumstance as pointed out by learned Additional Standing Counsel from paragraph-32 of the impugned judgment to arrive at the aforesaid findings. In paragraphs 8 and 10 of the impugned judgment, learned Trial Court has referred to the evidence of P.Ws.17, 20, 22, 23, 24, 15 and 19, but all the aforesaid witnesses have turned hostile and their evidence in no way prove the complicity of the present appellant. Learned Trial Court however has relied on the decision of Hon'ble the Supreme Court in the case of **State of Maharashtra *vs.* Suresh,** (2000) 1 S.C.C. 471, where it has been ruled thus –

"Three possibilities are there when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by him. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But, if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities, the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by him. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act."

(emphasis supplied)

Relying on the aforesaid decision, learned trial court, in page-29 of the impugned judgment, has held thus –

"In view of the above decision, as in the instant case the accused Ranjan Singh failed to explain as to how and under what

circumstances he came to know of such concealment, it is to be accepted that he himself had concealed the same."

10. Proceeding further, learned trial court has relied on the case of **Pulu Kuri Kottaya *vs.* Emperor,** A.I.R. 1947 P.C. 67, to hold that the statement of Ranjan Singh to the effect that they packed the severed heads of the deceased persons in a gunny bag and threw it into the river proves authorship of concealment of the severed heads by Ranjan Singh and none else. Learned trial court has relied on the decision of Hon'ble Kerala High Court in the case of **Joy @ Job and another *vs.* C.I. of Police,** 1990 Cr.L.J. NOC 124 (Kerala), which has been quoted in paragraph-31 of the impugned judgment, as follows :-

"What Section 27 of the Evidence Act permits is only proof of that part of the relevant information given by the accused. The extent of the admissible information and its effect in deciding the guilt will depend upon facts of cases. That will have relation to the extent of criminality which the proved information is capable of placing on the accused. The deficiency, if any, will have to be supplied by other items of admissible evidence. The information acting as the "Cause" and the discovery of "fact" operating as the immediate and proximate "effect" of the information, when put together could only lead to the legitimate inference possible. Information regarding the whereabouts of the dead body (subject to identification in case of dispute) and the consequent discovery may, in the absence of cogent, exculpatory explanation, in some cases lead to inference of concealment by the maker and his involvement in the crime. If the information only leads to the inference of the knowledge of the maker that the dead body is there without any involvement on his part in the crime, it may not by itself be sufficient to fix criminality and the remaining links may have to be supplied by the prosecution because his knowledge can be that somebody else placed the dead body there. **If authorship of the concealment is also part of the information given by the accused that is an additional circumstance to fix criminality on him in the absence of any acceptable explanation leading to innocence."**

(emphasis supplied)

Relying on the aforesaid decisions, learned trial court concluded thus –

"In view of the decisions discussed above, the accused Ranjan Singh is to be accepted as the author of the homicidal death of the deceased persons."

11. The discussion in the impugned judgment shows that in paragraph-26 of the impugned judgment, learned trial court has relied on recovery of severed heads of the deceased persons packed in a gunny bag from river Suna pursuant to disclosure statement made by Ranjan Singh and has held the following facts to have been proved :-

(1) that the severed heads of the deceased persons were packed in a gunny bag;

(2) the said gunny bag tied with severed heads of the deceased persons was concealed in the river Suna in the place from where it was recovered; and

(3) the condemned convict Ranjan Singh had got knowledge about the same.

12. From the knowledge of Ranjan Singh about the place of concealment of the severed heads, learned Trial Court has drawn the inference of his guilt so far as murder of four persons is concerned. Learned Trial Court has not taken into consideration any other evidence to arrive at the conclusion regarding complicity of Ranjan Singh in the crime. The inference of guilt of Ranjan Singh from his knowledge about place of concealment of the severed heads is rather imbued with certain principles decided in the judicial pronouncements discussed supra.

13. Proceeding further, in paragraph-32 of the impugned judgment, learned trial court has summarized the evidence adduced by the prosecution under the following heads :-

(i) As per the oral evidence of P.W.19 and P.W.24, the cousin brother of accused Ranjan Singh died due to snake bite.

(ii) Suspecting his death to have been caused by the practice of witchcraft, a meeting was called in the village.

(iii) To that meeting all the four deceased persons were called and they did not return back from the meeting.

(iv) Subsequently, trunks (headless dead bodies) of the three of the deceased persons were recovered in the down stream of river Suna.

(v) During police custody, accused Ranjan Singh made disclosure statement that they had packed the severed heads of the deceased persons in a gunny bag and thrown into river Suna and pursuant to his disclosure statement, the four severed heads of the deceased

persons tied in a gunny bag were recovered from river Suna from the exact place shown by him.

(vi) Accused Ranjan Singh had not given any explanation as to how and under what circumstances he had the knowledge that the severed heads of the deceased persons were tied in a gunny bag and were thrown in that place of river Suna.

(vii) The disclosure statement of accused Ranjan Singh further corroborated by the fact that the headless dead body of the deceased persons were recovered from the down stream of river Suna.

Learned Trial Court has proceeded further to hold thus :-

> "From these facts it is conclusively established that accused Ranjan Singh is the author of such homicidal death of the deceased persons. In my opinion, the prosecution has succeeded in establishing consistently the guilt of the accused Ranjan Singh beyond all reasonable shadow of doubt."

14. Coming to the contentions raised by learned counsels appearing for Ranjan Singh and learned Additional Standing Counsel, we may note here that it is an admitted fact at the Bar that none of the eye-witnesses including the relatives of the deceased persons has supported the prosecution case. Evidence of P.Ws. 17, 20, 24, 25 and 26, who are examined as eye-witnesses, are of no avail to the prosecution in as much as they did not utter a single word in favour of the prosecution and they only were cross-examined by the Public Prosecutor under Section 154 of the Evidence Act on the point of their previous statements before the Investigating Officer, and such cross-examination is in the form of suggestions, which the witnesses have denied to.

15. Some pieces of evidence, which learned Trial Court seems to have relied, are re-addressed in view of the contentions raised by learned counsels. P.W.24 though declared hostile, in his cross-examination by the Public Prosecutor, has testified thus –

> "After the death of the son of accused Siba Singh due to snake bite, suspecting his death to have been caused by practicing witchcraft, a meeting was called in village at about 4 p.m. and in that meeting deceased persons namely, Tia Singh, Surin and Budhini had attended that meeting. I cannot say if Sambari was called to

> that meeting or not. I had gone to attend the meeting, but before the meeting was concluded, I left the meeting. Deceased Tia, Surin and Budhini also returned from the meeting, but again they were called to the meeting in the evening. Since then they were not traced."

P.W.26, in his cross-examination by the P.P., has testified thus –

> "It is a fact that on 14.8.2007 on the day of 'Chitau Amabasya' the son of accused Siba Singh died due to snake bite."

P.W.19 is the son of deceased Surin Singh and Budhini Singh. He has testified thus –

> "On the night of the incident the villagers of Pratappur called my parents and another lady of village Kadapada from our maternal uncle's house. Since that night my parents and that lady of village Kadapada did not return home. After three days of that incident, I found the chopped heads of my father and mother and of that lady of vill. Kadapada in the river bed. The heads were chopped off from the neck, and were packed in a gunny bag."
>
> None of the aforesaid witnesses including other villagers examined as witnesses in the case have implicated any of the accused persons (since acquitted) including Ranjan Singh. P.Ws.24 and 26 have testified that son of Siba Singh died of snake bite. There is nothing however on record to prove that Ranjan Singh is the nephew of accused Siba Singh (since acquitted). There is also nothing to show that Ranjan Singh was there in the meeting where the deceased persons were called, or he had gone to call the deceased persons from their respective houses.

16. If we take into consideration the Circumstance Nos. 1, 2, 3 and 4, as quoted in paragraph-32 of the impugned judgment, and analyse the evidence in the touch-stone of the dictum in **M.G. Agarwal**'s case (supra), all the aforesaid four circumstances can be held to have been proved on the basis of the evidence adduced, to the extent that **the villagers had convened a meeting where the deceased persons were called, but they did not return thereafter, and after some days their chopped heads kept in a gunny bag were recovered.**

17. Coming to Circumstances No.5, 6 and 7, as quoted in paragraph-32 of the impugned judgment, we find Circumstance No.7 is of no consequence

in as much as the trunks of the deceased persons were found at different points of time and at different places in the down stream of the river. Such a fact may only be pressed to justify an inference that the occurrence had happened somewhere in the up-stream of the river and such a circumstance, as relied on by the learned trial court, cannot be held to be incriminatory so far as Ranjan Singh is concerned. Circumstance Nos.5 and 6 are on the point of recovery of the severed heads allegedly at the instance of Ranjan Singh pursuant to his statement purported to have been recorded under Section 27 of the Evidence Act.

18. In the premises as aforesaid, we propose to address the contentions raised by learned counsels for the parties on the question as to whether the discovery of severed heads at the instance of Ranjan Singh can be held to have been proved or, in the alternative, whether said circumstance alone can be made the basis of conviction.

19. P.W.29 is the principal I.O. He had recorded the confessional statement of Ranjan Singh under Section 27 of the Evidence Act, vide Ext.35. His evidence on the point runs as follows :-

> "……During police custody accused Ranjan Singh confessed his guilt in presence of witnesses and stated that his cousin brother (son of Siba Singh) died due to snake bite and on 24.8.07 on the day of 10th day of rituals, he, Muna, Sambhu, Kala, Surendra, Mara, Kanda and Fampu decided to call a meeting in the village suspecting his cousin brother to have been died by practicing witchcraft and not due to snake bite, and on Sunday evening they called all the villagers to the foot-ball field of their village for a meeting and they called deceased persons namely Surin Singh, Tia Singh, Sambari Singh and Budhini Singh to that meeting and inquired to them if they had committed murder of the son of Siba Singh by practicing witchcraft, to which they denied the charge. Thereafter he dealt a blow by a Kata to the neck of the deceased Budhini Singh and beheaded her and he also dealt a blow by that Kata to the neck of deceased Surin Singh and beheaded him. Thereafter, they picked the dead bodies and proceeded towards the river side and asked the villagers and the other two deceased persons to follow them and on the way accused Muna dealt a blow with a Kata to the neck of deceased Tia Singh and beheaded her and packed her dead body and then proceeded towards river bank and on the river bank deceased Sambari was asked to put her head on a wooden log and accused Sambhu dealt a blow by means of an axe to her neck and beheaded

> her and thereafter they threw all the four dead bodies without heads in the current of river water and packed the four heads of deceased persons in one gunny bag and tied the same and then threw it in the current of river water. They also threw all the weapons of offence (Kata, axe, etc.) in the river. I recorded his confessional statement in presence of witnesses……."

20. A cursory reading of the aforesaid evidence would make it clear that Ranjan Singh, Muna and Sambhu had thrown the severed heads into the river after packing the same in a gunny bag. Though the authorship of such concealment is plural, Ranjan Singh in his statement has confessed that he was one among the accused persons (since acquitted), who had thrown the severed heads into the river. It is not a case where the confessional statement is one containing the fact about the accused not stating that the severed heads were concealed by him. Judgment of Hon'ble the Supreme Court in the case of **State of Maharashtra *vs.* Suresh** (supra) covers a case where an accused points out the place where a dead body or an incriminating material is concealed without stating that it was concealed by him/her. The judgment shall become applicable to draw the inference to the effect that the accused himself had concealed the incriminatory fact if he declines to tell the criminal court that his knowledge about concealment was on account of the fact that he had seen somebody else concealing it or he was told by another person that it was concealed in the place from where it was found. In the present case, Ranjan Singh having confessed to have thrown the gunny bag containing severed heads of the deceased persons into the river water and such act having been confessed to have been done along with Muna and Sambhu, the decision in the case of **State of Maharashtra *vs.* Suresh** (supra) has no application to the facts of the present case.

21. Hon'ble Kerala High Court in the case of **Joy @ Job and another *vs.* C.I. of Police** (supra) has given a proposition by holding that if authorship of concealment is also a part of the information given by the accused, that is an additional circumstance to fix confess criminality on him in absence of any acceptable explanation leading to innocence. In view of such proposition, a question obviously arises as to **whether the confession of the accused regarding authorship of the concealment of incriminating article leads ipso facto to conclusion of guilt of the said accused so far as the substantive offence is concerned.** To find answer to this question, we feel persuaded to address the scope and ambit of Section 27 of the Evidence Act and find out the probative effect of the discovery pursuant to statement purported to have been recorded under

Section 27 of the Evidence Act. We feel persuaded to note here that Section 27 of the Evidence Act is the most important but at the same time most controversial Section occurring in the statute. No section has perhaps raised so much controversy and doubt as Section 27 of the Evidence Act, and no section has perhaps hunted the ingenuity of the judges and jurists so much like Section 27.

22. The scope and ambit of Section 27 of the Evidence Act were illuminatingly stated in **Pulu Kuri Kottaya *vs.* Emperor,** A.I.R. 1947 P.C. 67, in the following words, which have become locus classicus :

> "It is fallacious to treat the fact discovered within the section as equivalent to the object produced : the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to the fact. Information as to past user or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I shall produce the concealed knife from the roof of my house' does not lead to discovery of knife : knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

The aforesaid decision is highlighted in **Udai Bhan *vs.* State of Uttar Pradesh,** A.I.R. 1962 SC 1116 and **Prabhoo *vs.* State of Uttar Pradesh**, A.I.R. 1963 SC 1113. Hon'ble Supreme Court in the case of **Anter Singh *vs.* State of Rajasthan,** A.I.R. 2004 SC 2864, in paragraph-15 of the judgment highlighting the aforesaid position, has ruled thus :-

> "15. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact, now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this, as noted in Pulukuri Kottaya's case (supra) and in Udai Bhan *v.* State of Uttar Pradesh (AIR 1962 SC 1116)."

It is therefore clear that **"fact discovered"** included not only the physical object produced but also the place from which it is produced and the knowledge of the accused as to this.

23. Hon'ble Supreme Court in the case of **K. Chinnaswamy Reddy *vs.* State of Andhra Pradesh and Anr.,** A.I.R. 1962 SC 1788 was dealing with a case under Section 411, I.P.C., where the accused had made a statement under Section 27 of the Evidence Act to the effect that he would show the place where he had hidden the ornaments. Hon'ble Supreme Court ruled that the whole of the statement relates distinctly to discovery of the ornaments and is admissible under Section 27 of the Evidence Act. The words "where he had hidden them" have nothing to do with the past history of the crime and are distinctly related to the actual discovery that took place by virtue of the statement. Supplying the rationale for admissibility of the confessional statement of the accused on the point of self-authorship of the concealment indicative of his direct knowledge, Hon'ble Supreme Court held that **if any part of the statement distinctly relates to the discovery, it will be admissible wholly and the Court cannot say that it will excise one part of the statement, because it is of a confessional nature.**

24. An analysis of the provision contained in Section 27 of the Evidence Act along with the aforesaid decisions would show that Section 27 includes the mental fact of the author / actor, which is his knowledge about the object concealed and the place of concealment. Such knowledge may be direct, as done by the accused himself, or as perceived by his sense of vision by seeing somebody concealing, or indirect / hearsay, as heard by him from others about the fact of concealment. This aspect of direct and derivative knowledge of the accused has been highlighted in clear term in the case of **State of Maharashtra *vs.* Suresh** (supra) by holding that when the accused makes his statement without stating that the incriminatory material was concealed by him, the possibilities that may arise are :-

(1) that, the accused himself would have concealed it;

(2) that, he would have seen somebody else concealing it; and

(3) that, he would have been told by another person that it was concealed in the place from where it was discovered.

We, therefore, are of the view that any fact discovered pursuant to the statement of an accused cannot be stretched beyond his knowledge, i.e., direct or indirect (as outlined supra) about the object concealed and the place of concealment.

25. It cannot be disputed that there is a great deal of difference between a dead body as an incriminating fact and other articles like weapons of offence, blood stains, etc. as incriminating fact. A dead body (with marks of violence if can be found on inquest or on post mortem examination indicative of homicidal death) or for that matter, severed human heads as found in the present case, ipso facto proves commission of a crime and discovery of such dead body or severed human heads at the instance of an accused ipso facto makes the "fact" so discovered incriminating. But, so far as other articles are concerned, until their connection with the crime is proved, the fact discovered does not become relevant as incriminating.

Nice questions have arisen in a number of cases, as to what extent, on facts, a particular part of the statement made by the accused is admissible under Section 27 of the Evidence Act. In this connection, reference may be made to **Sanwat Khan *vs.* State of Rajasthan,** A.I.R. 1956 SC 54, **Limbaji & others *vs.* State of Maharashtra,** 2001 (8) SCALE 522, **K. Chinnaswami** (supra) **Trimbak *vs.* State of M.P.,** A.I.R. 1954 SC 39 and to host of other decisions. If the facts discovered become incriminating as an obvious corollary, the knowledge about the place of concealment of such an incriminating fact and the knowledge about concealment of such incriminating fact themselves become incriminating. But can we draw any inference of guilt of the author of concealment regarding a substantive offence of murder to have been committed by him from his self authorship of the object concealed, i.e. a dead body or a severed human head and his such knowledge about the place of concealment.

26. At the cost of repetition, it is worthwhile to quote Section 27 of the Evidence Act here for ready reference. It reads :

> **"Sec.27 :** Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Now, a careful reading of the provision would show that "such" refers to the entire statement or information given by the person. The words "so much" relate to "so much" out of the total statements as relates distinctively to the fact thereby discovered. In other words, what is relevant is that part of the statement relating "distinctively to the facts thereby discovered." Hon'ble Supreme Court in **Md. Inayatullah *vs.* State of Maharashtra,** A.I.R. 1976

SC 483 held that "distinctly" means "directly, indubitably, strictly, unmistakably".

The Privy Council in **Pulukuri Kotayya**'s case held that the **inculpatory part** of the statement of an accused is not admissible under Section 27 of the Evidence Act. In that case the High Court had convicted the accused following the judgment in **Athappa Gounder,** I.L.R. 1937 Mad. 695 and holding as admissible the word "with which I stabbed". The Privy Council held the aforesaid inculpatory statement to be not admissible under Section 27 of the Evidence Act and gave the famous ruling quoted very often with approval in different judicial pronouncement as quoted supra in paragraph-22.

If Kotayya's case, as approved by Hon'ble Supreme Court in different judicial pronouncements, is followed, then if the accused has no explanation to offer as to how he came to know that the dead body was in a particular place, a presumption will be drawn against him that he merely aided in hiding / concealment of the dead body and he would be guilty of an offence only under Section 201, I.P.C. By aid of any presumption, the Court cannot travel further beyond the scope of Section 27 of the Evidence Act to hold that, if no explanation leading to innocence is given by an accused, in such a case it may lead to conclusion that the accused is guilty of the offence of murder. In other words, from the factum of discovery of a dead body / severed head at the instance of an accused, the Court cannot jump to a conclusion that in view of the self-authorship of the concealment and absence of any exculpatory explanation by the accused, the accused is presumed to have committed the substantive offence of murder. At best, in such a situation, he can be found guilty of offence under Section 201, I.P.C. for having aided in hiding the dead body, etc. Hon'ble Kerala High Court in the case of **Joy @ Job** (supra) must be referring to the criminality of the accused in such a situation to the aforesaid extent while holding thus :

> "……If authorship of the concealment is also part of the information given by the accused that is an additional circumstance to fix criminality on him in the absence of any acceptable explanation leading to innocence."

Any other interpretation of the Section on the basis of judicial dictums so far shall certainly militate against the probative effect of **"discovery"** under the Section, which includes the physical object produced, place from which it is produced and knowledge of the accused as to this. We feel persuaded to quote here the observation of Hon'ble Supreme Court in **Anter**

Singh's case (supra) while quoting with approval the views of Privy Council in **Pulukuri Kotayya** and Hon'ble Supreme Court in **Chinnaswamy Reddy**, so far as probative effect of evidence under Section 27 of the Evidence Act is concerned.

> "**17.** As observed in Pulukuri Kottaya's case (supra) it can seldom happen that information leading to the discovery of a fact forms the foundation of the prosecution case. It is one link in the chain of proof and the other links must be forged in manner allowed by law. To similar effect was the view expressed in K. Chinnaswamy Reddy *v.* State of Andhra Pradesh and another (1962 SC 1788)."

We, therefore, have no hesitation to hold that evidence obtained under Section 27 of the Evidence Act alone in absence of any other incriminating circumstance cannot be made the sole basis of conviction under Section 302, I.P.C.

27. Before proceeding further, we feel persuaded to bear in mind the caution interdicted by the Hon'ble Supreme Court in the case of **Thimma *vs.* The State of Mysore,** A.I.R. 1971 S.C. 1871. In the aforesaid case, Hon'ble Supreme Court, in paragraph-10 of the judgment, has held thus :–

> "…….it appears to us that when P.W.4 was suspected of complicity in this offence, he would in all probabilities have disclosed to the police the existence of the dead body and the other articles at the place where they were actually found. Once a fact is discovered from other sources, there can be no fresh discovery even if relevant information is extracted from the accused and Courts have to be watchful against the ingenuity of the Investigating Officer in this respect so that the protection afforded by the wholesome provisions of Section 25 and 26 of the Evidence Act is not whittled down by the mere manipulation of the record of Case Diary. It would, in the circumstances, be somewhat unsafe to rely on this information for proving the appellant's guilt."

28. In the present case, recovery of four severed heads was made pursuant to the statement of Ranjan Singh purported to have been recorded under Section 27 of the Evidence Act and proved vide Ext.35. The aforesaid statement vide Ext.35 was recorded at 8.45 A.M. on 31.08.2007 at Nilagiri P.S. (evidence of P.W.29). Immediately after recording of the statement, Ranjan Singh, as testified by the I.O. (P.W.29), led him and the witnesses to the spots one after another, where murders of four persons were committed

and the place of the river where the severed heads tied in a gunny bag was thrown into. P.W.29 has further testified that he engaged his staff and local people to enter inside the river water to search for the weapon of offence and the severed heads and, during such search Constable No.C/649 namely S.K. Panigrahi (P.W.12) recovered a gunny bag from the river, inside which the severed human heads were there. The Constable (P.W.12) has testified that at about 1.30 to 2.00 P.M. on 01.09.2007 Reporters of Aajtak TV were shooting inside Suna river; some labourers shouted to have found one suspected gunny bag inside the water. Immediately he (P.W.12) entered into the river water, brought out a gunny bag and through a hole into the gunny bag he could see four numbers of human heads. In the afternoon all the four human severed heads were seized and inquests over the same were held. From such fact, it is therefore clear that after about 24 hours of the disclosure statement made by Ranjan Singh and pointing out by him to the spot where the severed heads were thrown, the severed heads were recovered after much search by the labourers engaged by the police and the police staff. In view of such fact, it cannot be held that the severed heads were discovered from the exact place pointed out by Ranjan Singh.

The I.O. (P.W.29) has testified that during investigation he could know that two working Adivasi ladies namely Sambari Singh and Tia Singh of village Pratappur have not returned to their house. After the investigation commenced, two more headless trunks were recovered and one of such trunk was recovered at Bharipur on 29.08.2007 and another on the same day from Budhabalanga river near Totapali under Balasore Sadar P.S. From recoveries of three headless trunks in the down stream of river Suna and information regarding missing of two working Adivasi ladies namely Sambari Singh and Tia Singh from village Pratappur, the I.O. (P.W.29) had already knowledge about the fact that the occurrence has happened either at Pratappur or nearby places situated in the upstream of river Suna. It was therefore obvious on the part of the police to search for the severed heads in the upstream near village Pratappur.

In the present case, altogether 24 accused persons are charge-sheeted, out of whom two are absconding and 22 accused faced trial. Out of said 22 accused persons, 21 have been acquitted. The evidence of witnesses namely P.W.19, 24 and 26 speaks of meeting by the villagers and there is no direct implication of Ranjan Singh either to be present in that meeting or to have called any of the deceased from their respective houses. When a gory and diabolic occurrence culminating in murder of four persons has happened and number of villagers are implicated as accused in the case, there is every chance that Ranjan Singh might have also knowledge

about the place where the dead bodies were disposed of and the severed heads were thrown. Before arresting Ranjan Singh on 31.08.2007, the I.O. (P.W.29) had already arrested accused Daktar Singh and Rabi Singh of village Pratappur. He also had examined them on 30.08.2007. The I.O. in paragraph-4 of his evidence has testified that on the basis of statements of Daktar Singh and Rabi Singh, he arrested Ranjan Singh and some other accused persons. The prosecution story is to the effect that the deceased persons were killed in a meeting attended by the villagers. In view of such facts, there is no escape from the conclusion that the I.O. by all probabilities had the knowledge about the place of disposal of the severed heads before examination of Ranjan Singh and recording of his statement under Section 27 of the Evidence Act.

Taking into consideration these circumstances in their entirety, we feel unsafe to rely on the discovery proceeding.

29. Regard being had to all the aforesaid facts and discussions, we are constrained to set aside the impugned judgment and order of sentence. Accordingly, the Jail Criminal Appeal is allowed and the Death Sentence Reference is answered in negative. Appellant Ranjan Singh be released from custody forthwith, if his detention is not required in any other case.

Appeal allowed.
Death reference answered negative.

2012 (II) ILR - CUT- 1013

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

JCRA. NO. 101 OF 2003 (Dt.13.07.2012)

MANOJ BHOI ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

CRIMINAL TRIAL – Circumstantial evidence – Theory of last seen together – According to P.W.3 the deceased and the accused were last seen together by him in the night of 23.06.2001 – The decomposed dead body of the deceased was discovered on 26.06.2001 – Long time gap between the deceased having been last seen in the company of the accused and the time of discovery of the dead body of the deceased for which possibility of any other person coming in between could not be ruled out – Held, it is difficult to accept the last seen theory as an incriminating circumstance. (Para 10)

Case laws Referred to:-

1.AIR 1992 SC 840 : (State of U.P.-V- Ashok Kumar Srivastava)
2.(1997)13 OCR 245 : (Jagata Singh-V- State)
3.AIR 1991 SC 1674 : (Inderjit Singh-V- State of Punjab).

For Appellant - M/s. Ramesh Sahoo, B.P.Mohapatra, Miss. Susama Pradhan.
For Respondent - Mr. Sk. Zafafulla, Addl. Standing Counsel.

PRADIP MOHANTY, J. This jail criminal appeal is directed against the judgment dated 07.07.2003 passed by the Sessions Judge, Sambalpur in S.T. Case No.67 of 2002 convicting the appellant under Sections 363/302/201 of the Indian Penal Code (in short 'IPC') and sentencing him to undergo imprisonment for life for the offence under Section 302 IPC and one year each for the offence under Sections 363 and 201 IPC.

2. The case of the prosecution, as per F.I.R. (Ext.1) lodged on 24.6.2001 by the father of the deceased (P.W.2), is that on 23.6.2001 his daughter (Purrnima) had gone to witness the car festival. In the Car Festival area, the accused was found taking Purnima with him. On being asked by Nabin Bhoi (P.W.3) as to where he was taking the girl, he replied that he was

taking to leave her in her house. When the girl did not return home up to 9:00 PM, they searched up to 2:00 AM in the night and during search, the accused was found returning to the village from the nearby village-Rangiatikira. Suspecting foul play the villagers detained the accused but towards the early morning he escaped and went away somewhere. When Purnima did not return home till morning, the informant lodged the report on the basis of which the case was initially registered u/s 363, IPC and investigation taken up. On 26.06.2001, the decomposed dead body of Purnima was discovered from a ditch situated near the village. On post-mortem, some ante-mortem injuries were found and the cause of death was opined as shock due to haemorrhage resulting from the cut injury on the neck. Thereafter, the case was turned to one u/ss 302/201/363, IPC. After completion of the investigation, charge-sheet was submitted against the present appellant and he faced trial.

3. During trial the accused-appellant took the plea of complete denial and false implication. In order to prove its case, the prosecution examined as many as fourteen witnesses and exhibited 15 documents. The defence examined none.

4. On conclusion of the trial, learned trial Judge basing upon the evidence of P.Ws.2, 3, 4, 6, 7 and 8 and other attending circumstances came to hold that the prosecution has been able to prove beyond all reasonable doubt that the appellant kidnapped the minor girl Purnima from the lawful guardianship of her father and committed her murder and concealed her dead body in order to cause disappearance of evidence with the intention of screening himself from legal punishment. Accordingly, he convicted the appellant u/ss.363/302/201, IPC and sentenced him as already indicated hereinbefore.

5. Learned counsel for the appellant submits that there is no material against the present appellant to convict him u/ss.302/363/201 IPC. There is also no eye witness to the occurrence and the entire case is based upon the circumstantial evidence. The trial court seems to have convicted the appellant relying upon the two circumstances, such as, extra judicial confession said to have been made by the appellant before P.Ws.2, 3, 4, 6, 7 and 8 and the last seen theory introduced by the prosecution through P.Ws.3 and 5. The chain of circumstances is not complete to arrive at an irresistible conclusion that it is the appellant and appellant alone who has committed the crime. In fact, there was no confession made by the appellant before any of the witnesses.

6. Mr. Jafurllah, learned Additional Standing Counsel vehemently contends that the deceased was missing on 23.06.2001 evening when she had gone out of the house to witness the car festival. Thereafter, her decomposed dead body was discovered on 26.06.2001. The injuries found were ante-mortem in nature. The deceased was last seen together in the company of the accused on 23.6.2001 evening. After they were last seen together, the accused was found absent from the village and at the dead of night he was found returning to the village alone. Extra judicial confession was made by the accused before the villagers. The conduct of the accused was suspicious, because previously he was declaring to kill Purnima and after the occurrence while he was detained by the villagers he escaped from their custody. The chain of circumstances is complete. Therefore, there is no material to interfere with the finding of the trial judge.

7. This Court minutely gone through the LCR. P.W.1, in his examination in chief, has stated that four days prior to the car festival, while he and others were working as labourers in the house construction of P.W.12 (uncle of the deceased), the accused arrived there and gossiped with them for about an hour. At that time, the deceased and her sister were playing nearby. Seeing them, the accused pointed his hand towards the deceased and said that such child should be killed and thrown away. In cross-examination, this witness admitted that he did not disclose this fact either before her father (P.W.2) and uncle (P.W.12).

P.W.2 is the father of the deceased and informant of this case. He stated that his daughter had been to witness car festival on 23.06.2001 and when she did not return home for a long time, he along with others searched for her but in vein. In the same night during search, Nabin Bhoi (P.W.3) informed them that he had seen the accused carrying the deceased in his shoulder towards the threshing-floor of Krushna Chandra Mishra. On being asked by P.W.3, the accused replied that he was bringing the deceased to her house. He has also stated that P.W.8 informed them that he heard crying sound of a girl in the same night some time between 8:30 to 9:00 PM. On getting information from P.W.7 and Dhani Majhi, P.Ws.6, 8 and 12 went and brought the accused to the Verandah of Dhanpati Pradhan. On being asked, the accused said that he had kidnapped Purnima and kept her at a place and on the following morning he would disclose about the place. They detained the accused till 5.00 AM when he told that he wanted to go to the house of Kishore Pradhan to consume 'Bhang'. So, the accused along with Krutartha (P.W.4) went towards the house of Kishore Pradhan but on the way the accused escaped from the company of P.W.4. On the following day, P.W.2 went to the police station and lodged the report. On 26.6.2001, the

dead body of the deceased was recovered from near the tank of their village on being detected by P.W.13 and Sadanand Bhoi. In cross-examination, he admitted that it is a fact that he had not mentioned in the FIR that on being asked by them the accused told that he had kidnapped Purnima and kept her at a place and on the following morning he would disclose as to where he had kept her, but it is not a fact that as the accused did not give such statement or confession that is why he had not mentioned in the FIR. He also admitted that it is true that in the FIR he had not mentioned that P.W.3 had seen the accused carrying Purnima on his shoulder towards threshing floor of Krushna Chandra Mishra, but it is not a fact that he did not state so before the I.O.

P.W.3 in his examination in chief has stated that in the night of occurrence when he came out of his house for urination he saw the accused carrying Purnima on his shoulder and on being asked the accused replied that he was taking Purnima to her house. He did not suspect anything, as previously the accused was working in the house of P.W.2, and went back to his house. When he knew that the family members were searching for Purnima, he came out of his house and disclosed before P.W.12 and others that he had seen the accused taking Purnima on his shoulder and that to his query the accused replied that he was taking Purnima to her house, and thereafter joined with them in search of her. When both of them were found absent in the house of the accused, they gathered on the Verandah of Dhanpati where they got information from Dhani Majhi and Bhabagrahi Hota that the accused had returned to his house. Some villagers went and brought the accused to that place. On being asked, the accused disclosed that he had taken Purnima and kept her at a place and in the next morning he would disclose about the same. Towards the last part of that night, the accused fled away while going to the house of his maternal uncle accompanied by Krutartha Pradhan (P.W.4) to consume Bhanga. He is also a witness to the seizure of 'Chadi' of the deceased under Ext.2. In cross-examination, he admitted that about 50 to 60 persons were gathered near the house of Dhanapati. When the accused was brought near that place his maternal uncles advised not to assault him. The seizure list (Ext.2) was prepared at the place wherefrom the 'Chadi' was recovered.

P.W.4 is a co-villager who stated in his evidence that in the night of 23.06.2001 he was preparing sweets in the house of Dhanpati Pradhan for marriage of his daughter. Hearing noise he came out and learnt that Purnima was missing. He further deposed that while they were searching for Purnima, P.W.3 came and disclosed to have seen the accused taking Purnima on his shoulder and one Ananta Majhi stated to have heard crying sound of a girl.

He also corroborated the statement of P.W.2 by stating that while he was accompanying the accused to the house of his uncles the accused escaped on the way. Nothing substantial has been brought out by way of cross-examination to discredit his testimony.

P.W.5 who is also a co-villager stated that the occurrence took place on the car festival day of the year 2001. In that evening he had been to witness the car festival and at that time he found Purnima was with the accused, who was purchasing chocolate, balloon, etc. for her at the Yatra place. At about 9.00 to 9.30 PM when he heard in the village that Purnima was missing, he disclosed before the villagers that he had seen Purnima with the accused, who was purchasing chocolate, etc. for her at Yatra place. He is a witness to the inquest and proved the inquest report (Ext.3). In cross-examination, he has specifically admitted that he disclosed before P.W.2 and his brother that he had seen the accused and Purnima at the Yatra place where the accused was purchasing chocolate, etc. for Purnima.

P.W.6 who is another co-villager stated that on the occurrence night hearing noise he came out of his house to know the reason. P.W.12 Rama Krushna Mishra told him that his niece Purnima was missing. While he along with others was searching for her, P.W.8 Ananta Majhi told them that in that evening he had heard crying sound of a girl and P.W.3 Nabin Bhoi informed that he had seen accused taking Purnima towards the threshing floor of Krushna Chandra Mishra and being asked by him the accused told that he was taking her to her house. After a while, they were informed by Dhani Majhi and Bhabagrahi Hota that accused had returned to his house and accordingly he along with P.Ws.8 and 12 went and brought the accused to the verandah of Dhanpati Pradhan. Being asked, the accused admitted that he had taken away Purnima and on the following morning he would disclose as to where he had kept her. He is also a witness to the seizure of 'Lungi' of the accused under Ext.4. His evidence has remained unshaken despite cross-examination by the defence.

P.W.7, while corroborating the statement of P.W.6 that he was informed by P.W.7 that the accused had returned to his house, has further stated in his evidence that in the night of occurrence the accused was brought to the village 'Khuli'. On being asked the accused did not say anything about Purnima at first but being repeatedly asked he admitted that he had taken away Purnima and would disclose in the following morning as to where he had kept her. Nothing contrary has been brought out in cross-examination to disbelieve his evidence.

P.W.8 in his evidence has stated that in the evening of occurrence while he was sitting on his front verandah he heard the crying sound of a girl child appeared to be that of Purnima from the side of threshing floor of Krushna Chandra Mishra. On his way to the house of Purnima, he met with P.W.12 and told him about hearing of the crying sound. Then, both of them (P.Ws.8 and 12) went to the house of Purnima and coming to know from her father (P.W.2) that she had gone towards the village 'Khuli', all of them went in search of her. While they were gathered near the house of Dhanpati, having failed to trace out Purnima, P.W.3 came and informed that he had seen the accused carrying Purnima on his shoulder. On getting this information from P.W.3, he (P.W.8) along with some other villagers searched for the accused in the houses of his maternal uncles, namely, Santosh Pradhan and Kishore Pradhan, but could not find out him. On getting information from Dhani Maji and P.W.7 that the accused had been returned to the village, they went and brought the accused to the verandah of Dhanpati and detained him there till 5:00 AM. During that period, the accused admitted that he had taken away Purnima and that on the following morning he would tell as to where he had kept her. As the accused wanted to consume 'Bhang', he was allowed to go along with P.W.4 Krutartha Pradhan but after a while P.W.4 came back and informed that the accused escaped from his custody. He stated to be a witness to seizure of 'Chadi' of the deceased under Ext.2 and seizure of 'Lungi' of the accused under Ext.4 and proved the said seizure lists (Exts.2 and 4) and his signatures appended thereto as Ext.2/2 and Ext.4/2. In cross-examination, he admitted that after taking dinner he came out of his house and sat on his front verandah probably around 8:30 PM to 9:00 PM and at that time he had not seen anybody passing by that way. When he heard the crying sound, he did not tell about that to anybody. He further admitted that the accused had worn the 'Lungi' (M.O.I) while he was moving at the Yatra place, but when he was brought near the house of Dhanpati Pradhan, he had not worn the same.

P.W.9 is the doctor who conducted autopsy over the dead body of the deceased and found the following injuries:

"(i) Incised wound on right side of fore-head horizontally placed of the size 1 cm. X 1 cm. X bone deep;

(ii) Incised wound of size 1 cm. X 1 cm. X ½ cm. on left hypochondrium (left upper abdomen) obliquely placed;

(iii) Incised wound of size 1 cm. X ½ cm. X ½ cm. On left infra axiliary region;

(iv) Incised would 7 cm X 3 cm. X 4 cm. on the front of neck at upper border of thyroid cartilage horizontally placed;

(v) Scalp eaten away by carrion feeders. Separation of coronal suture. Brain matter eaten away by maggots;

(vi) Left eye ball eaten away. Right eye ball intact;

(vii) Cut wounds of external injuries nos. (i) and (iv) showed blood clots at margins. External Injuries Nos.(ii) and (iii) the margins were eaten away by the maggots.

(viii) Genital orifices eaten away by maggots. Vaginal swab preserved for microscopic examination; and

(ix) All viscera pale."

He opined that the cause of death was due to shock and haemorrhage as a result of the cut injury to the neck. In ordinary course of nature injury no.iv was sufficient to cause death. The cut injuries were possible by sharp cutting weapon. He proved the post mortem report (Ext.5). In cross-examination, he admitted that injury nos.(i) to (iv) were visible injuries.

P.W.10 is the Revenue Inspector who prepared the spot map Ext.8. P.W.11 is the grandmother of the deceased. She stated that four days prior to the death of the deceased, while she was returning after taking her bath, the deceased came to her and told that their labourers were telling to kill her and throw away her dead body. Being asked who was saying so, the deceased told the name of the accused. In cross-examination, she admitted that she did not inform the same to her son and husband as she did not believe the version of a child to be true. On the day following missing of Purnima, she (P.W.11) had informed her (Purnima's) father that Purnima was saying so to her.

P.W.12 is the younger brother of P.W.2 who corroborated the statement of P.Ws.6, 7 and 8 in material particular. In cross-examination, he admitted that he had accompanied P.W.2 and scribed the F.I.R. at the police station. Police examined him and other persons of the village while they were sitting on the verandah of Dhanpati.

P.W.13 is another co-villager who has stated that about 4 to 6 days after missing of the deceased, he had gone to the side of Junakata to attend nature's call. Sensing some foul smell he went towards the direction from

where it was coming and found the decomposed body of the deceased lying there. Sadananda Bhoi, who was also with him, saw the dead body. Thereafter, they informed the matter in the village.

P.W.14 is the I.O. of this case. He deposed that on receipt of written report (Ext.1) the O.I.C., Sambalpur Sadar P.S. registered the case and directed him to take up investigation. During course of investigation, he examined the informant and other witnesses, visited the spots and prepared the spot maps (Ext.9 and Ext.9/1). He traced out the decomposed body of the deceased, on getting information over telephone from the occurrence village, and accordingly converted the case to one under Section 302 IPC. He sent requisition for Scientific Officer of D.F.S.L., Sambalpur, who visited the spot along with his staff and submitted his sport visit report to him (P.W.14). He held inquest over the dead body of the deceased and despatched the dead body to V.S.S. Medical College and Hospital, Burla for post-mortem examination. He seized the 'Chadi' of the deceased and 'Lungi' of the accused. After complying all formalities filed charge-sheet against the appellant. In cross-examination, he admitted that as the body of the deceased was decomposed, he could not find out any visible external injury on it. He further admitted that no weapon of offence has been seized in this case and no reason has been assigned by him for delayed examination of P.Ws.1 and 11.

8. Admittedly, there is no eye witness to the occurrence. The conviction has been recorded basing upon circumstantial evidence. Of them, extrajudicial confession and last seen theory are the two major circumstances, on which much emphasis appears to have been laid by the trial court. In the case of ***State of U.P. V. Ashok Kumar Srivastava; AIR 1992 SC 840***, the apex Court has held that while appreciating the circumstantial evidence, the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negatived on evidence. Great care must be taken in evaluating circumstantial evidence.

9. With the above touch stone, this Court evaluated the evidence of the witnesses. P.Ws.2, 3, 4, 6, 7, 8 and 12 are witnesses to the extrajudicial confession. Their evidence is that in the night of occurrence, on his return to village the accused was called near the house of Dhanpati Pradhan where almost all the villagers were assembled. Being asked repeatedly, the accused said that he had taken away Purnima and kept her at a place and on the next morning he would disclose about the same. From a bare reading

of the same, it would be clear that the statement made by the accused was not voluntary. Besides, there are major contradictions in the evidence of the above witnesses with regard to the confession made by the accused. Therefore, it cannot be termed as an extrajudicial confession in the eye of law.

10. As regards last seen theory, the prosecution has pressed into service the evidence of P.Ws.3 and 5. But, the trial court, as it reveals from the impugned judgment, has taken into account the evidence of P.W.3 only. According to P.W.3, the deceased and the accused were last seen together by him in the night of 23.06.2001. But, the facts remains that the decomposed dead body of the deceased was admittedly discovered on 26.06.2001. This shows that there was a long time gap between the deceased having been last seen in the company of the accused and the time of discovery of the dead body of the deceased, for which the possibility of any other person coming in between could not be ruled out. So, in view of the decision of this Court in ***Jagata Singh v. State***, (1997) 13 OCR 245, it is difficult to accept the last seen theory as an incriminating circumstance. In addition to the above, even if the last theory introduced by the prosecution is accepted, no conviction can be recorded relying on such circumstance in view of the judgment of the apex Court in ***Inderjit Singh v. State of Punjab***, AIR 1991 SC 1674, since except this circumstance there is no other incriminating circumstance on record to implicate the accused in the crime.

11. Apart from what has been stated above, in the 'Chadi' of the deceased and 'Lungi' of the appellant which were seized and sent for chemical examination no blood stains were found. No attempt has been made by the prosecution to examine Dhanpati, who is a very material witness. Where the case rests on circumstantial evidence, motive plays a vital role, and in the instant case prosecution has utterly failed to establish the motive behind the commission of the crime. The accused was not seen by any one while taking the deceased from the lawful guardianship of her parents and to that effect no evidence has been adduced by the prosecution. No documentary or oral evidence is adduced on behalf of the prosecution to show that there was enmity between the accused and the deceased or her family. The weapon of offence was neither seized nor produced before the Court. For all these reasons, the prosecution case is also to be viewed with suspicion.

12. Having regard to the entire oral and documentary evidence available on record, this Court comes to the conclusion that the prosecution has failed to establish all the circumstances by cogent and clinching evidence and the

circumstances so established do not form a complete chain to prove the guilt of the accused beyond all reasonable doubts. Under the circumstances, it is difficult for this Court to hold the accused-appellant guilty either for commission of offence under Section 302 or Section 363 or Section 201 of the Indian Penal Code.

13. In the result therefore, the JCRLA is allowed, the judgement dated 07.07.2003 passed by the learned Sessions Judge, Sambalpur in S.T. Case No.67 of 2002 convicting the accused-appellant under Sections 363/302/201, IPC and sentencing him to undergo imprisonment for life for the offence under Section 302, IPC and one year each for the offence under Sections 363/201, IPC is set aside and the accused-appellant is directed to be set at liberty forthwith, unless his detention is required otherwise.

Appeal allowed.

2012 (II) ILR - CUT- 1023

M. M. DAS, J.

W.P (C) NO.7540 OF 2012 (Dt.15.05.2012)

GOLEKHA CHANDRA SAHOO …….Petitioner

.Vrs.

CHOUDHURY KEDARNATH MISHRA ……..Opp.Party

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 39, RULE 7.

Inspection of suit property – Deputation of pleader Commissioner – Object is to find out its condition – Discretion of the Court – Discretion cannot be exercised on mere asking of the same – Held, Court can depute pleader Commissioner for inspection of the suit land where the party requiring inspection is incapable of having knowledge in view of the nature of the suit land or where he is not allowed to have the inspection himself or through agents or where evidence adduced by both sides is such that the Court feels that the report of the local investigation would help in assessing the evidence properly.

In the present Case the land being agricultural land is open to every body and witnesses would be available to the plaintiff to prove their assertions so the learned Court below was not correct in allowing the application Under Order 39, Rule 7 C.P.C.

Case laws Referred to:-

1.62(1986) CLT 201 : (Bijay Kumar Jena & Anr.-V-Dussasan @ Surendra Khuntia & Ors.)
2.AIR 2005 A.P. 529 : (J.Satyasri Rambabu-V- Smt.A Anasuya & Anr.)

For Petitioner – M/s. Prahalad Kar
For Opp.Party – None

M/s. S.C. Sathapathy and associates have entered appearance on behalf of the opposite party – plaintiff.

Heard Mr. P. Kar, learned counsel appearing for the petitioner and Mr. S.C. Sathapathy, learned counsel for the opposite party.

The opposite party has filed a suit for permanent injunction against the petitioner as defendant, being, C.S. No.76 of 2011 pending before the learned Civil Judge (Junior Division), Kujanga.

The plaintiff – opposite party filed an application for grant of interim injunction during pendency of the suit, on which the learned trial court passed the order on 10.06.2011 directing the parties to maintain status quo over the disputed property. Subsequent thereto, the opposite party – plaintiff alleging violation of the order of status quo, filed an application on 04.01.2012, which has been registered as I.A. No.112 of 2011, inter alia, stating that after passing of the status quo order, the petitioner – defendant has raised construction over the disputed property forcibly, violating the said order. The said application is subjudice. In the said interim application, an application was filed by the plaintiff under Order – 39, Rule – 7 C.P.C. for deputing a Pleader Commissioner for spot inspection and submission of report.

An objection was filed to the said application and after hearing the parties, the learned trial court, by the impugned order dated 17.04.2012, holding that to ascertain the real position of the structure standing over the suit land, which is the crux of the dispute, appointment of Pleader Commissioner is highly necessary for the ends of justice, as otherwise, the petitioner will sustain irreparable loss, allowed the said application deputing a Pleader Commissioner. The defendant – petitioner, being aggrieved by the said order, has preferred the present writ application.

Mr. Kar, learned counsel for the petitioner submits that the learned trial court, while passing the impugned order, has not assigned any reason as to in what manner, deputation of Pleader Commissioner is justified in the facts of the present case for just adjudication of the dispute. He further submits that by allowing deputation of a Pleader Commissioner to make a spot enquiry, the same clearly amounts to collection of evidence on behalf of the plaintiff in respect of his application under Order – 39, Rule – 2 – A C.P.C.

Mr. Kar, learned counsel in support of his above contention, relies upon the decision in the case of ***Bijay Kumar Jena and another v. Dussasan @ Surendra Khuntia and others,*** 62 (1986) C.L.T. 201.

Mr. Sathapathy, learned counsel, on the other hand, relying upon the decision in the case of ***J. Satyasri Rambabu v. Smt. A. Anasuya and another***, AIR 2005 Andhra Pradesh 529 submits that in a suit for injunction,

when in spite of a temporary injunction being granted against the defendants, if the defendants alter the nature of the suit land, the court, in such event, should appoint a Commissioner.

On perusal of the decisions of the Andhra Pradesh High Court, it appears that an injunction having been granted in a suit for perpetual injunction during the pendency of the suit and the plaintiffs having filed an interim application under Order – 39, Rule – 7 C.P.C., praying the court to appoint an Advocate Commissioner to note down physical features of the suit schedule land, inter alia, stating that contrary to the undertaking given by the defendants in the injunction matter, he has been digging trenches and filling the suit schedule land, the learned trial court appointed an Advocate Commissioner to record the physical features of the suit schedule land. The Andhra Pradesh High Court, in such circumstances held as follows :-

> "It is no doubt true that the Courts are normally reluctant to appoint a Commissioner for noting physical features of the suit schedule property, particularly in a suit for injunction since the same would amount to collecting evidence in favour of one of the parties. However, there is absolutely no reason to hold that it is a hard and fast rule. Having regard to the facts and circumstances of the case and particularly whenever the Court prima facie finds that there is an attempt on the part of one of the parties to alter the physical feature of the suit property and it is necessary to take note of the same, it is always open to the Court to appoint a Commissioner for inspection of such property. It is relevant to note that Order XXXIX, Rule 7 of the Code of Civil Procedure empowers the Court to make an order for detention, preservation or inspection of any property, which is the subject matter of the suit, if the Court feels that such action is necessary or expedient for the purpose of obtaining full information or evidence. In the light of the abovesaid provision, I am unable to agree with the contention of the learned counsel for the petitioner that the Court below has committed an error in appointing an Advocate Commissioner. As already noted above the specific plea of the plaintiffs is that in spite of the order of temporary injunction the defendant has been taking steps to alter the nature of the suit schedule land. In the circumstances, the Court below having considered the entire material on record has rightly appointed an Advocate Commissioner. The said order cannot be said to be vitiated on account of any patent error of fact or law and therefore, does not warrant interference in exercise of supervisory jurisdiction under Article 227 of the Constitution of India."

However, in the decision of Bijay Kumar Jena and another (supra), this Court was considering appointment of a Commissioner for inspection of the suit property under Order – 39, Rule – 7 C.P.C. in similar facts as is involved in the present case.

This Court analyzing the scope of Order – 39, Rule – 7 C.P.C. held as follows :-

"The object of inspection of the suit land is to find out its condition. Assistance of the Court would be necessary where the party requiring the assistance is incapable of having the knowledge in view of the nature of the suit land. There may be situation where the party seeking the assistance of the Court is not allowed to have the inspection himself or through his agents or where the evidence adduced by both sides is such that the Court feels that the report of the local investigation would help in assessing the evidence properly. The wide discretion under Order 39, Rule 7 C.P.C., is not to be exercised on the mere asking of the same.

In this case, the land being agricultural land is open to everybody. Witnesses would be available to the plaintiffs to prove their assertions. In such circumstance, trial court is justified in finding that the direction for inspection would be finding out materials for the plaintiffs. I may make it clear that in case after recording evidence the Court is satisfied on application that local inspection would be necessary, he may issue the direction on the application of either party." *(emphasis supplied)*

In view of the facts involved in the judgment of the Court in the case of Bijay Kumar Jena and another (supra) are almost exactly similar to the facts involved in the present case and in view of the fact that the totality of the circumstances in the case before the Andhra Pradesh High Court was different, I find that the ratio of the decision in the case of Bijay Kumar Jena and another is squarely applicable to the facts of the present case.

I, therefore, find that the learned court was not correct in allowing the application under Order – 39, Rule – 7 C.P.C. in deputing a Pleader Commissioner for inspection of the suit land. The impugned order, therefore, stands quashed and the writ application accordingly stands allowed. All pending Misc. Cases stand disposed of.

Writt petition allowed.

2012 (II) ILR - CUT- 1027

M. M. DAS, J.

W.P.(C) NO.28409 OF 2011 (Dt.08.05.2012)

APARNA DHIRSINGH ……..Petitioner

.Vrs.

PRAVAKAR SATPATHY & ANR. ……Opp.Parties

A. **CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) - ORDER 1, RULE 10.**

Probate Proceeding – Whether a purchaser of the property belonging to the deceased testator should be impleded as a party in the probate proceeding – Held, No. (Para 9)

B**. INDIAN SUCCESSION ACT, 1925 (ACT NO.39 OF 1925) – S.278.**

Probate Proceeding – Question regarding existence of title of the testator is not to be gone in to in a Probate Proceeding.

(Para 7,8)

Case law Referred to:-

AIR 2008 SC 140 : (Sunil Gupta-V-Kiran Girhotra & Ors.)

For Petitioner - M/S. U.C. Patnaik, G.M.Rath, S.Patnaik & S.P.Padhy.

For Opp.Parties - M/s. B.Routray, D.Routray, P.K.Sahoo, R.P.Dalai, K.Mohanty, S.Das, S.Jena & S.P.Nath (for O.P.1)

M/s. Dr. A.K.Rath, S.K.Das, A.K.Nath (for O.P.2).

M.M. DAS,J. The petitioner has filed the Testamentary Case to probate the Will alleged to have been executed by his deceased father on 14.12.2007 under section 278 of the Indian Succession Act which has been registered as Test Case No. 10 of 2008 pending before the learned District Judge, Cuttack . In the Probate application, the petitioner has named her mother and her younger sister as the near relatives. The petitioner has alleged that after institution of the above Test Case on receipt of notice of the said case, her mother and younger sister, being fully aware of the execution of the Will by her deceased father in her favour, on 27.10.2008 sold away portion of the schedule lot No. 2 properties in favour of three

persons, namely, Shri Devendranath Jenamani, Smt. Bijayalaxmi Jena and Shri Pravakar Satpathy. When the said purchasers tried to take possession of the properties sold to them, forcibly, the petitioner filed a civil suit, being C.S. No. 424 of 2008 before the learned Civil Judge (Sr. Division), Jajpur seeking a decree for declaration of her right, title and interest and confirmation of possession and in the alternative, recovery of possession along with a prayer to declare the sale deeds executed by her mother and sister as void as well as for permanent injunction. An interim application for injuncting the defendants during pendency of the suit was filed by the petitioner in the said suit, which being rejected, the petitioner preferred FAO No. 27 of 2009 before this Court.The said FAO was disposed of on 13.1.2010 directing the parties to maintain status over the disputed properties till disposal of the suit with a further direction to the learned court below to dispose of the suit expeditiously preferably within a period of six months.

2. The petitioner also filed W.P. (C) No. 22364 of 2010 for a direction for expeditious disposal of the Probate Misc. Case No. 4 of 2009. It may be mentioned here that the original application filed for probate of the Will by the petitioner before the learned District Judge, Cuttack, which was numbered as Test Case No. 10 of 2008, was subsequently numbered as Probate Misc. Case No. 4 of 2009 and on being transferred to the court of the learned Civil Judge (Sr. Division), Jajpur, it was again numbered as C.S. No. 25 of 2011. Writ Petition (Civil) No. 22369 of 2010 filed by the petitioner was disposed of by order dated 24.12.2010 of this Court which directed the learned trial court to dispose of the Probate Misc. Case by the end of May, 2011. On 28.1.2011, one of the purchasers, i.e., opp. party no. 1 along with opp. parties 2 and 3, the mother and the younger sister of the petitioner filed an application under Order 1, Rule 10 C.P.C. praying for impleading the opp. party no. 1 (purchaser) as a party in the said Probate case. The petitioner filed her objection.

3. After hearing the parties, the learned Civil Judge (Sr. Division), Jajpur allowed the prayer for impletion of the opp. party no. 1 to the said Probate Misc. Case now numbered as C.S. no. 25 of 2011 by his order dated 14.2.2011. In the said order, the learned Civil Judge, while allowing the prayer for impletion of the opp. party no. 1 as a party to the said proceeding, also disposed of the application dated 8.4.2010 filed by the opp. parties for making enquiry regarding the correctness of the valuation report given by the Collector. Being aggrieved by the said order dated 14.2.2011, the petitioner has preferred the present writ petition.

4. The learned Civil Judge (Sr. Division) Jajpur in the impugned order, on considering the application with regard to the correctness of the valuation report given by the Collector after elaborately discussing the submissions made before him and the decisions cited , issued an instruction to the Collector to make valuation of the structures/construction, if any, situated over the said plots including the Bagayat land and property of the six deities mentioned in Lot No. 1 of the land schedule. With regard to impletion of party, the learned Civil Judge holding that purchase of land by opp. Party no. 1 Pravakar Satpathy from the defendants has been admitted by the plaintiff-petitioner and the said Pravakar should be impleaded as a party to protect his interest, allowed the prayer made under Order 1, Rule 10 C.P.C.

5. During the course of hearing of this appeal, Mr. U.C. Patnaik, learned counsel for the petitioner fairly conceded that he does not challenge the portion of the impugned order directing fresh valuation of the property given by the Collector. However, with regard to the portion of the impugned order allowing the opp. Party no. 1 to be impleaded as a party in the proceeding, the same was vehemently challenged by the learned counsel for the petitioner who submitted that the purchaser of the property during the pendency of the Probate proceeding cannot be impleaded as a party to the Probate proceeding as he is neither a proper nor a necessary party to the said proceeding.

6. Dr. A.K. Rath learned counsel appearing for the opp. Party no. 2 in this writ petition submitted that he is only concerned with the portion of the order by which the court directed the Collector to make fresh valuation of the property and the said opp. Party no. 2 is not concerned with regard to the portion of the order allowing impletion of the opp. Party no. 1 as a party to the Probate proceeding.

None appeared for the opp. party no. 1 during hearing of this petition.

7. Mr. Patnaik, learned counsel for the petitioner relying upon an unreported decision of this Court dated 7.4.1993 passed in C.R. No. 343 of 1992 (***Smt. Manorama Badu Mohapatra and others v. Girish Chandra Nayak and others***) urged that in a proceeding for Probate or Letters of Administration under section 278 of the Indian Succession Act, existence of the title of the testator is not to be gone into. The only adjudication requires in this case is with regard to the genuineness of the Will to grant Probate. He, therefore, submitted that in a Probate Misc. Case, after general citations are issued, a person, no doubt, can enter caveat to make the proceeding contemptuous in order to challenge the genuineness of the Will under consideration and such person who can lodge a caveat pursuant to

citations can only be impleaded if he or she is one of the left out legal heirs of the deceased testator, who has not been named in the application for probate. This can never mean that the scope of a Probate proceeding can be open to decide the question of title of the testator which can be only decided in a suit. More over, Mr. Patnaik submitted that such a suit has already been filed and is subjudice.

8. It is well settled in law that question of title cannot be decided in a Probate Misc. Case under section 278 of the Indian Succession Act (See AIR 1970 Orissa, 95).

9. Mr. Patnaik further relied upon the judgment of the Supreme Court in the case of ***Sunil Gupta v. Kiran Girhotra and others,*** AIR 2008 SC 140 in support of the contention that the learned court below has committed an illegality in allowing the application filed under Order 1, Rule 10 C.P.C. for impletion of parties and directing the opp. Party no.1 to be added as a party to the Probate proceeding. In the said judgment, the Supreme Court was considering the question as to whether a purchaser of a property belonging to the deceased testator should be impleaded as a party in the Probate proceeding. The Supreme Court has categorically laid down that, citation as is well known should be conspicuously displayed on a notice board. Before purchasing the properties in the said case, the purchaser takes a calculated risk. In a situation of this nature, the purchaser is not a necessary party and he takes the risk of the result of the Probate proceedings. His apprehension that his vendor may not take any interest in the litigation cannot by itself be a ground for impleading him as a party, as, such presumption will be in the realm of speculation.

(emphasis supplied)

10. Considering the ratio of the aforesaid judgment of the Supreme Court in the case of Sunil Gupta (supra) and further finding that the learned court below in the impugned order has not assigned any reason whatsoever as to why he allowed the opp. Party no. 1 to be impleaded as a party in the Probate Proceedings, the said part of the order is found to be clearly unsustainable. Accordingly, while setting aside that part of the impugned order, where the learned court below has allowed impletion of opp. Party no. 1 as a party to the proceeding, it is directed that the proceedings for Probate of the Will, which was earlier directed by this Court to be disposed of by end of May, 2011, shall be finally decided and disposed of by the end of November, 2012. The opp. Party no. 1, who has been impleaded as a party, will be deleted from the record. The writ petition is accordingly disposed of.

Writ petiton disposed of.

2012 (II) ILR - CUT- 1031

M. M. DAS, J.

CRLMC. NO.3329 OF 2010 (Dt.27.06.2012)

BIRABAR SETHI @ BIRENDRA SETHI ……Petitioner

.Vrs.

STATE OF ORISSA ……Opp.Party

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

Quashing of order taking cognizance – Allegation of misappropriation of Government funds for construction of village concrete road during 2004-05 – Measurement conducted in 2008 – On enquiry Goverment reached at a conclusion with regard to excess payment.

Judicial notice can be taken of the fact that the concrete road used by the villagers constructed over four years back cannot have the same measurement and quality as it had on the date when it was constructed – Moreover when it is admitted by the then Asst. Engineer Shri Banerjee that the measurement done by the petitioner was check measured by him and was found to be correct and the said Asst. Engineer having not been arrayed as an accused being the higher authority over the petitioner, no prima facie case for the offence is made out for which cognizance has been taken – This Court also finds that if the Criminal Case is allowed to continue, for the above reasons, there can be no doubt that the same will be ended in acquittal of the petitioner – Held, continuance of Criminal Proceeding in T.R. No.22 of 2010 against the petitioner as well as the other accused persons would clearly amount to an abuse of the process of the Court – Order Dt.28.06.2010 taking cognizance U/s.13 (2) read with Section 13(1)(d) of the P.C. Act,1988 and U/s.418, 420, 120-B I.P.C. against the accused persons in T.R. No.22 of 2010 is set aside and the proceeding in the above case pending before the learned Special Judge, Vigilance Balasore is quashed.

Case laws Referred to:-

1.(2012)51 OCR (SC) 682 :(Dr. Subramanyam Swamy-V- Dr. Manmohan Singh &Anr.)
2.AIR 1964 SC 1 :(Dr. Raghubir Swain-V- State of Bihar).

For Petitioner - M/s. D.P.Dhal, K.Dash, P.K.Routray, B.S.Dasparida, A.K.Mishra & S.Mishra.
For Opp.Party - Mr. P.K.Pani, Standing Counsel (Vigilance)

M.M. DAS, J. The petitioner in this application under Section 482 Cr.P.C. has challenged the order dated 28.06.2010 taking cognizance of the offence under Sections 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 and under Sections 418/420/120 –B IPC passed by the learned Special Judge, Vigilance, Balasore in T.R. No.22 of 2010 and has sought for quashing of the proceedings in the said T.R. No.22 of 2010.

2. On receiving information with regard to the allegation of misappropriation of Government funds, while executing a project, i.e., construction of cement concrete road of Morsuan village under Balibandha Grama Panchayat in Jhumpura Block of Keonjhar district, an enquiry was conducted by the Vigilance Police. The prosecution alleges that during the enquiry, it was revealed that in 2004 – 05, the above concrete road was constructed at a cost of Rs. 2,50,000/-. To construct the said road, one Sri Bairagi Nayak of the said village was selected as Village Level Leader (VLL) in the Palli Sabha. As per the request of the Sarpanch, the Junior Engineer of Jhumpura Block prepared the estimate on 02.10.2004 for Rs.2,50,000/- as cost of construction of the said road. The estimate was sanctioned by Sri Ashis Kumar Banerjee, Assistant Engineer of the said Block. The then Sarpanch, Sri D. Majhi, accorded approval of the estimate and issued the work order dated 28.11.2004 in favour of the said Bairagi Nayak, who executed the work under the supervision of the Junior Engineer Sri Birabara Sethi. During the course of execution of the work, food- grains to the tune of 98 quintals and 500 bags of cement were issued on different dates to Shri Nayak. The Junior Engineer measured the work done recorded the measurement on 20.03.2005 in M.B. No.6, which was check-measured by Sri Ashis Kumar Banerjee, Assistant Engineer on the same day. The first Running Account (RA) bill for Rs.1,71,574/- was passed by the Sarpanch and a net amount of Rs.43,274/- was paid to the executant of the work after deduction of the cost of the cement and food-grains supplied to him. The executant completed the work and the Junior Engineer Sri Sethi measured the work on 27.05.2005 in M.B. No.6, which was also check -measured by the Assistant Engineer, Sri Banerjee, on the same date. The second Running Account (RA) and final bill amounting to Rs.78,426/- was passed for payment by the Sarpanch on 06.06.2005 and a net amount of Rs.60,334/- was paid to the executant Sri Nayak after due deduction. The length of the cement concrete road executed is 175 meters. It is further alleged that even though it was shown that the road was constructed completely, but during

the year 2005 – 06, the same work of Marsuan Naik Sahi village was again proposed to be executed under the name "Completion of Marsuan Naik Sahi village cement concrete road". For this, the Junior Engineer Sri Sethi prepared the estimate amounting to Rs.3,40,000/- on 02.09.2005, which was technically sanctioned by Sri Banerjee, Assistant Engineer and administratively approved by the Sarpanch. As per the recommendation of the Palli Sabha, the work was again entrusted to Bairagi Nayak, VLL on 30.03.2006. He executed the work under the supervision of the Junior Engineer Sri Sethi. During execution, 200 bags of cement and 90 quintals of rice were issued on different dates. After completion of the said work, Sri Sethi recorded measurement in M.B. No.8, which was check-measured by Sri Banerjee, Assistant Engineer. Thereafter, the first Running Account bill and the final bill of Rs.3,40,000/- was passed by the Sarpanch and the net amount of Rs.2,43,870/- was paid to the executant after due deduction. The length of the road executed was 596' 0". The work was technically inspected by Sri A.K. Mishra, Assistant Engineer, R & B, Barbil in presence of S.Os. The Assistant Engineer Sri Mishra has opined that there has been excess payment of Rs.21,202/- for the work executed during the year 2004 – 05 and Rs.33,728/- for the work executed during the year 2005 – 06. Thus, a total sum of Rs.54,930/- has been paid in excess due to inflated measurement. On the basis of the said enquiry report, the Inspector of Vigilance, Keonjhar Unit lodged an F.I.R. on 30.06.2008 mentioning therein that the above excess payment proves that the Junior Engineer Sri Sethi and the Assistant Engineer Sri A. K. Banerjee entered into a criminal conspiracy and recorded inflated measurement resulting in excess payment of the above amount to the executant Sri Bairagi Nayak and thereby committing misappropriation and causing loss to the State exchequer.

3. The F.I.R. was registered as Balasore Vigilance P.S. Case No.21 of 2008 under Sections 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act and Sections 418/420/120-B IPC and the matter was investigated. After completion of the investigation, final form has been submitted against Sri Birabara Sethi, Junior Engineer, who is the petitioner in this case and Sri Bairagi Nayak, VLL, who executed the work. Upon receipt of the said charge sheet (final form), the learned Special Judge, Vigilance, Balasore passed an order dated 28.06.2010 taking cognizance of the above offences in the aforementioned case, which is impugned in this present criminal Misc. Case petition.

4. Mr. Dhal, learned counsel for the petitioner urged that it is evident form the case diary that during the investigation, both the petitioner and the Assistant Engineer Sri Banerjee were examined by the Investigating Officer,

who stated that the works have been done in a proper way and since the measurement subsequently done during the enquiry after receipt of the allegation, was in the year 2008, i.e., after around a gap of three years from the date of execution of the work, Sri A.K. Mishra, Assistant Engineer, who measured the work in 2008, has reached at a wrong conclusion with regard to excess payment. It was further submitted that materials collected by the I.O. with regard to the petitioner as well as Sri Banerjee, were placed before the sanctioning authorities, namely,The Engineer-in-Chief, Water Resources, Odisha and General Administration Department respectively. While on the self-same material, the sanction was given by the Engineer-in-Chief to prosecute the petitioner, the General Administration Department, on the contrary, refused to give sanction against Sri Banerjee, though he stands on the same footing as per the F.I.R. He further submitted that whatever measurement was done by the petitioner was check-measured by the Assistant Engineer Sri Banerjee, in respect of whom, sanction has been refused by the General Administration Department and, therefore, he has not been shown as an accused in the charge sheet. Mr. Dhal, learned counsel contended that since Sri Mishra measured the thickness of the road in 2008 after a long gap, there is bound to be difference in measurement due to erosion of the road by user as well as weathering. Mr. Dhal, therefore, submitted that this Court, by exercising the power under Section 482 Cr. P.C., in the facts of the present case, should quash the order of cognizance as well as the proceeding against the petitioner inasmuch as Sri Banerjee, against whom, the sanction was refused to be accorded by the General Administration Department, has categorically stated before the Investigating Officer in his statement recorded under Section 161 Cr. P.C. that a work has been done in the proper way and the same has been measured and check-measured duly. The statements recorded under section 161 Cr. P.C. during the investigation of the petitioner and Sri A.K. Mishra are available in the case diary, which were perused by this Court.

5. Mr. Pani, learned counsel for the Vigilance Department produced before this Court the technical inspection report, which was prepared by Sri A.K. Mishra, Assistant Engineer, R & B, Barbil on 29.04.2008. He brought to the notice of this Court, the observations of Hon'ble Justice A.K. Ganguly, in the case of ***Dr. Subrmanyam Swamy v. Dr. Manmohan Singh and another,*** (2012)51 OCR (SC) 682, wherein His Lordship taking note of the increase in corruption in the country, has observed that corruption in our Country not only poses a grave danger to the concept of the constitutional governance, but also threatens the very foundation of the Indian democracy and the rule of law. The magnitude of corruption in our public life is incompatible with the concept of a socialist, secular, democratic republic.

The Supreme Court also observed that it cannot be disputed that where corruption begins, all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity, which are the core values in our Preambular vision and, therefore, the duty of the Court is that any anti-corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable, the Court has to accept the one that seeks to eradicate corruption to the one, which seeks to perpetuate it.

6. There is absolutely no quarrel on the above proposition with regard to the consequences of corruption. But, however, in a given case, if the allegations, prima facie, do not show that the action on the part of the accused would amount to corruption, the proceeding for such an offence cannot be sustained.

7. Further, in the instant case, the F.I.R., which was filed by the Inspector of Vigilance, Keonjhar Unit, on the basis of which the case was registered, categorically states as follows :-

> "Therefore, it is requested that a case against Sri Asish Kumar Bannerjee, Ex-Assistant Engineer, Jhumpura Block, Sri Birabara Sethi, Ex-Junior Engineer, Jhumpura Block and Sri Bairagi Nayak executed under Section 13 (2) read with Section 13 (1) (d) of the P.C. Act and Sections 418/420/120 – B IPC may please be registered and ordered to be investigated into."

8. During the investigation, it is, prima facie, revealed that statements of both the above Engineers against whom, similar allegation was made, gave their statements, which were recorded under Section 161 Cr. P.C. by the Investigating Officer stating that there has been no irregularity in conducting measurement of the work executed by Sri Bairagi Nayak. Admittedly, Sri Mishra, Assistant Engineer measured the cement concrete road constructed by Sri Nayak in the year 2008, on the basis of which allegation of excess payment rests.

9. Judicial notice can very well be taken of the fact that the concrete road used by the villagers constructed over four years back, cannot have the same measurement and quality as it had on the date, when it was constructed. Further, it being admitted by the then Assistant Engineer Sri Banerjee that the measurement done by the petitioner was check-measured by him and was found to be correct and the Assistant Engineer, Shri

Banerjee having not been arrayed as an accused, who was the higher authority over the petitioner and checked the measurement done by the petitioner and found the same to be correct, it is seen that no prima facie case for the offences of which cognizance has been taken, is made out and this Court further finds that for the above reasons, if the criminal case is allowed to continue, there can be no doubt that the same will end in acquittal of the petitioner.

10. With regard to exercise of jurisdiction under Section 482 Cr. P.C., it would be profitable to refer to the decision of the Supreme Court in the case of ***Dr. Raghubir Swain v. State of Bihar***, AIR 1964 SC 1. In the said case, the Supreme Court, though was dealing with the power of the High Court under Section 561 – A of the old Code, which is similar to Section 482 Cr.P.C. of the new Code, spoke about the inherent power of this Court in a general way when it observed that the inherent powers of the High Court of a State means the power, which must, by reason of being of highest Court in the State having general jurisdiction over civil and criminal courts in the State, inhere in that Court. The powers in a sense are in an inalienable attribute of a position, it holds with respect to the courts subordinate to it. Such powers are partly administrative and partly judicial. They are necessarily judicial when they are exercisable with respect to a judicial order and for securing the ends of justice. Thus observing, the Supreme Court held as follows :-

> "When we speak of the inherent powers of the High Court of a State we mean the powers which must, by reason of its being the highest Court in the State having general jurisdiction over civil and criminal Courts in the State, inhere in that Court. The powers in a sense are in an inalienable attribute of the position it holds with respect to the Courts subordinate to it. These powers are partly administrative and partly judicial. They are necessarily judicial when they are exercisable with respect to a judicial order and for securing the ends of justice. When we speak of ends of justice we do not use the expression to comprise within it any vague or nebulous concept of justice, nor even justice in the philosophical sense but justice according to law, the statute law and the common law. Again, this power is not exercisable every time the High Court finds that there has been a miscarriage of justice. …… Inherent powers are in the nature of extraordinary powers available only where no express power is available to the High Court to do a particular thing and where its express powers do not negative the existence of such inherent power. The further condition for its exercise, in so far as

> cases arising out of the exercise by the subordinate Courts of their criminal jurisdiction are concerned is that it must be necessary to resort to it for giving effect to an order under the Code of Criminal Procedure or for preventing an abuse of the process of the Court or for otherwise securing the ends of justice".

11. Considering the facts of the present case in the above background, this Court is of the view that continuance of criminal proceeding in T.R. No. 22 of 2010 against the petitioner as well as the other accused persons would clearly amount to an abuse of the process of the Court and the proceeding should be quashed to secure ends of justice.

12. In the result, therefore, the order dated 28.06.2010 taking cognizance of the offence under Section Sections 13 (2) read with Section 13 (1) (d) of the P.C. Act and under Sections 418/420/120 – B IPC against the accused persons in T.R. No.22 of 2010 is set aside and the proceeding, i.e., T.R. No.22 of 2010 pending before the learned Special Judge, Vigilance, Balasore stands quashed in its entirety.

13. The CRLMC is accordingly allowed.

Application allowed.

2012 (II) ILR - CUT- 1038

I.MAHANTY, J.

CRLMC. NO. 661 OF 2004 (Dt.12.07.2012)

RAMAKANTA SAHOO …….Petitioner

.Vrs.

SURESH PRASAD PANDA ……..Opp.Party

CRIMINAL PROCEDURE CODE, 1972 (ACT NO.2 OF 1974) – S. 197.

Previous sanction – Scope and ambit of the protection granted to a public servant – If it is prima facie found that the act or omission for which the accused was charged has a reasonable connection with the discharge of his duty then it must be held to be official to which applicability of Section 197 Cr.P.C. can not be disputed.

In the present case the work carried out was on a public road which is alleged to be inferior in quality - The petitioner in his official capacity was acting as executant, though the actual work has been carried out by the Junior Engineer – Held, impugned order of cognizance suffers from grave illegality since sanction U/s. 197 Cr.P.C. was mandatory which has not been obtained prior to passing of the order of cognizance. (Para 4,5)

Case laws Referred to:-

1.AIR 2008 SC 1992 : (Anjani Kumar -V- State of Bihar & Anr.)
2.2009(II) OLR 504 : (Debasis Panigrahi -V- State of Orissa & Anr.)
3.(2011)50 OCR 843 : (Sri Sankarsana Behera -V- State of Orissa)

For Petitioner - M/s. S.R. Mulia, S.K.Parida, R.C.Moharana, M.Mulia, R.R.Nayak.
For Opp.Party - M/s. L.Pradhan, A.K.Pradhan, D.P.Das, N.Hota & K. Bera.

I. MAHANTY, J. The present application under Section 482 Cr.P.C. has been filed by the petitioner-Ramakanta Sahoo with a prayer to quash the order dated 09.08.1996 passed in 1.C.C. Case No.6 of 1996, by which order the learned S.D.J.M., Biramaharajpur has been pleased to take cognizance against the petitioner for the offence under Section 409/34, I.P.C. The essential ground of challenge by the petitioner, who was then

working as Block Development Officer (B.D.O), is non-compliance of Section 197 Cr.P.C.

2. Mr. S.R. Mulia, learned counsel for the petitioner submitted that on perusal of the complaint petition, it would be clear that the complainant was a resident of village Lumarjena and it was alleged that improvement of the village road was executed by the B.D.O. (petitioner herein) and Junior Engineer-Sk. Abdul Raif, who claimed to be in-charge of the said road improvements. It was further alleged that the present petitioner-B.D.O and the Junior Engineer acted in a negligent manner and alleging various irregularities in carrying out of such improvements of the village road for which the villagers had made complaint to the Sub-Collector claiming the said work of an inferior quality. It appears from the impugned order dated 09.08.1996 that the learned S.D.J.M., Biramaharajpur was pleased to take cognizance of offence under Section 409/34, I.P.C. against the petitioner and Junior Engineer.

Mr. Mulia further submitted that the petitioner (B.D.O) had no role in execution of the work in question since the road work was entrusted to the Junior Engineer-Sk. Abdul Raif, who had already received the payment of the said work. It was alleged that the complainant was neither a superior authority nor had entrusted the work to the petitioner. Therefore, the complainant could not claim to be an aggrieved person and had no locus standi to lodge the complaint against the petitioner.

Mr. Mulia, learned counsel for the petitioner further submitted that even if the petitioner had constructed the road in question of an inferior quality through the Junior Engineer that was in his official capacity and, therefore, sanction under Section 197, Cr.P.C was mandatory. In this respect, it is asserted that the objective of Section 197, Cr.P.C is extremely clear. He placed reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Anjani Kumar v. State of Bihar & Another***, AIR 2008 SC 1992, and the judgments of this Court in the case ***of Debasis Panigrahi v. State of Orissa & Another***, 2009(II) OLR 504 and in the case of Sri ***Sankarsana Behera v. State of Orissa***, (2011) 50 OCR 843.

3. Mr. L. Pradhan, learned counsel for the opposite party-complainant supporting the order of cognizance stated that carrying out of inferior work and thereby causing loss to public exchequer cannot come under the definition of official duty of such public servant. Therefore, sanction under Section 197 is not required. He further submitted that the petitioner was a beneficiary of the public work which was carried out by the Junior Engineer

and the complainant being the beneficiary of such public road, has every right and locus standi to question to inferior work and any objection on the ground of lack of locus standi ought to be rejected.

4. Having heard learned counsel for both the parties, perusing the pleadings and on perusing the judgments relied upon by the petitioner referred to herein above, it appears that the scope and ambit of the protection granted under Section 197, Cr.P.C to a public servant, has repeatedly been reiterated by the Hon'ble Supreme Court in various judgments as well as in the case of **Anjani Kumar** (Supra). In the said case the Hon'ble Supreme Court came to hold that once it is established that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the Section in favour of the public servant. It is further noted in the said judgment that if it is prima facie, found that the act or omission for which the accused was charged which has a reasonable connection with the discharge of his duty then it must be held to be official, to which applicability of Section 197, Cr.P.C cannot be disputed.

5. The aforesaid principle laid down by the Hon'ble Supreme Court was reiterated by a Division Bench of this Court in the case of **Debasis Panigrahi** (supra) as well as in the case of **Sri Sankarsana Behera** (supra) and the said issue is no longer res integra. It is revealed from the complaint petition that, although it was contended that the work carried out was inferior but the actual work was being carried out on a public road and the petitioner in his official capacity was acting as executant "though the actual work has been carried out by the Junior Engineer".

Therefore, applying the principles laid down by the Hon'ble Supreme Court as well as the Division Bench of this Court in the cases referred to hereinabove, I am of the considered view that the impugned order of cognizance suffers from grave illegality since sanction under Section 197, Cr.P.C was mandatory in the instant case and the same had not been obtained prior to passing of order of cognizance.

6. Accordingly, the CRLMC is allowed and the order of cognizance dated 09.08.1996 passed in 1.C.C. Case No.6 of 1996 by the learned S.D.J.M., Biramarajpur is hereby quashed.

Application allowed.

2012 (II) ILR - CUT- 1041

I.MAHANTY, J.

CRLMC. NO.2530 OF 2007 (Dt.04.07.2012)

SANJAY KUMAR PARIDA .....Petitioner

.Vrs.

STATE OF ORISSA .....Opp.Party

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

Quashing of order taking cognizance – Offence U/s.16 (a) (i) (ii) of the Prevention of Food Adulteration Act, 1954 – Ground is report No.12/2007 of the Public Analyst relating to Honey (Dabur) is illegal.

In this Case the Public Analyst in his report No.12/2007 in respect of Honey (Dabur) has recorded total reducing sugar as 76.3% and noted under the "Criteria for conformity used" as "Not more than 65% by mass" – However stipulations contained in Clause 7.03 of Appendix-B of the Prevention of Food Adulteration Rules 1955 show the total reducing sugar in case of Honey is "Not less than 65% by mass" – Held, the observation of the Public Analyst in the Column "Criteria for conformity used" to the effect "Not more than 65% by mass" is definitely an error of record – Held, the impugned order Dt.27.08.2007 relating to Public Analyst report No.12/2007 is quashed.

(Para 5,6)

For Petitioner - M/s. Samir Kumar Mishra, M.R.Dash, A.Kejriwal.
For Opp.Party - Addl. Govt. Advocate.

I.MAHANTY,J. In this petition under Section 482, Cr.P.C., the petitioner Sanjay Kumar Parida has sought to challenge the order dated 27.8.2007 passed by the learned S.D.J.M., Nayagarh in 2© C.C.No. 33 of 2007, by which cognizance of the offence under Section 16(a)(i) & (ii) of the Prevention of Food Adulteration Act and Rules was taken.

2. Mr.S.K.Mishra, learned counsel for the petitioner submitted that the report of the Public Analyst, in particular, report No.12/07 (Dabur Honey) reveals that the article is adulterated vide result No.6. The result No.6 is quoted hereunder:

"Analysis Report:
Sample Description/ Physical Appearance: Honey Insect and fungus:- Nil, Odour & taste: Agreable

Sl.No.	Quality Characterstics	Method of est	Result	Criteria for conformity use
1.	Fiches test	DGHS	Negative	Negative
2.	Added colouring matter	DGHS	Nil	Negative
3.	Moisture	DGHS	18.5%	Not more than 25% by mass
4.	Ash	DGHS	01%	Not more than 0.5% by mass
5.	Sucrose	DGHS	Nil	Not more than 25% by mass
6.	**Total reducing sugar**	**DGHS**	**76.3%**	**Not more than 65% by mass**
7.	Acidity expressed as Formic acid	DGHS	0.12%	Not more than 0.2% by mass
8.	Fructose, Glucose Ratio	DGHS	1.00 %	Not more than 0.9% by mass

Observation:-The article is adulterated vide result No.6"

It is asserted on behalf of the petitioner that the Public Analyst erred in noting the criteria for conformity used and has noted "Not more than 65% by mass" whereas **Clause** A.07.03 of Appendix-B of the of the Prevention of Food Adulteration Rules, 1955, which deals with 'Honey', is extracted hereunder:

> "A.07.03 "HONEY" means the natural sweet substance produced by honey bees from the nectar of blossoms or from secretions of plants which honey bees collect, transform store in honey cembs for ripening.
>
> When visually inspected, the honey shall be free from any foreign matter such as mould, dirt, scum, pieces of beeswax, the fragments of bees and other insects and from any other extraneous matter.
>
> The colour of honey vary from light to dark brown.
> Honey shall conform to the following standards, namely:-

(a)	Specific gravity at 27^0C	Not less than 1.35 per cent by mass
(b)	Moisture	Not more than 25 per cent by mass
(c)	Total reducing sugar	Not less than 65 per cent by mass
	(i) For Carbia colossa and Honey dew	Not less than 60 per cent by mass
(d)	Sucrose	Not more than 5.0 per cent by mass
	(i) For Carbia colossa and Honey dew	Not less than 10 per cent by mass
(e)	Fructose-glucose ratio	Not less than 0.95 per cent by mass"

Placing reliance on the stipulations relating to Honey in Clause 07.03 of Appendix-B of the Prevention of Food Adulteration Rules, 1955, it is asserted by Mr.Mishra that the total reducing sugar in Honey is stipulated to be "not less than 65 per cent by mass", but the Public Analyst has recorded that the sample contained total reducing sugar of 76.3% and therefore, the sample confirmed to the said stipulation in Appendix-B of the Prevention of Food Adulteration Rules, 1955 and was not in violation of any criteria stipulated thereunder. Learned counsel for the petitioner, therefore, asserts on the basis of such argument that the prosecution of the petitioner on the basis of the report of the Public Analyst and the allegation of allegedly possessing Honey (Dabur) not complying with the stipulations laid down in the Act or the Rules is wholly incorrect and prays for quashing of the same.

3. Mr.A.K.Mishra, learned Addl. Government Advocate, on behalf of the State, on the other hand, submitted that on the raid conducted on the petitioner's premises, three samples have been drawn in respect of Besan, Honey (Dabur) and Biscuits and all the three items were sent to Public Analyst for testing and the Public Analyst gave reports on 5.2.2007 bearing Report No.11/2007 in respect of Besan, Report No.12/2007 for Honey (Dabur) and Report No.13/2007 for Biscuits.

4. Learned counsel for the State submits that in so far as Report Nos.11/2007 and 13/2007 are concerned, the Public Analyst has also certified that the said two articles were adulterated for the reasons contained in the said reports. Learned counsel for the State further submits that even if the Court considers the prayer of the petitioner vis-à-vis quashing of the proceeding arising out of Report No.12/2007 relating to Dabur(Honey), yet the prosecution on the basis of other two articles, namely, Besan (Report

No.11/2007) and Biscuits (Report No.13/2007) ought not to be quashed and the prosecution may be permitted to continue.

5. Having heard learned counsel for the respective parties and having perused the stipulations contained in Clause 7.03 of Appendix-B of the Prevention of Food Adulteration Rules, 1955 in so far as the stipulation regarding total reducing sugar is concerned, it is clear from Appendix-B that Honey is required to conform to the extent stipulated in the said clause and in particular relating to total reducing sugar, the stipulation is to the following effect :

"Not **less** than 65 per cent by mass"

However, the Public Analyst in his report No.12/2007 in respect of Honey (Dabur) has recorded that the total reducing sugar is 76.3%. Therefore, the above mandatory requirement as stipulated in Appendix-B and the recording in the column "Criteria for conformity used" the note of the Public Analyst to the effect that "not **more** than 65% by mass" is definitely an error of record.

6. Therefore, this Court is of the considered opinion that such erroneous report, cannot form a lawful basis for prosecution of the petitioner. Accordingly, the Public Analyst report No.12/2007 to the aforesaid effect and the impugned order dated 27.8.2007 are set aside and the petitioner will not be required to face trial/ prosecution in so far as the aforesaid Public Analyst report No.12/2007 is concerned. It is clarified that the proceedings basing on the Public Analyst report Nos.11/2007 and 13/2007 are not subject matter of challenge in this petition and hence, the prosecution is at liberty to proceed with the matter in accordance with law.

7. The CRLMC is allowed in terms of the directions noted above.

Application allowed.

2012 (II) ILR - CUT- 1045

SANJU PANDA, J.

W.P.(C) NO. 31396 OF 2011 (Dt.08.08.2012)

INSTITUTE OF PHARMACEUTICALS SCIENCE & TECHNOLOGY, PADMAPUR .....Petitioner

.Vrs.

PHARMACY COUNCIL OF INDIA & ORS. .....Opp.Parties

EDUCATION – Clause 4.2 of the prospectus for admission in to D.Pharma Course fixing over-age limit to 35 years – Contrary to the Pharmacy Act, 1948 and the Regulations framed there under – Held, since D.Pharma Selection Committee as constituted by the State Government has no jurisdiction to fix upper age limit in the absence of any statutory provision prescribed under the Act and the Regulations Clause 4.2 of the prospectus stipulating upper age limit is arbitrary hence quashed.

For Petitioner - M/s. D.K.Mohapatra & A. Sahoo.
For Opp.Parties - M/s. V.Narsingh, S.K.Senapati & S.Das (for O.P.No.4).

SANJU PANDA,J. The petitioner-Institute of Pharmaceutical Science and Technology, Padmapur, represented through its member of the Governing Body, namely, Bibhu Prasad Biswal, has filed this writ petition challenging Clause 4.2 of the Prospectus for admission into D. Pharma Course, which is contrary to the Pharmacy Council of India Act and Rules framed thereunder and is violative of Articles 14 and 16 of the Constitution of India.

Learned counsel for the petitioner submitted that in Clause 4.2 of the Prospectus issued by Director of Medical Education & Training, Odisha, opp. party No.3, over-age limit has been fixed to 35 years for taking admission into Diploma in Pharmacy (in short 'D. Pharma'). He further submitted that there is no age bar for taking admission in the Women's Polytechnics, Bhubaneswar which is imparting D.Pharma Course, though the said institution is approved by the Pharmacy Council of India and managed by the DTET, Orissa. The D.Pharma Course is a technical Course and from the inception, nowhere under the Statute any over-age limit has been prescribed. Till last year, no over-age limit has been prescribed by the

opp. parties to get admission into D.Pharma Course. In the State of Orissa, more than 50% seats are lying vacant in different Pharmacy colleges. Accordingly, if the aforesaid stipulation is made under Clause 4.2 fixing over-age limit by the opp. parties, it will reduce admission in D.Pharma Course since there is no reasonable nexus to fix over age limit, more particularly when no such prescription has been made under the Pharmacy India Act 1948 and the Regulations framed thereunder. Fixing over-age limit by opp.parties 3 and 4 is unreasonable, arbitrary and they have no jurisdiction to fix such over-age limit violating the Act and Regulations.

A Counter affidavit has been filed by opp.party no.4 taking a stand that reference made by the petitioner to Pharmacy Council of India Act and the Rules is a misnomer and there is no such Act and Rules. Diploma Education in Pharmacy is regulated by the Pharmacy Council of India (in short 'PCI'). Under Section 10 of the Pharmacy Act,1948, it has been prescribed the minimum qualification for admission into Diploma in Pharmacy Part-I course and courses of studies and other details pertaining to Examination of D.Pharma course. The State Government constituted a D.Pharma Selection Committee comprising of seven members. Out of seven members, two members representing the private Diploma Colleges of the State of Odisha, which are approved by the PCI. The said Committee decided about the modification to be made in the prospectus in the last year on 3.6.2011. All the members of the Committee unanimously agreed to fix the upper age limit apart from the lower age limit. Accordingly, Clause 4.2 was incorporated in the prospectus and the Selection Committee also intimated the said fact to the Registrar-cum-Member Secretary, PCI. New Delhi and they did not raise any objection to the same. The State Government also approved the said prospectus on 25.8.2011 and admission is concluded as per the schedule and nobody raised any objection before taking admission. Non-prescription of upper age limit by the PCI as per the Pharmacy Act 1948 does not debar the State authorities from making stipulation vis-à-vis the upper age limit and non-fixation of such upper age limit by other State Boards is irrelevant. Opp.party no.1- PCI has also filed a counter affidavit categorically taking a stand that the Council, to ensure uniform implementation of the educational standards throughout the country, prescribes the minimum qualification and also approves the courses of study and examination for pharmacists i.e. approval of the academic training institutions as provided under Section 12 of the Pharmacy Act .Section 12(1) speaks that any authority in a State which conducts a course of study for pharmacists may apply to the Central Council for approval of the course. The PCI, after such enquiry in conformity with the Education Regulations, shall declare the said courses of study to be an approved course of study for the

purpose of admission to an approved examination for pharmacists. Clause 12(2) says that PCI is empowered to inspect the institution for approval of the courses of study or examination in order to verify as to whether the course conducting authorities have provided the minimum required facilities prescribed by the Council. The State Pharmacy Council registers a candidate who has passed Diploma in Pharmacy as pharmacist. For registration of a pharmacist, the requirement is that (a) the applicant should have attained the age of 18 years and pay the prescribed fees, (b) applicant should reside or carry on the business or profession of pharmacy, in the State, and (c) applicant should have passed an approved examination or he should possess a qualification approved under Section 14 of the Pharmacy Act or is a registered pharmacist in other State. As per the guidelines prescribed by World Health Organization (in short 'WHO'), Pharmacy education is a health oriented subject and requires special technical skill. The students are given a vigorous training on all facets of drug i.e. reading of prescription, type of dosage forms, drug formulations, uses, compatibility, in-compatibility, drug interactions, side effects, storage, indications, contra-indications, etc. Pharmacist acts as an important member of "Health Care Team" to function as a perfect material media for a physician in combating diseases. Special skill and scientific knowledge is required to sell medicines because any lapse at the retail sale level can adversely affect the public health. With the development of the potent and synthetic drugs, the handling of drugs has become highly crucial as well as complex to safeguard the public health, which is of prime importance. Under Section 10 of the Pharmacy Act, the PCI is empowered to frame regulations. Accordingly, Education Regulations, 1991, has been framed prescribing the minimum standard of education required for qualification as a pharmacist. The Regulation is duly notified. Regulation 5 of Education Regulation further prescribes minimum qualification for admission to Diploma in Pharmacy Part-I Course and the admission making authority to Diploma courses are required to apply with the said provision for admission to first year diploma course in Pharmacy. The question regarding applicability of age limit for being eligible to take admission in D.Pharma course was considered by the Executive Committee of the PCI in its meeting held on 3.10.2005 and the said Committee noted that the Education Regulations,1991 are silent on fixing the age limit for admissions to D.Pharma course.

Learned counsel appearing for opp.party no.1 submitted that in view of the above position, opp. parties nos.3 and 4 are not authorized under the Act to prescribe or addition any age limit for admission into D.Pharma course.

Considering the aforesaid rival submission of the parties and after though the provisions of the Act and the Regulations . it reveals that the PCI being the Central body has been authorized under the Pharmacy Act and regulation framed thereunder to prescribe the minimum educational qualification for taking admission into D.Pharma course and courses of studies and conduct of examination. The Act and the Regulation do not authorize opp.parties 3 and 4 to prescribe upper age limit of a candidate to take admission into the said course. Prescribing the upper age limit was under consideration before this Court for admission into technical education like MBBS and BDS, where the minimum qualification was prescribed. In Writ Appeal No.555 of 2011, a Division Bench of this Court held that the Rules and Regulations framed under the Statute are framed regarding the eligibility for admission into MBBS course and such terms and conditions in order to maintain good standards in the professional medical course for its implementation. In the absence of the Regulation framed by the Medical Council of India with prior approval of the Central Government fixing the upper age limit of a student for admission into MBBS course in a college, fixing such upper age limit in the prospectus by OJEE which is not authorized in law and the same is in violation of the provisions of the MCI Regulations. Therefore, the same will not be binding upon the State Government and its authorities, who will be conducting the Entrance Test Examination for the eligible candidates to get seats. Therefore, insertion of Clause 4.2 in the Prospectus by the OJEE is without any authority of law and the same is violative of the principle of fundamental rights guaranteed under Articles 14,19(1)(g) and 21 and 21A of the Constitution of India.

It is said that age and physical challenges are no bar for a person, who wishes to prove himself or herself after getting education. These persons are ready to adopt to every changing situation. Admittedly, a country like India, where the health sector is a deficit sector and trained and skilled persons are not available. A bold stand is to be taken to reduce the deficit and move ahead which will reduce the deficits. It is desirable that, as in most of the other countries, only persons who have attained a minimum standard of professional education should be permitted to practice the profession of pharmacy. It is accordingly proposed to establish a Central Council of Pharmacy. It is further proposed to empower provincial Governments to prohibit the dispensing of medicine on the prescription of a medical practitioner otherwise than by, or under the direct and personal supervision of a registered pharmacist. With this object, the Pharmacy Act was enacted.

In view of the above object of the Act and the position of law and in the present case, since the D.Pharma Selection Committee as constituted by the State Government has no jurisdiction to fix upper age limit in the absence of any Statutory provision prescribed under the Act and Regulation as stated in the foregoing paragraphs, the same is arbitrary and unreasonable and is liable to be quashed.

Accordingly, this Court quashes Clause 4.2 of the Prospectus stipulating the upper age limit. The writ petition is allowed .No cost.

Writ petiton allowed.

2012 (II) ILR - CUT- 1050

SANJU PANDA, J.

W.P.(C) NO.11270 OF 2012 (With Batch) (Dt.08.08.2012)

SUBRAT DAS & ORS. ……Petitioners

.Vrs.

STATE OF ORISSA & ORS. …….Opp.Parties

EDUCATION - **Advertisement made for engagement of Sikshya Sahayaks in Dec.2011 – Petitioners selected and merit list prepared – Subsequent notification Dt.29.03.2012 fixing additional criteria to clear Teachers Eligibility Test (TET) which is mandatory before recruitment – Held, once process of selection of candidates is over no change could be effected to alter the stipulations contained in the advertisement – Moreover in view of Section 23(2) of the Right of Children to free and Compulsory Education Act, 2009, five years relaxation is available to the teachers to clear the TET and the Government of India has extended the relaxation period for one year i.e. up to 31.03.2013 – Held, the action of the authorities is arbitrary as the candidates had no breathing time to prepare for TET– Impugned notifications Dt.29.03.2012 and 16.06.2012 are quashed – Direction issued to O.P.1 and the Chief Executive Officers of the districts to issue engagement letters as per the selection list of Sikshya Sahayaks.**

(Para 11,12)

Case laws Referred to:-

1.(2012) 1 SCC 177 : (Parmender Kumar & Ors.-V- State of Haryana)
2.(2000) 9 SCC 115 : (Rajiv Kapoor & Ors.-V-State of Haryana)

For Petitioners - M/s. D.Routray, P.K.Sahoo, R.P.Dalai, S.P.Nath, S.Jena & S.Rout.
M/s. Dilip Ku. Mohapatra & A.Sahoo.
Mr. Biswajit Jena.
M/s. D.P.Dhal, S.K.Dash, S.Mohapatra.
M/s. K.K.Swain, P.N.Mohanty, R.P.Das.
M/s. S.R.Tripathy, S.K.Dash, S.Mohapatra.

For Opp.Parties - Standing Counsel for the School & Mass Education Dedpartment.
M/s. P.Mohanty, D.N.Mohapatra, Smt. J.Mohanty P.K.Nayak & S.N.Dash. Mr. K.K.Rath.

S. PANDA, J. Since the facts involved in these writ petitions are similar, they were heard together and are being disposed of by this common judgment.

2. The petitioners in these writ petitions assail the Notification issued by the Board of Secondary Education, Odisha, Cuttack, opposite party no.6, on 16.6.2012 to conduct the Teacher Eligibility Test (in short, "TET") as per the syllabus of the Orissa Teacher Eligibility Test.

3. Opposite party no.6 in order to engage Sikshya Sahayak/Sahayika (hereinafter referred to as "Sikshya Sahayaks") issued an advertisement in respect of different districts in the month of December, 2011, vide Annexure-1 series. Pursuant to the said advertisement, the petitioners along with many candidates offered their candidatures for engagement as Sikshya Sahayaks. The relevant eligibility criteria mentioned in the said advertisement are as follows:

"The candidate(s) must have passed;

(a) +2 Science/Arts/Commerce or equivalent qualification recognized by the authority with pass certificate of 7th class in Oriya with C.T (Recognized by NCTE);

(b) +2 Science/Arts/Commerce or equivalent recognized qualification recognized by the Rehabilitation Council of India (RCI) in two years Diploma Course in Special Education;

(c) B.Sc./B.A or equivalent qualification having passed in 10th standard in Oriya (MIL) with B.Ed recognized by NCTE.

xxx xxx xxx

and the candidate(s) must have registered their names in their respective Employment Exchanges."

The applications of the petitioners were duly considered and after following the due procedure as per the Scheme for engagement as Sikshya Sahayaks, the petitioners were duly selected and a merit list was prepared in respect of the petitioners in their respective districts as revealed from Annexure-2 series.

4. While the matter stood thus, the Government of Odisha in the Department of School and Mass Education Department issued a Notification on 29.3.2011 wherein a request was made to all the Collectors of the Districts not to proceed further in the matter of engagement of Sikshya

Sahayaks on the ground that TET is mandatory before the recruitment of teachers as stipulated by National Council for Teacher Education (hereinafter referred to as "NCTE") under the provisions of Right of Children to Free and Compulsory Education Act, 2009 (in short, "the Act, 2009"). Since the advertisement for engagement of Sikshya Sahayaks was made in the year 2011, i.e., much prior to the Notification dated 29.3.2012, the said notification has no retrospective effect. The TET is necessary for recruitment of teachers as per the Act, 2009, but nowhere the said Act provides TET before engagement of Sikshya Sahayaks. Accordingly, it is submitted by the learned counsel for the petitioners that the advertisement was published for engagement of Sikshya Sahayaks and the same was not for the purpose of recruitment of teachers. Under the Scheme, a Sikshya Sahayak after completion of five years of service can be recognized as a teacher and since the selection process has already started and merit list has been prepared, the authorities should not have changed the selection criteria by issuing a further advertisement to appear another test. As such, the TET scheduled to be held on 5th August, 2012 conducted by the Board of Secondary Education, Odisha, Cuttack at the headquarters of all Blocks/NACs/Municipalities/Corporation is liable to be quashed being arbitrary, discriminatory and unreasonable. He further submitted that in view of the Act and Notification issued by the Government, a person after engagement as Sikshya Sahayaks can also appear the TET.

5. A counter affidavit has been filed by opposite party no.1 taking a stand that NCTE issued a Notification on 23rd August, 2010 prescribing the minimum qualifications for a person to be eligible for appointment as a teacher in Class-I to VIII. The said Notification stipulates that a candidate should pass TET which will be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE. During the process of recruitment in 2010-2011, it was ascertained that required number of trained candidates particularly in Science category and in SC/ST/PH category would not be available for which the Government of India was requested to grant relaxation of qualification under Section 23(2) of the Act, 2009. Accordingly, the Government of India issued a notification on 23rd March, 2011 granting relaxation in the qualification for a period of one year from the date of the Notification. It was admitted that the advertisement was issued for engagement of Sikshya Sahayaks in the year 2011 and final merit list was prepared on 5.4.2012 and the same was published on 20th April, 2012. The condition of TET has not been stipulated in the guidelines for recruitment of Sikshya Sahayaks since by that time, the guidelines for conducting TET was not formulated by the NCTE.

6. While the matter stood thus, the Government of India in the Ministry of H.R.D., Department of School Education and Literacy on 27.3.2012 issued instruction to the Government of Odisha to ensure that TET is conducted by the Government of Odisha, which is binding and mandatory for recruitment/appointment of teachers in elementary schools of the States. Every State Government is statutorily required to comply with that and violation of the same may not stand the test of law. Accordingly, the School & Mass Education Department vide notification dated 2.4.2012 designated the Board of Secondary Education as the professional body for conducting TET examination in the State of Odisha. The detailed guidelines was issued on 4.6.2012 for conducting TET by the Board of Secondary Education and that shall be conducted once in a year or as decided by the Government according to need and only TET pass candidates shall be considered for engagement as Sikshya Sahayaks. It further reveals from the counter affidavit that the previous relaxation under Section 23(2) of the Act, 2009 by Government of India was for one year and the same expired w.e.f. 22nd March, 2012. Accordingly, the State Government requested the Government of India for grant of relaxation in respect of the minimum teachers qualification norms for a further period of three years beyond 22.3.2012. In reply to the same, the Government of India communicated their approval for relaxation in respect of the minimum teachers qualification norms notified by the NCTE for Class-I to VIII upto 31st March, 2013 subject to certain conditions wherein it has been stipulated that the State Government shall conduct TET in accordance with the guidelines dated 11.2.2011. In view of the above facts and circumstances, all the Collectors-cum-Chief Executive Officers, Zilla Parishads were requested not to proceed with the engagement of Sikshya Sahayaks and directed to conduct the TET before engagement. Accordingly, the Board of Secondary Education, Odisha, Cuttack issued a Notification for such test being the professional body to conduct the test. Therefore, the writ petitions have no merit and are liable to be dismissed.

7. From the record, it appears that TET pass is a minimum qualification for appointment of teachers as per the norms of NCTE. The Central Government relaxed the said norms in respect of the State of Odisha for a period of one year from 23rd March, 2011 exercising the power conferred under Section 23(2) of the Act, 2009 and the Rules made thereunder. The State Government and the other school managements shall ensure that teachers not possessing the minimum academic and professional qualifications laid down in the notification of NCTE shall acquire the same within the time limit specified under Section 23(2) of the Act, 2009. The notification was issued upon the request by the State Government, since the State Government does not have adequate institutions offering courses or

training in teacher education, or persons possessing minimum qualifications laid down in the Notification dated 25th August, 2010 of the NCTE. It further reveals that on 18th May, 2012 on the request of the Government of Odisha dated 4th April, 2012 to grant relaxation for further period of three years under Section 23(2) of the Act, the Government of India has extended the relaxation period upto 31st March, 2013. There is no dispute that the minimum qualification can be acquired by the candidates after the engagement as stipulated under Section 23(2) of the Act. This minimum qualification has been fixed by the NCTE to maintain and promote the standard of education in the country.

8. In the present case, since the advertisement was published for engagement of Sikshya Sahayaks in the year 2011, applications were called for and selection process was started and the selection list was accordingly prepared for engagement of the same. All of a sudden, in the month of April, the said process was delayed and the additional criteria were fixed to appear TET before engagement of Sikshya Sahayaks. Once the selection process started, the authorities should not have changed the criteria of selection.

9. In a decision reported in **(2012) 1 SCC 177**, Parmender Kumar and others v. State of Haryana and others, the apex Court considering the evaluation procedure for admission and the conditions invited in the prospectus held that conditions cannot be changed after declaration of the results and preparation of select list as the appellants had already shown their competence in written test and therefore revised eligibility conditions could not be applied to them on the pretext of upholding standard of education. Once the process of selection of candidates for admission to the courses had been commenced on the basis of the prospectus, no change could, thereafter, be effected by government orders to alter the provisions contained in the prospectus. It is open to the authorities to alter the terms and conditions just a day before counselling was to begin, so as to deny the candidates, who had already been selected.

10. In a decision reported in **(2000) 9 SCC 115**, Rajiv Kapoor and others v. State of Haryana and others, the apex Court has held that the authorities would do well in future to publish at the beginning of every academic year, even before inviting applications, a compendium of the entire scheme and basis for selection carrying out amendments up-to-date and the prospectus also specifically adopting them as part of the prospectus, to avoid confusion in the matter of selections, every year.

11. In view of Section 23(2) of the Act, 2009, five years relaxation is available to the teachers to clear the TET and one year relaxation has been

granted by the Central Government, i.e., till 31.3.2013 and as per the above settled position of law, this Court feels that the action of the authorities is unreasonable, arbitrary and the candidates had no breathing time to prepare themselves for the said TET as additional criteria to be considered for engagement as Sikshya Sahayaks after the selection process was started.

12. Accordingly, this Court quashes the notifications dated 29.3.2012 and 16.6.2012 issued by the Government of Odisha and Board of Secondary, Odisha, Cuttack, vide Annexures 3 and 5 and directs opposite party no.1 and the Chief Executive Officers of the Districts to issue engagement letters as per the selection list of Sikshya Sahayaks prepared by them forthwith and the candidates who will be engaged as Sikshya Sahayaks to be prepared themselves for OTET shall clear up the test by end of January, 2013.

With the above directions, the writ petitions are disposed of. No costs.

Writ petitions disposed of.

2012 (II) ILR - CUT- 1056

B. K. NAYAK, J.

CRL.M.C. NO.1716 OF 2010 (Dt.16.07.2012)

BHAGIRATHI JENA & ORS. .....Petitioners

.Vrs.

STATE OF ORISSA .....Opp.Party

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.319.

Power U/s. 319 Cr.P.C. – Unless the Court is hopeful that there is reasonable prospect of the Case as against the newly added accused persons ending in conviction of the offence concerned the Court should refrain from adopting such a course of action.

In this case even though there is some evidence against the present petitioners, the evidence is not to such extent which may reasonably lead to the conviction of the petitioners – Held, discretion exercised by the learned J.M.F.C. summoning the petitioners U/s.319 Cr.P.C. is set aside.

Case laws Referred to:-

1.(2009) 14 SCC 25 : (Ram Singh & Ors.-V- Ram Niwas & Anr.)
2.(2000) 3 SCC 262 : (Michael Machadio-V- Central Bureau of Investigation)
3.(2009) 42 OCR 645 : (Ramakanta Behera @ Sahu & Ors.-V-State of Orissa)
4.(2012) 52 OCR 1 : (Asish Kumar Nayak & Anr.-V- State of Orissa)

For Petitioners - Mr. Sangram Kumar Sahoo
For Opp.Party - Mr. Khirod Kumar Panigrahi

Heard learned counsel for the petitioners and the learned Additional Government Advocate appearing for the State.

Perused the record.

Order dated 12.5.2010 passed by the learned J.M.F.C., Puri in G.R. Case No.112 of 2008 directing issuance of summons to the present petitioners in exercise of power under Section 319, Cr.P.C. has been assailed in this application under Section 482, Cr.P.C.

In the aforesaid G.R. Case, one Sanju @ Sanjukta Jena who is the sole accused, is facing the trial for alleged offences under Sections 341/323, IPC. During course of evidence, P.Ws.1 to 6 did not at all implicate the present petitioners in the commission of the offences but deposed about the involvement of the sole accused-Sanjukta in the alleged offences. P.W.7, who is the informant, lodged the FIR alleging that the accused, Sanjukta along with the petitioners attacked and assaulted her. P.W.8 who is a member of the village committee, as per the version of the informant, was present on the spot at the time of occurrence. During course of investigation P.W.8 in his statement before the Investigating Officer did not implicate any of the petitioners in the commission of offences. The only person implicated by him is the sole accused, Sanjukta. P.Ws.7 and 8 in their evidence in Court ascribed different roles to the petitioners in the matter of commission of offences stating about their involvement.

The learned Assistant Public Prosecutor filed an application under Section 319, Cr.P.C. before the learned J.M.F.C. praying for summoning the present petitioners to stand trial along with the accused, Sanjukta which has been allowed by the impugned order dated 12.5.2010 on the ground that the evidence of P.W.7 as corroborated by P.W.8 makes it clear that there was enough material showing involvement of the petitioners in the commission of offences and they should be tried along with the accused-Sanjukta.

The learned counsel for the petitioners submits that the power under Section 319, Cr.P.C. is to be exercised very sparingly, when only compelling reasons exist, and there is reasonable prospect of the case against newly added accused persons ending in conviction and that mere presence of some evidence on record against the newly added accused persons should not be mechanically accepted. He further submits that material contradictions in the evidence given in Court vis-à-vis statements recorded by the Investigating Officer during investigation shall be looked into while forming an opinion whether the evidence can be reasonably accepted for the purpose of conviction of the newly added accused persons.

The learned Additional Government Advocate on the other hand, submits that the informant has directly named the accused persons in the FIR about their presence and involvement in the commission of the offences. He further submits that during her evidence, the informant (P.W.7) has scribed specific roles played by each of the present petitioners and her evidence has also been corroborated by the evidence of P.W.8, the independent witness.

The apex Court in the case of **Ram Singh and others** v. **Ram Niwas and another** reported in **(2009) 14 SCC 25** has held as follows:

"xxx xxx xxx

> The High Court, in our opinion, however, has committed a serious error in proceeding on the premise that mere existence of a prima facie case would be sufficient to exercise the court's jurisdiction under Section 319 of the Code, We have noticed hereinbefore the importance of the word "appears". What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, would lead to conviction of the persons sought to be added as accused in the case. The High Court further more committed a serious error insofar as it failed to take into consideration that when the order dated 29.5.2003 was passed, the learned Judge was in a position to consider the evidence brought on record including the cross-examination of the prosecution witnesses. The High Court did not arrive at any finding that a case has been made out for exercise of such an extraordinary jurisdiction which, in terms of the judgments of this Court, is required to be exercised very sparingly."

In the case of **Michael Machadio** v. **Central Bureau of Investigation** reported in **(2000) 3 SCC 262** the apex Court explaining the scope and ambit of Section 319, Cr.P.C. has observed as follows:

> "The Court must be reasonable satisfaction from the evidence already collected regarding two aspects while invoking power under Section 319 to proceed against other persons appearing to be guilty of offence. First is that the other person has committed an offence. Second is that for such offence that other person could as well as tried along with the already arraigned accused. But even then, what is conferred on the Court is only a discretion as could be discerned from the words "the Court may proceed against such persons". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the Court should turn against another person whenever it comes across evidence connecting that another person also with the evidence. Judicial exercise is called for keeping a conspectus of the case, including the stage at which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the Court to proceed against other person.

xxx xxx xxx

> Unless the Court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned we would say that the Court should refrain from adopting such a course of action".

The above decision was relied upon by this Court in the case of **Ramakanta Behera @ Sahu & others** v. **State of Orissa** reported in **(2009) 42 OCR 645** and **Asish Kumar Nayak & another** v. **State of Orissa** reported in **(2012) 52 OCR 1**.

In the case of **Asish Kumar Nayak** (supra), this Court considered the value and veracity of the evidence given by the prosecution witnesses in court with reference to their statements made before the Investigating Officer during investigation, in order to find out if there was reasonable prospect of conviction of the newly added accused on the basis of the evidence.

On going through the record, in the instant case, it is found that admittedly P.W.8 was an eye-witness to the occurrence who has given a statement before the Investigating Officer implicating the accused Sanjukta alone and has not whispered anything about the involvement of any of the present petitioners farless ascribed any particular role played by any of the present petitioners. Such omission in his statement before the Investigating Officer amounts to material contradiction and makes his evidence about involvement of the petitioners unreliable. Therefore, there is no corroboration to the evidence of P.W.7.

In the circumstances, I am of the view that even though there is some evidence against the present petitioners but the evidence is not to such extent as may reasonably lead to the conviction of the petitioners. I am, therefore, of the view that the discretion exercised by the learned J.M.F.C. summoning the petitioners under Section 319, Cr.P.C. has not been properly and rightly exercised. I, therefore, set aside the impugned order.The CRLMC is accordingly allowed.

Aplication allowed.

2012 (II) ILR - CUT- 1060

B. K. MISRA, J.

W.P.(C) NO. 27083 OF 2011 (Dt.30.06.2012)

TUNILATA NAYAK & ANR. ……Petitioners

.Vrs.

BIJAYALAXMI BISWAL & ORS. ……Respondents

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

AMENDMENT OF PLAINT – Suit is ready for hearing – Plaintiffs only elucidated the point of fraud practised by the husband of defendant No.1 on Defendant No.2 in obtaining the sale deed – No new facts stated to have been introduced to take the opponents by surprise as the fraud has been specifically mentioned in the original plaint – Held, learned Civil Judge (Sr.Divn.) caused no illegality in allowing the amendment petition – Prejudice caused to the defendants for the delay in seeking amendment can be mitigated on payment of cost.

(Para 8,9)

Case laws Referred to:-

1.(2006)(II) OLR (SC)561 : (Rajesh Kumar Aggarwal & Ors.-V-K.K.Modi & Ors.)
2.2001(1)OLR(SC) 475 : (Ragu Thilak D.John-V- S. Rayappan & Ors.)

For Petitioners - M/s. P.K.Sahoo, A.C.Mohapatra, A.K.panda, A.A.Lenka.
For Opp.Parties - M/s. B.H.Mohanty, D.P.Mohanty, R.K.Nayak, T.K.Mohanty & P.K.Swain & B.Das.

B.K.MISRA, J This writ petition has been filed for quashing the impugned order at Annexure-1, on the ground that the learned Civil Judge (Sr.Divn.), Nimapara without any jurisdiction and illegally allowed the prayer of the opposite parties for amendment of the plaint in C.S. No. 29 of 2010.

2. I have heard the learned counsel for the parties. Perused the impugned order at Annexure-1 and other materials on record.

3. It is seen that Civil Suit No. 29 of 2010 was filed originally by four plaintiffs, namely Bijaylaxmi Biswal, Nirupama Biswal, Saroja Kumar Biswal

and Manoja Kumar Biswal. Plaintiff No.1 Bijayalaxmi Biswal is the wife of Defendant No.1 Jogendra Biswal and Plaintiff Nos. 2 to 4 are the daughter and two sons of Plaintiff No.1 and the Defendant No.2. The suit has been filed challenging sale of the suit property by the Defendant No.2 to Defendant Nos. 1 and 3 on the ground that the sale deed in question is a spurious document and obtained by practicing fraud on Defendant No.2. After the suit was instituted, on the prayer of the Plaintiffs the name of the Plaintiff Nos. 3 and 4 Saroj Kumar Biswal and Manoj Kumar Biswal were deleted and they were transposed as Defendant Nos. 5 and 6. The original Plaintiff No.3 was allegedly a minor when the suit was filed. It is alleged that when Defendant No.6 Saroj Kumar Biswal became major he was prayed to be impleaded as a Plaintiff and to delete his name as Defendant No.6.

4. The main plank of the argument of Mr. Mohapatra, learned counsel appearing for the Petitioners is that the present Opposite Parties who are the Plaintiffs in C.S. No. 29 of 2010 have taken the trial court for a ride by misutilising the procedures and the learned Civil Judge (Sr.Divn.), Nimapara also fell into the trap of the unscrupulous Plaintiff-Opposite Parties by allowing their prayer for amendment of the plaint for the second time. It was also very strenuously contended by Mr. Mohapatra appearing for the petitioners that when the suit was ready for hearing at a belated stage the learned trial court should not have entertained the prayer for amendment of the plaint and by allowing such amendment the learned court has traversed beyond the jurisdiction in view of the restrictions imposed in the proviso to Order, 6 Rule, 17 of the C.P.C. Besides that it was also further contended that when the suit was initially presented by the Plaintiff-Opposite Parties they avoided to pay the court fees and obtained favourable interlocutory orders and with an malafide design when have filed the petition for amendment for the second time on 16.8.2011, the same should have been disallowed.

5. Mr.B.H.Mohanty, learned counsel appearing for the opposite parties on the other hand very forcefully contended that the impugned order is a speaking and well reasoned order and therefore calls for no interference at all as by allowing the prayer of the Plaintiffs for amending the plaint no illegality has been committed as no new facts were introduced nor by incorporating the said amendments into the plaint the nature and character of the suit has been changed and the new facts which have been incorporated by way of amendment are only elucidation of some facts with regard to the fraud which was practiced by the husband of Defendant No.1 in getting the sale deed executed from Jogendra Biswal who is the

Defendant No.2 in C.S. No. 29 of 2010. Accordingly, Mr.Mohanty contended that the writ petition being devoid of merit should be dismissed with cost.

6. I have gone through the petition filed by the Plaintiffs in C.S. No. 29 of 2010 seeking for amendment of the plaint. Annexure-2 the certified copy of the petition for amendment and the schedule of the proposed amendment contains the description for addition of Saroj Kumar Biswal as Plaintiff No.3 and to delete his name as Defendant No.6 from the cause title of the plaint and from the body of the plaint wherever it has been mentioned and certain facts with regard to the fake stamp papers used in the fraudulent sale deed.

7. Perusal of the certified copy of the plaint filed in C.S. No. 29 of 2010 shows that the said suit was filed with prayer to declare that the alleged sale deed executed by Defendant No.2 in favour of Defendant No.1 dated 20.2.1998 was not binding on the Plaintiffs as the same was not for the welfare of the family and not for any legal necessity and declaring the same invalid and also for permanent injunction. The plaint averments reveal that the husband of the Defendant No.1 taking advantage of the simplicity of Defendant No.2 managed to obtain the sale deed dated 20.2.1998 in respect of the whole suit schedule properties by practicing fraud and such transaction was a well led conspiracy and was not known to the Plaintiffs nor had they any occasion to know the same. I find that the Plaintiffs only elucidated the point of fraud with regard to the alleged sale deed taken by Defendant No.1 from Defendant No.2 in their amendment petition dated 16.8.2011 and no new facts have been introduced. The learned Civil Judge (Sr.Divn.), Nimapara in the impugned order has discussed the matter in detail by keeping in mind the established position of law and allowed the prayer for amendment to the plaint and I do not find any reason to interfere with that as rules of procedures are intended to be a handmade to the administration of justice. The party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even for infraction of the Rules of Procedures. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice. The object of the Court is to decide the rights of the parties and not to punish. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy. Technicalities of law should not be permitted to hamper the Courts in administration of justice between the parties. ***(2006) (II) OLR (SC) 561, Rajesh Kumar Aggarwal and others V. K.K.Modi and others, 2001 (1) OLR (SC) 475, Ragu Thilak D.John V. S.Rayappan and others***.

8. Thus, keeping in mind these golden principles of law and keeping in mind the fact scenario of this case the amendment which was sought for by

the Plaintiffs on 16.8.2011 with regard to the nature of fraud practiced cannot be said to have been introduced to take the opponents by surprise as it has been specifically mentioned in the original plaint about the fraud which was practiced by the husband of Defendant No.1 on Defendant No.2 in obtaining the sale deed. By allowing the prayer of the Plaintiff-Opposite Parties for amending the plaint, in my humble view the learned Civil Judge (Sr.Divn.), Nimapara did not commit any illegality and whatever prejudice that has been caused to the present petitioners for the delay in disposal of the suit can be mitigated on payment of cost.

9. Thus, from the aforesaid discussion the best interest of the justice would be served if the Plaintiff-Opposite Parties would pay cost of Rs.2,000/- (Rupees two thousand) to the present petitioners for the delay caused in seeking amendment. Opportunity should also be given by the learned trial court to the present petitioners who are Defendant Nos. 1 and 3 in the court below for filing additional written statement, if any after the amendments are incorporated to the plaint and the learned Civil Judge (Sr.Divn.), Nimapara thereafter proceed to take up hearing of the suit and make all endeavour to see that C.S. No. 29 of 2010 is disposed of preferably, within six months from the date of receipt of this order. Failure on the part of the present Opposite Parties who are Plaintiffs in C.S. No.29 of 2010 in paying cost as ordered above and carrying out the directions of the Court below under Annexure-1 would disentitle them of taking advantage of this order. With the aforesaid observations, the writ petition stands disposed of.

Writ petiton disposed of.