**2013 (II) ILR - CUT- 889**

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

W.P.(C) NO. 9415 OF 2012 (Dt.20.08.2013)

**JITENDRA ROUT & ANR.** ……Petitioners

*.Vrs.*

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

**ODISHA GOVERNMENT LAND SETTLEMENT ACT, 1962 – S. 3-A**

**De-reservation of Government land recorded as "Gochar" or village grazing land - Alienation of the said land in favour of a private company for industrial purpose, challenged – Held, de-reservation of any Government land reserved as "gochar" should be made in exceptional circumstances, for valid reasons having regard to importance of gochar in every village.**

**In this case de-reservation orders have been passed following due procedure in the OGLS Act & Rules after issuing public notice followed by an enquiry and recommendation - Objections raised by the petitioners that IDCO in contravention of the OIIDC Act, 1980 has transferred the land by way of lease in favour of O.P.7 and the establishment of the unit will affect the environmental condition has no merit – The writ petition by way of PIL is liable to be dismissed.**

(Paras 12 to 15)

**Case law Relied on:-**

(2011)2 SCC 591 : (State of Jharkhand & Ors.-V- Pakur Jagran Manch & Ors.)

For Petitioners - M/s. Asim Amitav Das, Mr. Deepak Kumar, Mr. P.K.Mishra & D.Dash.

For Opp.Parties - Mr. Asok Mahanty, Advocate General, Mr. S.P.Mohanty, P. Lenka & M. Barik, Mr.J.Patnaik,Sr.Advocate,BMohanty, T.K. Patnaik, A.Patnaik, R.P.Ray, B.S. Rayaguru, Mr. J. Das, Sr. Advocate, A.N. Das, N. Sarkar, E.A. Das & C.Padhi,Mr. R.K. Rath, Sr. Advocate S.N.B. Ray, S.K. Nayak, S.K.Samadar,

---

***C. NAGAPPAN, C.J.*** Petitioners, claiming to be the inhabitants of village Khamara Nuagaon have filed this writ petition by way of Public Interest

Litigation seeking to quash the order of the Collector-opp. Party No.3 dated 15.03.2011 under Annexure-5 de-reserving the lands measuring Ac.53.90 dec. under Khata No. 231 corresponding to plot No. 64 (part) in Mouza Khamara Nuagaon and subsequent order of sanction dated 18.03.2011 under Annexure-6 in favour of O.P. No.6-IDCO for industrial purpose; and further sought for declaration that the allotment of the said land by the O.P. No.6 in favour of O.P. No.7-Company vide letter dated 08.08.2011 under Annexure-8 is illegal.

2. Briefly, the case of the petitioners is that the O.P. No.7-Ultra Tech Cement Ltd. signed an MOU with the State Government, namely, opposite party No.1 on 10.11.2006 for establishment of 1.5 MTPA Split Cement Grinding Unit at Khamara Nuagaon and Kolathapangi under Athagarh Tahasil in the district of Cuttack with project cost of Rs.300 Crores. The Industrial Promotion and Investment Corporation of Orissa Ltd. (IPICOL) vide letter dated 09.06.2010 recommended IDCO-O.P. No.6 that Ac.90.00 of land at the said villages may be alienated in favour of O.P. No.7 for establishment of the 1.5 MTPA Split cement grinding unit. Pursuant to said recommendation, O.P. No.6-IDCO made requisition for alienation of government land measuring Ac. 53.90 in village Khamara Nuagaon vide letter No. 17613 dated 26.08.2010 for the purpose of establishment of the said industry. Thereafter, O.P. No.4 initiated a de-reservation case vide Lease-2- Misc. Case No. 5/2010 under the provisions of Orissa Government Land Settlement Act, 1962 (in short “the OGLS Act”) to de-reserve the said land and invited public objections by issuing proclamation. According to the petitioners, they along with some other co-villagers filed their written objection stating that cattle and livestock used to graze in the said Gochar land, the said land is also used by the villagers for organizing various social functions, the youth and the children of the village are also using the said land as play ground, and further setting up of the said industry will lead to environmental problems. On 08.12.2010 personal hearing as well as spot inspection was conducted by the Tahasildar, Athagarh-O.P. No.4 and after completion of the necessary formalities, the O.P.No.4 overruling the objections, vide letter dated 18.12.2010 recommended the O.P. No.3 that the subject land be de-reserved. The Collector-O.P. No.3 by order dated 15.03.2011 accepted the recommendation of the Tahasildar and directed for de-reservation of the said land in exercise of power under Section 3-A of the OGLS Act read with Rule 4 of the OGLS Rules, 1983 and sanctioned release of the said land in favour of IDCO and thereafter sanction order was issued on 18.03.2011 under Annexure-6. According to the petitioners, during pendency of the Lease Misc. Case No. 5/2010, they along with their covillagers approached the O.P. No.2 by way of a representation dated

10.11.2010 stating that their case was not heard in proper manner and their objections were not appreciated properly. On receipt of the said representation, the O.P. No.2 directed the Collector, Cuttack-O.P. No.3 to look into the matter, however, the said direction of O.P. No.2 was not complied with and hence the petitioner No.1 filed W.P.(C) No. 27155/2011 by way of a PIL before this Court and this Court vide order dated 21.10.2011 directed the O.P. No.2 to consider the representation filed by the villagers and dispose of the same.

In the meanwhile, lease deed was executed between the Collector, Cuttack and IDCO for transfer of 53.90 acres of land in village Khamara Nuagaon on 19.07.2011 and subsequently the IDCO-O.P. No.6 allotted the said extent of land in favour of O.P. No.7-Company vide letter dated 8.8.2011 for establishment of the said industry and accordingly lease deed also came to be executed on 19.8.2011 between the IDCO and O.P. No.7. It is also stated by the petitioners that the State Pollution Control Board (SPCB), namely, O.P. No.5 has granted consent to O.P. No.7 for setting up of a Bulk Terminal of capacity 2.0 MTPA under the relevant provisions of Acts.

3. Petitioners have stated that the subject land is a communal land and has been kept reserved for common use of villagers and there is no specific provision for de-reservation of such land for industrial purpose when industry is set up by a private company like O.P. No.7 and further the de-reservation of Gochar land in question has not been made in accordance with the provisions of the OGLS Act. Therefore, handing over the land in favour of O.P. No.7 is perverse and illegal and accordingly the impugned orders are liable to be set aside.

4. Opposite party Nos. 1 to 4 have filed a common counter affidavit stating that the orders impugned have been passed strictly inconsonance with Section 3-A of the OGLS Act and Rule 4 of the OGLS Rules and there is no illegality in the decision making process. It is stated that during the public hearing, the writ petitioners did not make any objection and though some other villagers filed their objections, the same were considered and verruled and the de-reservation proceedings for allotment of said government land to IDCO is proper and legal. Further, pursuant to the direction of this Court dated 21.10.2011 in W.P.(C) No. 27155/2011, the O.P. No.2, namely, Revenue Divisional Commissioner, Central Division, Cuttack conducted enquiry and held that the allotment of the government land in question to the IDCO for the purpose of industry is legitimate and objections raised by the petitioners are devoid of any merit. However, the said order has never been challenged by any person till now.

5. Opposite party No.5, namely, State Pollution Control Board in its counter has stated that after receipt of application from O.P. No.7 for grant of consent to establish the industrial unit in question, the proposed site was inspected by the Scientists of the Board on 10.08.2011 and the report was placed before the Consent Committee of the Board for consideration and the Board after considering the inspection report and the recommendation, vide order dated 01.11.2011 granted consent in favour of O.P. No.7 to establish the industrial unit subject to conditions as stipulated therein.

6. Opposite party No.6-IDCO in its counter affidavit has stated that the Collector, Cuttack has sanctioned lease of the government land in question in favour of IDCO for establishment of industries under the provisions of the OGLS Act and Rules made thereunder after completion of all the formalities in accordance with law and subsequently it has allotted the said land in favour of O.P. No.7 executing lease deed by observing legal formalities and therefore, the allegations made by the petitioners are not sustainable. It is further stated that since there is a provision of appeal under Section 7 of the OGLS Act against any order made under Section 3 of the Act and the petitioners have not availed the same, the present writ petition is not maintainable.

7. Opposite party No.7 has also filed an elaborate counter affidavit denying the allegations made by the petitioners and has prayed for dismissal of the writ petition.

8. We have heard the contentions of the learned counsel for the petitioners as well as respective learned counsel for opposite parties.

9. The main contention of the learned counsel for the petitioners is that the opposite parties in utmost disregard to the provisions of law governing the field has proceeded to de-reserve the communal lands so as to sub-serve the interests of a private company, namely, O.P. No.7.

10. Per contra learned Advocate General vehemently opposed the contentions raised by the petitioners and contended that the land in question is a government land and dereservation orders have been passed following the procedure stipulated under the OGLS Act and OGLS Rules and as the petitioners have not filed any objection during the public hearing they cannot raise any grievance in this writ petition as there is no illegality in the decision making process. In support of his contention, he has placed reliance on a decision of the Hon'ble Supreme Court in the case of State of Jharkhand & Ors. Vs. Pakur Jagran Manch & Ors., (2011) 2 SCC 591.

11. Opposite party No.7 was earlier known as M/s. Grasim Industries Ltd. and it had entered into the MOU with the State Governmnt i.e. O.P. No.1 for establishment of 1.5 MTPA Split Cement Grinding Unit at Khamara Nuagaon and Kolathapangi under Athagarh Tahasil in the district of Cuttack with project cost of Rs.300 Crores. IPICOL vide its letter dated 09.06.2010 recommended IDCO-O.P. No.6 that Ac.90.00 of land at the said villages may be alienated in favour of O.P. No.7 for establishment of the said unit and Annexure-1 is a photo copy of the said letter. The O.P. No.6, namely, IDCO filed requisition dated 26.08.2010 for alienation of government land measuring Ac. 53.90 in village Khamara Nuagaon for the purpose of establishment of the said industry and Annexure-2 is the photo copy of the said letter. Consequently, O.P. No.4-Tahasildar, Athagarh initiated a de-reservation case vide Lease Misc. Case No. 5/2010 to de-reserve said land measuring Ac. 53.90 dec. under Khata No 231 corresponding to Plot No. 64 (P) of the said village. Proclamation inviting objections was served in the Gram Panchayat and also in the village by beating of drums, but the resent writ petitioners did not file any objections whatsoever though some other villagers filed their objections before the Tahasildar. Grievances were heard and after making spot inspection the same were overruled and the Tahasildar submitted the report on the de-reservation proposal of the said land before the Sub-Collector, Athagarh, who recommended the same to the Collector, Cuttack for further action. Thereafter, O.P. No.3-Collector, Cuttack in exercise of power conferred under Section 3-A of the OGLS Act and Rule 4 of the OGLS Rules, accorded sanction to the de-reservation of the said Gochar land measuring Ac. 53.90 dec. for its eventual lease in favour of IDCO for industrial purpose and copy of the said order is found under Annexure-5.

12. Power to de-reserve the government land recorded as 'Gochar' is provided under Section 3-A of the OGLS Act and the stipulation is that such power is to be exercised by an officer not below the rank of a Collector authorized by the Government on its behalf. Rule 4 of the OGLS Rules prescribe the procedure to be followed in making such de-reservation which includes, inter alia, a public notice followed by an enquiry and recommendation. In this context, the decision of the Supreme Court relied on by the learned Advocate General referred to above is relevant, in which their Lordships of the Supreme Court held that the contention of the first respondent therein that "*once a gochar always a gochar, and there is no power in anyone at any time, to alter its status as gochar"* is without merit and proceeded further to observe that "the de-reservation of any government land reserved as gochar should only be in exceptional circumstances and for valid reasons".

13. In the present case, the de-reservation has been made following the due procedure contemplated under the OGLS Act and Rules. Further, in this case, this Court vide order dated 21.10.2011 in W.P.(C) No. 27155/2011 directed the Revenue Divisional Commissioner, Central Division, Cuttack-O.P. No.2 to conduct enquiry to find out as to whether the objections of the writ petitioners against the proposal for de-reservation of gochar land measuring Ac.53.90 dec. in village Khamara Nuagaon is legal and valid. Pursuant to the said direction, O.P. No.2 conducted enquiry, heard the writ petitioners twice and after going through the de-reservation case records and the report submitted by the Tahasildar, found that Ac. 205.12 dec. of gochar land was available in the village Khamara Nuagaon and after de-reservation of Ac.53.90 dec. of gochar land for eventual lease in favour of the IDCO, the surplus Gochar land is Ac.151.22, which is more sufficient than the reasonable requirement of the village and hence the objections raised by the petitioners devoid of any merit. The photo copy of the said report is found at Annexure-7 to the writ petition. In such circumstances, the contention of the present writ petitioners that the de-reservation of land in question, recorded as Gochar, has been made without following due procedure is without any merit and liable to be rejected.

14. The next contention of the learned counsel for the petitioners is that the alienation of Ac.53.90 dec. of land by way of lease to O.P. No.7 is not permissible in the eye of law. After de-reservation of government land measuring Ac.53.90 dec., the O.P. No.3-Collector, Cuttack sanctioned lease of the said land in favour of IDCO by letter dated 20.06.2011 for establishment of industry and lease deed dated 19.08.2011 came to be executed between the parties by complying the legal formalities. Section 33 of the Orissa Industrial Infrastructure Development Corporation Act (OIIDC), 1980 stipulates that after transfer of government land to the Corporation, the Corporation may dispose of the said land in any manner whether by way of sale, mortgage, exchange, or lease etc. Section 15 of the said Act deals with the general powers of the Corporation and sub-clause (a) states that the Corporation shall have power to lease, sell, exchange or otherwise transfer any property held by it on such conditions as may be deemed proper by the Corporation. Our attention was also drawn to the provisions of the Orissa Industries (Facilitation) Act, 2004 (Orissa Act 14 of 2004) in this regard. On the recommendation of the Nodal Agency, IDCO has granted lease of the land in question in favour of O.P. No.7-Company for establishment of industry.

15. The State Pollution Control Board- O.P. No.5, after considering the inspection report of its scientists, granted consent to O.P. No.7 to establish the Bulk Terminal of 2.0 MTPA capacity (which is a packaging unit in which

cement unloading and storing takes place in RCC Silos and packed in bags) subject to general and special conditions as mentioned therein and copies of the report and the order of consent are also annexed to the counter affidavit of the Board. One of the conditions stipulated in it is that "No Grinding shall be done and Cement shall be packed only." Hence the contentions of the learned counsel for the petitioners that the IDCO in contravention of the OIIDC Act, 1980 has transferred the land by way of lease in favour of O.P. No.7, and the establishment of unit will affect the environmental condition lack merit and liable for rejection.

In view of the above, there is no merit whatsoever in the writ petition. In the result the writ petition is dismissed. No costs.

Writ petition dismissed.

**2013 (II) ILR - CUT- 895**

**PRADIP MOHANTY, J & BISWAJIT MOHANTY, J.**

DSREF NO.1 OF 2013 & CRLA NO.100 OF 2013 (Dt.04.09.2013)

**STATE OF ODISHA** ……..Appellant

*.Vrs.*

**THIDU @ BISI MUNDA** ……..Respondent

**PENAL CODE, 1860 - Ss.366, 376 (2) (f), 302 & 201**

**Rape and murder – Death sentence by trial Court – Reference made to High Court for confirmation – Conviction based on circumstantial evidence and no question was put to the appellant during trial with regard to detection of blood in the towel –The victim was 3 years and the appellant was 27 years at the time of occurrence – Appellant had no criminal back ground and during his detention in custody no adverse report submitted by the jail Authority – Held, the severest of punishment i.e. the death penalty is not proper in this case which is commuted to sentence of life imprisonment with a condition**

**that in this case remission of sentence should not be considered before completion of 25 years of incarceration.** (Para 25)

**Case law Relied on:-**

(2013) 55 OCR (SC) 623 : (Shankar Kisanrao Khade-V- State of Maharashtra).

**Case laws Referred to:-**

1.AIR 1984 SC 1622 : (Sharad Birdhichand Sarda-V- State of Maharastra)
2.2013 (15) OCR (SC) 1036 : (Sujit Biswas-V- State of Assam)
3.AIR 1980 SC 898 : (Bachan Singh-V- State of Punjab)
4.(2001)2 SCC 28 : (Mohd. Chaman-V- State (NCT of Delhi)
5.2005 (10) SCC 322 : (Rahu-V- State of Maharastra)
6.1983 (3) SCC 470 : (Machhi Singh-V- State of Punjab).

For Complainant - Mr. Bishu Prasad Pradhan, Addl. Govt. Advocate.
For Respondent - M/s. Bijaya Kumar Ragada, L.N. Patel & N.K. Das.

---

Both the death reference and the criminal appeal arise out of the judgment of conviction dated 11.01.2013 and order of sentence dated 17.01.2013 passed by the learned Ad hoc Additional Sessions Judge (FTC), Sambalpur in S.T. Case No.227/79 of 2012. Therefore, they are heard together and disposed of by this common judgment.

**2**. By the impugned judgment and order, accused Thidu @ Bisi Munda has been convicted under sections 366, 376(2)(f), 302 and 201, IPC. For the offence under section 302, IPC, he has been sentenced to death, and for the offence under section 376 (2) (f), IPC, he has been sentenced to undergo imprisonment for life along with a fine of Rs.5000/- in default to undergo rigorous imprisonment for two months. No separate sentence has been awarded for the offence under sections 366 and 201, IPC. The reference made by the learned trial Judge under Section 366, Cr.P.C. for confirmation of the death sentence has been registered as DSREF No.1 of 2013 and the appeal preferred by the convict Thidu @ Bisi Munda challenging his conviction and sentence has been registered as CRLA No.100 of 2013.

**3.** The factual matrix for which the accused was charge- sheeted and sent up for trial is as follows:

**3.1** On 4.10.2012 at about 9.00 AM, Sarei Munda, the father of the deceased Samari Munda, along with his first wife Keli Munda, second wife Ratani Munda and his eldest son-Kela Munda had gone to the nearby jungle for the purpose of grazing cows. His other two sons, namely, Ghunu Munda and Fagunu Munda and his daughter deceased Samari Munda were in his house. On their return to the house at about 5.00 PM, he along with his other family members found that their daughter Samari Munda was missing. At about 9.00 PM, Sarei Munda reported at Thelkoloi Police Station about missing of the deceased and such report was entered in the Station Diary vide SDE No.100 of 2012. Subsequently, on enquiry, Sarei Munda came to know from his son Ghunu Munda that at about 2.00 PM a person of black complexion had come to their house and by adopting deceitful means he had taken away the deceased with him. Coming to know about the same, the family members along with the villagers searched for the deceased, but could not be able to trace her out. Being helpless, Sarei Munda, the father of the deceased, lodged an FIR on 05.10.2012 before the IIC, Thelkoloi P.S. describing the physical features and wearing apparels of the deceased Samari Munda. On receipt of the FIR, P.W.13, IIC, Thelkoloi Police Station registered Thelkoloi P.S. Case No.109 of 2012 under section 363, IPC and directed P.W.12, S.I. of police, Thelkoloi P.S. to take up investigation.

**3.2** During investigation, P.W.3 Doko Munda @ Kalia and P.W.4 Soudagar Munda disclosed that on the date of occurrence they had seen the deceased Samari Munda was being taken by the accused towards Talabira forest.Then, a search was conducted inside the Talabira jungle and the dead body of the deceased was recovered by police in a semi-decomposed position from a ditch covered by some twigs and tree branches. P.W.12 conducted inquest over the dead body of the deceased in presence of the witnesses, prepared the inquest report and sent the dead body for post-mortem examination to V.S.S. Medical College and Hospital, Burla. During inquest and the post-mortem examination, it was ascertained that prior to her murder the deceased was subjected to rape. P.W.5 Khyama Rohidas in the T.I. parade identified the towel that was wrapped on the head of the dead body and disclosed that he had given the said towel to the accused being his employer. P.W.13 apprehended the accused on 13.10.2012 at about 4.30 A.M. at Jharsuguda Railway Station and sent him to P.H.C., New Khinda for medical examination. P.W.9 is the Medical Officer, who examined the accused and noticed some injuries on his body. He also recorded the confessional statement of the accused in his medical examination report, as the accused confessed his guilt before him.

**3.3** The accused while in police custody confessed to have committed rape and murder of the deceased Samari Munda and concealed her dead body in a ditch in Talabira forest. He also confessed to have concealed his own wearing apparels under a bush near Kherual River Railway Bridge and gave recovery of the same. P.W.13, the Investigating Officer, on receipt of the post-mortem examination report, opinion report, chemical examination report and other incriminating materials submitted charge sheet against the accused under sections 366, 376(2)(f), 302 and 201, IPC.

**4.** On receipt of the charge-sheet, the learned Magistrate took cognizance of the offence and committed the case to the court of learned Sessions Judge, Sambalpur, who transferred the same to the court of learned Ad hoc Addl. Sessions Judge (Fast Track), Sambalpur for trial. Learned trial Judge framed charge under sections 366, 376 (2) (f), 302 and 201, IPC, to which the accused pleaded not guilty and claimed to be tried. In order to prove its case, prosecution examined as many as thirteen witnesses including the doctors and the investigating officers, besides exhibiting exhibited 31 documents and 6 material objects. The accused did not choose to adduce any oral or documentary evidence in defence. In his statement under Section 313, Cr.P.C., the accused took the plea of denial and claimed to have been falsely implicated. On culmination of the trial, the accused was found guilty for commission of offence punishable under sections 366, 376(2)(f), 302 and 201, IPC and he was convicted and sentenced as already stated hereinbefore.

5. Mr. Ragada, learned counsel appearing for the accused submits that the prosecution has failed to prove beyond reasonable doubt that it is the accused who has committed the offence. P.Ws.3 and 4, who are said to be witnesses to the last seen theory, are not natural witnesses and their testimony inspires no confidence. Further, in view of the time gap between the accused and deceased were last seen alive and recovery of the dead body, the last seen theory cannot be relied upon. The test identification parade also suffers from serious infirmities. Besides, there are material inconsistencies, contradictions and omissions in the evidence of the witnesses which have seriously affected the prosecution version and that the important links in the chain of circumstances are missing. He further submits that in any view of the matter, the case will not fall under the rarest of rare category warranting capital punishment. Further the learned counsel for the appellant submits that Bhutulu Munda and Ghinu were not examined despite they being material witnesses. Thus the prosecution has failed to prove the case beyond reasonable doubt. With regard to seizure of wearing apparel of the accused, the learned counsel pointed out that the same does not in any

manner connect the accused with the alleged offence. He also submitted that the extra-judicial confession has no evidentiary value since it is recorded in police custody.

**6.** Mr. Pradhan, learned Addl. Government Advocate, on the other hand, submits that the evidence adduced in this case prove beyond reasonable doubt that it is the accused, who had kidnapped the deceased, committed rape on her and later caused her death. P.Ws.3 and 4 are natural witnesses and they had no motive or any enmity with the accused so as to rope him in the crime and as such their evidence cannot be thrown out of consideration. The inconsistencies, contradictions and omissions appearing in the evidence of the witnesses are not material rather minor in nature which are bound to occur in case of truthful witnesses due to efflux of time. The T.I. parade conducted by P.W.7 does not suffer from any infirmity. The circumstantial evidence adduced and established by the prosecution are consistent with the only hypothesis of guilt of the accused and there is no missing link in the chain of circumstances. The principle of "rarest of rare case" is squarely applicable to the present case and, therefore, the impugned judgment of conviction and sentence does not call for interference by this Court.

**7.** Undisputedly, at the time of occurrence the deceased was a minor, she died a homicidal death and prior to her death she was subjected to forcible sexual assault. Now, it is to be seen whether the prosecution has been able to establish its case beyond all reasonable doubt that the accused has committed the offence. The prosecution undisputedly has not led any direct evidence in this case and has relied upon various circumstances to bring home the charges against the accused.

**8.** It is well settled in law that the cases where the evidence is of a circumstantial nature, the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused and the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. Further, in cases depending largely upon circumstantial evidence there is always a danger that the conjecture and suspicion may take place of legal proof and such suspicion however strong cannot be allowed to take place of legal proof.The Court has to be watchful and ensure that conjectures and suspicions do not take the place of a 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 that the accused may not be the author of the crime. Thus, above being the law governing the field, the evidence led in this case has to be carefully examined to see if the conclusion arrived at by the learned trial Judge is legally sustainable.

**9.** P.W.1 is none else but the father of the deceased Samari Munda. He is the informant in this case. In his examination-in-chief P.W.1 stated that on the date of occurrence at about 10.00 AM he along with his first wife and second wife had gone towards the nearby jungle for grazing cows. His deceased daughter Samari and two sons, namely, Ghunu and Fagu were in their house situated in village Budhiapali (Mundapada). They returned to their house at about 4.00 PM and found the deceased missing. They searched for her, but could not be able to trace her out. At about 10.00 – 11.00 P.M., they reported about missing of their daughter before the local Sarpanch P.W.2, who informed over telephone to the Thelkoloi P.S. The IIC, Thelkoloi P.S. arrived there and searched for the deceased along with the villagers. As they did not trace out the deceased, they returned to their house along with the villagers. In the night, his son Ghunu disclosed before him that in the day time a man of black complexion had come to their house and offered him Rs.1/- to purchase chocolate and also offered some 'Pakoda' to the deceased. Ghunu went to the shop for purchasing chocolate and by the time he returned, the deceased Samari and that black complexion man were not present in the house. On the next day, P.W.1 along with other family members again went to the house of the local Sarpanch P.W.2 and apprised him about the disclosure made by his son Ghunu. Then, P.W.1 along with P.W.2 and other villagers went to Thelkoloi Police Station and lodged the FIR (Ext.1) getting the same scribed by P.W.2 and enclosed therewith a photograph of the deceased Samari Munda. On receipt of the FIR, the police caused enquiry during the course of which Doko Munda P.W.3, Saudagar Munda P.W.4 and one Bhutulu Munda seeing the photograph of the deceased disclosed before the police and other villagers including P.W.1 that they had seen the deceased along with the accused Thidu in the jungle on the day of missing. Accordingly, a search was made inside the jungle and on the fourth day of missing, the dead body of the deceased, which was covered by some small branches and leaves of the trees, was recovered from a ditch nearby the Tinabandha jungle. He (P.W.1) identified the dead body to be of the deceased Samari. The head of the dead body was covered by a green colour towel and the deceased was wearing a brown colour frock. The dead body was decomposed to some extent and was infested with some maggots. The police conducted inquest over the dead body of the deceased in presence of P.W.1 and some

witnesses. Nothing substantial has been brought out in cross-examination to discredit his testimony.

**10.** P.W.2 at the relevant point of time was the Sarpanch. He deposed that on the date of occurrence at about 10.00 PM, P.W.1 along with his first wife came to his house and requested him to intimate the police over telephone about the missing of the deceased. Accordingly, he telephoned Thelkoloi Police Station and after some time the police arrived. They searched for the deceased for about 2 to 2½ hours, but could not trace her out. On the next day, P.W.1 again came to his (P.W.2's) house and told about the disclosure made by his son Ghunu. On being requested by P.W.1, he went to Thelkoloi P.S. and scribed the FIR as per his instruction. He read over and explained the contents of the FIR to P.W.1, who put his LTI in the FIR and submitted before the police along with a photograph of the deceased. Ext.1 is the said FIR and Ext.1/1 is his signature. Ext.2 is the seizure list under which the police seized the photograph of the deceased in his presence and Ext.2/1 is his signature. He supported the evidence of P.W.1 with regard to the disclosure made by P.Ws.3, 4 and one Bhutulu Munda during the course of enquiry that the deceased was last seen by them in the company of the accused and with regard to recovery of the dead body of the deceased and its identification by P.W.1. He further deposed that P.W.3, P.W.4 and Bhutulu Munda (not examined) after seeing the dead body identified to be of the girl to whom they had seen to be taken away by the accused towards the jungle. In his presence, police conducted inquest over the dead body of the deceased and prepared the inquest report. Ext.3 is the said inquest report and Ext.3/1 is his signature. The materials brought out in the cross-examination of P.W.2 do not in any way discredit his testimony rather most of the same affirm his testimony in the examination-in-chief.

**11.** P.W.3 Doko Munda is a co-villager by whom the deceased and the accused were last seen together. In his examination-in-chief, he stated that on the occurrence day at about 3.00 PM while he was returning to his house from Tilabandha Dhara (George) after fishing, he found accused Thidu carrying a girl child of aged about 3 years near Tilabandha of Talabira jungle. On his enquiry, accused Thidu told him that he is going towards the Dhara with the child. He returned to the village and came to know in the evening that the daughter of the informant was missing from the house. In the evening hour of the next day, police arrived in the village to search the deceased Samari. When the police showed the photograph of the deceased to him (P.W.3), he told the police and other villagers that he had seen the said girl being taken away by the accused on the previous day near Dhara. At that time, the accused was wearing a half pant and a half baniyan and

was holding a green towel whereas the girl was wearing a brown colour printed frock. After his disclosure, the police party along with some of the villagers including him (P.W.3) proceeded towards Tilbandha Dhara to search the deceased. During search, police recovered one violate colour torn pant (M.O.III) belonging to a girl child and seized the same in presence of P.W.3 and other villagers under seizure list Ext.4. After four days of missing, the dead body of the deceased Samari was found in a ditch, which was covered by some leaves and tree branches, situated at some distance from Tilabandha Dhara. The head of the dead body was covered by a green towel (M.O.I), which the accused was holding when P.W.3 met him. He further stated that after seeing the dead body, he identified her to be that girl child whom he had seen near Tilabandha Dhara to be taken away by the accused on the date of her missing. He noticed some injury marks near vagina and other parts of the dead body which was also infected with maggots. P.W.1 Sarei Munda, the father of the deceased, also identified the dead body to be of his daughter Samari Munda. In cross-examination, P.W.3 admitted that he had acquaintance with the informant, as he used to go to play football to the football field situated near the house of the informant-Samari. He had no prior acquaintance with the children of the informant Sarei Munda. When P.W.3 returned to his house after fishing, except the accused-Thidu and the girl child, he did not meet any person on the way till his arrival in the house. While he was fishing, no other person was present there. When he found the accused-Thidu and the girl child**,** she was wearing a frock belonging to girl. She was not wearing any shirt belonging to boys. When he saw the girl child, he did not see her pant as the same was covered by dust. When he found the dead body, he noticed some injury upon the head and on the right knee. The place where he found the accused taking away the deceased is locally known as “Samarjhula”. From the Tilbandha Dhara there is a way to Babukhinda village.

**12.** P.W.4-Saudagar Munda is a co-villager and witness to the last seen theory. In examination-in-chief he stated that on Thursday of the month of Dushera of the year of occurrence at about 2.00 P.M. he along with his brother-in-law Bhutulu Munda (not examined) while returning to their house situated in village Budhiapali Mundapada from Ekengudi tank after bathing, he found on the way that the accused-Thidu was proceeding on the way by taking a girl child aged about three years. He talked with the accused-Thidu and on his enquiry, the accused- Thidu told that he was going to take bath. At that time the accused- Thidu was wearing a half pant and was holding a green colour towel (M.O. I). The girl child was wearing a printed frock of brown colour (M.O. II).

In the evening hour of the day at about 7 to 8 P.M., P.W.4 came to know that the daughter of the informant-Sarei Munda, a girl child aged about three years was missing. In the evening hour of the next day, i.e., Friday, the police party arrived in their village to search the daughter of the informant-Sarei Munda. When the police showed the photograph of the daughter of the informant, P.W.4 disclosed before the police and villagers that he had seen the girl with the accused- Thidu on the previous day while the accused carrying her at the time of his returning after bath. While the police party and villagers were searching the daughter of the informant on Sunday at about 10.00 AM the dead body of a girl child was found in a ditch near the Tilabandha Dhara. The said dead body was identified by the informant-Sarei Munda to be of the deceased-Samari Munda. The dead body was covered by some leaves and some small tree branches. The head of the dead body was also covered by a green towel (M.O.I) which the accused-Thidu was holding when P.W.4 saw him near the Ekengudi Tank. There was some injury marks on the dead body and the same was also infected by maggots. On seeing the dead body, P.W.4 identified the same to be of the girl child whom the accused was carrying with him near the Ekengudi Tank on Thursday. In cross-examination, he also admitted that when he along with his brother-in-law Bhutulu Munda was bathing in the Ekengudi Tank, no other villagers were bathing there. While they were returning to the house except the accused-Thidu and the girl child, they did not meet any other person on the way.

**13.** P.W.5 is the owner of the tractor to whom the appellant approached to engage him as a driver. After engaging him as a driver, P.W.5 gave Rs.500/- to the appellant and also a towel after purchasing the same from Khinda weekly Market. The appellant worked for three days and on the forth day, without informing P.W.5 or the other labourers, the appellant did not come for duty. After some days, P.W.5 came to know that the appellant committed rape and murder. Thereafter, he received a summon from the Court and participated in the T.I. parade held inside the chamber of the Magistrate. In the said T.I. parade, P.W.5 identified the said green towel which has been marked as M.O.I. In cross-examination, he admitted that the towel which he had given was of average size and of Vitex Brand.

**14.** P.W.6 is the photographer who stated that on 7.10.2012, on being called by the I.I.C. Telkoi P.S., he along with him and other police staff went to Talabira jungle and on their arrival, he found the dead body of a child lying in a ditch and the same was covered by some small branches of a tree and some leaves and wrapped by a green colour Vitex towel. The said towel has been seized under Ext.5. He took photographs from different angle and on

the backside of the said photographs, he put his signature. In cross-examination, he admitted that by the time he arrived at the spot, the villagers have already discovered the dead body of the deceased.

**15.** P.W.7 is the J.M.F.C., Sambalpur who conducted the T.I. parade of the towel. He issued summon to P.W.5 to participate in the T.I. parade. After mixing the towel with other similar towels, P.W.5 was asked to identify the towel in the official chamber of P.W.7 and P.W.5 identified the towel which was used in the crime in presence of Sridhar Pradhan, the orderly peon of P.W.7 and Lingaraj Majhi, the Bench Clerk of P.W.7. Thereafter, P.W.7 prepared the report which has marked as Ext.6 on which he put his signature. In cross-examination, he admitted that the suspected towel was of BEETEX Superman brand and he has not mentioned the brand of other towels with which the suspected towel was mixed. All the towels were of similar looking. He also admitted that some identifying features like blood stains and mud stains were available on the towel.

**16.** P.W.8 is the doctor who conducted the autopsy examination and found as many as six external injuries excluding one external genitalia injury. He proved the post mortem report (Ext.7). He opined that the external injuries, internal injury on the neck and the injury on the external genitalia are ante-mortem in nature. The injuries on the neck appears to have been caused by some ligature material as well as manual pressure. He specifically opined that the injuries on the external genitalia are consistent with forcible sexual assault. On 20.10.2012, police produced the towel before him which was wrinkled, metted bearing mud stains and some brownish stains. He also opined that external injury no.3 i.e. the band shape pressure abrasion as described in the post-mortem report can be possible by such type of towel, if tied around the neck. The external injuries i.e. 1,2, 4, 5 and 6 can be possible by manual pressure while tightening the towel around the neck. In cross-examination, he admitted that he prepared two packets marked A & B. The ‘A’ packet contained dried blood soak gauge, nail clippings and the samples of scalp hair whereas the ‘B’ packet contains dried soap vaginal swab.

**17.** P.W.9 is the doctor who examined appellant after he was apprehended. In his examination in chief, he stated that the appellant had disclosed before him that he kidnapped the victim on 4.10.2012 and committed rape and murder her in Talabira forest on the same day. Then he concealed the dead body in a ditch inside the forest and covered it with branches and twigs of the said tree. After examination, he found the appellant to be capable of committing sexual intercourse and after further

examination, he opined that the sexual intercourse by him in the recent past cannot be ruled out. He stated to have prepared the report and proved the same as Ext.9. In cross-examination, he admitted that he did not find any sign and symptoms of recent sexual intercourse and the appellant is capable of doing sexual intercourse.

**18.** P.W.10 is a co-villager and a witness to the leading of discovery. He specifically stated that while the accused was in police custody, he confessed his guilt that he has committed rape and murder of the deceased and concealed his wearing apparels i.e. his pant, inner Baniyan and Chaddi which he was wearing at the time of commission of offence under the bush. After recording of the confessional statement of the appellant under Ext.11, he led the police and other witnesses towards Kherual River Railway Bridge from where he brought out a half pant, an inner baniayan and a chaddi from under the bush and the same have been seized by the police under Ext.12. In cross-examination, he admitted that they proceeded to the place of recovery by police jeep and thereafter proceeded by walking. From the same place, the appellant gave recovery of the pant, Baniyan and Chaddi at a time.

**19.** P.W.11 is the A.S.I. of Thelkoloi Police Station. In his examination-in-chief he stated that an FIR was lodged by the informant-Sarei Munda with regard to missing of his daughter- Samari Munda aged about three years. Basing upon the said F.I.R., the police registered the case and searched the girl child of the informant-Sarei Munda in different places. On 7.10.2012 at about 6 A.M. the police party along with P.W.11 and other villagers of Budhiapali Mundapada started searching the girl inside the Talabira forest. After a search of about 3 to 4 hours, they found a dead body of a girl child in a ditch inside the forest and the said dead body was covered by some twigs and branches. The dead body of the deceased was wrapped and tied by a green colour towel having stripes. The dead body was identified by the informant-Sarei Munda, the father of the deceased and some other villagers. Thereafter, the S.I. of Thelkoloi Police Station conducted inquest over the dead body of the deceased-Samari Munda in presence of the witnesses and prepared the inquest report. As per the direction of the IIC, Thelkoloi Police Station, the dead body was sent to V.S.S. Medical College and Hospital, Burla for post-mortem examination. After post-mortem examination, the Medical Officer handed over the wearing apparels of the deceased, collected Biological samples and the towel wrapped and tied with the dead body and after return, the IIC, Thelkoloi Police Station seized the wrapped and tied green colour stripes towel, the wearing apparels of the deceased-Samari Munda, i.e., one brown colour printed frock and two sealed packets of

Biological samples and the command certificate issued in their favour being produced by the constable and he prepared the seizure list vide Ext.13 wherein Ext.13/1 is the signature of P.W.11. Ext.13/2 is the command certificate.

**20.** P.W.12 is the S.I. of Thelkoloi Police Station. He stated that on 5.10.2012 at about 4.00 P.M. the informant-Sarei Munda of village Budhiapali Mundapada lodged an F.I.R. mentioning about the missing of his daughter-Samari Munda aged about three years and also alleging before the IIC, Thelkoloi Police Station that some person has kidnapped her from his house. Basing upon the F.I.R., the IIC, Thelkoloi Police Station registered the case as Thelkoloi P.S. Case No.109 of 2012 under Section 363, IPC and directed P.W.12 to take up the investigation of the case. Ext.1 is the F.I.R. wherein Ext.1/2 is the endorsement and signature of the IIC, Thelkoloi Police Station. Ext.1/3 is the formal F.I.R.

During investigation, P.W.12 examined the informant-Sarei Munda and some other villagers. On 5.10.2012 at about 5.00 P.M., P.W.12 seized the passport size photograph of the daughter of the informant on production of the informant-Samari Munda in presence of the witnesses and prepared the seizure list. Ext.2 is the said seizure list wherein Ext.2/4 is the signature of P.W.12. P.W.12 took the L.T.I. of the informant in the seizure list. Ext.2/2 is the passport size photograph of the deceased-Samari Munda seized vide seizure list wherein Ext.2/5 is the signature of P.W.12. After the seizure, P.W.12 proceeded to the house of the informant situated in village Budhiapali Mundapada in a lonely place and prepared a spot map. During spot verification, he found that the house of the informant situates in a lonely place in the said village and the other houses are situated more than 200 meters away from the same. During spot verification, he ascertained that the shop to which the son of the informant, namely, Ghunu Munda was sent for purchasing chocolate by the person suspected to be kidnapped the deceased-Samari Munda, situates at a distance of about 500 meters from the house of the informant. Ext.14 is the spot map wherein Ext.14/1 is the signature of the P.W.12. He further stated that before lodging the F.I.R., i.e., on 4.10.2012 he received a phone call from the local Sarpanch (P.W.2) about missing of the daughter of the informant basing upon the version of the informant-Sarei Munda. In that regard, there was a Station Diary entry vide S.D. Entry No.100 dated 4.10.2012.

After examining Doko @ Kalia Munda at about 11 P.M. on 5.10.2012 at about 11 P.M., P.W.12 along with some other villagers proceeded towards the Talabira forest through narrow forest footpath to search Samari Munda

and after arrival there, Doko @ Kalia Munda shown a small hillock locally known as “Samarjhulla Hillock” wherein he had seen the accused-Thidu Munda carrying the missing child Samari Munda by climbing down from the hillock. After some search near the place, P.W.12 recovered one half pant belonging to a girl child in torn condition and seized the same in presence of the witnesses. Ext.4 is the said seizure list wherein Ext.4/2 is the signature of P.W.12. On 6.10.2012, the mother of the missing child-Samari Munda, namely, Ratani Munda identified the torn half pant (M.O. III) to be of Samari Munda and also disclosed that she had worn the same at the time of her missing from the house. On further investigation on that day, on seeing the photograph of Samari Munda, the villagers Saudagar Munda (P.W.4) and Bhutulu Munda (not examined) disclosed that they had also seen the accused-Thidu Munda carrying the child on 4.10.2012 at about 2.00 P.M. near Ekengui Pond situates near their village. Accordingly, P.W.12 recorded the statement of the witnesses under Section 161, Cr.P.C. During investigation, he ascertained that the accused-Thidu Munda was working under one Khyama Rohidas (P.W.5) of village Matulcamp as a tractor driver. P.W.l2 examined P.W.5 and recorded his statement under Section 161,Cr.P.C. On 7.10.2012, P.W.12 along with the police party proceeded to village Budhiapali Mundapada and started searching the missing girl with the help of the villagers numbering about 50 to 60 at Talabira forest. While search was going on at about 10.00 A.M. inside the Talabira jungle, a dead body of a small girl child was found inside a ditch covered by some twigs and branches of tree. There were some injury marks upon the dead body and the head of the dead body was wrapped and tied by green colour towel. The dead body was identified by the informant-Sarei Munda to be of his daughter-Samari Mudna. The villagers, i.e., Doko Munda, Saudagar Munda and Bhutulu Munda also identified the dead body and told that they had seen the girl with the accused-Thidu Mudna earlier on 4.10.2012. Thereafter at about 10.30 A.M., P.W.12 conducted the inquest over the dead body of the deceased in presence of the witnesses and prepared the inquest report. During inquest, he found some parts of the dead body were infected by maggots. There were certain injury marks upon the dead body, dried blood-stains were also there in the private part, i.e., over the genital and other parts. Ext.3 (already marked) is the inquest report wherein Ext.3/2 is the signature of P.W.12. After inquest, the dead body was sent to V.S.S. Medical College and Hospital, Burla for post-mortem examination by issuing dead body challan. Ext.15 is the dead body challan wherein Ext.15/1 is his signature. After recovery of the dead body, the case was turned under Sections 363/302, IPC and the investigation was continued. P.W.12 also prepared a spot map vide Ext.18 wherein Ext.18/1 is his signature. On

7.10.2012 he handed over the charge to the IIC, Thelkoloi Police Station for further investigation.

In his cross-examination, P.W.12 admitted that he had prepared two spot maps of two different places. He had not prepared one consolidated map. He also admitted that on 4.10.2012 the police had information about missing of the deceased-Samari Munda. The F.I.R. was received at the police station on 5.10.2012. It is a fact that during examination, Saudagar Munda and Bhutulu Munda had stated that the accused-Thidu was wearing a long half pant whereas Doko Munda had stated that the accused-Thidu was wearing a half pant. It reveals that the deceased was not known to Saudagar Munda, Bhutulu Munda or Doko Munda earlier to the occurrence.

**21.** P.W.13 is the IIC, Thelkoloi Police Station. He stated that during investigation the dead body of the deceased-Samari Munda was recovered from Talabira jungle. After some investigation by the Investigating Officer P.W.12 as the case was turned to a case under Section 302, IPC., P.W.13 took charge of investigation. On 7.10.2012, during investigation at about 10.00 A.M. P.W.13 seized the Biological samples of the deceased collected at V.S.S. Medical College and Hospital, Burla in two sealed packets, one brown colour torn frock of the deceased and one green colour towel wrapped and tied over the dead body of the head of the deceased. He also prepared the seizure list vide Ext.-13 wherein Ext.13/3 is his signature. During investigation, P.W.13 conducted raid in the house of the accused-Thidu Munda situated at village Matulcamp on several occasions and also conducted raid in the house of some of relatives of the accused-Thidu on different occasions. Ext.19 is the search list prepared with regard to the search of the house of one Sashi Munda of village Bomaloi to apprehend the accused-Thidu wherein Ext.19/1 is his signature. Ext.20 is the seizure list prepared with regard to the search of the house of one Lochan Munda of village Bardhapali to apprehend the accused wherein Ext.20/1 his signature.

Ultimately on 13.10.2012 at about 4.00 A.M., the accused-Thidu @ Bisi Munda was found at Jharsuguda Railway Station. He was duly identified by one Kaustaba Rohidas of village Matulcamp. The accused- Thidu was apprehended there and was interrogated. The accused was brought to the police station from Jharsuguda Railway Station. On that day, i.e., on 13.10.2012 at about 12.30 P.M., he was sent to P.H.C., New Khinda for his medical examination. Ext.23 is the requisition issued by P.W.13 in favour of the accused-Thidu for medical examination wherein Ext.23/1 is the signature of P.W.13. He also seized the Biological samples of the accused-Thidu collected in a sealed packet at the medical in presence of the witnesses and

prepared the seizure list. Ext.24 is the seizure list wherein Ext.24/1 is his signature. On 14.10.2012 at 6.30 A.M. while the accused-Thidu was in police custody, he confessed his guilt in presence of the witnesses, Prasanta Kumar Nath, Sukhadeb Naik and P.W.13 that he kidnapped the victim girl-Samari Munda and committed rape on her and killed her and had concealed the dead body of the deceased in Talabira jungle and has concealed his wearing apparels under the Kherual Railway bridge and can give recovery of the same. P.W.13 recorded the confessional statement of the accused-Thidu in presence of the above named witnesses. Ext.11 is the confessional statement wherein Ext.11/2 is his signature. P.W.13 also took the signature of the accused on the confessional statement vide Ext.11/3. After recording of confessional statement, the accused led P.W.13 and the above witnesses to the place of concealment, i.e., Kherual river Railway bridge situated at a distance of about one and half kilometer from Thelkoloi Police Station and after arrival there, the accused brought out his cement colour pant, pink colour inner baniyan and black colour half chadi under the bush and gave recovery of the same to P.W.13 in presence of the above witnesses. After recovery of the pant, Chadi and Baniyan, P.W.13 seized the same in presence of the said witnesses and prepared a seizure list vide Ext.12 wherein Ext.12/2 is his signature and obtained the signature of the accused Thidu on the seizure list marked as Ext.12/3. On the same day, P.W. 13 forwarded the accused-Thidu to the court under Sections 366/376(2)(f)/302/201, IPC. Prior to forwarding the accused-Thidu to the court, P.W.13 sent the accused-Thidu to D.H.H. Sambalpur for necessary Pathological Test, as per requisition of the Medical Officer of P.H.C., New Khinda. The Pathological Examination of the accused-Thidu was conducted there. After returning of the escort party from the court, P.W.13 obtained the Pathological Examination report of the accused. Exts.25 and 26 are the Pathological Reports of the accused Thidu received from D.H.H. Sambalpur. On 14.10.2012, P.W.13 also made a prayer to the learned S.D.J.M., Sambalpur to conduct T.I. Parade in respect of the seized green colour towel wrapped and tied on the head of the deceased-Samari Munda. Accordingly, T.I. Parade was conducted in respect of the green colour towel in the official chambers of the leaned J.M.F.C., Sambalpur on the same day. P.W.13 also made a prayer to the learned S.D.J.M., Sambalpur to send certain seized incriminating articles to R.F.S.L., Sambalpur for Chemical Examination. Ext.30 (two sheets) is the true copy of the forwarding report sent to R.F.S.L., Sambalpur wherein Ext.30/1 the signature of P.w.13. Ext.31 (three sheets) is the Chemical Examination Report. On completion of the investigation in all respect, P.W.13 submitted the charge sheet under Sections 366/376(2)(f)/302/201, IPC against the accused-Thidu Munda.

In his cross-examination, P.W.13 admitted that on 4.10.2012 he personally received the information about the missing of the deceased-Samari Mudna from the local Sarpanch (P.W.2) at about 11.00 P.M. At that time there was only information about missing of the deceased Samari Munda and not of any allegation of foul play. In the F.I.R., the allegation was against an unknown person for kidnapping the deceased-Samari Munda. The F.I.R. discloses that the informant asked his son-Ghunu after his return and came to know that a person had kidnapped his daughter-Samari Munda.

**22.** Admittedly, there are no eye-witnesses to the occurrence. The prosecution case is based on circumstantial evidence. In the case in hand, the learned trial court has based its conclusion of guilt on last seen theory-that the accused and the deceased were last seen together, non-explanation of the accused about the whereabouts of the deceased, absconding of the accused after missing of the deceased, recovery of the green colour towel (M.O.I) of the accused-Thidu from the dead body of the deceased-Samari Munda and recovery of wearing apparels of the accused at his instance, extra judicial confession of the accused-Thidu before the Medical Officer (P.W.9) and non-explanation of the injuries found on accused. There is no dispute that the deceased was missing. There is no dispute that the death of the deceased-Samari Munda was homicidal in nature. There is no dispute that the deceased was aged about 3 years with regard to last seen theory, Doko @ Kalia Munda P.W.3 and Saudagar Munda P.W.4 have specifically stated that they had seen the girl with the accused-Thidu on the date of occurrence near Tilbandha of Talabira jungle. They specifically stated that three years of girl was with the accused Thidu and accused was holding a green towel and wearing a half pant and half baniyan and the girl was wearing a brown colour printed frock. After seeing the photograph of the deceased on 5.10.2012, these two witnesses disclosed that they have seen the girl along with the accused in the Tilabandha Jungle. After disclosure of the above fact, the police along with the villagers went to search the girl in the Tilabandha jungle. They found a pant of the deceased which was identified by her mother. Both the witnesses identified the dead body of the deceased. They also identified the green colour towel which was tied on the face of the deceased-Samari Munda.

**23.** On the date of occurrence, P.W.1, father of the deceased, returning from the forest found his daughter (deceased) absent from house. So, he went to the house of P.W.2 and intimated him about missing of the deceased. P.W.2 reported the matter over telephone to S.I. of police, Thelkoloi Police Station P.W.12, who entered the fact in the Station Diary vide Entry No.100 dated 04.10.2012. Police came to the village and searched for the deceased

along with P.W.1, P.W.2 and other villagers till late night, but they could not find the deceased. In the said night, Ghunu, the son of P.W.1, disclosed that one black complex man came to him and handed over Rs.1/- for purchase of chocolate and he also offered 'PAKODI' to the deceased. He went to purchase chocolate and after return did not find the deceased and the said black complex man. On the next morning, P.W.1 went to P.W.2 and P.Ws. 1 and 2 along with other villagers went to the police station. P.W.1 lodged the F.I.R. scribed by P.W.2. The I.I.C., P.W.13, registered Thelkoloi P.S. Case No. 109 of 2012 under Section 363 IPC and directed the Sub-Inspector of Police, P.W.12, to take up the investigation. Thereafter, the informant and the police personnel searched the village and nearby place including the forest area. On the same day, P.W.12, the I.O., examined some of the witnesses and shown the photograph of the deceased Ext.2/2. P.W.12 also proceeded to the house of P.W.1 (informant) which situates at a lonely place in the village 200 meters away from the houses of the other villagers. They proceeded to different villages and shown the photographs of the deceased to the villagers. P.Ws.3 and 4, seeing the photograph of the deceased stated that on 04.10.2012 the appellant was carrying the deceased inside Talabira forest. After examining P.W.3 at about 11 P.M. on 5.10.2012, P.W.12 along with P.W.3 and some other villagers proceeded towards Talabira forest through narrow forest footpath to search the deceased. P.W.3 after their arrival showed a small hillock, locally known as 'Samarjhula Hillock', wherein he had seen the appellant carrying the missing child. After some search near the place, they got one half pant belonging to the deceased in torn condition and P.W.12 seized the same in presence of the witnesses under Ext.4. On the next date, i.e., 06.10.2012, the mother of the missing child (deceased) identified the torn half pant M.O.III to be of the deceased and also disclosed that she had worn the same at the time of her missing from the house. On further investigation, P.W.4 and one Bhutulu Munda disclosed that they had also seen the appellant carrying the missing child. On the same day, search was made in the house of the appellant and his relations to apprehend him. P.Ws. 1 and 4 corroborated the above statements. On 07.10.2012, P.W.12 along with the police party proceeded to the village Budhiapali Mundapada and started searching the missing girl with the help of the villagers at Talabira forest. While search was made inside the jungle at about 11 A.M. the dead body of a small child was found inside a ditch covered by some twigs and branches of tree. There were some injury marks upon the dead body and the head of the dead body was wrapped and tied by green colour towel. The dead body was identified by P.W.1, the informant, to be of his daughter. P.Ws. 2, 3, 4 had also identified the dead body and P.Ws. 3 and 4 stated that they had seen the girl with the appellant earlier on 04.10.2012. After identification of the dead body, inquest was conducted. Nothing has been elicited in cross-

examination from P.Ws.1 to 4 to demolish the above evidence. There were certain injury marks upon the dead body, dried blood-stains were also there in the private part, i.e., over the genital and other parts. P.Ws.2 and 12 also proved the inquest report under Ext.3. The autopsy over the dead body of the deceased was conducted by P.W.8. The injuries found by him at the time of autopsy have been reflected in the post mortem examination report (Ext.7) proved by him during his evidence. He opined that the external injury no.3 can be possible by the towel (M.O.I), if tied around the neck. He further opined that asphyxia produced by forcible confliction of the air bag as a result of tightening of towel around the neck is sufficient to cause death in ordinary course of nature. After examination of the towel (M.O.I) it was handed over to the police with label and seal for onward transmission to S.F.S.L. for necessary examination of the stains. Nothing has been elicited through cross-examination from P.W.8 to dispute the homicidal death and the injury found on the person of the deceased. Thereafter, the case was turned to a case under Section 302 IPC. Subsequently, steps were taken by the police personnel to apprehend the appellant, but could not succeed. The I.O. after search at different places found the appellant on 13.10.2012 at Jharsuguda Railway Station. He was duly identified by one Kaustaba Rohidas of village Matulcamp. Thereafter the appellant was apprehended there and was interrogated. On the same day, the appellant was sent for medical examination and he was examined by P.W.9, the Medical Officer, New Khinda P.H.C., under Thelkoloi Police Station. Before examination of the appellant, he voluntarily disclosed before P.W.9 that he kidnapped one minor girl, namely, Samari Munda on 04.10.2012, committed rape and murdered her in Talabira forest on the same day. Thereafter he concealed the dead body of the girl in a ditch inside the forest and covered it with branches and twigs of the tree. Thereafter, P.W.9, the Medical Officer examined the appellant and opined as follows;

"(i) After examination I found the person to be capable of committing sexual intercourse.

(ii) I also found him habituated to sexual intercourse."

The police also made a query from P.W.9 on 16.10.2012 about the injury found on the person of the appellant. He gave his opinion as follows:

"(i) The minor abrasion found on the fore-head and left fore- arm of accused Thidu Munda during my examination could be possible as a result of scratching by branches of trees while moving inside the forest footpath.

(ii) Age of abrasion's 8 to 10 days prior to medical examination."

He also proved the Exts. 9 and 10. In cross-examination, nothing has been elicited from the doctor (P.W.9). While the appellant was in police custody, he confessed his guilt that he has committed rape and murdered the deceased and also stated that he has concealed the dead body of the deceased in Talabira jungle and also concealed his wearing apparels which he was wearing at the time of committing offence near the Kherual River Railway Bridge. Thelkoloi police along with the other villagers went to the place of concealment in a jeep. The statement made by the appellant before the police on 14.10.2012 also proved by P.W.10. The appellant led the police and the witnesses including P.W.10 near Kherual River Railway Bridge. After reaching there, the appellant brought out his cement colour pant, pink colour inner Baniyan and black colour half chadi and produced the same before the witnesses. The I.I.C., Thelkoloi Police Station seized the wearing apparels of the appellant under Ext.12 in presence of P.W.10. In cross-examination, he has admitted that he went to the place of recovery by police jeep. At a distance of about 50 metres from the place of recovery, the jeep was parked and they proceeded further by walking. Thereafter, the appellant gave recovery of his wearing apparels. P.W.5 is the witness, under whom the appellant was working as Tractor driver. He specifically stated that he gave one towel to the appellant and purchased the same from Khinda weekly market. The appellant was working as a driver for three days. On the fourth day without informing him or the labourers of his tractor, the appellant did not come for work, and thereafter also he did not come for further work. After some days, he heard about the occurrence and involvement of the appellant. P.W.5 also participated in the T.I. Parade held inside the chamber of the Judicial Magistrate First Class, Sambalpur with regard to green colour towel. In the said T.I. Parade he identified the green towel which he had given to the appellant from among a number of similar types of towels. He put his signature in the T.I. Parade report. He also identified the M.O.I in Court. Nothing has been elicited in cross-examination by the defence to dispute T.I. Parade report. P.W.7 is the Judicial Magistrate First Class, who conducted the T.I. Parade. In cross-examination, he stated that the towels with which the suspected towel was mixed were of similar looking, with the suspected towel. Similar type of towel as that of the suspected towel and the other towels put-up in the T.I. Parade are commonly available in every house. P.W.5 correctly identified the towel. P.W. 7 also proved the T.I. Parade report. P.W.13, the I.I.C., Thelkoloi Police Station investigated the matter and sent the seized incriminating articles to R.F.S.L., Sambalpur for chemical examination. On completion of the investigation, he filed the charge sheet under Sections 366, 376(2) (f), 302, and 201 IPC. The chemical examination report has been

marked as Ext.31. On the towel (MOI) human blood was detected by the chemical experts. In the accused statement he denied all the facts. On perusal of the record, it reveals that no question was put to him by the court with regard to detection of blood from the towel. Therefore, chemical examination report cannot be utilized against the appellant in view of the ratio decided in the cases of ***Sharad Birdhichand Sarda v. State of Maharastra***, AIR 1984 SC-1622, and the case of ***Sujit Biswas v. State of Assam; 2013 (15) OCR (S.C.) 1036.*** However, with regard to contention of the accused relating to non-examination of Bhutulu Munda and Ghinu is concerned, we can remind the learned counsel that it is the quality not quantity of evidence, which is material. It is well settled that evidence is to be weighed not counted. Bhutulu Munda stands on the same footing as that of P.Ws.3 and 4. Since the evidence of P.Ws.3 and 4 stand undemolished, non-examination of Bhutulu Munda no way weakens the case of prosecution.

So far as the time gap between the time when accused and deceased were last seen together and death of deceased is concerned, it may be noted here that they were last seen together at 2 P.M./3 P.M. on 4.10.2012 as per P.Ws.3 and 4. P.W.8 conducted autopsy on 7.10.2012. He clearly opined that time since death at the time of post-mortem examination is within and about 36 to 72 hours. Under such circumstances, it cannot be said that there is much time gap. Time gap of 72 hours clearly includes 4.10.2012, which is the date of occurrence.

So far as the contention of the learned counsel for the appellant with regard to seizure of wearing apparel of accused is concerned, if nothing else it clearly indicates guilty mind of accused. Such seizure at the instance of accused under the circumstances refers to a conduct which destroys the presumption of innocence. Thus, such conduct is material to draw adverse inference.

With regard to contention of appellant relating to extra-judicial confession having no value having been rendered in police custody, it may be noted that during cross-examination nothing has been elicited from P.W.9 to disbelieve him. No question was asked by defence with regard to presence of police personnel at the time of confession of the accused. As P.W.9 has nothing to gain out of the case, thus his version of confession is to be accepted as trustworthy.

**24.** Thus, this Court has scanned the entire evidence. This case is based on circumstantial evidence such as last seen theory, discovery of the dead body and wearing apparels of the appellant at his instance, subsequent conduct of the appellant under Section 8 of the Evidence Act and after his confession of guilt before the police and the witnesses. The appellant was

absent from the scene, apprehended by the police nine days after the occurrence and examined by the doctor before whom he made extra judicial confession and thereafter wearing apparels of the appellant were recovered at his instance. From the evidence, as discussed earlier, it is crystal clear that prior to the commission of rape and murder of the deceased the appellant abducted her from her house in order to force her to illicit intercourse with him and caused disappearance of evidence of the offence of abduction, rape and murder by throwing the dead body of the deceased in a ditch and covering the same by means of twigs and tree branches.

From the above assessment of the entire evidence on record, it can be safely concluded that the prosecution has successfully proved the case under Sections 366,376(2) (f), 302 and 201 IPC against the appellant.

**25.** With regard to sentence, Mr. Ragada, learned counsel for the appellant submits that this case is not coming under the purview of "rarest of rare" case and he cited the ratio decided in ***Bachan Singh v. State of Punjab***, AIR 1980 SC 898. ***He further relied on Mohd. Chaman v. State (NCT of Delhi); (2001) 2 SCC 28, Rahul v. State of Maharastra, 2005 (10) SCC 322 and Shankar Keshar Rao Khade v. State of Maharastra; 2013 (55) 0CR (S.C.) 623***.

Mr. Pradhan, learned Additional Government Advocate submits that this case is clearly coming under the purview of "rarest of rare" as per the decisions in ***Bachan Singh v. State of Punjab***, AIR 1980 SC 898 and ***Machhi Singh v. State of Punjab***, 1983 (3) SCC **470** taking into consideration the gravity of the offence and the age of the deceased was three years. He further submits that it is a clear case of rape and cold blooded murder of a helpless innocent child of aged about three years. The post-mortem examination report shows a number of injuries upon the genital of the victim child in support of rape. By considering the nature of the crime and the systematic manner in which the victim was abducted, raped and murdered all these clearly demonstrate the depravity of the mind of the accused.

Perused the judgments cited above. In the case of **Mohd. Chaman v. State (NCT of Delhi)**, (2001) 2 SCC 28, the accused a 30 year old man, had raped and killed a one and a half year old child. Despite concluding that the crime was serious and heinous and that the accused had a dirty and perverted mind, the Supreme Court converted the death penalty to one of imprisonment for life since he was not such a dangerous person who would endanger the community and because it was not a case where there was no alternative but to impose the

death penalty. It was also held that a humanist approach should be taken in the matter of awarding punishment. It was held:

> "Coming to the case in hand, the crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is: Whether the case can be classified as of a "rarest of rare" category justifying the severest punishment of death. Treating the case on the touchstone of the guidelines laid down in **Bachan Singh, Machhi Singh** ((1983) 3 SCC 470) and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the "rarest of rare cases" deserving death penalty. We find it difficult to hold that the appellant is such a dangerous person that to spare his life will endanger the community. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. It is our considered view that the case is one in which a humanist approach should be taken in the matter of awarding punishment."

**Rahul v. State of Maharashtra**, (2005) 10 SCC-322 was a case of the rape and murder of a four and a half year old child by the accused. The death sentence awarded to him was converted by the Supreme Court to one of life imprisonment since the accused was a young man of 24 years when the incident occurred, apparently his behaviour in custody was not uncomplimentary, he had no previous criminal record, and would not be a menace to society. It was held:

> "We have considered all the relevant aspects of the case. It is true that the appellant committed a serious crime in a very ghastly manner but the fact that he was aged 24 years at the time of the crime, has to be taken note of. Even though, the appellant had been in custody since 27.11.1999 we are not furnished with any report regarding the appellant either by any probationary officer or by the jail authorities. The appellant had no previous criminal record and nothing was brought to the notice of the Court. It cannot be said that he would be a menace to the society in future. Considering the age of the appellant and other circumstances, we do not think that the penalty of death be imposed on him."

By applying the ratio decided in ***Shankar Kisanrao Khade v. State of Maharashtra; (2013) 55 OCR (SC) 623*** which though was a case of rape and murder of a minor girl of aged about 11 years; there the death sentence awarded was converted to imprisonment for life and the above mentioned cases and keeping in view the mitigating circumstances, namely, the age of the appellant, which was 27 years, that he has no criminal back ground, that during his detention no adverse report has been submitted by the Jail Authority, and the fact that no question was put to the appellant during trial with regard to detection of blood in the towel (see **Sujit Biswas** v. **State of Assam (supra**)) and giving maximum weightage to the mitigating circumstances, this Court comes to the conclusion that the severest of punishment, i.e., the death penalty is not proper in this case. At the same time, this Court is also not inclined to impose the life imprisonment as generally administered, which entails release of the convict after incarceration for about fourteen years. This Court, therefore, comes to the conclusion that the accused/convict should be imprisoned for at least 25 (twenty five) years in terms of the ratio decided in Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka, 2008 Crl. Law Journal 3911.

In the result, this Court upholds the conviction of the accused under Sections 366, 376(2)(f), 302 and 201 of the IPC but set aside the punishment of death imposed on him and modify the sentence to punishment of imprisonment for life, with the further condition that in this case remission of sentence should not be considered before completion of 25 (twenty five) years of incarceration. The reference made by the learned Ad hoc Additional District and Sessions Judge (F.T.C.), Sambalpur is accordingly discharged and the Criminal Appeal Filed by the appellant is partly allowed.

The Death Reference and the Criminal Appeal are accordingly disposed of.

Death reference disposed of.
Appeal allowed in part.

**2013 ( II ) ILR - CUT- 918**

**PRADIP MOHANTY, J & BISWAJIT MOHANTY, J.**

RVWPET NOS.24 & 25 OF 2013 (Dt.24.09.2013)

**NIRANJAN SETHI** ……..Petitioner

*.Vrs.*

**UNION OF INDIA & ORS.** ……Opp.Parties

**CIVIL PROCEDURE CODE, 1908 – O-47, R-1**

**Review of Judgment – No allegation of mala fide or improper functioning of members of the selection committee – Moreover the review petitioner has made an alternative prayer to consider his case alone which has been allowed by this Court vide judgment Dt.21.12.2012 – Review Petitioner cannot say that he will be prejudiced and uniformity in the selection cannot be maintained, particularly when he himself has not acted in a fair manner by not making all the recommendee officers as parties to the original application – Held, there being no error apparent on the face of the impugned judgment Dt.21.12.2012, both the review petitions stand dismissed.**

(Paras 7,10)

**Case laws Referred to:-**

1.AIR 2000 SC 2587 : (Kunhayammed& Ors.-V- State of Kerala)
2.45(1978)CLT 18 : (N. C. Mohanty-V- State of Orissa)
3.2007(1)GLT 260 : (State of Assam & Ors.-V- Rimki Buragohain & Ors.)
4.AIR 1981 SC 487 : (Ajay Hasia etc.-V- Khalid Mujib Sehravardi & Ors. Etc.)
5.(1995)1 SCC 170 : (Meera Bhanja (Smt.)-V- Nirmala Kumari Choudhury (Smt.))

For Petitioner - Mr. Ganeswar Rath, Sr. Advocate (in both the cases)

For Opp.Parties- Mr. S.D. Das, Asst. Solicitor General of India, (for Opp.Party Nos.1 & 2 in both cases)
Addl. Govt. Advocate (for O.P. Nos.3 to 5 in both cases)
Mr. S.K. Padhi, Sr. Advocate, S.K. Singh & Miss.S.Das, T.K. Kamila (for O.P.No.6 in RVWPET No.24 of 2013
& O.P.No.7 in RVWPET No.25 of 2013)
M/s. Shakti Prasad Panda, R.R. Swain

(for O.P.No.6 in RVWPET No.25 of 2013).

***BISWAJIT MOHANTY, J***. Both the Review Petitions have been filed by one Niranjan Sethi with a prayer to review the common judgment dated 21.12.2012 passed by this Court in W.P.(C) Nos.24325 and 24106 of 2011 and confirm the order dated 22.6.2011 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.33 of 2011. Said Niranjan Sethi was opposite party no.6 in W.P.(C) Nos.24325 and 24106 of 2011 and an applicant in O.A. No.33 of 2011 before the learned Tribunal.

**2.** Shortly stated the undisputed facts are as follows:

The Government of Orissa in General Administrative Department vide its letter dated 17.7.2010 called for nomination of Non-State Civil Service Officers for consideration of appointment to two posts of Indian Administrative Service for the year 2010. The above noted selection to Indian Administrative Service is guided by the Indian Administrative Service (Appointment by Selection) Regulations, 1997 (in short "1997 Regulations"). The said Regulations refer to a Committee in Regulation-2(a). Regulation-2(a) makes it clear that "Committee" means the committee constituted under Regulation-3 of the Indian Administrative Service (Appointment by Promotion) Regulations, 1955 (in short "1955 Regulations"). Regulation-3 of 1955 Regulations provides for constitution of a committee to make selection and refers to the Schedule which contains details of members of the Committee. The Committee indicated at Sl.No.3 of the Schedule is relevant for the present purpose. As per the said Schedule, it has to consist of Chairman of UPSC/his representatives, Chief Secretary of State Government, Senior-most officer of the Cadre serving in the State, other than the Chief Secretary, Heads of General Administrative Department/Personnel Department/Revenue Department of State Government not below the rank of Secretary and two nominees of Government of India not below the rank of Joint Secretary. Thus the Selection Committee consists of very high officials. 1997 Regulations prescribe different stages for selection. Regulation-4 of 1997 Regulations makes it clear that the number of persons proposed for consideration of the Committee shall not exceed five times number of vacancies proposed to be filled up during the year. Thus it prescribes an outer limit with regard to number of persons to be considered. Regulation-5 of 1997 Regulations states that the Committee shall meet every year to consider proposal of the State Government made under Regulation-4 of 1997 Regulations and recommend the names of persons not exceeding the number of vacancies for appointment to IAS. Regulation-5 is the most important Regulation as it

speaks of preparation of a list of suitable officers after scrutiny of service records and personal interview.

In the present case, the dispute started with non-recommendation of the name of Niranjan Sethi under Regulation-4 of 1997 Regulations. In fact, initially, the name of said Niranjan Sethi was recommended but later a revised list of 9 officers was forwarded excluding the name of said Niranjan Sethi as some of his official actions were under investigation by the Vigilance Department. Accordingly, 9 officers whose names appeared in the revised list, were directed to appear before the Selection Committee. Against such action, said Niranjan Sethi submitted a representation and later approached the Central Administrative Tribunal, Cuttack Bench, Cuttack by filing Original Application No.718 of 2010. The Tribunal disposed of the said Original Application directing the Union Public Service Commission to consider the representation of Niranjan Sethi. UPSC rejected his representation on 19.1.2011. Upon rejection, said Niranjan Sethi filed O.A. No.33 of 2011 before the Central Administrative Tribunal, Cuttack Bench, Cuttack. In the meantime, on 9.11.2010, the Selection Committee held its meeting for preparing a list of suitable officers as required under 1997 Regulations by scrutinizing service records and by holding personal interview. Nine officers as indicated above appeared in the said personal interview. Accordingly, Niranjan Sethi filed the above O.A. No.33 of 2011 with the following prayers:

"(i) To declare the Selection Committee meeting held on 9th November, 2010 for appointment to IAS in terms of "Indian Administrative Service (Appointment by Selection) Regulations, 1997" as illegal, arbitrary and ab initio void being contrary to the Regulation and direct the Respondents to conduct selection afresh;

(ii) To quash the order of rejection under Annexure- A/6 on 19th January, 2011 being contrary to the Rule, law and without due application of mind;

(iii) And/or to direct the Respondent to consider the case of the Applicant for appointment to IAS as per "Indian Administrative Service (Appointment by Selection) Regulations, 1997" against the two vacancies of IAS 2010; and

(iv) to pass any other order/orders as deemed fit and proper."

Though in the said Original Application filed by Niranjan Sethi, it was made clear at Paragraph-4.6 that the Selection Committee sat on 9.11.2010 interviewed 9 officers, however, despite praying for declaring the Selection Committee meeting held on 9.11.2010 as illegal; Niranjan Sethi did not make

those 9 officers as parties in the said Original Application. Later on, it appears that two out of the 9 officers who attended the interview, intervened in the matter and were added as respondent nos.6 and 7, namely, Gopabandhu Sathpathy and Pradeep Kumar Biswal. Still 7 officers who participated in the selection were left out and were not made parties in O.A. No.33 of 2011.

W.P.(C) Nos.24325 and 24106 of 2011 out of which the present Review Petitions arise, were filed by Gopabandhu Satpathy and Pradeep Kumar Biswal respectively. Said Gopabandhu Satpathy and Pradeep Kumar Biswal are opposite party nos.6 and 7 in Review Petition No.24 of 2013 and opposite party nos.7 and 6 in Review Petition No.25 of 2013. The Tribunal vide its order dated 22.6.2011 allowed Original Application No.33 of 2011 holding that the selection held on 9.11.2010 for filling up two posts of I.A.S. from Non-State Civil Service Officers is unsustainable in the eyes of law and directed the official respondents to conduct selection afresh confining the same to originally recommended 10 officers including Niranjan Sethi, as indicated in Annexure-A/1 of O.A. No.33 of 2011. Challenging the same, Gopabandhu Satpathy filed W.P.(C) No.24325 of 2011 and Pradeep Kumar Biswal filed W.P.(C) No.24106 of 2013 before this Court with prayer to declare the order dated 22.6.2011 passed by the Tribunal to be bad in law and further prayed that the UPSC be directed to publish the final result of selection and accordingly, the appointments be given. The said writ applications were disposed of on 21.12.2012. While disposing of the said writ applications, this Court held that the findings reached by the Tribunal that Niranjan Sethi has been deprived of his right to be considered by the Selection Committee are absolutely just and proper but the direction to quash the entire selection held on 9.11.2010 by the Tribunal was unjust and improper. This Court made it clear that without setting aside the selection held on 9.11.2010, the interest of Niranjan Sethi will be protected by directing the UPSC to consider the case of Niranjan Sethi alone. Thereafter, the Selection Committee should publish the result of selection that was held on 9.11.2010 along with the result of selection of Niranjan Sethi and accordingly, make necessary recommendations. It was made clear that this course was being adopted as the same would not cause any prejudice and harassment to the parties.

**3.** Taking exception to such directions of this Court, Niranjan Sethi filed the present Review Petitions with prayer to review the judgment dated 21.12.2012 passed by this Court in W.P.(C) Nos.24325 and 24106 of 2011 and to confirm the order dated 22.6.2011 passed by the Tribunal in O.A. No.33 of 2011.

**4.** Mr. G. Rath, learned Senior Advocate appearing for the review petitioner (Niranjan Sethi) submitted that the ordering portion as contained in Paragraph-16 of the judgment dated 21.12.2012 altering the directions of the Tribunal to quash the entire selection and confining the same to his client needs to be reviewed and for such alteration no reason has been given. In this context, he relied on a decision of the Hon'ble Supreme Court reported in **AIR 2000 SC 2587** (**Kunhayammed and others** v. **State of Kerala**). He submitted that altering/modifying the direction of the Tribunal for quashing the entire selection process without giving any reason amounts to error apparent on the face of record. Secondly, he submitted that no prejudice would be caused to all 10 candidates as they will attend the selection afresh. Thirdly, he submitted that by altering the direction of the Tribunal uniformity cannot be maintained in the process of selection as there would be a gap of more than two years in between the selection held on 9.11.2010 and one which would be held presently confining the same to Niranjan Sethi after direction of this Court. Mr. Rath further submitted that the persons constituting the new Selection Committee would be different than the persons who constituted the Selection Committee on 9.11.2010. Thus, no uniformity can be maintained. In this context, he relied on a decision of this Court reported in **45 (1978) CLT 18** (**N.C. Mohanty** v. **State of Orissa**), an unreported decision of Jammu and Kashmir High Court in the case of **Gazla Masoodi and other** v. **State and others** in SWP No.1506 of 2011 & CMP Nos.2436, 3357, 3318, 3319 and 3422 of 2012 decided on 04.12.2012, a decision of Gauhati High Court reported in **2007 (1) GLT 260** (**State of Assam and others** v. **Rimki Buragohain and others**), an unreported decision of Madras High Court in the case of **UPSC** v. **Sivakumar** in WP Nos.4371, 4374 and 4375 of 2001 and PMP No.6168 of 2001 decided on 30.6.2006 and **AIR 1981 SC 487** (**Ajay Hasia etc.** v. **Khalid Mujib Sehravardi and others etc**.). Lastly he submitted that after issuance of Annexures-R 6/1 and R 6/2 pursuant to the order dated 22.6.2011 passed in O.A. No.33 of 2011 by the Tribunal fresh cause of action has arisen. Since Gopabandhu Satpathy and Pradeep Kumar Biswal, who are opposite parties in the Review Petitions, never challenged the same, those communications still stand and accordingly, no relief ought to have been granted to Gopabandhu Satpathy and Pradeep Kumar Biswal in W.P.(C) Nos.24325 and 24106 of 2011. In this context, he relied on a decision of the Hon'ble Supreme Court reported in **(1996) 6 SCC 291**.

**5.** Mr. S.K. Padhi, learned Senior Advocate appearing for opposite party no.6 in the Review Petition submitted that the scope of review is very limited and it has got its well-defined parameters as settled by the Hon'ble Supreme Court. In this context, he relied on a decision of the Hon'ble Supreme Court reported in **(1995) 1 SCC 170** (**Meera Bhanja (Smt.)** v. **Nirmala Kumari**

**Choudhury (Smt.)**) wherein the Hon'ble Supreme Court has made clear that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1 of the Civil Procedure Code. The Review Petition has to be entertained only on the ground of error apparent on the face of record and not on any other ground. An error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require long-drawn process of reasoning of points where there may be conceivably be two opinions. The limitation of powers of the Court under Order 47, Rule 1 of the Civil Procedure Code is similar to the jurisdiction available to the High Court while seeking review of the orders under Article-226 of the Constitution of India. Secondly, he submitted that the submission of the learned counsel for the review petitioner that no reason has been given for modifying/altering the order of the Tribunal is not correct. Paragraph-16 of the common judgment rendered in W.P.(C) Nos.24325 and 24106 of 2011 itself contains the reasons, i.e., no prejudice/harassment be caused to the parties. Here all recommendees were not made parties before the Tribunal though a prayer was made for setting aside the entire selection held on 9.11.2010. On the question of maintaining the uniformity in the selection process, Mr. Padhi learned Senior Advocate for opposite party no.6 submitted that the process of appointment by selection under 1997 Regulations passes through many stages as delineated under Regulations 5, 6 and 7 of 1997 Regulations. Since the Selection Committee consists of very high level officials, it is expected that these officials would act in a fair and reasonable manner. Therefore, the apprehension of the review petitioner is without any basis. Further Mr. Padhi pointed out that detail guidelines have been issued for distribution of marks in the process of selection. As per the guidelines out of maximum 100 marks, 50 per cent is assigned to evaluation or ACRs for the 5 preceding years and 50 per cent has been assigned to personal interview. The guidelines further make it clear that the question in the interview can be asked on regional/national/international issues and an indicative list containing the subjects covering the regional, national and international issues have been indicated. All those are contained in Annexures-B/6 and B/7 filed along with the counter-affidavit of Gopabandhu Satpathy in both the Review Petitions. Regarding various decisions cited by Mr. Rath, learned Senior Advocate for the review petitioner, Mr. Padhi submitted that those decisions are distinguishable on fact and even if persons are interviewed by the same Board consisting of same persons there is no bar for them to accept /to adopt different modalities while interviewing different candidates.

**6.** Mr. Padhi further submitted that in the Original Application the review petitioner at Paragraph-iii of his prayer which has been quoted earlier has

clearly made an alternative prayer to consider his case and since this Court vide its judgment dated 21.12.2012 has allowed the said prayer, the review petitioner can have no grievance in the matter. Lastly, he submitted that so far as non-challenging of documents under Annexures R-6/1 andR-6/2 is concerned, the same being consequential to the order dated 22.6.2011 passed by the Tribunal in O.A. No.33 of 2011, nothing much can be read into it as the original order dated 22.6.2011 of the Tribunal was challenged in W.P.(C) Nos.24325 and 24106 of 2011.

**7.** In such background, let us examine whether there exists error apparent on the face of judgment dated 21.12.2012 rendered by this Court in W.P.(C) Nos. 24325 and 24106 of 2011 warranting review of the same.

The submission of the learned counsel for the review petitioner that there exists no reason for modifying the order of the Tribunal which set aside the entire selection held on 9.11.2010 is not correct. It has been clearly indicated in the judgment that modification has been done keeping in mind that the same would not cause any prejudice/harassment to the parties. In this context, it may be noted here that though the Review Petitioner in Original Application before the Tribunal made a prayer to set aside the entire selection held on 9.11.2010 and though he knew that in the said process, 9 officers have already been interviewed, he deliberately did not make all the recommended officers as parties. Therefore, setting aside of the entire selection would have prejudiced the rest of the officers who have not been made parties and have already attended the interview. Setting aside of entire selection would have been a great harassment to such officers. Further since no allegation of malafide or improper functioning of members of Selection Committee was made by the Review Petitioner, setting aside of entire selection was improper. The Tribunal in its reasoning for setting aside the entire selection mainly referred to the fact that the Selection Committee was fed with an incomplete list, in which the name of Niranjan Sethi even though eligible was not there thus he was prevented from appearing before the Selection Committee. Accordingly, the selection held on 9.11.2010 was quashed by the Tribunal, though there was no allegation of malafide or improper functioning of members of the Selection Committee. Regulation-4 of 1997 Regulations makes it clear that number of officers required for consideration of selection shall not exceed five times of the number of vacancies proposed to be filled up during the year. But nowhere says that it is bound to consider the number of officers who must be five times of the number of proposed vacancies. Thus here for two vacancies 9 officers were considered. Therefore, it cannot be said that the Selection Committee was fed with an incomplete list. On this account also the entire selection cannot be set aside. Lastly, more important thing is that the review petitioner has

made an alternative prayer to consider his case alone, which has been allowed by this Court vide its judgment dated 21.12.2012. In such background, the review petitioner cannot say that he will be greatly prejudiced by the said order and uniformity in the selection cannot be maintained, particularly, when he himself has not acted in a fair manner by not making all the recommendee officers as parties to the Original Application. It lies ill in his mouth to plead about equality and uniformity when his conduct does not show him to be a believer in such concepts. Though the review petitioner pleads about equity, equality and uniformity, he wanted to get the entire selection quashed without making all the officers as parties whom he knew have already appeared in the interview for selection. Therefore, the decisions cited by the learned counsel for the review petitioner on the question of uniformity are distinguishable on facts, as all the officers, who are going to be affected if the entire selection is set aside, are not before us and neither they had opportunity to address the Tribunal on issues raised.

In this context, Mr. G. Rath, learned Senior Advocate relied on a decision reported in **45 (4978) CLT 18** (**N.C. Mohanty** v. **State of Orissa**). In that case the petitioner prayed for seniority over opposite party nos. 3 to 9 and for quashing of the gradation list. Thus, he made officers as opposite parties over whom he claimed relief. Whereas in the present case as indicated earlier the recommendee officers were not made parties before the Tribunal. In such background, it will not be equitable to quash the entire process of selection for maintaining uniformity in selection process. The question of maintaining uniformity in selection process could have been considered only if all necessary parties were there before the Tribunal. Thus, the factual scenario of the present case is different from that of the above noted case.

So far as the judgment rendered in Gazala Masoodi's case (supra) by the High Court of Jammu and Kashmir is concerned, there the select list was challenged on the ground of violation of statutory rules as well as process for selection being vitiated for want of uniformity. There it was held that interview of the candidates, who formed one class, by three committees offended the rule of uniformity. It was also found that there has been violation of the statutory rules. However unlike the present case from Paragraph-19 of the judgment, it appears that the private candidates were made parties in that case. However, it is not clear whether all the selected candidates were made parties in that case. In fact in that case no issue was framed as to whether the entire selection can be set aside in absence of all the selected candidates. Since that issue was not raised, it cannot be presumed that in the said case all the selected candidates were made

parties. Thus, the case of Gazala Masoodi (supra) is distinguishable on facts.

So far as the decision of Gauhati High Court in **Rimki's** case (supra) case is concerned, it is clear from the judgment that though the selected candidates were not arrayed as parties in the case filed before the High Court of Gauhati, however, later, on account of direction of Gauhati High Court, public notification of the proceeding was made in four news papers so as to enable selected candidates and others interested in the proceeding to appear before the court if they so desired. Thus in that case, enough opportunity was given to the selected candidates to participate in the proceeding. Thus, the facts are different from present case.

So far as the decision of Madras High Court in the case of UPSC v. R. Shivkumar is concerned, in the said case from Paragraph-5, it is clear that the persons included in the select list were all arrayed as respondents in the three Original Applications.

So far as **AIR 1981 SC 487** cited by Mr. Rath is concerned, in that case no issue is there as to whether the entire selection process can be set aside in the absence of persons who have undergone the process of selection. At the cost of repetition, it can be stated that if all the recommendee officers, who have undergone selection process/personal interview were there as parties before the Tribunal, we could have gone into the question of maintaining uniformity. Since these officers were not there before the Tribunal, it would be improper to quash the entire selection and direct fresh selection for maintaining uniformity.

In this context, we would like to draw attention of everybody to a judgment of the Hon'ble Supreme Court reported in AIR 2002 SC 834 (The State and Financial Corporation and another v. M/s. Jagdamba Oil Mills and another) which inter alia deals as to how the precedents are to be relied upon. The Hon'ble Supreme Court in this case has made it clear that the Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which the reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appeared. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. For the above noted

reasons, the decisions cited by Shri G.Rath, learned Senior Counsel are factually distinguishable and have no application to the present case.

**8.** Further the contentions of the review petitioner that no prejudice would be caused if 10 candidates attend the selection afresh cannot be accepted inasmuch as by such course of action, the officers, who are not parties before us would have to undergo rigorous process of interview once again and that will cause them much prejudice and harassment. Further it is reiterated that no prejudice would be caused to the review petitioner to undergo process of interview alone as the same stands granted in tune with his alternative prayer. In this context we accept the contention of Mr. Padhi that since the selection committee is a high power body consisting of high officials it is expected that it would act fairly.

**9.** So far as submission of Mr. Rath on Annexures-R-6/1 and R-6/2 relying on a decision reported in **(1996) 6 SCC 291,** it may be noted here that the facts of the above decision stand on a different footing than that of the present case. Moreover since the original order of the Tribunal dated 22.6.2011 in O.A. No.33 of 2011 has been challenged and modified, at this stage arguments advanced by Mr. Rath on Annexures-R6/1 and R6/2 are of little use or impact.

**10.** For all the reasons, there exists no error apparent on the face of the judgment dated 21.12.2012 of this Court and accordingly, both the Review Petitions stand dismissed. No costs.

Review petitions dismissed.

**2013 (II) ILR - CUT- 927**

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

CRLMC NOS. 1693 OF 2008 & 33 OF 2009 (Dt.12.07.2013)

**BIBHUDHENDU PRASAD MOHANTY** ……...Petitioner

.*Vrs.*

**STATE OF ODISHA (VIGILANCE)** ……..Opp.Party

**PREVENTION OF CORRUPTION ACT,1988 - Ss.7,13(2),13(1) (d)**

**Trap Case – Mere recovery of tainted money is not sufficient to convict the accused when there is no corroboration of the testimony of the complainant regarding demand of bribe by the accused – Held in such case evidence of the complainant cannot be relied on.**

**In this case the over hearing witness has not heard the demand, although he has seen the transaction and acceptance, So the version of the complainant, not being corroborated, cannot be relied on – Moreover there is no prospect of the case ending in conviction of the petitioner and allowing the case to continue would amount to wastage of valuable time of the Court – Held, the impugned order taking cognizance as well as the proceeding in the trap case are quashed.**

(Paras 11,12,13)

**Case laws Referred to:-**

1.(2007)36 OCR (SC) 47 : (B. Noha-V- State of Kerala & Anr.)
2.(2012)53 OCR (SC) 173 : (Ahmad-V- State of Karnataka)
3.AIR 1992 SC 604 : (State of Haryana & Ors.-V- Ch. Bhajan Lal & Ors.)
4.(1979)4 SCC 526 : (Panalal Damodar Rathi-V- State of Maharashtra)
5.(2009)3 SCC 779 : (C.M. Girish Babu-V- CBI, Cochin, High Court of Kerala)
6.(1979)4 SCC 725 : (Suraj Mal-V- State (Delhi Admn.).

For Petitioner - M/s. P.C. Jena, S.J.Das & A. Barik.
For Opp.Party - Mr. P.K. Pani,
Addl. Standing Counsel (Vigilance)

---

***M.M. DAS, J.*** As both the aforesaid Criminal Misc. Cases filed by the accused – petitioner arise out of one T.R. Case, being T.R. Case No. 27 of 2008, corresponding to Cuttack Vigilance P.S. Case No. 43 of 2007 (G.R. Case No. 43 of 2007) pending before the learned Special Judge (Vigilance), Cuttack, they were heard together and are being disposed of by this common judgment.

2. CRLMC No. 1693 of 2008 has been filed by the accused petitioner to quash the FIR, upon which, Cuttack Vigilance P.S. Case No. 43 of 2007 was registered. As during pendency of the said case, a charge sheet has been filed and the learned Special Judge, Vigilance, Cuttack in T.R. Case No. 27 of 2008 took cognizance of the offences under section 13(2) read with

13(1)(d)/7 of the P.C. Act against the accused-petitioner, CRLMC No. 33 of 2009 has been filed to quash the said order dated 23.12.2008 taking cognizance of the above offences against the petitioner.

3. The short facts involved in both the cases are that one Debadutta Mishra, who happens to be a reporter of the daily Oriya newspaper, "The Dharitri", lodged a report before the Superintendent of Police, Vigilance, Cuttack regarding a land dispute, inter alia, alleging that he lodged an F.I.R. about the said land dispute before the present petitioner, who was discharging the duty as I.I.C., Jajpur Town Police Station and the said F.I.R. was entered as a Station Diary by the petitioner, but he did not take any action thereon. It was alleged in the said report lodged by Mr. Debadutta Mishra that when he again and again requested the petitioner to take action against the culprits, the petitioner demanded Rs. 3,000/- for taking action. On such information being lodged, the Vigilance police on maintaining proper procedure along with the official witnesses proceeded to Jajpur Police Station, where it was found that the petitioner was in the Government quarters. The complainant and the over hearing witnesses went to the petitioner's quarter and they were asked by the petitioner to sit on the Sofa which was on his verandah and instructed the complainant to follow him to his bed room, where he demanded and accepted the gratification from the complainant. After receipt of the money, he examined the notes and kept the tainted money in his right side Pant pocket. Then the money was immediately recovered from his Pant pocket and his hand was washed with Sodium Carbonate solution when the colour of the solution turned light pink.

4. The petitioner's case is that the allegation of demand of illegal gratification by him is not corroborated by any witness including the over hearing witness. The report of the Vigilance Department itself categorically indicates that the over hearing witness has not heard regarding the demand, but has seen the acceptance, which is evident from the detection report available in the case diary. The further case of the petitioner is that the dispute is purely civil in nature between the informant's father-in-law and the land owner, where the petitioner had nothing to do in the criminal case initiated by the informant by lodging information before him. Admittedly, the over hearing witness has not seen the occurrence, but has only stated to have seen the acceptance of the money which, according to the petitioner, is not sufficient to prove the case, once the demand is not proved.

5. It was contended on behalf of the petitioner that even if there is acceptance of money in absence of any demand, it cannot be accepted to be a case of bribery.

6. Mr. Pani, learned counsel for the State, however, submitted that on the facts of the case, acceptance of the money by the petitioner itself is sufficient to draw an inference that it was a gratification accepted " as motive or reward" for doing or forbearing to do any official act and the word 'gratification' need not be stretched to mean reward because reward is the out-come of the presumption which the court has to draw on the factual premises that there was payment of gratification. Mr. Pani has relied in support of his contention on the decision of the Hon'ble apex Court in the case of ***B.Noha v. State of Kerala and another,*** (2007) 36 OCR (SC) 47. He further submitted that even accepting that the dispute was purely civil in nature, the Hon'ble apex Court in the case of Syed ***Ahmad v. State of Karnataka,*** (2012) 53 OCR (SC) 173 laid down that explanation (d) to Section 7 of the P.C. Act clearly says that whether the accused could or could not deliver results becomes irrelevant in view of the acceptance of the testimony of P.Ws 1 and 2 in the said case. He also relied upon various judgments of the Hon'ble apex Court in support of his contention that when a public servant is charged under section 161 IPC and it is alleged that illegal gratification was taken by him for doing or procuring an official act, it is not necessary for the court to consider whether or not the accused public servant was capable of doing or intended to do such an act.

7. Learned counsel for the petitioner, also relied upon various decisions of different High Courts as well as the Hon'ble apex Court in contending that if the fact of demand has not been proved, no offence is made out under sections 13 (2) and 13 (1) (d) read section 7 of the P.C. Act.

8. It is trite that in a trap case for taking bribe, mere recovery of tainted money divorced from circumstances under which it is paid is not sufficient to convict the accused. When there is no corroboration of the testimony of the complainant regarding demand of bribe by the accused, it has to be accepted that the complainant's version is not corroborated and, therefore, evidence of the complainant cannot be relied on.

9. Exercise of power under section 482 Cr.P.C. has been succinctly dealt with in various judgments of the Hon'ble apex Court, wherein it has been held that the entire materials produced by the prosecution, if do not make out a case against the accused, the continuance of such a criminal proceeding will amount to abuse of the process of the Court and will be a travesty of justice. In the oft quoted judgment of the Hon'ble apex Court in the case of ***State of Haryana and others v. Ch. Bhajan Lal and others,*** AIR 1992 SC 604, the Hon'ble apex Court has laid down the guidelines, which are to be followed while exercising inherent power by this Court under

section 482 Cr.P.C. One of the grounds mentioned is that where un-controverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused, the Court can exercise the inherent power under section 482 Cr. P.C. for quashing the proceeding.

10. Reverting back to the facts at hand and referring to the materials available on record, it appears that it is a fact that at the time of trap, a sum of Rs. 3,000/- in currency notes was received from the complainant by the accused-petitioner. But from the detection report, it appears that after the accused –petitioner accepted the money from the complainant, the Investigating Officer disclosing his identity and the identity of other members, charged the petitioner about acceptance of bribe and he (accused-petitioner) disclosed that the complainant had taken Rs. 3,000/- from him as hand loan and today he has repaid the same which was accepted by him. It is an admitted fact that the tainted notes on being accepted and the petitioner's hand being washed, the solution/chemical changed its colour which only shows that the said currency notes were received by the accused-petitioner in his own hand. However, the statement of the over hearing witness before the I.O. was that as per plan, he accompanied the complainant Shri Mishra to the residence of the accused-petitioner. Both of them entered inside his residence. He waited in the inner verandah, which is in between the bed room and the entrance room and the complainant entered inside the bed room. Seeing him, the Orderly of the petitioner made query about his identity to which he gave clarification that he has come with complainant since he is one of his relations. He has not heard the demand, but has seen the transaction and acceptance, after which, he relayed the information to the other members of the trap party. After getting information from him, the Vigilance team arrived and took follow up action. ***(emphasis supplied)***

11. In the case of ***Panalal Damodar Rathi v. State of Maharashtra*** (1979)4 SCC 526, a three Judge Bench of the Hon'ble apex Court held that when there was no corroboration of the testimony of the complainant regarding the demand of bribe by the accused, it has to be accepted that the version of the complainant is not corroborated and, therefore, the evidence of the complainant cannot be relied on.

In the case of ***C.M. Girish Babu v. CBI, Cochin, High Court of Kerala,*** (2009) 3 SCC 779, it was held by the Hon'ble apex Court referring to its earlier judgment in the case of ***Suraj Mal v. State (Delhi Admn.),*** (1979)4 SCC 725 that mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to convict the accused

when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe.

***(emphasis supplied)***

12. In the above backdrop, on consideration of the facts involved in the present case, this Court is firmly certain that there is no prospect of the case ending in conviction of the petitioner and allowing the criminal case to be continued would amount to wastage of valuable time of the court for holding a fruitless trial for the purpose of formality of completion of the procedure to pronounce the conclusion on a future date. It is an admitted position that most of the Vigilance Courts in the State are under heavy pressure of work and in such situation, if a case of the present nature is allowed to be continued, it would amount to adding fuel to the fire, ultimately serving no purpose. This Court, therefore, concludes that the learned court below should not have taken cognizance of the offences as done in his order dated 23.12.2008 against the accused-petitioner and the case should not be permitted to be continued as otherwise the same would amount to abuse of the process of the Court as well as a travesty of justice.

13. In the result, the order dated 23.12.2008 passed by the learned Special Judge, Vigilance, Cuttack taking cognizance of the offences, as stated above, against the accused-petitioner stands quashed and, consequently, the proceedings in T. R. Case No. 27 of 2008 pending before the said court also stands quashed. Both the Criminal Misc. Cases are allowed.

Applications allowed.

**2013 (II) ILR - CUT- 932**

**M. M. DAS, J & DR. A. K. RATH, J**

W. P. (C) NO. 14057 OF 2013 (Dt.12.07.2013)

**AMIT KR. PATTANAYAK** ……..Petitioner

*.Vrs.*

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

**ODISHA EDUCATION ACT, 1969 - S.10-C (6)**

**Petitioners challenged their transfer order on the ground that no common Cadre of Lecturers of different subjects in different Colleges has been constituted – In fact a common Cadre of Lecturers of all the aided Colleges of the State have been constituted by the State Government on 22.10.1982 – Once a College comes within the purview of Grant-in-aid fold, there is no provision for making a separate notification of encadrement of every such individual appointment – So when a Cadre is constituted of a service all persons subsequently appointed to the service, are automatically appointed to the Cadre and become subject to the conditions of the service relating to the Cadre – Held, petitioners who are appointed in aided Colleges as Lecturers are within the common Cadre and were liable to be transferred.**

(Paras 13, 14)

**Case law Referred to:-**

1991 (II) OLR-87 : (Akshya Kumar Beura-V- Director, Higher Education & Ors.)

For Petitioner - M/s. B. Routray, Sr. Advocate,
M/s. S.K. Padhi, Sr. Advocate.

For Opp.Parties - Mr. Sangram Das,(Counsel for the State)

---

Though all these writ petitions have been listed for admission, but on the consent of the learned counsel for the parties, the same are taken up for final disposal.

We have heard Mr. B.Routray, learned Senior Counsel appearing for the petitioners in W.P.(C) No.14057 of 2013 and 14059 of 2013, Mr.S.K.Padhi, learned Senior Counsel appearing for the petitioner in W.P.(C) No.14062 of 2013 and Mr. Sangram Das, learned counsel for the State.

2. In all the writ petitions, challenge is being made to the order of transfer passed by the Director, Higher Education, Orissa, Bhubaneswar.

3. The case of the petitioners is that in absence of any cadre, as provided under Sec. 10 (C) of the Orissa Education Act, (hereinafter referred to as 'Act' for the sake of brevity), the impugned order is bad in law. It is further stated that though a specific provision has been provided under Sec.10 (C) of the Act to constitute a common cadre of lecturers of different subjects in the different colleges, but no common cadre has been constituted till now. It is further stated that transfer of an employee of an aided college is governed under a set of statutory rules i.e. Orissa Aided Educational

Institutions Employees Common Cadre and Inter transferability Rules, 1979 (hereinafter referred to as 'Rules' for the sake of brevity). Rule 3 of 1979 Rules provides constitution of the common cadre. Rule 6 vests the power on the Director to transfer an employee of a common cadre in case of colleges. However, no common cadre has been constituted.

4. Pursuant to issuance of notice, opposite parties entered appearance and filed counter affidavit. The specific case of the opposite parties is that a common cadre of lecturers of all aided colleges of the State has been constituted by the State Government in exercise of the powers conferred by sub-Sec. (1) of Sec.10 (C) of the Act vide Government order dated 22.10.1982 under Annexure-A. The further case of the opposite parties is that once a cadre is constituted, all persons, who are subsequently appointed to the service, are automatically appointed to the cadre. It is further stated that all persons, who are appointed in aided colleges as lecturers in regular manner and are receiving Grant-in-Aid, are borne in the common cadre and, as such, any lecturer being within the said cadre is liable to be transferred.

5. Referring to the provisions of Sec.10 (C) of the Act and Rules 3 and 6 of the 1979 Rules, learned Senior Counsel appearing for the respective petitioners submit that since no cadre has been constituted till date, the order of transfer is bad in law and unworkable.

6. Per contra, learned counsel appearing for the State submits that a common cadre of lecturers of all the aided colleges of the State has been constituted way back on 22.10.1982 vide Annexure-A. Furthermore, all persons, who were subsequently appointed to the service, are automatically appointed to the cadre and any lecturer being within the common cadre, is liable to be transferred by the State Government under sub-sec. (6) of Sec.10 (C) of the Act as well as 1979 Rules.

7. On the rival submissions of the parties, really one point arises for consideration as to whether a common cadre of lecturers relating to the aided colleges of the State of Orissa has been constituted by the State Government in accordance with the provisions of Sec.10 (C) (1) of the Act and whether the petitioner, who has been appointed in an aided college as lecturer in a regular manner receiving Grant-in-Aid, is borne in the common cadre and liable to be transferred.

8. Though submissions of the learned Senior Counsel appearing for the respective petitioners at flash appears to be persuasive, but on a dipper scrutiny of the provisions of Sec.10 (C) (1) of the Act and Rules 3 and 6 of

the 1979 Rules and the order dated 22.10.1982 vide Annexure-A, the same holds no water. In service jurisprudence, the term 'cadre' has definite legal connotation. The word 'cadre' is not synonymous with service. Section 10 (C) of the Act provides for constitution of a common cadre and its consequences.

9. To appreciate the rival submissions made at the Bar, the provisions of sub-Secs. (1) to (5) of Sec.10 (C) of the Act and Rules 3 and 6 of the 1979 Rules are extracted hereunder:

> ***"10-C.*** Constitution of common cadre and its consequences. (1)The State Government may, by order, constitute a common cadre in relation to all or any class of employees of all or any category of aided Educational Institutions as may be specified in the order.
>
> (Provided that the State Government may constitute a common cadre in relation to all or any class of employees of all or any category of aided High Schools or Upper Primary Schools for the whole State or for any educational circle or may be specified in the order)
>
> (2) Before constitution of a common cadre under Subsection (1)- The Director, in case of Colleges, and the Inspector of Schools having jurisdiction, in case of schools, shall furnish detailed information relating to the terms and conditions of service prescribed for such cadre to every employee belonging to that cadre with a notice requiring him to exercise his option within such period, not being less than thirty days and more than forty-five days as may be specified therein, for absorption or otherwise in such cadre.
>
> (3) The option shall be exercised in writing and shall be file with the Director or the Inspector of Schools, as the case may be.
>
> (4) Any employee who fails to exercise option within the aforesaid period shall be deemed to have opted for being absorbed in the common cadre.
>
> (5) Where an employee of Educational Institution exercises his option for not being absorbed in the common cadre the Managing Committee, or as the case may be, the Governing Body of the Institution shall terminate the services of such employee within fifteen days from the date of receipt of an intimation to that effect from the Director, as the case may, be, the Inspector of Schools, and the provisions of Section 10-A shall not apply to any such termination".

xxx xxx

***"Rule 3***. Constitution of the common cadre – On constitution of the common cadre under Sub-section (1) of Sections 10-C by Government a gradation list of persons in respect of cadre, shall be prepared by the Director in Orissa Gazette No.1481 – Dt.20.7.1979 – S.R.O. No.722-79 in accordance with such direction as the Government may issue from time to time.

xxx xxx

6. Power to transfer – (1) The Director shall have the power to transfer employee of the common cadre in the case of Colleges. The Inspector in the case of High Schools and the District Inspector in respect of Middle English Schools shall have the power to transfer employee in the common cadre from the institution to another within the jurisdiction.

(2) The Director shall have the power to transfer employees in the common cadre from one educational circle to another in respect of employees serving in High Schools and the Inspector, one educational district to other within his circle incase of employees serving of Middle English Schools.

(3) No employee who has not completed five years of the service in a particular institution shall be ordinarily
transferred :

Provided that such an employee may be transferred before completion of the said period in public interest, administrative and academic consideration so demanded.

(14) The authorities empowered to make transfer under Sub rules (1) and (2) shall be the disciplinary authorities in respective cases during the period intervening the date of relief and date of joining)".

10. Once a cadre is constituted of a service, all appointments made thereafter to the service are, ordinarily, made in the cadre either as within the strength of the cadre or as temporary additions to the strength. When a cadre is constituted, all persons who were subsequently appointed to the service, are automatically appointed to the cadre and become subject to the conditions of the service relating to the cadre.

11. An identical question came up for consideration before this Court in the case of ***Akshya Kumar Beura Vrs. Director, Higher Education and others***, 1991(II) OLR-87. In the said case, this Court was called upon to decide as to whether the petitioner, who was not a person belonging to the common cadre of lecturers, was liable to be transferred. Referring to sub-Secs. (1) to (5) of Sec.10(C) and also Rules 3, 4 and 5 of the 1979 Rules, this Court in the aforesaid decisionheld as follows:-

> "A plain reading of Sub-sec.(2) of Sec. 10(C ) of the Orissa Education Act shows that the option in question is to be invited from the persons at the first constitution of the cadre. It is the specific legislative provisions that before the cadre is constituted every employee who is to be absorbed in that cadre is to be furnished with the detailed informations regarding the terms and conditions of service and option is to be asked from him giving him time to exercise the same within not less than thirty days and not more than 45 days. Sub-sec. (4) makes provision for a deemed exercise of option in favour of encadrement if there is a failure to exercise the option within the stipulated period and under Sub-sec. (5) if an employee refuses to be absorbed in the cadre, his services are to be terminated. There is no provision in the Section requiring an option to be invited as and when every new appointment is made to the category of service in respect of which the cadre is constituted. Once a cadre is constituted of a service, all appointments made thereafter to the service are, ordinarily, made in the cadre either as within the strength of the cadre or as temporary additions to the strength. The contention of there being a requirement to ask for option to every fresh appointee is wholly without substance being plainly unworkable. It is well known that when a cadre is constituted, all persons who are subsequently appointed to the service are automatically appointed to the cadre and become subject to the conditions of service relating to the cadre. This submission of Mr. Mohapatra must accordingly fail".

12. In paragraph-5 of the judgment, their Lordships further held as follows:-

> "Sec.10-C(1) vests authority in the Government to constitute a common cadre in relation to all or any class of employees of all or any category of aided educational institutions. The lecturers of the aided colleges or the teachers of the aided schools constitute class by themselves in respect of whom constitution of common cadres can be contemplated of. In schools trained graduates may be even

contemplated as a different class. It is difficult to imagine that the State Government to constituting a common cadre of lecturers of aided colleges will make a further classification between the persons who are existing by the date of the constitution of the cadre and those who are appointed thereafter. Such a classification would neither be intelligible nor reasonable.Constitution of a common cadre entails within it different consequences bearing upon the service career of the incumbent, such as seniority, promotion, pay, etc. It may justifiably be said that the persons who are not inside the cadre, while the cadre is existing, are not eligible to the benefits enjoyed by those borne in the cadre. Such persons maybe adversely affected if they are not included in the cadre. The entire mischief appears to have arisen from the words used in Annexure-A extracted above wherein the constitution of the cadre was directed of lecturers who have opted or deemed to have opted for absorption in the concerned cadre. Even though on a plain reading the words are amenable to an interpretation as is suggested by Mr. Mohapatra, yet we think that the real intention behind the order was different and that phraseology used is more a matter of confusion than revealing one real intention. It could not have been the intention of the Government in making the order to confine the constitution of the cadre only to the existing personnel and leave out all persons who would be appointed thereafter. It is to be remembered that persons who had opted not to be included in the cadre were to have their services terminated under Sub-sec.(5) of Sec.10-C. It rather appears that specifically the lecturers who had opted or were deemed to have opted were indicated in the order only for the purpose of identification but not so as to exclude others. The communication of the Director in Annexure-4 that formal enacadrement and notification takes a long time as such never meant that the petitioner was not within the cadre but only meant that a formal notification publishing the list of the cadre takes a long time. In that view of the matter, we would hold that all persons who are appointed in aided colleges as lecturers in the regular manner are borne in the common cadre and hence the petitioner being one such, is within the common cadre and was liable to be transferred which power vested in the Government under Sub-sec.(6) 10-C as also under Common Cadre Rules. (emphasis is ours)

13. On taking a holistic view of the matter, we are of the considered opinion that a common cadre of lectures of all the aided colleges of the State have been constituted by the State Government way back on 22.10.1982 vide Annexure-A. In the back drop of the settled legal dictum that once a

cadre is constituted of a service, all appointments made thereafter to the service are ordinarily made in the cadre either as within the strength of the cadre or as temporary additions to the strength, we are of the view that when a cadre is constituted, all persons, who were subsequently appointed to the service, are automatically appointed to the cadre and become subject to the conditions of the service relating to the cadre.

14. We further hold that all persons, who are appointed in an aided colleges as lecturers in regular manner and receiving Grant-in-Aid, are borne in the common cadre and the petitioners being such lecturers are within the common cadre and liable to be transferred, which power is vested in the Government under sub-Sec. 6 of Sec.10-C of the Act.

15. Referring to Annexure-A, list of 255 Non- Government Aided Junior Colleges receiving Grant-in-Aid prior to 1994, Annexure-B list of 193 Non-Government Aided Junior Colleges receiving Grant-in-Aid under Grant-in-Aid Order 1994, Annexure-C, list of 40 Non-Government Block Grant Junior Colleges receiving Block Grant in Grant-in-Aid Order 2004 and Annexure-D, list of 108 Non-Government Aided Degree Colleges receiving Grant-in-Aid prior to 1994 which are appended to Orissa (Aided Colleges, Aided Junior Colleges and Aided Higher Secondary Schools) Grant-in-Aid Order 2009, it is submitted that a cadre in respect of the colleges receiving Grant-in-Aid after 1994 has not been constituted.

16. We are afraid that once a college comes within the purview of Grant-in-Aid fold, there is no provision for making a separate notification of encadrement of every such individual appointment.

17. All the contentions raised by the learned Senior counsel appearing for the respective petitioners having failed, the writ applications are liable to be dismissed. The writ applications are accordingly dismissed. No order as to costs.

Writ petition dismissed.

**2013 (II) ILR - CUT- 940**

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

R.S.A. NOS. 557 & 558 OF 2004 (Dt.14.08.2013)

**BANSIDHAR SETHI & ORS.** ……..Appellants

*.Vrs.*

**KUSUMA DEI & ORS.** ……Respondents

**A. EVIDENCE ACT, 1872 – S. 90**

**Presumption under Section 90 arises in respect of original documents only but not in respect of certified copy of a document which has been admitted as secondary evidence.**

(Paras 12,13,14)

**B. HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1937 – S.3 (1)**

**Whether Hindu Women's Right to Property Act, 1937 empowers a widow to gift her husbands property ? – Held, No.**

**In this case the property in question exclusively belonged to Madan Sethi, the father of the original plaintiff – Madan died prior to 1944 i.e. after 1937 Act came in to force leaving behind two widows and a married daughter as well as a minor son – So even though the two widows acquired some right U/s.3 of the 1937 Act, such right is a limited right – It is also well settled that such widow has no right of disposition of the property except for religious and charitable purposes and other purposes amounting to legal necessity – Held, the widow of Madan Sethi, who is the mother of the plaintiff had no right of alienation of the suit property by way of gift deed in the year 1944.**

(Paras 23, 24)

**Case laws Referred to:-**

1.AIR 1996 SC 1253 : (Lakhi Baruah & Ors.-V- Sri Padma Kanta Kalita & Ors.)
2.1998(II) OLR 295 : (Kirtan Behari Acharya-V- State of Orissa & Ors.)
3.AIR 1993 Patna 129 : (Haradhan Mahatha & Ors.-V- Dukhu Mahatha)
4.AIR 1954 SC 606 : (Sri Lakhi Baruah & Ors.(Supra),Sital Das-V- Sant Ram & Ors.)
5.AIR 1956 SC 305 : (Harihar Prasad Singh & Anr.-V- Deonarain Prasad & Ors.)

6.AIR 1968 SC 947 : (KalidindiVenkata Subharaju & Ors.-V-Chintalapati Subharaju & Ors.)
7.AIR 1935 PC 132 : (Basant Singh & Ors.-V- Brijraj Saran Singh & Ors.)
8.AIR 1983 Orissa 71 : (Sulabha Gouduni & Ors.-V- Abhimanyu Gouda & Ors.)
9.AIR 1955 Orissa 73 : (Moni Dei-V- Hadibandhu Patra & Anr.)
10.AIR 1951 Orissa 378 : (Radhi Bewa & Anr.-V- Bhagaban Sahu & Ors.)
11.AIR 1995 SC 995 : (N. Jayalakshmi Ammal & Anr.-V- R.Gopala Pathar & Anr.)
12.AIR 2009 Bombay 34 : (Jamunabai Bhalchandra Bhoir & Ors.-V- Moreshwar Mukund Bhoir).
13.AIR 1977 SC 2069 : (Controller of Estate Duty, Madras-V- Alladi Cuppuswamy)
14.AIR 1966 SC 1879 : (Eramma-V- Verrupanna & Ors.)
15.AIR 1996 Orissa 50 : (Brajabandhu Misra-V- Luhurani Misra).
16.AIR 1974 Orissa 74 : (Bhaskar Rout & Ors.-V- Rambha Bewa & Ors.)
17.AIR 1994 Orissa 10 : (Duli Prusty & Anr.-V- Ketaki Prusty & Anr.).

For Appellants - M/s. B.H. Mohanty, Sr. Advocate,
R. K. Nayak, D.P. Mohanty,
T.K. Mohanty, S. Burma.
For Respondents - M/s. S.P. Mishra, Sr. Advocate,
S. Mishra, S. Dash, S.K. Mohanty,
S. Mishra, B. S. Panigrahi, B. Mohapatra,
S. S. Khshyap & S. Nanda.

---

***M. M. DAS, J.*** Both these appeals arise out of a common judgment dated 5.10.2004 passed by the learned Ist Additional District Judge, Cuttack in Title Appeal Nos. 25 and 95 of 2000 . The learned lower appellate court while dismissing the Title Appeal No. 95 of 2000 preferred by the present appellants and allowing the Title Appeal No. 25 of 2000 filed by the respondents reversed the judgment and decree of the learned Civil Judge (Junior Division passed in T.S. No. 147 of 1997. Both the appeals have been admitted on the following substantial question of law:-

> "Whether Hindu Women's Right to Property Act, 1937 empowers a widow to gift her husband's property ?

During course of hearing, it appeared to the Court that a further substantial question of law also arises for determination in these two Second Appeals, i.e**.** "whether the presumption under Section 90 of the Evidence Act is

available to be raised on the certified copy of a document, which has been admitted as secondary evidence ?"

2. The facts leading to both the above appeals are required to be referred to in gist.

One Sulochana Sethi, the predecessor of the present appellants filed the suit bearing T.S. No.147 of 1997 in the court of the learned Civil Judge, (Junior Division), 1st Court, Cuttack impleading the respondents as defendants, seeking declaration of her title over Ac.0.03 decimals of land from the southern part of the suit property, in accordance with the registered gift deed bearing No.5511 dated 04.12.1944 executed in her favour and in the alternative to declare her title over the same by way of adverse possession along with a further prayer for partition of her fifty per cent share.

3. The plaintiff's case was that the suit land originally belonged to one Madan Sethi, the father of the plaintiff - Sulochana, who is the common ancestor of all the parties. The said Madan Sethi died prior to 1944 leaving behind two widows, namely, Nima Bewa and Udia Bewa, a married daughter (plaintiff-Sulochana) and a minor son, namely, Babaji Sethi (through Udia). The defendant No.1 is the widow and the defendants 2 to 8 are the sons and daughters of late Babaji Sethi. After the death of Madan Sethi, both his widows gifted away half portion of the suit schedule property from southern part measuring Ac.0.03 decimals with two thatched rooms in favour of the plaintiff by executing and registering a gift deed. Babaji Sethi lived in the northern half of the suit schedule property, who died in 1955 and his legal heirs, the defendants, continued to possess the suit land, which was in possession of late Babaji Sethi. By passage of time, dissension arose in the family, for which the plaintiff approached the local Panchayat for a decision in the matter and there being non-cooperation from the defendants, the plaintiff filed the suit.

4. The case of the defendants in their written statement is that Madan Sethi, the common ancestor died in 1946 and thereafter his two widows also died prior to coming into force of the Hindu Succession Act, 1956. Babaji Sethi died on 20.03.1996 being succeeded by the defendants as his legal heirs. After the death of Madan Sethi in 1946, his only son Babaji Sethi inherited the suit property with life interest of the widows of Madan Sethi therein. At the time of death of Madan Sethi, Babaji Sethi being a minor, the plaintiff and her husband were looking after the affairs of the family and on their request, the widows of Madan permitted them to remain in the suit house. Taking advantage of the minority of Babaji and illiteracy of the

widows, the plaintiff and her husband, in the guise of a Power of Attorney, got the gift deed executed on 04.12.1944. The gift deed, being a fraudulent document inasmuch as the widows having no right of alienation as per Hindu Women's Right to Property Act, 1937, it does not confer any title in favour of the plaintiff. On the basis of the void gift deed, the plaintiff recorded her name along with Babaji in respect of the suit property in Hal settlement, but the same was set aside in R.P. Case No.231 of 1993 with a direction to record the names of the defendants in the ROR. The plaintiff's possession over the suit land is not on the basis of the right, but only permissive in nature which cannot ripe into title by way of adverse possession. The suit schedule property also being the homestead land consisting of dwelling house of the defendants, plaintiff has got no right of partition.

5. On the above pleadings, the learned trial court framed as many as ten issues, out of which, issue No.8 relates to the substantial questions of law as framed in the second appeals.

6. The learned trial court by the judgment and decree dated 25.02.2000 and 20.03.2000 respectively, decreed the suit in part. While negativing the claim of title of the plaintiff by other means, it declared the title of the plaintiff by way of adverse possession on the basis of long standing possession. The said judgment was challenged by the plaintiff by filing T.A. No.95 of 2000 and the defendants by filing T.A. No.25 of 2000.

As stated earlier, the learned lower appellate court allowed T.A. No.25 of 2000 and reversed the judgment and decree passed by the learned trial court, while dismissing T.A. No.95 of 2000 filed by the plaintiff.

7. Mr. B.H. Mohanty, learned senior counsel appearing for the appellants contended that during hearing of the appeals, the certified copy of the registered deed of gift dated 04.12.1944, which was marked as 'X' before the learned trial court was marked as Ext.11 as additional evidence. He submitted that the conclusion of the learned lower appellate court that the gift deed marked as Ext.11 cannot be accepted as the presumption under Section 90 of the Evidence Act is not applicable to a certified copy of thirty years old document, is erroneous in law.

Mr. Mohanty further submitted that the gift deed Ext.11, which is of more than 30 years old attracts the presumption under Section 90 of the Evidence Act. In support of his contention, he placed reliance on the decision in the case of ***Sri Lakhi Baruah and others v. Sri Padma Kanta Kalita and others,*** A.I.R. 1996 SC 1253 and submitted that the Hon'ble

apex Court, in the said judgment has come to the conclusion that in the event, the foundation for marking such a certified copy as a secondary evidence has been led and in the event, the document in question comes from a proper custody, the presumption under Section 90 of the Evidence Act is also available to such a certified copy of the document. He, therefore, submitted that once the gift deed was admitted as additional evidence and marked as Ext.11, the presumption under Section 90 of the Evidence Act is available to be drawn on the said document. The conclusion of the learned lower appellate court, according to Mr. Mohanty, that the said document Ext.11 is a void one, not having been properly proved, is not sustainable. If this is accepted, Mr. Mohanty submitted that Ext.11 remains as a valid document conferring right, title and interest on the plaintiff in respect of the suit property.

8. Mr. S.P. Mishra, learned senior counsel appearing for the respondents, on the contrary, submitted that Ext.11, being a certified copy and not the original document, the presumption under Section 90 of the Evidence Act cannot be drawn in respect of Ext.11, as such a presumption is not available to be drawn, even though the original might have been more than thirty years old. He referred to the decision of this Court in the case of ***Kirtan Behari Acharya v. State of Orissa and others***, 1998 (II) OLR 295. He further submitted that even accepting that Ext.11 has been admitted into the evidence as a secondary evidence at the lower appellate stage, the same having been executed by two widows, who are admittedly illiterate and Pardanasini ladies, onus lay on the plaintiff to prove valid execution of the said document, which the plaintiff has failed to discharge. According to Mr. Mishra, as a matter of fact, the plaintiff, in her evidence has categorically admitted that neither she nor her husband had gone to the Sub-Registrar office at the time of the execution and registration of the gift deed and she is unable to say, who scribed the gift deed and who are the witnesses thereto. The plaintiff herself stated to have no knowledge about the contents of the gift deed. Under such circumstances, the plaintiff is not entitled to the benefit of the presumption under section 90 of the Evidence Act.

9. To appreciate the rival contentions made by the learned counsel for the respective parties with regard to drawing of presumption under Section 90 of the Indian Evidence Act, 1872 and with regard to the correctness and genuinity of Ext.11, it would be appropriate to quote section 90 of the said Act, which is as under :-

> "90. **Presumption as to documents thirty years old.-** Where any document, purporting or proved to be thirty years old, is produced

from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation – Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable".

10. The principle underlying section 90 of the Act is that if a document of thirty years old or more, is produced from the proper custody and on its face, the same is free from suspicion, the Court may presume that it has been duly executed and attested. The reason for incorporating this section was based on necessity and convenience, as it is some time highly difficult and some time impossible to prove hand writing, signature and execution as well as attestation of old documents after lapse of many years. Such presumption under section 90 of the Act is available only if the two conditions enumerated in the said section are fulfilled or in relation to documents, the execution and attestation of which are not denied, only in such contingencies, the formal proof of such documents is waived for saving the time of the Court in a case. Where the executant or the attesting witness are not alive or available and the genuineness of the said document is disputed and mode of proof as required under section 69 of the Act is also not possible, the Court would be entitled to raise a presumption under section 90 of the Act in relation to its due execution and attestation, if it comes to the conclusion that the document is such that it is likely to have been executed having regard to the natural human conduct and there are no circumstances raising suspicion of the Court.

11. However, in cases, where genuineness of the document is disputed and the executant or attesting witness are alive and available or, if they are dead or not available, but evidence is available for proving the documents in accordance with the mode prescribed under section 69 of the Act, then the Court should not raise presumption under section 90 of the Act and admit the documents into the evidence, but direct the parties to prove the documents by leading evidence. (See ***Haradhan Mahatha and others v. Dukhu Mahatha,*** A.I.R. 1993 Patna, 129)

It has been also held by this Court as well as the Hon'ble Supreme Court that the presumption under section 90 of the Act is permissive and it is a matter of judicial discretion, where the Court would make the presumption or would call upon the party to offer the other proof.

12. One distinctive feature of the present case is that the document admitted as additional evidence and marked as Ext.11 by the learned lower appellate court is not an original document, but a certified copy of a gift deed. It was authentically laid down by this Court in the case of Kirtan Behari Acharya (supra) that section 90 of the Act is applicable to the original document and not to the certified copy. Even though the certified copy of a document more than thirty years old is admitted into the evidence without objection that would not authorize the Court to raise a presumption of due execution of the original documents or genuineness of the contents thereof or the attestation. This view also has been taken in a series of judgments of the Hon'ble Supreme Court in the cases of ***Sri Lakhi Baruah and others (Supra)***, ***Sital Das v. Sant Ram and others***, AIR 1954 SC 606, ***Harihar Prasad Singh and another v. Deonarain Prasad and others***, AIR 1956 SC 305 and ***Kalidindi Venkata Subbaraju and others v. Chintalapati Subbaraju and others***, AIR 1968 SC 947.

13. As a matter of fact, Privy Counsel in the case of ***Basant Singh and others v. Brijraj Saran Singh and others***, AIR 1935 PC 132 laid down that presumption under section 90 arises in respect of original documents. The copy does not warrant presumption of its execution and attestation.

14. In view of the settled position of law as above, this Court finds that the learned lower appellate court was correct in holding that there is no evidence led on behalf of the plaintiff to show that all the attesting witnesses to the said gift deed are dead, but none of the attesting witnesses have been examined. The learned lower appellate court, with regard to raising a presumption under section 90 of the Evidence Act relying upon the case of Kirtan Bihari Acharya (supra) in paragraph – 12 of the judgment held as follows :-

> "12. Now at this stage, the question remains to consider the submission of the learned counsel for the plaintiff that the document being 30 years old, presumption u/s.90 of the Evidence Act as to extent of the execution of the document i.e. signature, attestation etc. It is the settled position of law that the presumption as to documents purporting or proved to be of 30 years old and produced from any custody, which the court in the particular case consider

> proper, extends to the execution and attestation of the documents though not to its contents, i.e., the Court may presume that the signature and every other part of such document, which purports to be in handwriting of any person, is in that person's handwriting and in case of a document executed or attested, then it is duly executed and attested by the person, by whom it purports to be executed and attested. It has been held in Kirtan Bihari Acharya v. State of Orissa, 1998 (2) OLR 295 that the presumption arising u/s. 90 of Evidence Act is applicable to original documents and not the certified copy thereof. Even if the original documents might have been more than 30 years old, admission of such documents even without objection, would not authorize the court to raise a presumption of due execution of the original documents or genuineness of the contents thereof."

This Court, therefore, finds no error to have been committed by the learned lower appellate court in coming to the above finding.

15. Before delving into the question with regard to the right of a Hindu woman over the property before the Hindu Women's Right to Property Act, 1937 (for short, 'the 1937 Act') came into operation and thereafter, the Hindu Succession Act in 1956, it would be appropriate to refer to the concurrent findings of both the courts below, which are as follows:-

> (i) The widows/donors of Madan Sethi had no right to alienate the property in the year 1944, i.e., prior to coming into operation of the Hindu Succession Act, 1956, and
>
> (ii) Madan having died after 1937, both of his widows derive the benefit of the provisions of Hindu Women's Right to Property Act, 1937 in respect of conferring limited interest over the suit property.

16. If we trace out the history with regard to Hindi Women's Right to Property prior to the enactment of the 1937 Act, it would be found that *Vijnanevara* concluded that the widow is entitled to inherit to her husband's property, if he died separated and not reunited and left no male issue. The text of Mitakshara is "therefore, it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man, who being divided from his co-heirs and not subsequently reunited with them dies leaving no male issue" (Mit. II, 1, 39) (See ***Rewan Pershad v. Mt. Radha*** (1846) 4 Moor's Indian Appeal 137, 148 and 152). Prior to the 1937 Act, under Hindu Law governed by Mitakshara School of Law, a Hindu widow was only entitled to

maintenance from out of the joint family property of her husband/coparcener.

With regard to the limited powers of disposal of property possessed by a female prior to 1937 Act, according to Hindu Law, restriction was the "Rule" absolute power was the "exception". It would be profitable at this juncture to quote Katyayana, who says that "let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it. But she has no property therein to the extent of gift, mortgage or sale". The sages declared that the transactions of a woman have no validity, especially the gift, hypothecation or sale of a house or field and such transactions are valid when they are sanctioned by the husband, or on failure of the husband by the son or on failure of the husband and the son, by the King. An analysis of the above proposition clearly goes to show that prior to the 1937 Act, a Hindu widow only had a limited interest over the property of her husband after death of her husband leaving exclusive properties behind, provided, there is no other male heir, i.e., no son born to the husband through the widow.

17. Dealing with the case where, as a matter of fact, it was found that the husband died prior to coming into operation of the 1937 Act, this Court, in the case of ***Sulabha Gouduni and others v. Abhimanyu Gouda and others***, AIR 1983 Orissa 71, while considering the effect of section 14 (1) of the Hindu Succession Act, in such situation, referring to section 14 (1) of the Hindu Succession Act, laid down that it is admitted case of the parties that plaintiff no. 1 was receiving maintenance from defendant no.1. It is neither in the pleadings nor in evidence that any property was possessed by the plaintiff no. 1 acquired by her in lieu of maintenance. It was further held that severance of status between two brothers Khetra and Shyam and the joint recording of the names of plaintiff no. 1 and defendant no. 1 do not attract the provisions contained in section 14 (1) of the Hindu Succession Act. The Court further held that, in fact, the case of the plaintiff was not built on the plank of section 14 (1), but as a post-Act widow whose limited ownership ripened into full ownership. In view of the conclusion arrived at by this Court that the widow was a pre-Act widow, the Court felt it unnecessary to refer to the number of authorities cited at the Bar and rejected the claim of the widow.

In a Full Bench decision in the case of ***Moni Dei v. Hadibandhu Patra and another***, AIR 1955 Orissa, 73, this Court considered the question as to whether section 3 (2) of the 1937 Act will have a retrospective effect. It was held in the said case that the decision of the Court in the Special Bench in the case of ***Radhi Bewa and another v.***

***Bhagaban Sahu and others***, AIR 1951 Orissa, 378 was erroneous and the same has been wrongly decided. Thus, the Full Bench came to the conclusion that the provisions of the Act have no retrospective effect so as to apply to the case of a widow whose husband had died prior to the date of commence of the 1937 Act.

In the case of ***N. Jayalakshmi Ammal and another v. R.Gopala Pathar and another,*** AIR 1995 SC 995, the Hon'ble apex Court expressed its view that the burden of proof is on the plaintiffs, who are successors of the widow to prove that the husband died after coming into force of the 1937 Act and the widow obtained the undivided half right in the property as per the 1937 Act. Finding that this fact has not been proved by the plaintiffs came to the conclusion that the widow was not shown to have inherited the undivided half share of her husband in the property and she was incompetent to convey any interest in the suit property as per Exhibit A.4 in the said case. Accordingly, the Hon'ble apex Court laid down that on the death of the husband, the brother of the husband Srinivasa became entitled to the property by survivorship and he was competent to execute Ext. B.2 to the first defendant, who became entitled to the entirety of the property.

With regard to non-applicability of the 1937 Act to a Pre-Act widow, the Bombay High Court in the case of ***Jamunabai Bhalchandra Bhoir and others v. Moreshwar Mukund Bhoir,*** AIR 2009 Bombay 34 held as follows:-

> "In this case the husband of Hindu Widow had died prior to coming into force of Act (18 of 1937). u/s. 3 (1), if Hindu dies intestate leaving separate property that separate property shall, devolve upon his widow along with the lineal descendants subject to the provisions of sub-section (3) and under sub-section (2), if a Hindu governed by Mitakshara School of Hindu Law died intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-sec. (3), have in the property the same interest as he himself had. Sub-sec. (3) provides that the interest was to be limited interest known as Hindu Women's estate. Section 4 of that Act declared that nothing in the said Act shall apply to the property of any Hindu dying intestate before the commencement of this Act. Hindu widow could claim share in the property u/s. 3 of this Act if her husband would have died after the commencement of this Act. As stated earlier this Act came into force on 14-3-1937. As husband of widow had died prior to that date, this Act is not applicable to the facts of this case and she could not get any share or interest in the property. Admittedly,

> under the Shastric Hindu law, widow was not entitled to inherit any right or share in the joint family property or even in the separate property of her husband. She had only right of maintenance from the property. A mere right of maintenance without actual acquisition in any manner is not sufficient to attract S. 14 (1). Hence, her daughter also would not be entitled to share in the property as widow herself had no share in property."

18. In this regard, it may further be noted that the Hon'ble Supreme Court in the case of ***Controller of Estate Duty, Madras v. Alladi Cuppuswamy***, AIR 1977 SC 2069, while dealing with the character of the interest which a Hindu widow gets by way of a statutory provisions contained in the 1937 Act observed that there can be no doubt that prior to the passing of the 1937 Act, the Hindu woman had no right or interest at all in a Hindu coparcenary. She was neither a coparcener nor a member of the coparcenary nor did she have any interest in it, except the right to get maintenance. She also had no right to demand partition of the coparcenary property after the death of her husband. The Hon'ble Supreme Court in the case of ***Eramma v. Verrupanna and others,*** AIR 1966 SC 1879 again held on facts of the said case that at the time of death of the appellant's husband, the Hindu Women's Right to Property Act, 1937 had not come into force and so, when the Succession Act came into force, the appellant had no manner of title to the properties. The Hon'ble Supreme Court further held that even though the appellant was in possession of the properties, that fact alone was not sufficient to attract the operation of section 14 of the Hindu Succession Act. In that context, the Hon'ble Supreme Court in the case of Eramma (supra) held:

> "……..The object of the section is to extinguish the estate called "limited estate" or "widow's estate" in Hindu law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property wth all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder. It does not in any way confer a title on the female Hindu when she did not in fact possess any vestige of title. The provisions of section 14(1) cannot be attracted in the case of a Hindu female who is in possession of the property of the last male holder on the date of the commencement of the Act, when she is only a trespasser without any right to the property".

19. This Court has also repeatedly held that a pre-Act widow, whose husband died prior to 1937 had absolutely no right over the coparcenary property and it was only the 1937 Act, which entitled a widow to get a limited interest in equal share along with the son. Before enactment of the said 1937 Act, a widow did not get any interest in the property if the husband left any son, grandson and great- grandson.

20. In Article 35 in Mulla Principles of Hindu Law at page 107 in the 15th Edition, the position of law prior to coming into operation of 1937 Act has been stated as "under the law prior to the Act, the widow of a person governed by the Mitakshara had only a right of maintenance in respect of a coparcenary property in which the husband had interest. In respect of separate property left by her husband, she had only the right of maintenance when the husband had left a son, grandson or great-grandson. She could inherit his separate property only in the absence of these immediate heirs". (See ***Brajabandhu Misra v. Luhurani Misra***, AIR 1996 Orissa 50).

21. In the case of ***Bhaskar Raut and others v. Rambha Bewa and others***, AIR 1974 Orissa, 74, this Court found that there is admission with regard to the share of the widow which if accepted, it would be considered that the widow was a post-Act widow. In that context, it was observed that had she been a pre-Act widow, she would have no interest in the property and the share of her husband would have passed by survivorship to the other coparceners. Thus a pre-Act widow would be only a maintenance holder and will have no right over the coparcener property has been reiterated in the case of ***Duli Prusty and another v. Ketaki Prusty and another,*** AIR 1994 Orissa 10.

22. From the discussions made above, no further interpretation is required to be made with regard to the right of a widow whose husband expired prior to the 1937 Act came into operation. It is clear that a pre-Act widow is only a maintenance holder and does not succeed to the joint family property on the death of her husband. In view of section 4 of the 1937 Act, which clearly stipulates that nothing in the said Act shall apply to the property of any Hindu dying intestate before commencement of the Act, a pre-Act widow cannot get the benefit of section 3 of the said Act, even if he survives after 1937. As already discussed, in view of the settled position, even if a pre-Act widow survived till the Hindu Succession Act**,** 1956 came into operation, she having no right over the coparcener/joint family property, the question of she becoming an absolute owner under section 14 of the Hindu Succession Act, even if it is found that she is in possession over any

portion of the coparcenary/joint family property does not arise and she will not be considered to be the absolute owner thereon as she acquired no right over the property on the death of her husband prior to 1937.

23. In the instant case, admittedly, the property exclusively belonged to Madan Sethi the father of the original plaintiff Sulochana. The said Madan Sethi died prior to 1944 leaving behind two widows and a married daughter as well as a minor son. Hence, even though the two widows acquired a right under section 3 of the 1937 Act, such right is a limited right.

24. It is well settled in law that a Hindu widow whose husband died after the 1937 Act came into operation, has a right to succeed to his property under section 3 (1) of the Act along with male issue of the deceased husband if he is governed by the Mitakshara law equally with the male issue. However, the interest over the property of such widow is construed to be a limited interest and it is further well settled law that the widow has no right of disposition of the property except for religious and charitable purposes and other purposes amounting to legal necessity (See Article 181-A and B of Mulla Hindu Law). In the instant case, the gift deed was allegedly executed in 1944 in favour of the plaintiff. Bereft of the fact that the gift deed cannot be accepted into evidence as already held above, even otherwise, the widow of Madan Sethi who was the mother of the plaintiff had no right of alienation by way of gift in respect of the suit property. Further, as it is admitted that the mother of the original plaintiff has gifted away the property and was no more in possession over the property on her own right inasmuch as the co-widow of late Madan Sethi did not survive by the time the Hindu Succession Act came into force, section 14 (1) of the said Act will have no application in the present case.

25. In view of the above conclusions, this Court finds that the learned appellate court was correct in reversing the judgment and decree of the learned trial court by allowing T.A. No. 25 of 2000 preferred by the respondents and dismissing the T.A. No. 95 of 2000 filed by the appellant. Both the substantial questions of law involved in the Second Appeals are accordingly answered and the appeals being devoid of any merit stand dismissed. However, there shall be no order as to the costs.

Appeals dismissed.

**2013 (II) ILR - CUT- 953**

**INDRAJIT MAHANTY, J & B.N. MAHAPATRA, J.**

W. A. NO. 347 OF 2012 (Dt.20.09.2013)

**M/S. HOTEL HANS COCO PALMS** ……..Appellant

*.Vrs.*

**MILAN DAS @ MILAN KRISHNA DAS** ……Respondent

**INDUSTRIAL DISPUTES ACT, 1947 - S.11-A**

**Grant of relief of reinstatement and back wages – It must be proved that the workman was not in "gainful employment" during the period of his termination from service.**

**In this case the respondent-workman has categorically denied his engagement in M/s.Usthi Foundation India – M/s.Usthi Foundation being impleded as a party in the writ petition filed counter affidavit denying the employment of the workman in their organization at any point of time – The burden of proof U/s.106 of the Evidence Act having been duly discharged by the workman denying his employment after termination and the burden being a negative one, the onus of proof should be shifted to the employer to show that the workman was gainful employment after termination from service which the appellant-employer has miserably failed to prove – Held, the present appeal deserves to be dismissed.** (Paras 8,9,10)

**Case law Referred to:-**

2009-I-LLJ-326 (SC) : (Talwara Co-operative Credit & Service Society Ltd.-V- Sushil Kumar)

For Appellant - M/s. Biplab Mohanty, T.K. Pattnaik, A. Pattnaik, S. Pattnaik, R.P. Ray, N.S. Rizvi, B.S. Rayaguru, U.A. Pattnaik.

For Respondent - In person

---

***I. MAHANTY, J.*** The present appeal has been filed by the appellant (M/s. Hotel Hans Coco Palms) challenging the judgment dated 25.9.2012 passed by the learned Single Judge in W.P.(C) No.17293 of 2010.

2. Mr. Pattnaik, learned counsel for the appellant submits that the parties had been directed to seek for Alternative Dispute Resolution pursuant to the order of the learned S.D.J.M., Puri dated 22.6.2013.

3. It appears from the submissions made in course of hearing today that such settlement of dispute failed since the offer of the appellant was not accepted by the workman (respondent).

4. Learned counsel for the appellant submits that the present appeal has been filed challenging the impugned judgment as referred hereinabove, on two grounds, firstly that the respondent was not the workman as per Section 2(s) of the Industrial Dispute Act, 1947 and the second contention was that the issue of backwages ought to have been determined after ascertaining as to whether the respondent was in gainful employment during the period of his termination or not.

In this respect, learned counsel for the appellant placed reliance on a judgment of the Hon'ble Supreme Court in the case of Talwara Co-operative Credit & Service Society Ltd. v. Sushil Kumar, 2009-I-LLJ-326 (SC).

5. The Respondent in person, on the other hand, contends that both the aforesaid issues have already been decided by both the Labour Court as well as the Hon'ble Single Judge of this Court and there is no necessity to interfere with the said findings. In this respect, he draws our attention to the order dated 7.8.2007 passed in I.D. Case No.55 of 1997(I.D.Case No.144 of 2008), whereby the Presiding Officer, Industrial Tribunal, Bhubaneswar had come to reject the application filed by the present appellant, praying to implead one M/s.Usthi Foundation India, Puri as a party in that case and the said order of the Tribunal had never been challenged by the appellant. After the award was passed by the Industrial Dispute Tribunal, the appellant had approached this Court in W.P.(C) No.4832 of 2009. The respondent had also challenged the amount of backwages in W.P.(C) No.12357 of 2009. Both the aforesaid cases came to be disposed of by a common judgment vide order dated 11.3.2010 directing to remit the matter back to the Labour Court to pass fresh award.

6. The Tribunal passed a final award holding that the opposite party-respondent was a "workman" and directed reinstatement with full backwages. This award passed by the Tribunal was challenged before this Court in W.P.(C) No.17293 of 2010 which came to be dismissed by the judgment dated 25.9.2012 and is the subject matter of challenge in the present appeal.

7. Insofar as the question of "gainful employment" after the order of termination is concerned, the opposite party-respondent has categorically denied his engagement in M/s.Usthi Foundation India. It appears from the order-sheet of W.P.(C) No.17293 of 2010, that the appellant herein had filed a petition to implead M/s.Usthi Foundation India as an opposite party in the writ application. Thereafter, notices were issued by this Court to the said M/s.Usthi Foundation India and a counter affidavit came to be filed by one Sri Ratan Barik, working as Deputy Secretary of M/s.Usthi Foundation India, at Penthakata, Dist. Puri wherein, he has categorically stated that "*no name as Milan Das @ Milan Krishna Das is forthcoming was/is to be employed in this organization"*. This affidavit was also taken into consideration by the learned Single Judge.

On perusal of the judgment dated 25.9.2012 passed by the learned Single Judge in W.P.(C) No.17293 of 2010, we find that both the issues raised by the learned counsel for the appellant herein have been duly considered and held against the appellant-management. Insofar as the question, as to whether the respondent was a workman or not, after dealing with the various case laws and the concerned law on the subject, in Paragraphs 10 and 11 of the judgment, which requires no repetition for the reasons of brevity.

8. On perusal of the judgment of the Hon'ble Single Judge, we find no justifiable ground to entertain any challenge thereto, since we are in respectful agreement with the reasons indicated therein. Insofar as the question of backwages is concerned, as to whether the opposite party was gainful employment after termination, we are of the considered view that the judgment of the Hon'ble Supreme Court in the case of **Talwara Co-operative Credit & Service Society Ltd**. (supra) relied upon by the appellant in the facts of the case do not apply. The principle enunciated by the Hon'ble Supreme Court, on the other hand, clearly supports the case of the opposite party-respondent. For better appreciation, the relevant paragraph i.e. Paragraph-14 thereof, is quoted hereunder:

> "14. This Court in a large number of cases noticed the paradigm shift in the matter of burden of proof as regards gainful employment on the part of the employer holding that having regard to the provisions contained in Section 106 of the Indian Evidence Act, the burden would be on the workman. The burden, however, is a negative one"

9. It is well settled by the Hon'ble Supreme Court that Section 106 of the Indian Evidence Act casts burden on the workman but, the burden, however,

is a negative one. Such burden has been duly discharged by the opposite party-respondent by denying that he was ever in employment after his termination from the services of the appellant. Consequently, the onus of the workman stood discharged and the onus of proof should shifted to the employer to show that the employee was gainful employment, which the appellant has miserably failed.

10. In the present case, the appellant-employer alleged that the respondent had been engaged by M/s.Usthi Foundation India. Although the Tribunal had rejected the petition filed by the appellant to implead the said organization and no challenge thereto was carried by the appellant, yet, once again, in the writ petition before the learned Single Judge, a similar prayer was made and M/s.Usthi Foundation India was noticed. An affidavit on behalf of M/s.Usthi Foundation India came to be filed supporting the workman and not in any manner supporting the case of the appellant-employer. Therefore, clearly the Appellant has failed to establish that the Respondent was in any form of gainful employment post his termination from service.

**11.** In the light of the aforesaid circumstances, we are of the considered view that the present appeal deserves to be dismissed. Accordingly, the appeal stands dismissed being devoid of any merit but, in the circumstances, without cost.

Appeal dismissed.

**2013 (II) ILR - CUT- 956**

**INDRAJIT MAHANTY, J & B. N. MAHAPATRA, J.**

W.P.(C) NO.16667 OF 2013 (Dt.26.09.2013)

**M/S. MARINE DIESEL SERVICE** ……..Petitioner

*.Vrs.*

**BHARAT PETROLEUM CORPORATION LTD.& ORS.** ……...Opp.Parties

**A. COMPANIES ACT, 1956 – S.11(2)**

**Bid of the petitioner-firm rejected as its partnership firm consists of 27 persons – Section 11 (2) of the Act prohibits partnership firm consisting of more than twenty members – Mere registration of the firm by the Inspector-General of Registration-cum-Registrar of firms Odisha,Cuttack will not help as it opposed to law U/s.11 (2) of the Act – Held, the impugned order is in order and calls for no interference by this Court.** (Para 10)

**B. TENDER – Bid of the petitioner-firm rejected as its partnership firm consists of 27 members instead of 20 as required U/s. 11 (2) of the Companies Act – Mere registration of the firm by the Registrar of firms Odisha, Cuttack will not help as it is opposed to law – Rejection of petitioner's tender is correct.** (Para 10)

**Case laws Referred to:-**

1.AIR 1966 SC 1490 : (Commissioner of Income-tax, Punjab, Himachal Pradesh, Jammu & Kashmir & Simla-V- M/s. Chander Bhan Harbhajan Lal)
2.AIR 1959 SC 559 : (Badri Prasad & Ors.-V- Nagarmal & Ors.)
3.AIR 1968 Bombay 347 : (V.V. Ruia-V- S. Dalmia)
4.AIR 1930 Privy Council 300 : (Senaji Kapurchand & Ors.-V- Pannaji Devichand)
5.AIR 1925 Privy Council 83 : (Surajmull Nargoremull-V- TritonInsurance Co.Ltd.)

For Petitioner - M/s. Goutam Ku. Acharya, Sr. Advocate, B.Das, J.S.Acharya, S.K. Behera, K.Ghadai, R. Naik & D.K. Naik.
For Opp.Paties -Mr. S.D.Das, Sr. Advocate, Asst. Solicitor General of India.

---

***I. MAHANTY, J.*** The petitioner-M/s. Marine Diesel Service claiming to be a registered firm, registered under the Indian Partnership Act, has filed the present writ application with a prayer seeking direction to the opposite party (Bharat Petroleum Corporation Ltd.) not to finalise the tender of the petitioner-firm as it is the lowest bidder amongst all the bidders/participants.

*2.* From the pleadings of the case, it appears that the Opposite Party-Corporation had floated a tender call notice on 20.4.2013 in the daily newspaper 'The Sambad' inviting bids from the eligible bidders for transportation of petroleum products from Paradeep and Balasore to other parts of the State throughout the country. The Opposite Party-Corporation

rejected the bid of the petitioner-firm and communicated the grounds to them by letter dated 19.7.2013 amongst other grounds which is quoted hereunder:

> "However, the law prohibits a partnership firm with more than 20 partners. Section 11(2) of the Companies Act, 1956 lays down that *"No Company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Indian law."* Since your partnership firm exceeded twenty partners and it was neither incorporated as a Company, your partnership being invalid, your firm failed to qualify in the Technical Bid. You were orally informed by the Technical Evaluation Committee accordingly. We therefore deny your contention that your Technical Bid was cleared by us."

3. In view of the aforesaid facts, the only question that arises for consideration in the present application as to whether the ground stated under the Companies Act, for holding the technical bid of the petitioner-firm to be invalid, is justifiable in law ?

4. Sri S.D.Das, learned Senior Advocate appearing for the Corporation placed reliance on the judgments of the Hon'ble Supreme Court in the case of **Commissioner of Income-tax, Punjab, Himachal Pradesh, Jammu and Kashmir and Simla v. M/s. Chander Bhan Harbhajan Lal,** AIR 1966 SC 1490 as well as in the case of **Badri Prasad and others v. Nagarmal and others**, AIR 1959 SC 559 and pleaded that the petitioner's partnership firm have been constituted by the Deed Of Partnership available under Annexure-1 and on a plain reading thereto, it would be clear that 27 individuals signed the aforesaid partnership deed as partners of the petitioner-firm, namely, M/s. Marine Diesel Service who made the necessary bid pursuant to the tender call notice issued by the Corporation. He further stated that in view of the bar stipulated under Section 11(2) of the Companies Act, 1956, the partnership deed was invalid in law and, therefore, the Corporation had no other legal alternative other than to hold that the petitioner-firm fails to qualify in its technical bid.

5. Learned Senior Advocate for the petitioner-firm, on the other hand, placed reliance on the judgment of the Bombay High Court in the case of **V.V.Ruia v. S.Dalmia**, AIR 1968 Bombay 347 and submitted that since the Inspector-General of Registration-Cum-Registrar of Firms, Orissa, Cuttack had admittedly registered the petitioner-firm even though admittedly 27

partners had been indicated therein, the petitioner-firm should not be held as "technical invalid" since the valid registration exists as on date of submission of tender.

6. In the case of **V.V.Ruia (supra),** the Bombay High Court had analysed Section 11 (2) of the Companies Act, 1956 and had noted that in order to attract the prohibition contained in Sub-section (2) of Section 11, four following conditions needed to be fulfilled:

(i) It must be a company, association or partnership consisting of more than twenty persons.

(ii) It must not have been registered as a company under the Companies Act nor must it have been formed in pursuance of some other Indian Law.

(iii) It must have been formed for the purpose of carrying on any business but other than of banking.

(iv) Business must have for its object the acquisition of gain by the company, association or partnership or by the individual members thereof.

7. In the case of **Senaji Kapurchand and others v. Pannaji Devichand**, AIR 1930 Privy Council 300, Hon'ble Privy Council had occasion to deal with Section 4(2) of the Companies Act, 1913 which is quoted herein below:

> "No company, Association or Partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the Company, Association or Partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act, or of Letters Patent."

The aforesaid provision is parameteria with Section 11(2) of the Companies Act, 1956 which is quoted herein below:

> "No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Indian law."

Considering the bar created by the Companies Act in a case where it was found that the partnership firm consisted of 22 persons and, therefore, violative of Section 4(2) of the Companies Act, 1913, it came to conclude as follows:

> "xx xx Where a plaintiff comes to Court on allegations which on the face of them show that the contract of partnership on which he sues is illegal, the only course for the Courts to pursue is to say that he is not entitled to any relief on the allegations made as the Courts cannot adjudicate in respect of contracts which the law declares to be illegal."

8. The aforesaid principles also referred to and confirmed by the Hon'ble Supreme Court in the case of **Badri Prasad and others** (supra) wherein the Hon'ble Supreme Court while dealing with the similar provision of Section 4(2) of the Rewa State Companies Act, 1935 held that where an association is formed, in contravention of Section 4(2) of the Rewa State of Companies Act, 1935, it was contended that by reason of the illegality of the contract of partnership, the members of the partnership have no remedy against each other for contribution or apportionment in respect of the partnership dealings and transactions and, therefore, no suit for accounts lay at the instance of the plaintiffs-appellants, who were also members of the said illegal Association.

The Hon'ble Supreme Court held that the aforesaid contention raised was sound since admittedly, more than twenty persons have formed the Association in question. It was not dispute that it was formed in contravention of Section 4(2) of the Rewa State Companies Act, 1935.

The Hon'ble Supreme Court has placed reliance in the case of **Surajmull Nargoremull v. Triton Insurance Company Ltd**., AIR 1925 Privy Council 83 and in particular, the observation made therein to the following effect:

> "No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset. The enactment is prohibitory."

9. In the case of **Commissioner of Income-tax, Punjab, Himachal Pradesh, Jammu and Kashmir and Simla** (supra), Paragraph-24 would be relevant which is extracted hereunder:

> "(24) A further question which arises on the particular facts of this case is whether the Rupar firm can be said to have legal

> existence because its real partners are not merely 14 persons but there are 7 persons in addition to that number. Under the provisions of S.11 of the Companies Act, 1956 (S.4 of the 1913 Act) where the number of partners exceeds 20 the firm has to be incorporated and that is admittedly not what has been done here. If, therefore, the number is in excess of 20 the firm being unincorporated, it cannot be said to have a legal existence. Unfortunately the Income-tax Appellate Tribunal has not discussed the facts and circumstances of this case but dismissed the second appeal preferred by the appellant on the short ground that there was no merit in it in view of the decisions cited by it. It was necessary for the Tribunal to ascertain whether on the facts of this case those decisions concluded the matter. The questions which arise are in my opinion, substantial between the parties and are not settled. For these reasons I allow the appeal, set aside the judgment of the High Court and direct the Tribunal to refer the question earlier set out to the High Court. Costs so far incurred will abide the result."

10. On consideration of the submissions advanced by the learned counsel for the respective parties as well as the various judgments cited at the Bar as referred hereinabove, we are of the considered view that Section 11 of the Companies Act, 1956 prohibits a partnership consisting of more than twenty-four members to do any business and the object of which is the acquisition of gain and mere registration of the petitioner-firm by the Inspector-General of Registration-Cum-Registrar of Firms being on the face of it, opposed to law and the prohibition contained in the Companies Act, 1956, is of no legal consequence. Hence, rejection of the petitioner's tender by the Opposite Party-Corporation on the ground of violation of Section 11(2) of the Companies Act, 1956 is in order and justifies no interference.

11. Accordingly, the writ application stands dismissed. Interim order dated 05.09.2013 passed in Misc. Case No.15576 of 2013 stands vacated. The Opposite Party-Corporation is at liberty to proceed in the matter in accordance with law.

Writ petition dismissed.

**2013 (II) ILR - CUT- 962**

**I. MAHANTY, J & B. N. MAHAPATRA, J.**

W.A. NO. 571 OF 2011 (Dt.13.09.2013)

**TEJASWINI PANIGRAHI** ……..Appellant

*.Vrs.*

**GOVERNMENT OF ODISHA & ORS.** ……..Respondents

**GENERAL CLAUSES ACT, 1897 – S.10**

**General principle is, a party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity – The object of the above principle is to enable a person to do what he could have done on a holiday, on the next working day – The reason behind the same is law does not compel the performance of an impossibility.**

**In the present case, the last date for submission of application was 31.01.2010 which was a holiday so the last date of submission of application shall be treated as the next working day i.e.01.02.2010 on which date respondent No.5 produced the Nativity Certificate – Held, this Court do not find any illegality in the order of the learned single Judge for interference.** (Paras 12,13,16,17,20)

**Case laws Referred to:-**

1.2010 (1) CLR (SC) 179 : (Mohd.Ayub -V- State of U.P. & Ors.)
2.2005(1) SCC 191 : (Huda & Anr.-V- Babeswar Kanhar & Anr.)
3.(1999)8 SCC 266 : (Kishoe Jha-V- Mahaveer Prasad & Ors.)
4.(2000)4 SCC 342 : (Mohammed Gazi-V- State of M.P. & Ors.).

For Appellant - M/s. Goutam Misra & M. Panda.

For Respondents - M/s. Pratyusha, G.R. Mohapatra, A. Dash

***B.N. MAHAPATRA, J.*** The Appellant in the present Writ Appeal assails the legality/validity of the order dated 03.11.2011 passed by the learned Single Judge in W.P.(C) No.23288 of 2010 dismissing the Writ Petition and upholding the order dated 26.11.2010 passed by respondent No.3-Additional District Magistrate, Subarnapur in rejecting selection of the appellant as Anganwadi Worker for Jamchhapar Anganwadi Centre.

2. The fact of the case in a nutshell is that respondent No.2-Child Development Project Officer, Binka (for short, 'the CDPO') issued an Advertisement on 14.01.2010 (Annexure-1) inviting applications for selection of Anganwadi Workers for various Anganwadi Centres including Jamchhapar Anganwadi Centre. In the said Advertisement, it was specified that the candidates were to submit their application forms on working days from 10 AM to 5 PM till 31.01.2010 in the office of respondent No.2. Pursuant to the above Advertisement, appellant submitted her application form on 29.01.2010 along with all required documents and certificates as mentioned in the advertisement for selection of Anganwadi Worker for Jamchhapar Anganwadi Centre. Respondent No.5 submitted her incomplete application form, i.e., without Nativity Certificate for the above Anganwadi Centre. Respondent No.2, after verification of applications of Jamchhapar Anganwadi Centre, vide Notification No.138 dated 05.02.2010 invited objections against candidates short-listed in the said Notification. In the said Notification, appellant and respondent No.5 were both short-listed for Jamchhapar Anganwadi Centre. The Selection Committee headed by the Sub-Collector, Sonepur-respondent No.4 on 07.04.2010 met for selection of Anganwadi Workers for various Anganwadi Centres as advertised under Annexure-1. As the respondent No.5 was not issued with a Nativity Certificate within the date line of filing of application form, which was issued by the Additional Tahasildar, Binka on 01.02.2010, the Selection Committee did not consider her candidature though respondent No.5 had secured the highest point. Pursuant to the result of the Selection process, the CDPO vide order dated 16.04.2010, selected the appellant as Anganwadi Worker for Jamchhapar Anganwadi Centre, as she was the only eligible and successful candidate. Thereafter, the appellant immediately joined on receiving the order of her selection. While the appellant was discharging her duties to the utmost satisfaction of all concerned, respondent No.5 preferred an appeal before respondent No.3-Additional District Magistrate, Subarnapur vide A.W.W. Appeal Case No.88 of 2010, challenging the selection and engagement of appellant as Anganwadi Worker, Jamchhapar Anganwadi Centre. The sole ground of challenge of selection of the respondent no.5 was that she was more qualified than the appellant but her application was rejected at the time of selection as the Nativity Certificate was submitted after the last date of submission of application forms. The further case of respondent No.5 was that the last date of receipt of the application was fixed to 31.01.2010 which was a Sunday. Thus, she submitted her Nativity Certificate on 01.02.2010. Respondent No.3 vide his order dated 26.11.2010 allowed the appeal of respondent No.5 with the observation that as 31.01.2010, which was the last date of receipt of the application form was a Sunday, the next working day should have been

treated as the last date of receipt of the application. Further, respondent No.3 held that as respondent No.5 had applied on 30.01.2010, i.e., prior to the last date but without a Nativity Certificate, her application should not have been rejected merely on the ground that the Nativity Certificate was produced on 01.02.2010. Pursuant to the above order of respondent No.3-ADM, Subarnapur, respondent No.4-Sub-Collector, Sambalpur by his order dated 24.12.2010 directed for disengagement of the appellant/petitioner. Pursuant to the direction of respondent No.4-Sub-Collector, respondent No.2 also issued order of the even date to the appellant to hand over the charge.

3. Being aggrieved by the order dated 26.11.2010 (Annexure-7), the appellant assailed the same in W.P.(C) No.23288 of 2010, which was dismissed by a learned Single Judge of this Court vide order dated 03.11.2011 under Annexure-11. Hence, the present appeal.

4. Mr.M.Panda, learned counsel appearing on behalf of the appellant submitted that the learned Single Judge dismissed the Writ Petition without realizing/considering/appreciating the fact that as on the last date stipulated in the advertisement, respondent No.5 was not eligible and she had not got any Nativity Certificate at all, which was procured after the cut-off date prescribed in the advertisement, i.e., after 31.01.2010. The application submitted by respondent No.5 on 30.01.2010 without the required Nativity Certificate was incomplete. Therefore, the Selection Committee could not have accepted such an incomplete application by surpassing the laid down principles of law vis-à-vis the Anganwadi Worker Guidelines which mandate that an Anganwadi Worker should be a resident of the Anganwadi Centre for which she is applying. After submission of incomplete application, respondent No.5 should not have been allowed to rectify her mistake by curing the defect and submitting the Nativity Certificate, which is obtained beyond the last date of submission of application. Respondent No.5 had also not given any undertaking to produce such Nativity Certificate on a subsequent date. As per the conditions stipulated in the Advertisement, every applicant interested for the post of Anganwadi Worker should file her application within 31.01.2010. It is an admitted fact that the application filed by respondent No.5 was incomplete as on 30.01.2010. Nativity Certificate of the respondent No.5 was not in existence till 30.01.2010. Thus, at the time of application, respondent No.5 was not eligible for the post of Anganwadi Worker for the Centre in question.

5. Further, placing reliance on the decision of this Court in the case of *Madhumita Das Vs. State of Orissa and others*, 100 (2005) CLT 664 it was submitted that qualification of a candidate has to be adjudged as on the date

of filing of the application and therefore respondent No.5 could not have been engaged as Anganwadi Worker for lack of eligibility. The Anganwadi Workers do not carry out any functions of the State. They do not hold any post created under any statute. Hence, the recruitment rules ordinarily applicable to the employees of the State are not applicable to the case of Anganwadi Workers. Therefore, the learned Single Judge has committed wrong by applying the provisions of the General Clauses Act and by holding that when 31.01.2010 was a Sunday then 01.02.2010 was to be considered as last date of submission of application forms. Learned Single Judge, while passing the impugned order, failed to appreciate that the present appellant has been working in the said Anganwadi Centre for the past one and half years and was otherwise eligible in all respects. The revised Guidelines for selection of Anganwadi Workers stipulate that "a candidate once selected and engaged to work as Anganwadi Worker will ordinarily continue to work till satisfactory discharge of duties". In the present case, no dissatisfaction has ever been attributed against the appellant's duty as Anganwadi Worker. Hence, the disengagement of the appellant is unjustified. Concluding his argument, Mr.Panda submitted for quashing of the order dated 03.11.2011 passed by the learned Single Judge in W.P.(C) No.23288 of 2011 under Annexure-11 and order dated 26.11.2010 passed by respondent No.3 in A.W.W. Appeal Case No.88 of 2010 under Annexure-7 and to allow the appellant to continue in her service as Anganwadi Worker for Jamchhapar Anganwadi Centre in the district of Sonepur.

6. Mr. Pratyusha, learned counsel appearing for respondent No.5 submitted that respondent No.5 submitted her application on 30.01.2010 without Nativity Certificate as the same was not issued to her. It is further submitted that the appellant has secured only 43.2% marks where respondent No.5 has secured 47.6% marks. Apart from that, respondent No.5 is otherwise more suitable. Thus, respondent No.5 is more meritorious than the appellant. The Selection Committee did not consider the candidature of respondent No.5 on the ground that the Nativity Certificate was not enclosed with the application form submitted on 30.01.2010; therefore they have selected the appellant. Learned Single Judge has analyzed the fact and law and come to the conclusion that there was no infirmity in the decision taken by the appellate authority. Decision of the Appellate Authority being in consonance with the law does not call for any interference. Admittedly, according to the Notification, the last date to furnish all the documents was 31.01.2010, i.e., Sunday, which was a holiday. Respondent No.5 therefore submitted her Nativity Certificate on the very next day, i.e., 01.02.2010, which was a working day. Thus, the act of respondent No.5 is protected under Section 10 of the General Clauses Act. In support her contention, learned counsel for respondent No.5 relied upon

the judgments of the Hon'ble Supreme Court in *Mohd. Ayub Vrs. State of U.P. and others*, 2010 (1) CLR (SC) 179 and *Huda and another Vs. Babeswar Kanhar and another,* 2005 (1) SCC 191. Concluding her argument, Ms. Praytusha submitted for dismissal of the Writ Appeal.

7. On the rival contentions the only question that falls for consideration by this Curt is as to whether the learned Single Judge is right in holding that since the last date of submission of application form for the post in question fell on Sunday, which was a holiday, the next working day should be treated as the last date and if an application was filed on that day, the same should be treated as valid application and filed within the cut-off date?

8. Undisputed facts in the present case are that on 14.01.2010, respondent No.2-CDPO, Binka issued an advertisement inviting applications for selection of Anganwadi Workers for various Anganwadi Centres including Jamchhapar Anganwadi Centre. In the said Advertisement, it was specified that applications for engagement as Anganwadi Workers shall be accepted by the said CDPO till 31.01.2010 during working days between 10 AM to 5 PM. In the present case, on 29.01.2010, the appellant filed her application along with all documents; however respondent No.5 submitted her application on 30.01.2010 without the Nativity Certificate, which was produced on 01.02.2010. It is also not in dispute that the appellant had secured only 43.2% marks whereas respondent No.5 had secured 47.6% marks. Despite the same, the Selection Committee did not select respondent No.5, as she had not submitted her application along with the Nativity Certificate on 30.01.2010 and the same was produced on 01.02.2010. The Selection Committee selected the appellant even though she secured less marks than respondent No.5. The Appellate Authority, i.e., ADM, Subarnapur before whom respondent No.5 filed A.W.W. Appeal Case No.88 of 2010 held that 31.01.2010 being a Sunday, the next working day, i.e., 01.02.2010 should have been treated as last date of receipt of the application form. The ADM further held that respondent No.2-CDPO, Binka has published in her Notification No.138 dated 05.02.2010 for inviting objections as per Guidelines Sl. No.7(ii)(d) indicating the name of respondent No.5. Hence, it would be presumed that her name had duly been accepted by the Selection Committee. With this finding, the appeal was allowed and selection of the appellant was set aside.

Learned Single Judge also came to the conclusion that 31.01.2010 being a holiday, applying principles of natural justice and rule of prudence respondent No.5's application should have been accepted on the very next working day, i.e., 01.02.2010. With this observation, learned Single Judge

has confirmed the decision of respondent No.3-ADM, Subarnapur, who has allowed the appeal of respondent No.5.

9. The order of the First Appellate Authority, which has been extracted in the order of the learned Single Judge reveals that respondent No.5 produced all the documents even the photocopy of the identity card along with her application dated 30.01.2010 but without Nativity Certificate. Learned Single Judge observed that "obviously, when the petitioner filed her application on 30.01.2010, she could not get her Nativity Certificate, though she had applied for the same much before, 31.01.2010 being a holiday". There is no denial to the above fact by the appellant. Moreover, had 31.01.2010 not been a holiday, respondent No.5 could have obtained the Nativity Certificate on that day which she obtained and submitted on the next day, i.e., 01.02.2010.

10. In the instant case, there is no dispute that the last date for submitting application was 31.01.2010 which was a holiday on account of Sunday and on the next date the petitioner filed her nativity certificate.

11. At this juncture, it would be profitable to refer to Section 10 of the General Clauses Act, which reads as follows:

> "**10. Computation of time**.- (1) Where, by any [Central Act] or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or Office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:
>
> Provided that nothing in this section shall apply to any act or proceeding to which the [Indian Limitation Act, 1877 (15 of 1877], applies.
>
> (2) This Section applies also to all [Central Acts] and Regulations made on or after the fourteenth day of January, 1887."
>
> Thus, in view of the above provision of the General Clauses Act, the act of respondent No.5 in filing Nativity Certificate on 01.02.2010 shall be considered as done in due time.

12. Hon'ble Supreme Court in the case of ***Huda (supra)*** held as under:-

> "5. What is stipulated in clause 4 of the letter dated 30-10-2001 is a communication regarding refusal to accept the allotment. This

was done on 28-11-2001. Respondent 1 cannot be put to loss for the closure of the office of HUDA on 1-12-2001 and 2-12-2001 and the postal holiday on 30-11-2001. In fact he had no control over these matters. Even the logic of Section 10 of the General Clauses Act, 1897 can be pressed into service. Apart from the said section and various provisions in various other Acts, there is the general principle that a party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity (see *Sambasiva Chari* v. *Ramasami Reddi*[1]). The underlying object of the principle is to enable a person to do what he could have done on a holiday, on the next working day. Where, therefore, a period is prescribed for the performance of an act in a court or office, and that period expires on a holiday, then the act should be considered to have been done within that period if it is done on the next day on which the court or office is open. The reason is that law does not compel the performance of an impossibility. (See *Hossein Ally* v. *Donzelle*) Every consideration of justice and expediency would require that the accepted principle which underlies Section 10 of the General Clauses Act should be applied in cases where it does not otherwise in terms apply. The principles underlying are *lex non cogit ad impossibilia* (the law does not compel a man to do the impossible) and *actus curiae neminem gravabit* (the act of court shall prejudice no man). Above being the position, there is nothing infirm in the orders passed by the forums below. However, the rate of interest fixed appears to be slightly on the higher side and is reduced to 9% to be paid with effect from 3-12-2001 i.e. the date on which the letter was received by HUDA."

13. The matter can be looked at from a different angle. Law is well-settled that the Court has to consider the scope and application of doctrine of "*lex non cogit at impossibilia*" (the law does not compel a man to do what he cannot possibly perform) and doctrine of "*impossibilium nulla obligation est*" (the law does not expect the party to do the impossible).

[See ***Kishoe Jha Vs. Mahaveer Prasad and others***, (1999) 8 SCC 266]

14. The Hon'ble Supreme Court in ***Mohammed Gazi Vs. State of M.P. and others***, (2000) 4 SCC 342 held as under:-

"7. In the facts and circumstances of the case, the maxim of equity, namely, actus curiae neminem gravabit — an act of the court shall

> prejudice no man, shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, lex non cogit ad impossibilia — the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. The applicability of the aforesaid maxims has been approved by this Court in Raj Kumar Dey v. Tarapada Dey and Gursharan Singh v. New Delhi Municipal Committee."

15. The Hon'ble Supreme Court in Gujarat Assembly Election Matter, (2002) 8 SCC 237 held as under

> "The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse."

16. The law is understood to disclaim all intention of compelling to impossibilities and the administration of laws must adopt the general exception in the consideration of all particular cases. Therefore, there are implied obligations not to force a person to do something which is rendered impossible by causes beyond his control. (Vide *Hick Vs. Rodocanachi, 1899 (2) QB 626*)

17. Admittedly, in the present case, the last date for submission of application was 31.01.2010, which was a holiday and therefore, the last date of submission of application shall be treated as the next working day, i.e., 01.02.2010 on which date respondent No.5 produced the Nativity Certificate. Therefore, as on 01.02.2010, the application filed by respondent No.5 was complete in all respects. The position would have been different if 31.01.2010 would not have been a holiday and respondent No.5 filed her Nativity Certificate on 01.02.2010.

18. The decision of this Court in Madhumita Das (supra) has no application to the present case as the fact of that case is completely different from the facts of the present case. In that case, the petitioner did not submit her application complete in all respect by the last date of receipt of the application. Therefore, this Court did not find any infirmity in the action of the Commissioner in rejecting application of the petitioner in that case and not calling her for interview. However, in the present case, as stated above, the last date fixed for submission of application forms was a holiday. Therefore, the next working day is treated as last date for filing of the application forms and on that day wanting Nativity Certificate was filed. Thus, the decision of this Court in the case of *Madhumita Das (supra)* is of no help to the appellant.

19. Similarly, the decision of Hon'ble Supreme Court in *Ashok Kumar Sonkar Vs. Union of India* (2007) 4 SCC 54 is not similar to the facts of the present case. In that case the Hon'ble Supreme Court has not decided the validity of any application made for engagement in a post on the next working day of the cut-off date, which was a holiday. Therefore, this case is of no help to the appellant.

20. For the reasons stated above, we do not find any illegality in the order of the learned Single Judge dated 03.11.2011 passed in W.P.(C) No.23288 of 2010 in rejecting the appellant/petitioner's Writ Petition and upholding the order of the Additional District Magistrate dated 26.11.2010 passed in A.W.W. Appeal Case No.88 of 2010 who rejected the selection and engagement of the appellant as Anganwadi Worker for Jamchhapar Anganwadi Centre.

21. In the result, the Writ Appeal is dismissed.

Appeal dismissed.

**2013 (II) ILR - CUT- 970**

**SANJU PANDA, J & DR. B. R. SARANGI, J.**

(GOVT. APPEAL NO.17 OF 1999 (Dt.21.08.2013)

**STATE OF ORISSA** ……..Appellant

*.Vrs.*

**SANTOSH KU. SWAIN & ORS**. ……...Respondents

**CRIMINAL PROCEDURE CODE, 1973 – Ss.378, 386**

**Appeal against acquittal – Interference – Court can interfere if the order of acquittal is perverse and unsustainable.**

**In this case P.Ws.4,5 & 6 are eye witnesses and they consistently stated about the overt act committed by A-1 which was supported by the doctor (P.W.9) – Trial Court disbelieved their evidence on the ground that they are interested and partisan witnesses – hence this appeal.**

**Where witnesses are interested, the Court should approach their evidence with care and caution in order to exclude the possibility of false implication – In a faction ridden village it will really be impossible to find out independent persons to come forward and give evidence – In large number of such cases only partisan witnesses would be natural and probable witnesses – Held, merely because the witnesses are interested and partisan their evidence cannot be rejected entirely – The impugned order of acquittal is set aside - A-1 was found guilty for the offences U/s.302 I.P.C. along with other offences and respondent-Nos.2 to 14 are found guilty U/ss. 148, 149, 336, 337 I.P.C. and all are convicted and sentenced accordingly.**

(Paras 10,11,13,17 & 18)

**Case laws Referred to:-**

1.AIR 2006 SC 3709 : (State of A.P.-V- S. Rayappa & Ors.)
2.(2003)10 SCC 414 : (State of M.P.-V- Mansingh & Ors.)
3.AIR 2009 SC 3208 : (Bheru Lal & Ors.-V- State of Rajasthan)
4.AIR 1976 SC 2263 : (Lakshni Singh & Ors.etc.-V- State of Bihar)
5.(2009)1 SCC (Cri.)60 : (Ghurey Lal-V- State of Uttar Pradesh)
6.(1992)5OCR 529 : (Krushna Podha & Ors.-V- State of Orissa)
7.(2008)39 OCR(SC)531 : (State of U.P.-V- Punni & Ors.).
8.(2013)6 SCC 428 : (Yanob Sheikh @ Gagu-V- State West Bengal).

For Appellant - M/s. Addl. Govt. Advocate
For Respondents - M/s. B. Routray, A. K. Mohanty, B. Sarangi, S.S. Kanungo, A.K. Baral & B. Dash. Mr. D.P. Dhal.

---

***S. PANDA, J.*** The appellant has filed this Government Appeal challenging the judgment dated 15.3.1994 passed by the learned 1st Addl. Sessions Judge, Berhampur in Sessions Trial No.9/92 (S.C. No.40/92 GDC) acquitting the accused persons of the charges under Sections 148/302/149 IPC and charges under Sections 336/337 IPC.

2. The prosecution case, in a nutshell, is that P.W.4 was the informant. He lodged a written report at Bhejiput Out Post on 16.10.1991 at about 11 P.M. It was alleged in the FIR (Ext.5) that on 16.10.1991 at about 8 P.M while his cousin brother Panchu Sahu-deceased was coming from the paddy field, the accused persons, being armed with deadly weapons came out from the house of Santosh Kumar Swain (A-1) due to previous enmity and obstructed him. It was further alleged that A-2 abused him and instigated others to kill him. At that time, wife of A-1, Promodini Swain charge sheet accused not being faced the trial has been declared as absconder, handed over a Bhali (MO I) to her husband and instigated him to kill the deceased. Suddenly, A-1 pierced the weapon of offence on the chest of the deceased as a result of which he fell down there and other accused persons threw brickbats. The informant along with others, who was present at the spot, tried to rescue the deceased. However, due to pelting of brickbats, they failed to rescue the deceased. After knowing the deceased died, accused persons left the place to kill another person, namely, Krushna Swain and attacked his house. One Kailash Sahu, wife of Krushna Swain and others sustained injuries due to pelting of brickbats. Apprehending further disturbances, they shifted the injured and the deceased to Bhejiput Out Post in an Auto and with the help of Thana Babu, they shifted the deceased and injured to Khallikote Hospital. It was also alleged in the FIR that the informant named P.Ws.5 and 6 (Sibaram Pradhan and Maguni Swain) as eye witnesses to the occurrence. Accordingly, the informant submitted the written report to the ASI, Bhejiput Out Post, who made a station diary entry and sent the FIR to Khallikote Police Station for registration of police case, where it was registered as Khallikote P.S. Case No.69 of 1991 for commission of offence under Sections 147/148/336/337/302/149 IPC and the investigation taken up. After completion of investigation, charge sheet was filed for commission of offence under the aforesaid Sections of the I.P.C. Out of the accused persons, namely, Banambar Swain and Promodini Swain were shown as absconders. Except those two accused persons, rest of the accused persons faced the trial. The case was split up against the aforesaid two accused persons as they could not be apprehended.

3. In support of its case, prosecution examined as many as nine witnesses out of whom P.Ws.4, 5 and 6 were eye witnesses to the occurrence. P.W 7 was the Police Officer who received the written FIR at Bhejiput Out Post and he sent the same to Khallikote Police Station. P.W.8 was the I.O who registered the FIR as Khallikote P.S. Case No.69 of 1991. P.W.9 was the doctor who conducted the post-mortem over the dead body of the deceased.

4. The defence case was that the informant party including deceased attacked the house of accused A-1 being armed with various deadly weapons and hearing hulla, some of the villagers came there and protested such action on which there was a fight between those two groups. During the said fight, the deceased accidentally received a stab blow. Despite request of the wife of the deceased, he was not given immediate medical attention as a result of which the injured died. The absconding accused Promodini and Banambar were not at all present in the village on the said day. The accused A-1 did not give stab blow to the deceased as alleged and accused persons were falsely and maliciously implicated in the case due to previous enmity. The defence also disputed the place of occurrence and the presence of light at the spot.

5. In support of their plea, defence examined the wife of the deceased as D.W.1. It was also alleged by the defence that there was a criminal case pending between the parties for the offence under Sections 143/323/325 IPC and also a proceeding under Section 107 Cr.P.C.

6. P.W.9 was the doctor. In the post-mortem report (Ext.26), he indicated that the death of the deceased was homicidal and the injuries were ante-mortem in nature. He stated that there was a spindle shaped incised stab wound of 4 cm. x 2 cm. x abdominal cavity deep over the left upper abdomen and that stab wound on the abdomen was fatal in ordinary course of nature. He also stated that external wound and corresponding internal wound could have been possible with the weapon like Bhali (M.O. I). The cause of death of the deceased was due to shock as a result of internal hemorrhage resulting in the injuries stated below. P.W.9 found the following external and internal injuries on the dead body of the deceased which are extracted below:

> "EXTERNAL INJURIES:
>
> 1. Abrasion 1 x ¼ x 1" above the right eye brow on the midline.
>
> 2. Abrasion 1" x 1/2" over right occipital region.
>
> 3. One spindle shaped incised stab wound 4 cm x 2 cm x abdominal cavity deep over the left upper abdomen obliquely across 5" below the left nipple and 3" away from the midline.
>
> INTERNAL INJURIES:
>
> 1. The peritoneal cavity contained fluid blood and the stomach contained fluid blood and blood clots, small intestine was injured at

three places and the large intestine at low place due to the external stab wound.

7. The trial court first discussed the evidence of D.W 1 and came to the conclusion that her statement seemed overall biased the accused persons under the facts and circumstances of the case and did not spring from mere sense of justice and fair-play. He did not rely on any of the points deposed by D.W.1 and held that her evidence was not trustworthy. Then, he discussed with regard to the place of occurrence and held that the evidence of P.Ws.4, 5 and 6 was quite clear that the accused persons came out from the house of accused A-1 and went into that house after the occurrence. The spot of occurrence was in front of the house of A-1 and P.Ws.4,5 and 6, who were eye witnesses to the occurrence, were partisan witnesses in view of previous rivalry between the parties. He also recorded that P.W.9 stated that repairing of injury would have been required major surgery. Since the death was undoubtedly caused by the stab injury, it was immaterial whether the deceased could have been survived by resorting to proper remedies and skillful treatment. Thus, the person who gave the stab injury must be held to be guilty of homicide. He also referred to page-35 of the case diary and found that 161 statement of the informant was recorded by P.W.7, the police officer, who received the FIR at Bhejiput Out Post on 16.10.1991 at 11 P.M. But the very first line of the FIR showed that the informant gave a written report at 11 P.M on 16.10.1991. The endorsement of the ASI revealed that he had received it at 12.45 A.M on 17.10.1991. If 12.45 A.M was taken to be the time, when the report was presented, then there was a delay of about 5 hours. Delay per se in lodging the FIR would not result in throwing out the prosecution case but if such delay resulted in a colourful version or concoction, the prosecution case might be disbelieved as a result of that he drew an inference that earlier FIR was suppressed. On such findings, the trial court disbelieved the prosecution case and passed an order of acquittal.

8. Learned Addl. Government Advocate for the State submitted that the accused persons were specifically charged under Section 148/302/149 IPC. The trial court did not assign any reason in the entire judgment while acquitting the accused persons from those charges. He submitted that the charges were under Sections 148/302/149 IPC read with Section 336/337 IPC. However, so far as charges under Sections 336/337 IPC are concerned, there was no discussion made by the trial court and without assigning any reason, he acquitted the accused persons from the said charges. He further submitted that P.Ws.4,5 and 6, who were eye witnesses, consistently stated regarding the overt act committed by A-1 which has not been taken into consideration by the trial court. Therefore, the order of

acquittal is liable to be reversed as the trial court has treated them as partisan witnesses. The evidence of P.Ws.4,5 and 6 and the opinion of the Doctor (P.W.9) coupled with the post-mortem report, the only irresistible conclusion is that A-1 committed the murder none else. Hence, the order of acquittal is liable to be set aside. He further submitted that the findings of the trial court that earlier FIR was suppressed is not sustainable as neither prosecution nor defence ever raised such point during course of trial inasmuch as nothing was suggested to P.Ws.7 and 8 during their cross-examinations about the suppression of earlier FIR and about the discrepancy in the date and time put in 161 statement of the informant by P.W.7. Therefore, the said findings are non est in the eye of law and is liable to be interfered with. In support of his contention, he has cited the decisions of the apex Court in the cases of State of A.P v. S.Rayappa & others, AIR 2006 SC 3709, State of M.P. v. Mansingh and others, (2003) 10 SCC 414 and Bheru Lal & others v. State of Rajasthan, AIR 2009 SC 3208 wherein the apex Court has held that where the eye witnesses are interested and partisan, their statements shall not be discarded out rightly; rather their evidence are to be dealt with carefully and cautiously and in case the trial court judgment is perverse, interference is warranted.

9. Learned counsel for the respondents submitted that the trial court considered the defence case that there was prior enmity and free fight between the parties. He further submitted that the proceedings under Section 107 Cr.P.C and G.R. Case No.225 of 1991 were initiated on 25.6.1991. The accused persons also lodged an FIR at Khallikote P.S. on the very day, i.e. on 16.10.1991 as there was a case and counter case filed. Therefore, the order of acquittal passed by the trial court need not be interfered with. He further submitted that the FIR was a manipulated one as in the FIR it was written that the informant lodged the FIR at 11 P.M but the A.S.I made an endorsement in the said FIR at 12.45 A.M. When the informant reported regarding murder of the deceased, the A.S.I should have reduced the same into writing immediately instead of asking the informant to get a written copy. As the informant stated that he had received the copy of the FIR from P.W.7 which was not correct because P.W.8 in his deposition stated that he handed over the FIR copy to the informant. All these discrepancies created a doubt in the mind of the trial court regarding suppression of the original FIR. The same has been discussed by the trial court in the judgment. As the FIR was a concocted version and all the evidences available on record were dealt with by the trial court, the impugned judgment does not warrant interference. In support of his contentions, he has cited the decisions of the apex Court in the case of Lakshmi Singh and others etc. v. State of Bihar, AIR 1976 SC 2263 and

Ghurey Lal v. State of Uttar Pradesh, (2009) 1 SCC (Cri.) 60 and this Court in the cases of Krushna Podha and three others v. State of Orissa, (1992) 5 OCR 529 and State of U.P. v. Punni & others, (2008) 39 OCR (SC) 531 wherein it has been held that where the decision of the trial court is based on erroneous view of law, contrary to the evidence of documents on record, the finding is manifestly unjust and unreasonable and perverse, in such case interference is warranted. However, while dealing with a case the court may reach at a different conclusion that where two views are possible, the view in favour of the accused need not be interfered with.

10. From the rival submissions of the parties, after going through the materials available on record and the prosecution case as described in the above paragraphs, it reveals that P.Ws.4,5 and 6 have categorically stated that A-1 assaulted the deceased by means of Bhali (MO-I), the weapon of offence. P.W.9, the doctor, who conducted post-mortem examination over the dead body of the deceased also corroborated the said facts. Since the evidence of P.Ws.4,5 and 6 was inconsistent with regard to the action of A-2, the aforesaid contradiction does not brush aside the prosecution case totally. These are minor discrepancies regarding suppression of FIR. It reveals that P.W.4, the informant, categorically stated that he along with others brought the deceased and other injured persons to Bhejiput Out Post and lodged the FIR. They along with the Thana Babu took the injured to Khallikote Hospital for treatment, where the doctor declared the deceased dead. Therefore, the irregularity appeared in the time reflected by A.S.I (P.W.7) in the FIR and the time of lodging the FIR by P.W.4 has been well explained instead of completing the formality after receiving the written report. P.W.7 took immediate steps to give treatment to the injured and the timing regarding 161 statement made by the A.S.I has been well explained from the record. Since the defence did not put any question to P.Ws.7 and 8 regarding suppression of the FIR, the trial court should not have come to a conclusion that the original FIR was suppressed and it should not have passed the order of acquittal.

11. Further, law is well settled that merely because the witnesses are interested and partisan, their evidence cannot be rejected entirely; rather it is the duty of the court to find out in case those eye witnesses are not allowed to be examined, the real culprit will go unpunished. If the answer is negative then the court may rely on them coupled with other materials available on record.

12. The appellate court may review the evidence in appeal against order of acquittal. Its power of reviewing evidence is wide and the appellate court can review the trial court's conclusion with respect to both facts and law. The

accused is to be presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal confirms the said presumption. Therefore, due and proper weight and consideration must be given to the trial court's decision. There must also be substantial and compelling reasons for holding that the trial court was wrong. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has found that the trial court's judgment is likely to result in "grave miscarriage of justice".

13. The evidence of interested witnesses should be thrown out at the behest or should not be relied upon for convicting an accused in the absence of any independent witness. What the law requires is that where the witnesses are interested, the court should approach their evidence with care and caution in order to exclude the possibility of false implication. The evidence of interested witnesses is not like that of an approver which is presumed to be tainted and requires corroboration but the said evidence is as good as any other evidence. In a faction ridden village, it will really be impossible to find out independent persons to come forward and give evidence. In a large number of such cases only partisan witnesses would be natural and probable witnesses. Once it is found by the court, on an analysis of the evidence of an interested witness that there is no reason to disbelieve him then the mere fact that the witness is interested cannot be persuade the court to reject the prosecution case on that ground alone.

14. The apex Court in Mansingh's case (supra) has held that merely because there was some change in time of lodging of FIR that does not per se render the prosecution version vulnerable. At the most, the requirement was a careful analysis of evidence.

15. The apex Court in the case of Yanob Sheikh alias Gagu v. State of West Bengal, (2013) 6 SCC 428 has held that a second First Information Report about the same occurrence between the same persons and with similarity of scope of investigation cannot be registered and by applying the test of similarity, it may then be hit by the proviso to Section 162 Cr.P.C. An FIR normally should give the basic essentials in relation to the commission of a cognizable offence upon which the investigating officer can get immediate start his investigation in accordance with the provisions of Section 154, Chapter XII of the Cr.P.C. Therefore, it is not possible to accept the contention that the FIR subsequently registered was a second FIR with regard to the same occurrence with similar details and was hit by Section 162. Section 134 of the Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact. It is not always the quantity but the quality of the prosecution evidence that weighs

with the court in determining the guilt of the accused or otherwise. The prosecution is under the responsibility of bringing its case beyond reasonable doubt and cannot escape that responsibility. In order to prove its case beyond reasonable doubt, the evidence produced by the prosecution has to be qualitative and may not be quantitative in nature. The court is primarily concerned and has to satisfy itself with regard to the evidence being reliable, trustworthy and of a definite evidentiary value in accordance with law. Moreover, whatever one of the witnesses had stated in his cross-examination, to some extent supported the case of the prosecution if P.Ws clearly supported the case of the prosecution. Their statements, examined in conjunction with the statements of the doctor and the investigating officer, clearly establish the case of the prosecution beyond any reasonable doubt and in order to examine some of the witnesses will not fatal to the prosecution case.

16. If the discrepancy of the evidence of the witnesses goes to the very root of the matter touching the core of the material aspects of the incident, then the court will consider such discrepancy. However, if the discrepancy is minor, it would be sufficient if it contains a gist of the incident committing the material aspects of it. The evidence of such witnesses is trustworthy and reliable.

17. The trial court has given a finding that the evidence of P.Ws.4,5 and 6 was quite clear that the accused persons came out from the house of the accused A-1 and went into that house after the occurrence. The prosecution did not change the spot of occurrence. The occurrence took place in front of the house of accused A-1. Accused A-1 gave a stab blow to the deceased by means of Bhali. The allegations made against all other accused persons except A-1 were omnibus in nature and the role played by other accused persons had some minor discrepancies. However, as P.Ws.4 and 5 belonged to the informant group, they should not have been considered as partisan witnesses and assault and stab injuries on the deceased by A-1 should not have been discarded by the trial court, which amounts to miscarriage of justice. P.Ws.4,5 and 6 are consistent regarding material part, i.e., the stab blow made by A-1. P.Ws.4 and 5 also categorically stated that the accused persons threw brickbats as a result of which one Laxmi Swain wife of Krushna Swain received injury on her face and Kailash Sahu received injury on his lip. The defence has not cross-examined the said witnesses on the said point.

18. Accordingly, we set aside the judgment dated 15.3.1994 passed by the learned 1st Addl. Sessions Judge, Berhampur in Sessions Trial No.9/92 (S.C. No.40/92 GDC) and find Santosh Kumar Swain (A-1) guilty for the

offence under Section 302 IPC and for the offence under Sections 148/149/336/337 IPC.

Therefore, we sentence Santosh Kumar Swain (A-1) to undergo R.I for life under Sections 302 IPC and R.I. for one year under Sections 148/149/336/337 IPC and direct that both the sentences shall run concurrently.

So far as respondent nos.2 to 14 are concerned, we find them guilty for the offence under Sections 148/149/336/337 IPC and sentence them to undergo R.I for one year under the aforesaid sections. The accused persons are directed to surrender to custody to serve the sentences. The Government Appeal is accordingly allowed.

Appeal allowed

**2013 (II) ILR - CUT- 979**

**SANJU PANDA, J & DR. B. R. SARANGI, J.**

MATA NOS. 70, 73 & 93/2010 (Dt.03.10.2013)

**NALINI SAMAL & ANR.** …….Appellants

.*Vrs.*

**BRUNDABAN SAMAL & ANR.** ……..Respondents

**A. HINDU ADOPTIONS & MAINTENANCE ACT, 1956 - S.20**

**Maintenance for minor daughter – Parents married on 15.07.1999 and the daughter born on 09.11.1999 i.e. four months after marriage – Wife pleaded relationship with husband prior to marriage – Magistrate refused maintenance as the legitimacy of the child was in dispute – Order challenged – Relationship between the parties prior to marriage was not disputed by the husband as he has not raised any question about the said child till filing of the present proceeding in 2005 and as such he has accepted the said child as his own child – Held, the impugned order is set aside – Husband is directed to pay Rs.2,50,000/- to the daughter towards her maintenance and marriage.** (Paras 10,12)

**B. HINDU MARRIAGE ACT, 1955 – S.13**

**Divorce – Wife challenged the decree – Records show that relationship between the parties has been irretrievably broken down and they are residing separately more than a decade – Chance of reunion is also bleak due to pendency of different proceedings between them – Held, the decree of divorce passed by the Family Court is confirmed.** **(**Paras 11,12)

For Appellants - M/s. R.K. Swain, B. Nayak, B. Mohanty, A.K. Nandy, A.K. Sethi. M/s. N. Panda-1, M.K. Panda & S.Mazumdar. M/s. S.Mohanty, B. Biswal, C.Sethy, S.C. Mohanty. M/s. R.K.Mohanty.

For Respondent - M/s. K.Patnaik, Md.H.Khan, T.Ram, A.K.Bhanja, S.K. Sethi. M/s. R.K. Mohanty, D. Mohanty, S. Mohanty, A.Mohanty, N.Mohanty, D. Varadwaj, S.Mohanty. M/s. K.N.Patnaik, M/s. S.K.Mishra, S.K.Rout, J.Pradhan.

---

***S. PANDA,J.*** MATA No. 70 of 2010 has been filed by the wife and minor daughter challenging the order dated 12.8.2010 passed by the learned Judge, Family Court, Cuttack in C.P. No.463 of 2003, dismissing the application filed by them under Sections 18 and 20 of Hindu Adoption & Maintenance Act, 1956.

2. MATA No.73 of 2010 has been filed by the husband challenging the order dated 12.8.2010 passed by the learned Judge, Family Court, Cuttack in Criminal Proceeding.No.362 of 2005 filed by the minor son under Section 125,Cr.P.C granting maintenance to him.

3. MATA No.93 of 2010 has been filed by the wife challenging the judgment and decree passed by the learned Judge, Family Court in C.P.No.100 of 2005 filed by the husband under Section 13 of the Hindu Marriage Act for divorce on the plea of adultery.

4. The learned Judge, Family Court, Cuttack while disposing of the aforesaid three proceedings by a common judgment allowed C.P.No.100 of 2005 on contest against the wife and ex-parte against one Tapan Swain, against whom the plea of adultery has been taken by the husband. While granting decree of divorce, the court below directed to pay Rs.2,00,000/- as permanent alimony to the wife and a sum of Rs.1,00,000/- to the minor son, as lump sum maintenance with a direction to keep the aforesaid Rs.1,00,000/- in the name of minor son in fixed deposit in any nationalized

bank for a period of five years and he (the minor) is entitled to draw monthly interest out of the amount regularly. So far as grant of maintenance to minor daughter is concerned, the same was dismissed.

5. The facts as revealed from the record are as follows:

The marriage between Brundaban-appellant and Nalini-respondent took place on 15.7.1999 as per Hindu law, custom and rites. Thereafter, both of them lived as husband and wife for some years. Out of their wedlock, a daughter, namely Reemita was born. The respondent was in the family way and was expected to deliver a child in September, 2003. Appellant being a Constable of Police was at Buxibazar, Cuttack. In course of time dissension erupted between the couple for demand of dowry by the husband and in-laws. It is alleged that when their marriage was about to settle, appellant was given Rs.1,00,000/- for business purpose and with the said money he purchased a land in his name, which amount was obtained by respondent's father by way of loan from State Bank of India, Bidyadharpur Branch by mortgaging his immoveable property, in which appellant was the guarantor. After marriage, both the couple resided together. It is alleged that when further demand of dowry made by appellant and his family members was not fulfilled, respondent was tortured mentally and physically time and again. Thereafter, on 23.1.2003 as per conspiracy of appellant's family members respondent was forcibly driven out from the matrimonial house. Since then she and her children are residing with her parents. Respondent being a cardiac patient is undergoing treatment regularly. It is therefore contended that the respondent and her children have no independent source of income for their sustenance and appellant has neglected to maintain them having sufficient means. The wife has taken a plea that there was relationship between them prior to marriage. The father of respondent-wife had given Rs.1,00,000/- to the husband for business purpose taking loan from State Bank of India in which the husband was a guarantor. However, the appellant utilized the said money towards purchase of a piece of land in his name. Even after marriage, the wife was continuously residing at Buxibazar, Cuttack Town, the in-laws demanded more dowry and due to non-fulfillment of such dowry, she was forcibly driven out on 23.1.2003 and from that date she with her children is residing in her father's house. She admitted that she is a cardiac patient and is undergoing regular treatment. As she has no independent source of income to maintain herself and the children, she is entitled to get maintenance for herself and the children. She also stated that the husband has some landed property and earns much income from business also. As such the wife and the children are entitled to get maintenance.

6. The husband-appellant is working as a constable of police. He has taken a plea that after two months of marriage, wife left the matrimonial house and is residing at Khandola i.e. at her father's house. While the wife residing at her parents house, he noticed regarding the adulterous life the wife on 10.10.2002. He protested and the said matter was compromised. In spite of such compromise, wife did not return to the matrimonial home and continue her life as before. The female child, namely, Reemita was born just three months after the marriage. As such she was not born out of the wedlock. Accordingly, she is not entitled to get any maintenance from him. As he was treated by the wife in a cruel manner, it was not possible to lead a peaceful conjugal life with her and apprehending danger to his life, he is entitled to decree of divorce. He also disowned the parent-ship of the son, as wife has left the matrimonial home two months after the marriage. On the above pleadings, the parties have adduced their respective evidence.

7. On analyzing the facts and evidence on records the court below recorded the following findings. The marriage between the parties is not in dispute. Exts.1 and 2 are the birth certificates of the daughter and son respectively, from which it reveal that Brundaban is the father of the children. Thus, from the birth certificate issued by the Government of Orissa in the Department of Health & Family Welfare, the date of birth of the daughter was on 9th November, 1999. Since marriage was solemnized on 15th July, 1999 and the daughter was born four months after the marriage, the said child could not have been born through Brundaban-the appellant. The court below also disbelieved the relationship of husband and wife prior to marriage, as the same was not pleaded in the petition filed by the wife and daughter for maintenance. The adulterous life of the wife has not been established convincingly by the husband. The wife has deserted the husband and husband has not maintained the wife since 23rd January, 2003 till date. As the wife has deserted the husband for a continuous period of two years preceding the date of presentation of petition for divorce, the application for divorce was allowed and the wife is entitled to permanent alimony. Taking into consideration the income of the husband, the court below has fixed the quantum of maintenance as aforesaid. The minor son was born on 15th November, 2003. Therefore, he is entitled to maintenance.

8. Learned counsel for the wife submitted that the court below has not taken into consideration the pleadings and evidence adduced by the parties on record and on an erroneous approach of law and facts rejected the claim of maintenance of the minor daughter and passed the decree of divorce. Accordingly, the wife has filed both the appeals challenging the said judgment and decree. On the other hand, learned counsel for the husband supported the judgment and decree passed and submitted that the

judgment and decree passed by the court below in Criminal Proceeding No.362 of 2005 granting maintenance to the son is illegal as the legitimacy of the child is in dispute. He further submitted that the amount of permanent alimony as awarded to the wife may be reduced.

9. Hence, in these appeals, it is to be determined whether both the children are belonging to the appellant-husband and he, being the father, is liable to maintain them?

10. The husband has not proved the plea of adultery by adducing cogent evidence. Therefore, rightly the court below rejected the said plea taken by the husband. The relationship between the parties prior to marriage was not disputed by the husband even though same was not pleaded and he stood guarantor to the loan obtained by her father. Marriage was in the month of July, 1999 and the daughter was born on 9.11.1999. The husband has not raised any question about the said child till filing of the present proceeding in the year, 2005. He has accepted the child as his own child. Therefore, it can safely be concluded that the appellant-husband is the father of the said child. Hence, the finding, of the court below that the daughter born after four month's of the marriage is not entitled to get maintenance, is set aside. Accordingly MATA No.70 of 2010 filed by the daughter for maintenance is allowed.

11. Admittedly, the wife was with the husband till 23rd January, 2003 at Buxibazar, Cuttack-in the official Govt. quarters of the husband. Hence, the burden was with husband to prove that the son is the illegitimate son, which he could not. Accordingly, the same is dismissed. So far as desertion is concerned, from the evidence of the parties, it appears that at no point of time wife has disclosed her intention that she is permanently left the matrimonial house with an intention not to return back, rather, she came back the matrimonial house on 23rd January, 2003. She was forcibly driven out. Law is well settled that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. The inference of desertion has to be made on a balance of probabilities. The burden of proving desertion the "factum" as well as the "animus deserendi" is on the petitioner; and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion through out was without just cause. In other words, even if the wire, whether she is the deserting spouse, does not prove just cause for her living apart, the husband has still to satisfy the Court that the desertion was without cause (*See AIR 1964 SC 40*, ***Lachman Utamchand Kirpalani v. Meena alias Mota)***. In the present case, the wife is residing at her parents house and she is a cardiac patient and under

treatment. The husband accepted the same and has not taken any steps to bring her back and provided treatment. Hence, wife residing at her parents house will not amount to cruelty. However, the court below, without considering the conduct of the husband, who did not take any step to bring back the wife to the matrimonial home, came to an abrupt conclusion that the wife has deserted the husband for a period of two years preceding to the filing of petition for divorce. From records, it appears that the relationship between the parties has been irretrievably broken down and they are residing separately since more than ten years. There is no chance of reunion between them because of allegation and counter allegation and pendency of so many proceedings between them. The wife has not claimed for enhancement of the quantum of permanent alimony rather during pendency of the appeal, she has withdrawn the permanent alimony awarded by Family Court without any objection.

12. Considering the above, MATA No. 93 of 2010 filed by the wife is allowed in part. We confirm the decree of divorce passed by the learned Judge, Family Court, Cuttack on the findings stated in the above paragraphs and in MATA 70 of 2010 direct the father to pay a sum of Rs.2,50,000/- (Rupees two lakhs fifty thousand) to the daughter, namely, Reemita Samal towards her maintenance and marriage and the said amount shall be kept in fixed deposit in any nationalized Bank in her name and she is entitled to interest thereof and the fixed deposit amount shall be utilized for her marriage or for her higher study on prior application filed before the Family Court.

Accordingly, MATA No.73 of 2010 filed by the husband challenging permanent alimony to the son has no merit, and the same is dismissed.

Appeals disposed of.

**2013 (II) ILR - CUT- 984**

**S. PANDA, J & DR. B. R. SARANGI, J.**

W.P.(C) NOS. 863 & 1011 OF 2013 (Dt.12.07.2013)

**SAMARENDRA JENA** …….Petitioner

*.Vrs.*

**SANGHAMITRA BISWAL** ……..Opp.Party

**FAMILY COURTS ACT, 1984 – S.13**

**Engagement of advocate by a party in the Family Court – It is totally restricted U/s.13 of the Act – However the Family Court in exercise of its discretion may allow a party to engage legal practitioner to enable them to act as amicus curiae – Held, there is no illegality in the impugned order rejecting the prayer of the petitioner for permitting him to be represented through lawyer.** (Paras 6,8,11)

**Case laws Referred to:-**

1.2006 (I) OLR 524 : (Sadhana Patra-V- Subrat Pradhan)
2.(2011)1 SCC 252 : (S.D. Joshi & Ors.-V- High Court of Judicature at Bombay & Ors.)
3.AIR 1968 SC 647 : (State of Orissa-V- Sudhansu Sekhar Misra & Ors.)
4.AIR 1980 SC 1707 : (Rajpur Rudra Meha & Ors.-V- State of Gujarat)
5.AIR 1985 SC 218 : (M/s. Amar Nath Om Prakash & Ors.-V-State of Punjab & Ors.)
6.2008(3) SCC 574 : (Som Mittal-V- Govt. of Karnataka)
7.2008 (9) SCC 284 : (Rajbir Singh Dalal (Dr.)-V- Chaudhari Devi Lal University Sirsa & Anr.)
8.AIR 1991 Bom.105 : (Leela-V- Dr. Mahadeo)
9.(1997)12 OCR 196 : (Manguli Dalei-V- Smt. Malini Dalei).
10.AIR 1992 SC 1981=1992(4)SCC 711 : (Nelson Motis-V- Union of India)
11.AIR 1963 SC 946 : (State of Uttar Pradesh-V- Dr.Vijay Anand Maharaj).

For Petitioner - M/s. Rama Ch. Sarangi & P.M. Pratihari.

For Opp.Party - M/s. Biswanath Rath, J. Rath, S. Sethy, S. K. Mishra, S. Mishra.

---

***DR. B.R.SARANGI, J.*** Being aggrieved by the order dated 7.1.2013 passed by the learned Judge, Family Court, Bhubaneswar in C.P.No. 68 of 2010 rejecting the application to permit the petitioner-husband for engagement of legal practitioner under Section 13 of the Family Courts Act, he has preferred W.P.(C) No. 863 of 2013. The wife being petitioner in W.P.(C) No.1011 of 2013, has approached this Court seeking for a direction to the learned Judge, Family Court, Bhubaneswar to dispose of C.P.No.68 of 2010 within a time frame. Since both the cases arise out of C.P.No.68 of 2010, they are heard together and disposed of by this common judgment.

2. The petitioner-husband filed C.P.No. 68 of 2010 before the learned Judge, Family Court, Bhubaneswar for dissolution of marriage, which was performed under the Special Marriage Act. In course of hearing, an

application was filed by the petitioner-husband, who was respondent in the aforesaid C.P. No. 68 of 2010 before the learned Judge, Family Court, Bhubaneswar praying to permit him to be represented through a lawyer vide Annexure-1 on 3.4.2012. The said application was rejected by the learned Judge, Family Court, Bhubaneswar vide order dated 7.8.2012 without assigning any reason and therefore, the petitioner-husband approached this Court by filing W.P.(C) no.14916 of 2012. On consideration of the contentions raised therein, this Court by order dated 19.12.2012 set aside the order dated 7.8.2012 passed by the learned Judge, Family Court, Bhubaneswar rejecting the application for representation by legal practitioner and remitted the matter to the said court for reconsideration of the application dated 3.4.2012 strictly in consonance with law by passing a speaking order (afresh), consequence thereof, the impugned order in Annexure-3 dated 7.1.2013 has been passed, which is under challenge in W.P.(C) No. 863 of 2013.

3. On being noticed, the opposite party-wife entered appearance and supported the order passed by the learned Judge, Family Court, Bhubaneswar stating that in view of the provisions contained in Section 13 of the Family Courts Act, the order passed is absolutely correct and needs no interference by this Court at this stage.

4. Mr.R.C.Sarangi, learned counsel for the petitioner-husband assails the impugned order dated 7.1.2013 on the ground that the learned Judge, Family Court has not considered the contentions raised in the application filed under Annexure-1 in proper perspective and has stated that though the petitioner-husband relied upon the judgment of this Court in **Sadhana Patra v. Subrat Pradhan (2006(I) OLR, 524)** he has not filed the order/decision and he has abruptly came to the conclusion thereby depriving the petitioner-husband to avail the assistance of a lawyer for the purpose of cross-examination and making argument on his behalf. He further submitted that though reliance was made upon the judgment of the apex court in **S.D.Joshi and others v. High Court of Judicature at Bombay and others**, (2011) 1 SCC 252, the learned Judge, Family Court has not appreciated the said judgment in proper perspective and rejected the application without any application of mind. Several judgments have been referred to in the writ petition filed by the petitioner-husband reported in **State of Orissa Vs. Sudhansu Sekhar Misra & others**, AIR 1968 SC 647, **Rajpur Rudra Meha & others Vs. State of Gujarat**, AIR 1980 SC 1707, **M/S Amar Nath Om Prakash & others Vs. State of Punjab & others**, AIR 1985 SC 218, **Som Mittal Vs. Govt. of Karnataka**, 2008(3) SCC 574 and **Rajbir Singh Dalal (Dr.) Vs. Chaudhari Devi Lal University, Sirsa &**

**another**, 2008(9) SCC 284. According to Mr. Sarangi, depriving the petitioner by rejecting the application to permit him to engage a lawyer to defend his case violates Article 29 of the Constitution and therefore, he seeks for quashing of the said order.

5. Mr.Biswanath Rath, learned counsel appearing for the opposite party-wife vehemently urged that the impugned order passed by the learned Judge, Family Court, Bhubaneswar is absolutely in consonance with the provisions of law and more so, Section 13 of the Family Courts Act, 1984 only puts a restriction with regard to the representation of the parties by the legal practitioner. In view of such position, the prayer made by the petitioner-husband cannot be allowed in the ends of justice. He further submits that the petitioner is himself a practicing Advocate of the Bhubaneswar Bar.

6. Before going to the merits of the case, we propose to state the objects of enactment of Family Courts Act, 1984, wherein it is found that several associations of women, other organizations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59$^{th}$ report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt in the public interest, to establish Family Courts for speedy settlement of family disputes. To satisfy the objects and reasons for establishment of family courts, the legislature in its wisdom have enacted an Act to provide for the establishment of the family courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith called “Family Courts Act, 1984”, hereinafter to be referred to as “the Act”, in short. Various provisions have been made under the said Act to achieve its objects. One of such provision is Section 13, which reads as follows:

> "**Sec.13**. Right to legal representation:- Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right to be represented by a legal practitioner."

On perusal of the aforesaid section, it appears that the said Section puts a restriction on the parties to engage lawyers to represent their case in the family courts. Similar provision is found in Section 36 of the Industrial Disputes Act, 1947. The common view in both the enactments, i.e., Family Courts Act, 1984 and Industrial Disputes Act, 1947 is to settle the disputes through conciliation. In the latter Act, the Section is very clear that the party to the dispute may be represented by legal practitioner with the consent of parties, whereas Section 13 of the Family Courts Act is silent on the point whether permission can be obtained from the court to engage legal practitioner by any party to the dispute to act on their behalf. The law makers intended to keep the proceedings in the Family Court simple, informal and non-technical to achieve the main objectives of the enactment. In that perspective, it is mainly aimed at the right of the parties to engage legal practitioner. However, there is no bar on the parties to make application to permit them to engage legal practitioner. In such case the court can permit the parties to engage legal practitioner by exercising its discretion to enable them to act as amicus curiae. Law itself prohibits for engagement of lawyer to represent a case before the family court excepting to act as amicus curiae as per the provisions of the said Section and therefore, engagement of lawyer by the parties is not permissible.

7. Similar question has been considered by this Court in Sadhana Patra (supra) in which the learned Single Judge of this Court referring to the judgment in **Leela v. Dr.Mahadeo, AIR 1991 Bom. 105** has come to a definite conclusion that the representation by a lawyer is not a matter of right, but permission to be represented by a lawyer should be liberally granted where the facts are complicated. While giving such conclusion, this Court has also relied upon the judgment of this Court in **(1997) 12 OCR 196 (Manguli Dalei v. Smt.Malini Dalei)**.

8. The reliance on the judgments referred to in the writ petition, as stated supra, have neither been placed nor have been urged nor the same are in the context of which the case is to be decided at the time of hearing by Mr.Sarangi, learned counsel appearing for the petitioner-husband. So far as the reference made to the judgment of the apex Court in **S.D.Joshi(supra)** is concerned, the question of applicability of Section 13 of the Act was not under consideration in the said case, rather the apex Court

had taken into consideration the provisions contained in Sections 3(2)(a)(d), 4, 7 to 10, 16 and 19 of the Act and also considered the meaning of 'Judge', 'Court', 'Tribunal', "Administration of Justice" with reference to the constitutional provision mentioned in Articles 233, 234 and 236 of the Constitution. Neither the applicability of Section 13 of the Act had been urged nor was there any occasion for the apex Court to deal with the said matter. In view of such provision, it is very much clear that as per the provisions contained in Section 13 of the Act, the right of representation and assistance of a lawyer before the Family Court is totally restricted.

9. On perusal of Section 13, it is evident that the provision is very clear. It is well established that if the words of a statute are clear and free from any vagueness and are, therefore, reasonably susceptible to only one meaning, it must be construed by giving effect to that meaning, irrespective of consequences. (See: **Nelson Motis v. Union of India, AIR 1992 SC 1981= 1992(4) SCC 711.).**

10. The Supreme Court in **State of Uttar Pradesh v. Dr. Vijay Anand Maharaj**, AIR 1963 SC 946 has held as follows:

> "when the language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the act speaks for itself. "

That apart, interpretation of statute by **Maxwell** also states as follows:

> "The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words"

In the present case, when the legislative intent is very clear while enacting Section 13 keeping its objects and reasons, there is no question of any deviation or defiance thereof.

11. In view of the above, we do not find any illegality or infirmity in the impugned order of the learned Judge, Family Court, Bhubaneswar while rejecting the prayer of the petitioner for permitting him to be represented through lawyers under Annexure-3. Accordingly, the writ petition bearing W.P.(C) No. 863 of 2013 filed by the petitioner-husband is dismissed.

12. As a consequence of dismissal of the aforesaid writ petition filed by the petitioner-husband, the writ petition, bearing W.P.(C) No. 1011 of 2013 filed by the opposite party-wife is disposed of with a direction to the learned Judge, Family Court, Bhubaneswar to conclude C.P. No. 68 of 2010 within a

period of six months from the date of receipt of a certified copy of this judgment. No cost.

Writ petitions disposed of.

**2013 (II) ILR - CUT- 990**

**S. PANDA, J & DR. B. R. SARANGI, J.**

CRLA NO.175 OF 2006 (Dt.04.09.2013)

**BIRABARA KANDI** …….. Appellant

*.Vrs.*

**STATE OF ORISSA** ……Respondent

**PENAL CODE, 1860 – Ss.302, 304-PART-I.**

**Murder – Father is the assailant of his son – Family dispute – Deceased assaulted the accused one day before the occurrence – Accused-father could not tolerate the behavior of his son – No premeditation in the mind of the appellant to cause death – Appellant being unmindful of the consequences inflicted a single blow which unfortunately caused damage to a vital organ causing death of the deceased – The entire incident took place in a fit of anger, at the spur of the moment – Though the appellant had knowledge that the act is likely to cause death but he had no intention to cause death – Held, the offence would fall under any of the exceptions to Section 300 I.P.C. to state that it is a case of culpable homicide not amounting to murder – Conviction U/s.302 I.P.C. is altered to one U/s.304 Part-I I.P.C. and the appellant is sentenced to undergo R.I. for ten years.**

(Paras 11,13)

**Case laws Referred to:-**

1.AIR 1996 SC 3471 : (Alli Mollah & Anr.-V- State of West Bengal)
2.(2010)6 SCC 407 : (Gopal Singh & Ors.-V- State of Madhya Pradesh)
3.(2012)1 OLR 279 : (Gangadhar Bariha & Lingaraj Bariha-V- State of Orissa
4.(2012)53 OCR 1051 : (Gunanidhi Parida-V- State of Orissa)
5.(2012)53 OCR 574 : (Pita @ Pitabasa Gounda-V- State of Orissa)
6.(2012)53 OCR (SC) 1144 : (Sudhakar-V- State of Maharashtra)

For Appellant - Mrs. M. Panda, Amicus Curiae.
For Respondent - Mr. Zafarulla, Addl. Standing Counsel.

---

***DR.B.R.SARANGI, J.*** On the request of the learned counsel for the appellant, this Court by order dated 31.7.2013 adjourned the matter to 21.8.2013, on which date, none appeared for the appellant. Since the appeal is of the year 2006, this Court engaged Mrs.M.Panda as Amicus Curiae to argue the matter and accordingly, the matter was adjourned to today.

2. This appeal is directed against the judgment and order dated 30.3.2006 passed by the learned Addl. Sessions Judge, Fast Track Court-2, Cuttack in S.T.Case No. 476 of 2005 convicting the appellant for commission of offence under Section 302, IPC and sentencing him to undergo imprisonment for life.

3. The prosecution case in brief is that on 10.8.2004 at about 4.30 P.M., Bikram Kandi @ Babuli, the deceased, came to the informant Bijay Kandi (P.W.1) and asked for betel. While the informant was preparing betel for the deceased, the accused, Birabar Kandi, father of the deceased standing on the road asked the informant for betel and proceeded towards his cabin and suddenly the accused-appellant, Birabar Kandi brought out a katari and gave one forceful katari blow on the back side neck of the deceased, who was waiting to take betel from the informant (P.W.1). Immediately after giving such katari blow, the accused, father of the deceased escaped by means of a bicycle. Due to such katari blow, the deceased fell down on the ground sustaining severe injuries on his neck and immediately succumbed to the injuries.

4. The informant, P.W.1 reported the matter to the police and accordingly, the accused-appellant faced trial for the offence under Section 302, IPC and ultimately convicted and sentenced to undergo imprisonment for life.

5. The plea of the defence is of complete denial.

6. To establish the case, the prosecution examined as many as 13 witnesses whereas none was examined on behalf of the defence. The prosecution has relied upon documents marked as Exts.1 to 14 whereas the defence has not relied on any documents.

7. Out of the 13 witnesses, P.W.1 is the informant and eye witness to the occurrence, P.W.2 is another eye witness to the occurrence, who claims that he was present near the betel shop at the time of occurrence, P.Ws.3 and 4 are the witness to the inquest and seizure respectively, whereas P.W.5 is another seizure witness to the nail clippings of the accused and also a witness to the seizure of wearing apparels of the deceased obtained from the doctor after the post mortem examination, P.W.6 is the wife of the deceased, who immediately heard about the occurrence and rushed to the spot, P.W.7 is the local sarpanch, who heard about the incident immediately after the occurrence and also a witness to the inquest, P.Ws.8 and 9 are the witnesses to the inquest and witness to the seizure of sample earth blood stained earth, blood stained slipper, blood stained gauge, sample gauge seized vide seizure list Ext.5, P.W.10 is the doctor, who conducted post-mortem examination, P.W.11 is a witness to the seizure of Katari, who does not support the prosecution case, for which he was declared hostile by the prosecution, P.W.12 is the scientific officer, who visited the spot and collected the incriminating materials on the requisition of the I.O., and P.W.13 is the I.O., who after completion of investigation submitted charge-sheet against the accused-appellant. P.W.13 who is the O.I.C. of Salipur Police Station on receiving telephonic intimation about the incident on 10.8.2004 at about 5 P.M. came to the spot at 5.30 P.M. where P.W.1 presented the F.I.R. Ext.1 before him. On the basis of the above mentioned facts and circumstances, learned Addl. Sessions Judge, formulated two points for determination which reads as follows :

> "(i*) Whether the accused had inflicted Katari blow on the neck of the deceased.*
>
> *(ii)* Whether the deceased succumbed to the injuries caused by the accused."

Both the points being interlinked, learned Addl. Sessions Judge had taken up together for consideration and ultimately relying upon the statement of P.W.1, the informant, an independent eye witness to the occurrence and P.W.2, held the accused-appellant guilty of the offence under Section 302, IPC and convicted and sentenced him thereunder as stated above.

8. The appellant has been in custody since 11.8.2004 and after submission of charge-sheet he faced trial. From the materials available on record, it appears that the conviction is based on the evidence of the eye witnesses, P.W.1 and P.W.2, P.W.1 being the informant and P.W.2, who was sitting near the spot at the time of occurrence and P.W.6, the wife of the

deceased, who immediately after the occurrence heard about the incident and rushed to the spot. Therefore, the entire prosecution case is based on the statements of two eye witnesses, P.Ws.1, 2and 6, who is a post occurrence witness and heard about the same. As per the statement of P.W.6, the wife of the deceased, four days prior to the occurrence, she along with her husband-deceased remained separately from the accused and the accused blamed her that she had instructed the deceased to remain separately from the accused. For the said reason, prior to one day of the occurrence, the accused assaulted her and when her husband could know about such fact, he (deceased) also assaulted the accused. Thereafter, she along with her deceased husband remained in another house, which is 2-3 houses apart from the original house. It is further stated by P.W.6 that the matter was to be decided by the village Panch, but before any amicable settlement was arrived at, she heard that the accused had killed her husband. During cross-examination, nothing has been brought out to rebut the fact of ill-feeling between the accused and the deceased. But fact remains that the deceased and P.W.6 were remaining separate from the accused because they were not pulling on well with him.

9. So far as the evidence of P.W.1, the eye witness to the occurrence, is concerned, it is stated that while he was preparing betel for the deceased, he could see the accused standing on the road and asked him to prepare betel for him. More specifically, he stated that he saw the accused giving Katari blow on the neck of the deceased, who succumbed to the injuries. During cross-examination, it was brought out from him that the occurrence was so sudden that none could decide what to do and for that reason, he could not shout. Except a few suggestions such as the informant has got land dispute with the accused and was taking Ganja with group of boys, nothing has been brought on record to rebut the evidence of P.W.1. Therefore, on the basis of the materials available on record and relying upon the statements made by P.W.1, who is an eye witness to the occurrence, it cannot be said that the accused had not committed the crime, rather the evidence of P.W.1 gets corroborated by the evidence of P.W.2, who is also another eye witness, who was sitting near the shop of P.W.1 at the time of occurrence to take betel. P.W.2 had corroborated the evidence of P.W.1 stating that while the deceased was standing in front of the shop of P.W.1 to take betel, the accused came to that cabin to take betel and immediately gave a Katari blow on the neck of the deceased and escaped in a bicycle and the deceased succumbed to the injuries.

10. So far as the evidence of P.Ws.7,8 and 9 are concerned, immediately after the occurrence, they went to the spot and saw the

deceased lying with bleeding injuries on his neck and they also heard that the accused had escaped after killing his son and so far as the medical evidence is concerned, P.W.10 has opined that the death was caused to the deceased due to the injuries caused by sharp cutting weapon like M.O.I, the Katari.

11. From the above evidence, it can be elucidated that there was family dispute between the deceased and his father, the accused-appellant, which has culminated into anger because as per the statement of P.W.6, the deceased assaulted the accused just one day before the occurrence. Apart from the same, the deceased having remained separate from the accused, aggravated his anger towards the deceased and more so, he is a Ganja addict. On consideration of the facts narrated above, there is nothing to suggest that there was any premeditation in the mind of the appellant to cause death of the deceased, rather the entire act has been done out of anger, may be with the influence of Ganja. The appellant, who is the father of the deceased, was not in a position to tolerate the behavior of his son as he was remaining separate from him. Therefore, unmindful of the consequences, though not in a cruel manner, the appellant inflicted the single blow by Katari, which unfortunately caused the damage of the vital organ resulting in the death of the deceased.

12. In support of her contention, Mrs.Panda has reliedupon the judgments of the apex Court as well as this Court in **Alli Mollah and another v. State of West Bengal,** AIR 1996 SC 3471, **Gopal Singh and others v. State of Madhya Pradesh** (2010) 6 SCC 407, **Gangadhar Bariha and Lingaraj Bariha v. State of Orissa** (2012) 1 OLR, 279, **Gunanidhi Parida v. State of Orissa** (2012) 53 OCR 1051, **Pita @ Pitabasa Gouda v. State of Orissa,** (2012) 53 OCR 574, and **Sudhakar v. State of Maharashtra** (2012) 53 OCR (SC) 1144.

13. Learned counsel for the appellant states that no reliance can be placed on the evidence of P.W.2, as eye witness who immediately disappeared from the place after seeing the occurrence on unacceptable plea that on seeing blood, he became afraid of and rushed to his home. For this purpose, she has relied upon **Alli Mollah (supra)** and Gopal Singh (supra). She further contended that conviction under Section 302, IPC is only attracted if the assault is caused with the intention of causing death. Considering the factual background of the case in hand, it appears that the entire incident took place in a fit of anger and at the spur of the moment because of the family quarrel as revealed from the statement of P.W.6, the wife of the deceased. For that learned counsel has relied upon Gangadhar

Bariha (supra). She further contended that even if evidence of P.Ws.1 and 2 are believed, the same has to be considered with reference to the evidence of P.W.6, who has stated that one day prior to the occurrence, the appellant assaulted her on the ground that she insisted the deceased to remain separately. The deceased also assaulted the appellant as she assaulted P.W.6. On the next day, the appellant assaulted the deceased on the back side of the neck by means of a Katari. Therefore, though the appellant had knowledge that the act is likely to cause death, but he had no intention to cause death. In this background, the only question that arises for consideration is as to whether there was mitigating circumstances in order to hold that the offence would fall under any of the exceptions to Section 300, IPC to state that it is a case of culpable homicide not amounting to murder. Reliance has been placed on Gunanidhi Parida (supra) and Pita @ Pitabasa Gouda (supra) as stated above. In view of the aforesaid facts and circumstances, we are of the considered opinion that being unmindful of the consequences though not in a cruel manner, the appellant inflicted the single blow, which ultimately caused severe damage to the vital organ resulting in death of the deceased, thereby the offence alleged and as found proved against the appellant, can be brought under the First Part of Section 304, IPC as held in Sudhakar (supra) relied upon by the learned counsel for the appellant. Therefore, while affirming the conviction of the appellant, we alter the same to one under Section 304 Part I of IPC in place of Section 302, IPC and sentence the appellant to undergo rigorous imprisonment for ten years.

14. Accordingly, the appeal stands partly allowed with the above modification of the charge and the sentence imposed on the appellant.

Appeal allowed in part.

**2013 (II) ILR - CUT- 996**

**B. N. MAHAPATRA, J.**

W.P.(C) NO. 15465 OF 2013 (Dt.04.09.2013)

**SUMAN PANIGRAHI** ……..Petitioner

*.Vrs.*

**BOARD OF SECONDARY EDUCATION, ODISHA & ANR.** …….Opp.Parties

**EXAMINATION – A Candidate appearing in an examination has a right to fair and proper valuation – If a candidate suffered irreparable loss relating to his career for the fault of the Opp.Parties, the Opp.Party authority is liable to pay compensation to such candidate.**

**In this case petitioner appeared in the annual H.S.C. Examination, 2013 – Result published declaring him failed as he secured 06 marks in Mathematics paper – After rechecking revised mark sheet supplied to him showing 89 marks instead of 06 and by that time on line and off line admission in +2 classes for regular students were over – Irreparable loss caused to the career of the petitioner for no fault of him – He has also suffered from shock, harassment, humiliation and mental agony due to the fault of the Opp.Parties – Held, the B.S.E. Odisha is liable to pay compensation of Rs.3,00,000/- to the petitioner within a period of 8 weeks, failing which the compensation shall carry 9% interest P.A. till payment – The authorities shall take stringent action against erring officials and may recover the whole or any part of the compensation amount from them**. (Paras 26, 27)

**Case law Referred to:-**

AIR 1992 SC 2069 : (Kumari Smt.-V- State of Tamil Nadu & Ors.)

For Petitioner - M/s. R.K. Nayak, F.R. Mohapatra, M.K. Panda & S.K.Panda.

For Opp.Parties - M/s. B. Dash, P.K.Mohanty, J.P. Tripathy.

***B.N.MAHAPATRA, J*** This writ application has been filed with a prayer to direct opp. Parties to pay compensation to the petitioner to the tune of Rs.5 lakhs for mental agony/shock, harassment and loss of one valuable academic year caused to him.

2. Petitioner's case in a nutshell is that the petitioner belongs to a very poor family and prosecutes his study from a little source of income of his

father, who is a small farmer. He has a strong will to do something in future after graduation and to lead a dignified life in the society. He appeared in the Annual High School Certificate Examination, 2013 held on scheduled dates in Panchayat High School, Betada in all subjects. The results of annual H.S.C. Examination, 2013 were published on 30.4.2013 in the website of the Board of Secondary Education, Odisha. From the said website the petitioner came to know that he has been declared as 'fail' and 06 marks have been awarded to him in mathematics paper. He further found that in total he has secured 412 marks out of 600 marks. Soon after knowing result from the website of the Board of Secondary Education, Odisha, the petitioner on 3.5.2013 deposited a sum of Rs.260/- for rechecking of Mathematics paper and supply of Xerox copy of the same. Since no result was communicated to the petitioner immediately, he approached this Court on 14.05.2013 in W.P.(C) No. 11556 of 2013. During pendency of the said writ petition, a revised mark sheet was issued by the opp. Parties which was received by the petitioner on 19.06.2013 enhancing his mark in Mathematics answer script from 06 to 89 and declaring the petitioner to have passed in 1st Division. Since the result of re-addition of marks was communicated to the petitioner, this Court disposed of the earlier writ petition *inter alia* with the observation that so far the prayer made in the writ petition, nothing remained to be decided. Thereafter, the present writ petition is filed claiming compensation of Rs.5 lakhs for mental agony, shock, harassment meted out to the petitioner and loss of one valuable academic year caused to him.

3. Mr. Nayak, learned counsel appearing on behalf of the petitioner submitted that the action of opp. Parties declaring the result of the petitioner as 'fail' is illegal, arbitrary and contrary to law in view of the fact that as per the opp. Parties' own admission, the petitioner secured 89 marks and passed in 1st Division, but it was published in the website that he secured 06 marks in Mathematics and had failed. The opp. Parties in their counter affidavit have never stated/explained any reason of their negligence in publishing the wrong result. The fresh mark sheet issued by the opp. Parties was received by the petitioner on 19.6.2013 after expiry of the last date fixed for submitting application for higher studies. As per the revised mark sheet, which was issued after rechecking, the petitioner got 1st Division in H.S.C. Examination, 2013 securing 495 marks out of 600, i.e., 82.5% and became eligible to take admission in a good College of the State for prosecuting higher studies. For the wrong committed by the opp. Parties, he could not take admission in a better College as a result of which, the petitioner would either be deprived of getting admission in a good College or lose one valuable academic year of his career. After knowing the result from the website that he was declared failed by the opp. Parties, the petitioner was

very much perturbed mentally and might have committed suicide, if his parents and friends would not have given him mental courage. The petitioner so also his parents were made to suffer harassment and humiliation in the society for the negligent and illegal act of opposite parties for which they are vicariously liable to adequately compensate the petitioner and his family members for the sufferings and mental agony caused to them. The near and dear or the society could not compensate the said loss in any manner. Thus, it was submitted that opposite parties are liable to pay compensation to the petitioner for their negligent and illegal action. Concluding his argument, Mr. Nayak prayed for compensation of Rs.5 lakhs to the petitioner.

4. Per contra, Mr. B. Dash, learned counsel appearing on behalf of the opp. Parties-Board submitted that pursuant to the application of the petitioner, his Mathematics paper was rechecked and re-addition was made. It was found that the petitioner has secured 89 marks instead of 06 marks and accordingly, a revised certificate was issued showing him to have passed in 1st Division; the Deputy Secretary, Balasore Zone received the said revised Certificate from opposite party No.2 on 10.06.2013 who in turn sent it to the Headmaster of the concerned High School where the petitioner last studied; the petitioner received the same on 19.6.2013. The claim of compensation of Rs.5 lakhs has been made by the petitioner taking advantage of Sec. 35-A of the Court Fees Act as being a minor, he is not required to pay court fee.

5. Referring to various provisions of the Board, Mr. Dash submitted that the Board is a Body constituted to regulate and supervise Secondary Education. Under Section 19 of the Board of Secondary Education Act, 1979 (for short, "Act, 1979") the Board is competent to constitute Committees and accordingly, the Board has constituted the Committees and one of such Committees is "Examination Committee". The Board framed its regulation which is notified by the Government of Odisha on 22.12.1955 vide Notification No.11283-E and Examination Committee also finds place in Regulation 2 (c) of the Regulation. Regulation 22 speaks about the power of the Examination Committee. In 2013, the Examination Committee issued instructions to the Assistant Examiner, Deputy Chief Examiner, Chief Examiner and Scrutinizer (for short, "examiners") in connection with evaluation of answer scripts of H.S.C./C.T./C.P.Ed./ Madhyama Examinations. In the said instructions, it was clearly indicated that the examiners are responsible for the error-less valuation of answer scripts. Therefore, if there is any mistake, it is due to the examiners, those who are involved in the process of evaluation.

6. It was further submitted that publication of result of the candidates is always provisional. Therefore, under Regulation 43, if any candidate is dissatisfied with the result, he may request the Secretary of the Board for rechecking/re-addition of marks in any paper within one month of publication of the result with prescribed fee and form. Therefore, opp. parties are in no way negligent or careless in their duties and they are not liable to pay any compensation to the petitioner. However, if at all this Court decides to award any compensation in favour of the petitioner, that may be realized from the persons, who are involved in the process of evaluation and responsible for such laches. In support of his contention, Mr. Dash relied upon judgment of the Hon'ble Supreme Court in the case of *President, Board of Secondary Education, Orissa v. D. Sunakar and another* dated 14.11.2006 passed in Civil Appeal (Civil) 4926 of 2006 (Arising out of SLP (C) No.17990 of 2005). It was further contended by Mr. Dash that all the persons involved in the process of evaluation of answer papers are not the employees of the Board. The Board does not have any administrative control over the said persons as they are the employees of the School and Mass Education Department of the Government of Odisha.

7. Mr. Dash further submitted that the Government of Odisha, Department of Higher Education had made an advertisement in daily Odia 'The Samaja" dated 26.7.2013, Cuttack regarding admission into +2 and +3 Classes for Academic Year 2013-14. Therefore, the petitioner can take admission in +2 Class for the academic session 2013-14. Hence, question of loss of one academic year does not arise. Concluding his argument, Mr. Dash prayed for dismissal of the writ petition.

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

(i) Whether in the facts and circumstances of the case, the petitioner is entitled to get any compensation?
(ii) If the answer to question No.(i) is in affirmative then who is liable to pay such compensation and what would be the quantum of compensation?
(iii) What order?

9. Since all the above questions are inter-linked, they are dealt with together.

10. Undisputed facts are as follows:

The petitioner who is represented through his father-guardian had appeared in H.S.C. Examination, 2013 in Panchayat High School, Betada and results of the said Examination were published on 30.4.2013 in the

website of the Board of Secondary Education, Odisha from which the petitioner came to know that though he secured 412 marks in total, out of 600 marks, he was declared failed as he secured 06 marks only in Mathematics paper. Immediately thereafter, the petitioner on 3.5.2013 deposited Rs.260/- for rechecking of the Mathematics paper and supply of Xerox copy of the said answer paper. Since the petitioner was not provided with the result of the rechecking /re-addition of the Mathematics paper and Xerox copy of the said paper immediately, he filed W.P.(C) No.11556 of 2013 on 14.5.2013 with the following prayer :

> "In the facts and circumstances of the case, the petitioner most respectfully prays this Hon'ble Court to be graciously pleased to allow the writ petition, issue of a writ or direction in the nature of certiorari or any other appropriate writ or direction quashing the decision of the opp. parties declaring the result of Annual H.S.C. Examination 2013 in respect of the petitioner as Fall under Annexure-2.
>
> And further issue a writ of direction in the nature of mandamus or any other appropriate writ or direction to the opp. parties to publish the result of the petitioner after rechecking the Mathematics paper and issue the mark sheet in his favour accordingly.."

11. The matter was listed before this Court on 26.06.2013 and this Court directed the petitioner to serve extra copy of the writ petition on learned counsel for opposite party-BSE, who was directed to obtain instructions in the matter and the matter was directed to be listed on 08.07.2013. During pendency of the said writ petition, opposite parties after coming to know that the petitioner secured 89 marks instead of 06 marks in the Mathematics paper issued the revised mark sheet to the Deputy Secretary, Balasore Zone to hand over the same to the Headmaster of the School where the petitioner last studied and the Headmaster supplied the said revised mark sheet to the petitioner on 19.6.2013. In the above circumstances, the earlier writ petition, i.e., W.P.(C) No.11556 of 2013 was disposed of on 8.7.2013 with the following observation:

> " 3. The petitioner is a brilliant student and he is suffering due to no fault of him. Because of the fault of the Board officials, career of the petitioner is going to be marred. However, so far as prayer in the present writ petition is concerned, after rechecking he has been awarded with 89 marks in Mathematics paper. Hence, nothing remains in the present writ petition to be decided.
>
> 4. Accordingly, the writ petition is disposed of. However, it is open to the petitioner to avail any remedy permissible under law".

12. Petitioner's claim is that by the time revised mark sheet was supplied to him on 19.06.2013, the last dates for submission of application to take admission in +2 class through online and offline fixed to 11.06.2013 and 12.06.2013 respectively for regular students were over. Thus, the case of the petitioner is that since the revised mark sheet was supplied to him on 19.6.2013, he could not apply for his higher study as regular student. In support of his contention, he relied upon Annexure-4, which is a copy of the key dates obtained from the website of Higher Education Department. In Columns 3 and 4 of the said key dates, the last date for making application to take admission in the higher studies in respect of regular students has been notified as dated 11.06.2013 and 12.06.2013 for online and offline respectively.

13. Opp. parties strongly denied the petitioner's claim for grant of compensation of Rs.5 lakhs basically on the following grounds:

(i) The publication of result of the candidates is always provisional. Therefore, under Regulation 43 if any candidate is dissatisfied with the result, he may request the Secretary of the Board for rechecking/re-addition of marks in any paper within one month of the date of publication of the result with prescribed fees and form. As per order of this Court dated 02.11.1992, in the case of ***Reena Dei Vrs. Board of Secondary Education, Orissa (OJC No. 752 of 1992)***, the Board was directed to communicate the result of re-addition within three months. Therefore, opp. Parties are in no way negligent or careless in their duty and liable to pay any compensation as the Board has communicated the result of re-addition of the petitioner within three months from the date of deposit of re-addition/rechecking fees.

(ii) The Government of Odisha in the Department of Higher Education has made an advertisement in the daily news paper "The Samaja" dated 26.07.2013 regarding admission in +2 and +3 Classes after publication of result in Supplementary and Instant Examination conducted by B.S.E., Odisha and CHSE, Odisha in all Junior/Degree/Autonomous Colleges for the academic year, 2013-14. Under the eligibility clauses in the 2nd paragraph of the aforesaid advertisement, it is mentioned that applicants who could not apply during the e-admission period due to various reasons, may apply for admission. Therefore, it was contended that if the petitioner so likes, he can take admission in +2 Class for the academic year 2013-14 and question of loss of one academic year and suffering from any mental agony etc. does not arise. In support of his contention, Mr. Dash annexed the advertisement dated 26.7.2013 as Annexure-B to his counter.

(iii) Under Section 19 of the Orissa Secondary Education Act, 1979 the Board is competent to constitute Committees. One of such committees is Examination Committee. Regulation 22 speaks about the power of the Examination Committee. Under sub-regulation (v) of Regulation 22, the Examination Committee has power to lay down instructions to be issued to candidates, Superintendents of the Examination Centres, Examiners and others. Accordingly, the Examination Committee issued instructions to the examiners in connection with the evaluation of answer books of H.S.C/C.T./C.P.Ed/ Madhyama Examinations every year including in the year 2013. As per such instructions, the examiners are responsible for error-less valuation of the answer script. It is their responsibility to ensure that the candidates get credit what they actually deserve. Therefore, the Board is not liable to pay any compensation. If this Court comes to a finding that there is any negligence in evaluating the petitioner's mathematics paper then responsibility may be fixed on the examiners at the valuation centre on account of whose inattentiveness there is improper evaluation in spite of the clear instruction given by the Board for meticulous evaluation and posting of marks. So they are liable to pay the compensation as they are involved in the process of evaluation.

(iv) All the persons involved in the process of evaluation of answer books/scripts are not the employees of the Board. The Board does not have any administrative control over those persons as they are the employees of the School and Mass Education Department of the Government of Odisha. Therefore, the Board is not liable to pay the amount of compensation as prayed for by the petitioner.

14. In the context of payment of compensation, the above grounds taken up by opp. party–B.S.E. are irrelevant and not sustainable in law.

15. So far ground No.(i) taken by opposite parties not to pay compensation is concerned, i.e., result declared by the Board is provisional, communication of result of re-addition to a student within reasonable time have nothing to do with payment of compensation. Even if the result declared by the Board is provisional and the result of the re-addition has been communicated within the reasonable time, if the student's career is marred and/or he/she suffers from mental agony, shock, harassment and humiliation due to wrong/mistake in declaration of provisional result, he/she has to be compensated suitably. Therefore, the mere fact that the Board intimated the result of re-addition within a reasonable time does not wash away the fact of wrong and negligence committed by the opp. parties in not ensuring award of correct and accurate marks which the petitioner was entitled to.

16. To deal with ground No.(ii) taken by the opposite parties not to pay compensation, I have to consider as to whether in the present case the petitioner has suffered any loss, mental agony and harassment, career set back etc. due to wrong declaration of his result as failed and for awarding 06 marks instead of 89 marks in Mathematics answer script. In this case, petitioner was declared failed as 06 marks were awarded in Mathematics paper. On re-addition it was found that in fact the petitioner secured 89 marks in that subject. Thus, the total mark of 412 originally awarded to the petitioner was enhanced to 495 marks out of 600 marks which comes to 82.5% of marks and such revised mark sheet was communicated to the petitioner on 19.6.2013 by which time the last dates for regular students to apply for higher study online, i.e., 11.6.2013 and Off line 12.6.2013 were over, as per key dates notified by the Higher Education Department under Annexure-4. This fact has not been disputed by OP-BSE. Thus, the petitioner was deprived of making application for higher studies as a regular student because of negligent act of the opp. Parties.

17. At this stage it is relevant to extract here the observation of this Court in the case of *Reena Dei (supra)* relied upon by the opp. Parties.

> "…… A candidate who appears at an examination has a right to fair and proper valuation. Fair and accurate valuation is must. Otherwise not only the students but also the society at large would lose faith on the persons who have undertaken the duty of evaluating the performance of students in the examination. It is high time that the Board should take a stock of the whole situation and block the loopholes in the system which is presently in a real bad shape. In a welfare State education occupies a very high position. Therefore, the Board has a bounden duty to be above suspicion like Caesor's wife."

18. The Hon'ble Supreme Court in the case of the **President, Board of Secondary Education, Orissa & another v. D. Suvankar and another** in Appeal (Civil) No.4926 of 2006 (arising out of S.L.P. (C) No.17990 of 2005) decided on 14th November, 2006 observed as follows :

> "Award of marks by an Examiner is to be fair, and considering the fact that revaluation is not permissible under the Statute, the Examiner has to be careful, cautious and has a duty to ensure that the answers are properly evaluated. No element of chance or luck should be introduced. An examination is a stepping – stone on career advancement of a student. Absence of a provision for revaluation cannot be a shield or the Examiner to arbitrarily

evaluate the answer script. That would be against the very concept for which revaluation is impermissible."

Thus, a candidate who appears at an examination has a right to get fair and proper evaluation of his answer scripts. An examination is a stepping-stone on career advancement of a student. In the instant case, admittedly due to negligence and latches on the part of the opposite parties, the petitioner's career is marred and he suffers from mental agony, shock, harassment and humiliation in the society.

19. Placing reliance on Annexure-B attached to the counter affidavit filed by opp. parties, Mr. Dash submitted that Government of Odisha in the Department of Higher Education made an advertisement in the daily news paper "The Samaja" dated 26.7.2013 Cuttack for admission into +2 and +3 Classes after publication of the results in Supplementary and Instant Examinations conducted by B.S.E., Odisha and C.H.S.E., Odisha in all Junior and Degree/Autonomous Colleges for the academic Session 2013-14 and under the eligibility clause in the 2nd paragraph, it is given that the applicants who could not apply during e-admission period due to various reasons can apply for admission. Therefore, it was argued by Mr. Dash that the petitioner, if he so likes, can take admission in +2 class for the academic session 2013-14 and question of loss of one academic year does not arise. Perusal of Annexure-B reveals that such advertisement has been made for admission to seats lying vacant in +2 and +3 Classes of various Junior Colleges. The eligibility clause in paragraph 2 of the said Advertisement also reveals that the applicants, who have not got any seat during online admission, they are eligible to make application. This itself shows that in the first phase of admission seats were filled up in good Colleges as the students having secured higher marks could be able to take admission in better Colleges. Now, the advertisement under Annexure-B is made to fill up the left out /vacant seats in +2 and +3 classes of various Colleges. Undoubtedly, the petitioner, who has secured 82.5 % marks is deprived of getting a seat in a better College because of negligence on the part of the opp. Parties in wrongly declaring him failed by awarding 06 marks in Mathematics paper in stead of 89 marks. If the petitioner would have got correct mark sheet before expiry of the last date for applying to take admission in +2 and +3 classes as regular student, he could have got a seat in a better College. Now, the petitioner is left with the choice either to lose one year and wait for the next year admission session, i.e., 2014-15 to get a seat in a better College or to take admission this year against the vacant seats available after the first round of admission is over. In either way, petitioner sustains a serious set back in building his academic career. Had

the result of the petitioner been declared correctly, he could have been able to take admission in a better College this year where he could have got better facilities of studying and interacting with equally or more talented students.

The petitioner drew the attention of this Court to the Advertisement made in daily news paper "The Samaja" under Annexure-5 stated to be dated 07.08.2013 which also reveals that such advertisement was made for admission to +2 and +3 seats remaining vacant after 1st phase of admission was over. This Court while disposing of the earlier writ petition i.e. W.P.(C) No.11556 of 2013 has observed that the petitioner, who is a brilliant student is suffering due to no fault of him and because of the fault of the Board officials, the career of the petitioner is going to be marred. Therefore, the stand taken by Mr. Dash that the petitioner is in no way prejudiced in view of having an opportunity to take admission in any College on the basis of Advertisement made under Annexure-B is not only unfortunate, but also shocking.

20. Ground Nos. (iii) and (iv) taken by opposite parties not to pay compensation to the petitioner are that they are in no way negligent or careless in their duties. If this Court at all directs for payment of compensation, the same may be realized from the persons who are involved in the process of evaluation of answer script.

In the additional affidavit dated 14.8.2013 filed by the opp. Parties, it is stated as follows:

> "In the present case one Jugajyoti Ratha of Gadibrahma, Laximdhara Girls' High School, Balikuda of District-Jagatsinghpur was the Asst. Examiner who examined the Mathematics paper of the petitioner, one Jyotshna Kumari Pattnaik of Balikuda High School, Balikuda, Dist. Jagatsinghpur, was the DeputyChief Examiner, one Krushna Chandra Mohanty of Marichpur, Dist. Jagatsinghpur was the Chief Examiner and one Amiya Kumar Swain of Biju Pattnaik Smruti Bidya Pitha of Patenigaon, Jagatsinghpur was the Scrutinizer in respect of the above Mathematics paper and all of them are negligent in their respective duties on the process of evaluation of the Mathematics paper of the petitioner".

21. The above statements of the Board amply prove lack of control of the Board on the evaluation process. This is very sad state of affairs. Undisputedly, the petitioner appeared in the H.S.C. Examination, 2013 which was conducted by the opp. party-Board; the result of such candidate

was declared in the website of opp. Party-Board; the opp. Party-Board has also issued H.S.C. Examination Certificate and Mark sheet to the petitioner; the Examination Committee is constituted by the Board; the examiners appointed by the Examination Committee are doing the examination work on behalf of and as agents of the Board of Secondary Education, Odisha. Therefore, the Board cannot take a stand that it is not responsible for awarding 06 marks in stead of 89 marks in Mathematics paper as the examiners are entrusted with the work of awarding marks to students.

22. The Hon'ble Supreme Court in the case of **D. Suvankar and another** (supra) held as under:

> "….Ultimately, it is the Board which has to ensure that the correct marks sheet is issued to the candidates since candidates who appear at the High School Certificate are of tender age. If by mistake the Board indicates to the candidates' incorrect marks, it is bound to have adverse effect on the mind of the candidates of tender age. Therefore, it is imperative on the part of the board to ensure that errorless marks sheet is issued to each candidate."

23. Needless to say that the petitioner-student has a right to prosecute his study with dignity. Therefore, the Board of Secondary Education, Odisha must ensure the education of the students with dignity. For the wrong committed by the examiners engaged by the Board through the Examination Committee to examine the answer scripts of the students, it would be appropriate to hold that the case is governed by the legal maxim *"respondeat superior"* and the Board is liable for the wrong committed by examiners and also the Examination Committee.

24. In ***Kumari Smt. vs. State of Tamil Nadu and others,*** AIR 1992 SC 2069, the Hon'ble Supreme Court while overruling the decision of the Madras High Court observed that the writ jurisdiction under Article 226 of the Constitution of India can be invoked by the Writ Court for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. In that case, a six years' old child had fallen down in an uncovered sewerage tank. The High Court had refused to entertain the claim of compensation in a writ petition under Article 226 of the Constitution, but the Hon'ble Supreme Court directed the State to pay compensation.

25. For the reasons stated above, I am of the considered view that the Board of Secondary Education, Odisha is liable to pay compensation to the petitioner for the wrong/negligence committed by the examiners in awarding 06 marks instead of 89 marks in Mathematics paper for which the petitioner

shall either lose one academic year or shall be deprived of getting a seat in a better College and suffering from mental agony, humiliation and harassment for no fault of him.

26. In the present case, doubt comes to the mind about efficacy of the methods evolved by the Board. The plight of the students and irreparable loss caused to the career of students cannot be lost sight of. No money can compensate the grave injustice suffered by the petitioner because of the patent negligence and carelessness of the examiners appointed by the Examination Committee constituted by the opp. Party-Board. It is not uncommon that in some cases brilliant students commit suicide because of award of abnormally less marks beyond their legitimate expectation. It is only the grace of God that the petitioner has not taken any such heart-rending step out of frustration. It may be noted that in many cases later on it is found that less marks are awarded due to carelessness of the examiners as on re-addition of the marks such students get their expected marks like the present case. This action of the opp. parties has not only caused a lot of anguish and tension but also mental torture to the petitioner and has resulted in gross violation of human right of the petitioner. Right to life would include expectation of fair-play, caution and care of the examiners appointed by the Examination Committee constituted by the Board. This is a clear case where the petitioner is entitled to get just and fair compensation. It would be worth mentioning that even in the cases relating to vehicular accidents, compensation under the Motor vehicle statute is awarded where the injured-victim's past educational career was good but because of accident he is incapacitated to pursue his study. In the case at hand, this Court cannot lose sight of the fact that the career of a meritorious student is at stake.

27. In view of the above, opposite party No.1- Board of Secondary Education, Odisha is directed to pay a compensation of Rs.3,00,000/- (rupees three lakhs) to the petitioner within a period of eight weeks from today, failing which, the amount of compensation shall carry interest @ 9% per annum till payment. I have taken note of various factors like break and interruption of educational career of a meritorious student, his mental agony, shock and humiliation in the society. The authorities shall also take stringent action against the erring officials who are responsible for this impasse. It is open to the Board of Secondary Education to recover the whole or any part of the amount of compensation from the erring officials. The entire compensation amount shall be kept in fixed deposit in any Nationalized Bank in the name of the petitioner for a period of five years with a condition that the monthly interest of such fixed deposit shall be paid to the petitioner regularly to meet his educational expenses. If there will be any need of money for the purpose

of higher study/ education of the petitioner-student, liberty is given to the petitioner to move this Court for premature withdrawal of the fixed deposit.

28. With the aforesaid observations and directions, the writ petition is allowed to the extent indicated above. No costs.

Writ petition allowed.

**2013 (II) ILR - CUT-1008**

**B. N. MAHAPATRA, J.**

W.P.(C) NO.19825 OF 2013 (Dt.18.09.2013)

**DR. MANOJ KUMAR** ……..Petitioner

*.Vrs.*

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

**EDUCATION – Admission to P.G. (Medical) Courses 2013 – Petitioner denied admission as he is not a resident of Odisha State as per Clause-F of the State guidelines – As a result of which candidates below petitioner's rank given admission – Action challenged – Held, Clause-F of the State guidelines quashed being violative of Article 14 of the Constitution of India – Direction issued to O.P.2 & 3 to re-do the admission to P.G. (Medical) Course in Government Colleges of Odisha restricting it to the petitioner and those direct candidates who secured ranks below the petitioner but got admission in the P.G. (Medical) Course, 2013.** (Paras 14,15,18,19)

**Case laws Referred to:-**

1.(1984)3 SCC 654 : (Dr. Pradeep Jain & Ors.-V- Union of India & Ors.)
2.(2003)11 SCC 186 : (Magan Mehrotra & Ors.-V- Union of India & Ors.)
3.AIR 2012 SC 339 : (Asha –V- Pt. B.D. Sharma, University of Health Sciences & Ors)

For Petitioner - M/s. G.A.R. Dora, G.R. Dora, J.K. Lenka & P.K. Behera.
For Opp.Parties - Mr. R.C. Mohanty,(for O.Ps.1 to 4)

***B.N.MAHAPATRA, J.*** This writ application has been filed with a prayer to quash Clause-F of the Guidelines for allotment of candidates for Post-Graduate (Medical) Courses in the Government Medical Colleges of Odisha (for short, "State Guidelines") under Annexure-1 being ultra vires Article 14 of the Constitution of India. Further prayer of the petitioner is to declare the admission made on the basis of Clause-F of the State Guidelines as void and direct the opposite parties to publish a fresh guideline deleting Clause-F and to re-do the admission to the P.G. (Medical) Course in the Government Colleges of the State of Odisha. Alternatively, it is prayed that the petitioner may be given first preference in the 2nd counseling.

2. Petitioner's case in a nut-shell is as follows:\

The petitioner is a permanent resident of State of Bihar. He qualified in the All India Pre-Medical Test (PMT) conducted by the Central Board of Secondary Education (for short, "CBSE") for the 15% seats reserved for the All India quota and was admitted in the MBBS Course in the year 2000 in SCB Medical College, Cuttack. He completed the said course in the year 2005. Thereafter, he completed one year internship in December, 2006. Then he appeared in National Eligibility-cum-Entrance Test, 2013 (for short, "NEET-2013") conducted by the Medical Council of India (MCI) for admission to P.G. (Medical) Course in India; he qualified in the said examination and has secured 243 rank of the State of Odisha. The counseling for Odisha State quota seats in P.G. Courses in the Medical Colleges of Odisha State for the academic session 2013-14 was held from 1st to 15th August, 2013 which included verification of documents. Consequent upon participation of the State in the selection of P.G. Medical students through Common Entrance Test (NEET) P.G. conducted by National Board of Examination (NBE), the State of Odisha framed guidelines for allotment of candidates for P.G. (Medical) Courses in the Government Medical Colleges. Clause F of the State Guidelines speaks that a candidate in order to be eligible for prosecuting P.G. (Medical) Courses must be a permanent resident of Odisha. In view of Clause-F of the State Guidelines, the petitioner is debarred from taking admission in P.G. (Medical) Courses in Govt. Medical Colleges. Hence, the present writ petition.

3. Mr. G.A.R. Dora, learned Senior Counsel appearing for the petitioner submitted that merit is the basis for admission to the P.G. (Medical) Courses. Therefore, to exclude the petitioner from consideration on the basis of his merit, the ground that he is not a permanent resident of Odisha would amount to denying him the equal opportunity in the matter of admission to the P.G. (Medical) Courses which is violative of his right to equality under Article 14 of the Constitution. The second counseling for balance seats was

scheduled to be held on 29th and 30th August, 2013 as per information published in the website under Annexure-2. Though the petitioner belongs to Bihar domicile yet he will not be eligible to take admission in State of Bihar as he has not done MBBS course from any of the Medical Colleges in Bihar as provided under Clause 5.1 of the prospectus of the P.G. (Medical) Admission Counseling Prospectus, 2013 of Bihar. In view of the judgments of the Hon'ble Supreme Court in the cases of ***Dr. Pradeep Jain and others vs. Union of India and others****, (1984) 3 SCC 654,* and ***Nikhil Himthani vrs. State of Uttarakhand and others*** in Writ Petition (Civil) No.379 of 2013, Clause-F of the State Guidelines which provides that the candidate who is not a domicile of Odisha State is not eligible for admission into P.G. Course is violative of Article 14 of the Constitution. It is further submitted that in a case of exactly similar nature, admission to P.G. Courses was denied to a candidate on the ground that he was not a domicile of the State of Uttarakhand even though he has completed his MBBS Course from a Medical College in Uttarakhand and he was selected against 15% all India quota like the present petitioner. The Hon'ble Supreme Court quashed the domicile clause of the eligibility criteria vide its judgment dated 06.08.2013 passed in ***Nikhil Himthani*** (supra) and directed the authority to publish a fresh information bulletin and to re-do the admission to the P.G. (Medical) Course.

Mr. Dora vehemently argued that the case of the petitioner is directly covered by the case of *Nikhil Himthani (supra)* which is binding on every body.

4. Mr. Dora further submitted that the judgment of the Hon'ble Supreme Court in the case of Nikhil Himthani (supra) is dated 06.08.2013. A doctor friend of the petitioner knew that petitioner was debarred from taking admission in State of Odisha on the ground that he is not a native of Odisha. When his friend, who belongs to Uttarakhand, found the judgment of the Hon'ble Supreme Court in ***Nikhil Himthani*** ( supra) relating to Uttarakhand he took 2 to 3 days to contact the petitioner over phone to say about the case. On request he sent the copy of the judgment through email, which the petitioner received on 22.08.2013 and came to Cuttack immediately and the writ petition was filed on 26th August, 2013 which is before the cut-off date, i.e., before commencement of second round counseling which was scheduled to be held on 29.08.2013 and 30.08.2013. The assigned Bench did not function on 25th and 29th August, 2013. As directed in the Notice, mention was made before the Court No.XV stating urgency but his Lordship refused to take up the matter. Under compulsion mention was made before the Hon'ble Chief Justice on 29.08.2013. His Lordship directed to move before Court No.XII on the same day. Though it was mentioned before Court No.XII on 29.08.2013 that

30.08.2013 was fixed for counseling of direct candidates and 31.08.2013 was the cut off date, His Lordship passed the interim order on 29.08.2013 directing that the admission of all direct candidates made on 30.08.2013 shall be subject to result of the Writ Petition. After NEET result was published, All India and State-wise rank (merit) lists were prepared and sent to respective States. Ranking list of Odisha was a combined one both for in-service and direct candidates. Petitioner is a direct candidate and his rank in the combined list is 243. The revised list was prepared segregating direct and in-service candidates. It is reliably learnt that Sl. No.209 in the combined list becomes 126 in the revised list after segregation, so 243 will be within 140 to 150. The candidates up to rank No.190 have got clinical subjects. Thus, students of less meritorious than the petitioner have got clinical subjects in P.G. (Medical) Courses. In view of Clause F of the State Guidelines, the petitioner did not make any application to opp. parties for consideration of his case for e-counseling though he secured rank in Odisha State Merit List.

5. Mr. Dora referring to a Notification of Government of Bihar dated 10.09.2013, a copy of which has been filed along with memo dated 16.09.2013, submitted that the Government of Bihar has fixed 23.09.2013 for second round of counseling in respect of 2013 NEET, which is after 31.8.2013.

Concluding his argument, Mr. Dora prayed for grant of similar relief in the case of the present petitioner, since the cut-off date to give admission to P.G. (Medical) Courses has been over by 31st August, 2013, i.e., two weeks before.

6. Mr. R.C. Mohanty, learned counsel appearing for opposite party Nos.1 to 4 submitted that the P.G. (Medical) Selection Committee, 2013 has the primary responsibility for making admission to the P.G. (Medical) Course in accordance with the regulations and guidelines of Medical Council of India as well as of the State Government and as per the Bulletin prescribed by the National Board of Examination. It was submitted that for the current year, a common entrance test i.e. NEET-P.G. was conducted by National Board of Examinations and no separate entrance test has been conducted by the State of Odisha for selection and admission to P.G. (Medical) Courses for the State quota seats. The petitioner belongs to the State of Bihar and he has not done MBBS Course from any of the Medical Colleges of the Bihar. Therefore, he is not eligible to get admission to P.G. (Medical) Courses in the State of Odisha. The petitioner in his NEET application has filled up the form stating therein that he is a domicile of Bihar for which he has been given rank in the merit list of Bihar State. Instead of challenging the prospectus of Bihar, the petitioner has challenged the State

Guidelines. As per the information bulletin of NEET-P.G., 2013, Sl. No.8 of the bulletin is very much clear as it deals with domicile. It is further submitted that out of the total seats of P.G. (Medical) Courses, 50% of seats is for All India seats or All India Quota and other 50% is for the State Quota. The State Guideline was issued on 27.05.2013 by the State Government for allotment of candidates for P.G. (Medical) Courses in the Government Medical Colleges of the State of Odisha. Those Guidelines were not challenged by the petitioner when it was available for all candidates for getting admission to P.G. (Medical) Courses. The petitioner has neither challenged the said State Guidelines nor has made any application for consideration of his case for e-counseling though he was given rank in the Odisha State Merit List. The petitioner has filed the present writ petition on 26.08.2013 when already the admission to the P.G. (Medical) Courses on 1st round counseling was over since 31.07.2013.

7. Mr. R.C.Mohanty further submitted that the Hon'ble Supreme Court on hearing a petition after 4th round counseling was over in respect of All India Seats vide its order dated 21.08.2013 passed in W.P.(C) No.433 of 2013, has extended the cut-off date for all the seats with a direction to complete the process of counseling and admission before 31st August, 2013 for remaining vacant seats of the State quota as well as the seats returned to the State from All India Quota. Mr. R.C. Mohanty submitted that pursuant to the interim order of this Court dated 29.08.2013 passed in Misc. Case No.18216 of 2013 directing that admission of all direct candidates shall be subject to the result of this writ petition, it has been mentioned by PG Selection Committee 2013 that counseling of all the direct candidates held on 30.08.2013 shall be subject to the outcome of this writ petition. In support of this contention he referred to Annexure-A/3 dated 31.08.2013 written by the Member Convenor to the DMET. Through the said letter, the DMET was further informed that 27 seats are lying vacant after admission to PG (Medical) Course was over. In the affidavit dated 17.09.2013 filed on behalf of opposite party Nos.2 and 3, it is stated that the convenor has calculated the expected rank of the petitioner-Dr. Manoj Kumar and found that if he would have been taken into consideration with State merit list prepared for Odisha without insisting his resident certificate of Odisha his rank would have been 149 and some candidates below rank 149 have been given admission to non-clinical subject. No clinical subjects were available to any candidate below Sl.No.148 of the merit list of 30.08.2013 for direct category candidates. It was further submitted that no admission can be allowed after the cut-off date in view of the judgment of the Hon'ble Supreme Court in the case of *Mridul Dhar vs. Union of India, (2005) 2 SCC 65 and Medical Council of India vs. Manas Ranjan Behera, (2010) 1 SCC 173.* Mr. Mohanty also

relied upon the judgment of the Hon'ble Supreme Court in the case of *Faiza Choudhary vs. State of Jammu and Kashmir and Another, (2012) 10 SCC 149*. Concluding his argument, Mr. Mohanty prayed for dismissal of the writ petition.

8. Though copy of the writ petition has been served on learned Additional Standing Counsel for opposite party No1-State on 26.08.2013, no separate counter has been filed by opposite party No.1 but Mr. R.C. Mohanty has filed counter affidavit on behalf of opposite party Nos.1 to 3. At the time of hearing also no submission as regard validity or otherwise of the State Guidelines/Policy has been made by Government Counsel except Mr. R.C. Mohanty.

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

(i) Whether Clause F of the State Guidelines (Annexure-1) is ultra vires Article 14 of the Constitution?

(ii) Whether the petitioner is entitled to get the relief in the light of the judgment of the Hon'ble Supreme Court in the case of *Nikhil Himthani (supra)* after 31st August, 2013 for the purpose of taking admission to P.G. (Medical) Course*?*

(iii) What order?

10. To deal with the above questions, it may be relevant to note certain facts which are not disputed. The petitioner is a permanent resident of Bihar. The Pre-Medical Test (PMT) was conducted by the CBSE and through PMT the petitioner was admitted in MBBS Course in the year 2000 in SCB Medical College, Cuttack. He completed the said course in the year 2005. Thereafter, he has also completed his internship in December, 2006. The petitioner appeared in NEET-2013 which was conducted by the NBE for admission to P.G. (Medical) Courses for the session 2013. He came out successful and his Rank is 243 for Odisha State. He could not participate in the e-counseling in view of the Clause F of the State Guidelines (Annexure-1), which reads as under:

> **"F. CATEGORY OF CANDIDATES:**
> A candidate in order to be eligible for prosecuting P.G. Course must be a permanent resident of Odisha."

The petitioner filed this writ petition on 26.08.2013 i.e. before commencement of second round of counseling which was scheduled to be

held on 29.8.2013 and 30.8.2013. This Court vide order dated 29.08.2013 passed the interim order directing that the admission of all the direct candidates made on 30.08.2013 shall be subject to the result of this writ petition.

11. On the above backdrop, I have to deal with the questions referred to supra.

So far as question No.(i) is concerned, the case of the petitioner is directly covered by the judgment of the Hon'ble Supreme Court in the case of *Nikhil Himthani (supra)* . The facts of the case in ***Nikhil Himthani*** *(supra)* as stated in paragraph-2 of the said judgment are as follows:

> "2. The facts very briefly are that the petitioner is a permanent resident of Delhi and had qualified in the All India Pre-Medical Test conducted by the Central Board of Secondary Education (for short 'the CBSE') for the 15% seats reserved for the All India quota. He was admitted in the MBBS course in the year 2007 in the Medical College at Haldwani in the State of Uttarakhand. He completed his MBBS course in March, 2012 and thereafter completed one year of internship in March, 2013. The petitioner then appeared in the NEET Examination, 2013 conducted by the Medical Council of India (for short 'the MCI') for admission to post-graduate medical courses in India and qualified in the examination and claims to have secured 60th rank of the State of Uttarakhand."

On the above facts and taking into consideration of rival contentions of the parties, the Hon'ble Supreme Court has held as under:

> "14. We now come to clauses 2 and 3 of the Eligibility Criteria in the Information Bulletin. Under clauses 2 and 3, a domicile of Uttarakhand who has passed MBBS from a medical college of some other State having been admitted either through the 15% All India quota or through the pre-medical test conducted by the concerned State Government has been made eligible for admission to a post-graduate medical course in the State quota. Obviously, a candidate who is not a domicile of Uttarakhand State is not eligible for admission to post-graduate course under clauses 2 and 3 of the Eligibility Criteria. Preference, therefore is given only on the basis of residence or domicile in the State of Uttarakhand under clauses 2 and 3 of the Eligibility Criteria and such preference on the basis of residence or domicile within a State has been held to be violative of Article 14 of the Constitution in the case of Dr. Pradeep

> Jain and Others vs. Union of India and Others (supra) and Magan Mehrotra and Others vs. Union of India and Others (supra).
>
> 15.....Thus, it will be clear from what has been held by the three-Judge Bench of this Court in Magan Mehrotra and Others vs. Union of India and Others (supra) that no preference can be given to candidates on the basis of domicile to compete for the institutional quota of the State if such candidates have done their MBBS course in colleges outside the State in view of the decisions of this Court in Dr. Pradeep Jain and Others vs. Union of India and Others (supra). Hence, clauses 2 and 3 of the Eligibility Criteria in the Information Bulletin are also violative of Article 14 of the Constitution."
>
> (underlined for emphasis)

12. The Hon'ble Supreme Court in the case of ***Dr. Pradeep Jain and others*** *(supra),* has held as under:

> "….Now, the primary imperative of Article 14 is equal opportunity for all across the nation for education and advancement and, as pointed out by Krishna Iyer, J., in *Jagdish Saran* v. *Union of India*[5] "this has burning relevance to our times when the country is gradually being 'broken up into fragments by narrow domestic walls' by surrender to narrow parochial loyalties". What is fundamental, as an enduring value of our polity, is guarantee to each of equal opportunity to unfold the full potential of his personality. Anyone anywhere, humble or high, agrestic or urban, man or woman, whatever be his language or religion, place of birth or residence, is entitled to be afforded equal chance for admission to any secular educational course for cultural growth, training facility, speciality or employment. It would run counter to the basic principle of equality before the law and equal protection of the law if a citizen by reason of his residence in State A, which ordinarily in the commonality of cases, would be the result of his birth in a place situate within that State, should have opportunity for education or advancement which is denied to another citizen because he happens to be resident in State B. It is axiomatic that talent is not the monopoly of the residents of any particular State; it is more or less evenly distributed and given proper opportunity and environment, everyone has a prospect of rising to the peak. What is necessary is equality of opportunity and that cannot be made dependent upon where a citizen resides. If every citizen is afforded equal opportunity, genetically and environmentally, to develop his

potential, he will be able in his own way to manifest his faculties fully leading to all round improvement in excellence. The philosophy and pragmatism of universal excellence through equality of opportunity for education and advancement across the nation is part of our founding faith and constitutional creed. The effort must, therefore, always be to select the best and most meritorious students for admission to technical institutions and medical colleges by providing equal opportunity to all citizens in the country and no citizen can legitimately, without serious detriment to the unity and integrity of the nation, be regarded as an outsider in our constitutional set-up. Moreover, it would be against national interest to admit in medical colleges or other institutions giving instruction in specialities, less meritorious students when more meritorious students are available, simply because the former are permanent residents or residents for a certain number of years in the State while the latter are not, though both categories are citizens of India. Exclusion of more meritorious students on the ground that they are not resident within the State would be likely to promote substandard candidates and bring about fall in medical competence, injurious in the long run to the very region. "It is no blessing to inflict quacks and medical midgets on people by wholesale sacrifice of talent at the threshold. Nor can the very best be rejected from admission because that will be a national loss and the interests of no region can be higher than those of the nation." The primary consideration in selection of candidates for admission to the medical colleges must, therefore, be merit. The object of any rules which may be made for regulating admissions to the medical colleges must be to secure the best and most meritorious students."

13. The Hon'ble Supreme Court in the case of ***Magan Mehrotra and others vs. Union of India and others,*** *(2003) 11 SCC 186,* held as under:

"…In view of the judgment of the three-Judge Bench in Pradeep Jain case it must be held that the aforesaid decision of the States of Assam, Tamil Nadu, Goa and Karnataka conferring preference on the basis of residence was not warranted under law inasmuch as to have a uniformity throughout the country and in the larger interest of all concerned taking into account the pattern of admission to undergraduate course, and also the excellence that is required for admission to postgraduate course the only preference that should be adopted by all States is the institutional preference, as was indicated in Pradeep Jain case…."

14. In the present case as stated above, the petitioner has been graduated from SCB Medical College, Cuttack and he could not take admission into P.G. (Medical) Course as he is not a resident of Odisha State as required under Clause F of the State Guidelines.

15. In view of the above, I am of the considered opinion that Clause 'F' of the State Guidelines under Annexure-1 is violative of Article 14 of the Constitution.

16. To deal with question No.(ii), it is also necessary to refer to the judgment of the Hon'ble Supreme Court in the case of ***Nikhil Himthani*** *(supra).* The relevant portion of said judgment reads as follows:

> "16. In the result, we allow the writ petition, quash clauses 1, 2 and 3 of the Eligibility Criteria in the Information Bulletin and declare the admissions made on the basis of clauses 1, 2 and 3 of the Information Bulletin as void. The respondents will now publish a fresh Information Bulletin and re-do the admissions to the post-graduate medical courses in the Government colleges of State of Uttarakhand in accordance with law by the end of August, 2013 and also ensure that the colleges in which the students are admitted in post-graduate medical courses hold the required number of classes as prescribed by the MCI."

17. At this juncture, it is also relevant to refer to the judgment of the Hon'ble Supreme Court in the case of ***Asha vs. Pt. B.D. Sharma, University of Health Sciences and others***, AIR 2012 SC 3396. Hon'ble Supreme Court in the case of Asha (supra) after taking note of its earlier judgment in the case of ***Mriduldhar (minor and another) (supra)*** *and large number of other cases* held as under:

> "31. There is no doubt that 30th September is the cut-off date. The authorities cannot grant admission beyond the cut-off date which is specifically postulated. <u>But where no fault is attributable to a candidate and she is denied admission for arbitrary reasons, should the cut-off date be permitted to operate as a bar to admission to such students particularly when it would result in complete ruining of the professional career of a meritorious candidate, is the question we have to answer</u>. Having recorded that the appellant is not at fault and she pursued her rights and remedies as expeditiously as possible. We are of the considered view that the cut-off date cannot be used as a technical instrument or tool to deny admission to a meritorious

students. The rule of merit stands completely defeated in the facts of the present case. The appellant was a candidate placed higher in the merit list. It cannot be disputed that candidates having merit much lower to her have already been given admission in the MBBS course. The appellant had attained 832 marks while the students who had attained 821, 792, 752, 740 and 731 marks have already been given admission in the ESM category in the MBBS course. It is not only unfortunate but apparently unfair that the appellant be denied admission. Though there can be rarest of rare cases or exceptional circumstances where the courts may have to mould the relief and make exception to the cut-off date of 30th September, but in those cases, the Court must first return a finding that no fault is attributable to the candidate, the candidate has pursued her rights and legal remedies expeditiously without any delay and that there is fault on the part of the authorities and apparent breach of some rules, regulations and principles in the process of selection and grant of admission. Where denial of admission violates the right to equality and equal treatment of the candidate, it would be completely unjust and unfair to deny such exceptional relief to the candidate. "

"36. Now, we shall proceed to answer the questions posed by us in the opening part of this judgment.

ANSWERS

(a) The rule of merit for preference of courses and colleges admits no exception. It is an absolute rule and all stakeholders and concerned authorities are required to follow this rule strictly and without demur.

(b) 30th September is undoubtedly the last date by which the admitted students should report to their respective colleges without fail. In the normal course, the admissions must close by holding of second counseling by 15th September of the relevant academic year (in terms of the decision of this Court in Priya Gupta (supra). Thereafter, only in very rare and exceptional cases of unequivocal discrimination or arbitrariness or pressing emergency, admission may be permissible but such power may preferably be exercised by the courts. Further, it will be in the rarest of rare cases and where the ends of justice would be subverted or the process of law would stand frustrated that the courts would exercise their extraordinary jurisdiction of admitting candidates to the courses after the deadline of 30th September of the current academic year. This, however, can only be done if the conditions stated by this Court in the case of Priya Gupta (supra) and this judgment are found to be

unexceptionally satisfied and the reasons therefor are recorded by the court of competent jurisdiction.

(c ) & (d) Wherever the court finds that action of the authorities has been arbitrary, contrary to the judgments of this Court and violative of the Rules, regulations and conditions of the prospectus, causing prejudice to the rights of the students, the Court shall award compensation to such students as well as direct initiation of disciplinary action against the erring officers/officials. The court shall also ensure that the proceedings under the Contempt of Courts Act, 1971 are initiated against the erring authorities irrespective of their stature and empowerment.

Where the admissions given by the concerned authorities are found by the courts to be legally unsustainable and where there is no reason to permit the students to continue with the course, the mere fact that such students have put in a year or so into the academic course is not by itself a ground to permit them to continue with the course." (underlined for emphasis)

18. In the present case, the petitioner filed the present writ petition on 26.08.2013, i.e., before commencement of second round counseling which was scheduled to be held on 29.08.2013 and 30.08.2013. On 29.8.2013 in Misc. Case No.18216 of 2013, this Court passed the interim order that "the counseling shall be subject to the result of this writ petition". On the request of the opp. parties, the case was adjourned to 3.9.2013. Mr. Mohanty submitted that pursuant to the interim order dated 29.08.2013 it has been mentioned by the PG Selection Committee 2013 that counseling of all direct candidates held on 30.08.2013 is subject to the outcome of this writ petition. In this regard, Mr.Mohanty also drew attention of this Court to Annexure-A/3 dated 31.08.2013 issued by the Member Convenor to DMET. The matter was again listed in this Court on 4.9.2013. On that date, submission was made on behalf of Mr. R.C. Mohanty, learned counsel appearing for opposite parties 1 to 4 that Mr. Mohanty has undergone eye operation and therefore, he would be unable to appear before the Court till 10.9.2013. Therefore, this Court adjourned the matter to 11.9.2013. On 11.9.2013 this Court heard Mr. Dora and Mr. Mohanty. However, Mr. Mohanty after arguing for some time submitted that he was getting pain in his eye after operation and requested to adjourn the matter till Monday (16.9.2013) to enable him to argue further; the matter was adjourned to 16.09.2013. On 16.09.2013 hearing was concluded and judgment was reserved. Thus, so far as petitioner is concerned, he is not at fault. He is diligent in pursuing his rights

and legal remedy. The fault is with the opp. party-authorities who have framed the State Regulation incorporating Clause 'F' which reads that a candidate in order to be eligible for prosecuting P.G. (Medical) course must be a permanent resident of Odisha and such eligibility criteria is contrary to the decision of the Hon'ble Supreme Court in the cases of ***Pradeep Jain*** (supra), ***Magan Mehrotra*** (supra) and ***Nikhil Himthani (supra).*** The action of opp. parties is violative of Article 14 of the Constitution. The petitioner is a candidate placed at higher rank in the merit list. According to the petitioner, the Ranking List of Odisha was a combined one both for in-service and direct candidates. Petitioner is a direct candidate and his rank is 243. A revised list was prepared segregating the direct and in-service candidates. In the revised list of direct candidates in Sl. No.209 in the combined list became 126 in the revised list after segregation. Therefore, it is claimed by the petitioner that his ranking being 243 it would have become 140-150. The candidates up to rank No. 190 of the revised list have got clinical subjects. The opposite parties in their affidavit dated 17.09.2013 sworn by Dr. Jayant Kumar Das stated that the expected rank of the petitioner would have been 149 and some candidates below rank 149 have been given admission to P.G. (Medical) Courses. Thus, candidates below petitioner's rank have been given admission in the P.G. (Medical) Courses. This is certainly not fair and the petitioner has been denied admission for no fault of him but for the illegal action of the opposite parties. Opposite parties, in their counter affidavit, stated that after completion of the final round of counseling 27 seats are lying vacant in P.G. (Medical) Courses.

19. For the reasons stated above, I am of the view that the petitioner is entitled to get relief in the light of the judgment of the Hon'ble Supreme Court in the case of ***Nikhil Himthani (supra)*** after 31.08.2013 for the purpose of getting admission to PG (Medical) Courses-2013**.** Clause 'F' of the State Guidelines, under Annexure-1, is quashed. Therefore, the State Government is directed to issue guidelines on domicile aspect keeping in mind the decisions of the Hon'ble Supreme Court in the cases of ***Nikhil Himthani*** (supra), ***Dr. Pradeep Jain and others*** *(supra) and* ***Magan Mehrotra and others*** *(supra).*

In the fact situation, since the petitioner is the only candidate before this Court and could not get admission in P.G. (Medical) Courses because of Clause 'F' of the State Guidelines and that the students, who rank below the petitioner, have taken admission in the said course, opposite party Nos. 2 and 3 are directed to redo the admission to the P.G. (Medical) Courses in the Government Colleges of Odisha restricting it to the petitioner and those direct candidates who secured ranks below the petitioner but got admission

in the P.G. (Medical) Courses 2013, as soon as possible but not later than 10 days from today. Opposite party Nos.2 and 3 are further directed to ensure holding of additional classes of student(s) to meet the required number of classes as prescribed by the Medical Council of India.

20. With the aforesaid observations and directions, the writ petition is allowed to the extend indicated supra, but without any order as to costs.

In view of the urgency and paucity of time, urgent certified copy of this judgment be granted on proper application in course of the day and free copy of this judgment be handed over to learned counsel for opposite parties for compliance.

Writ petition allowed.

**2013 (II) ILR - CUT-1021**

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

W.P.(C). NO.16690 OF 2012(Dt.22.08.2013)

**KHITISH CHANDRA PATRA** ……..Petitioner

.*Vrs.*

**SARITA SA & ANR.** ……Opp.Parties

**ODISHA PANCHAYAT SAMITI ACT, 1959 - S. 44-L**

**Recounting of votes – Court should not allow, as a matter of course, since it would affect the secrecy of ballots.**

**In this case there is no pleading by O.P.1 specifying the number of votes have been wrongly counted in favour of the petitioner and she has also not lodged any complaint regarding illegal counting of votes – Her bald allegation that some valid votes have been added in favour of the petitioner and many votes casted in her favour have been illegally rejected, does not make out a case for recounting – Held, since O.P.1 has not furnished any material particulars either in the pleadings or in evidence, the impugned order passed by the trial Court allowing recounting of votes is set aside.**

**Case law Referred to:-**

AIR 2010 SC 24 : (Kattinokkula Murali Krishna-V-Veeramalla Kpteswara Rao & Ors.)

For Petitioner - M/s. Suryakanta Dash.

For Opp.Parties - M/s. D. Mund.

---

Heard learned counsel for the parties.

This writ petition has been filed challenging the order dated 31.08.2012, passed by the learned Civil Judge (Senior Division), Kalahandi at Bhawanipatna, in Election Petition No.16 of 2012, allowing the application of opposite party no.1 for recounting of votes.

The case of the petitioner is that he and opposite party no.1 contested for the election for the post of Member of Narla Panchayat Samiti of Chantamal Gram Panchayat, which was held on 15.02.2012. In the result announced, the present petitioner was declared elected as the Member of Narla Panchayat Samiti, having secured majority of the votes. Being aggrieved by the result of the election, opposite party no.1 filed Election Petition No.16 of 2012, before the learned Civil Judge (Senior Division), Kalahandi at Bhawanipatna, praying for recounting of votes and to declare the present petitioner disqualified.

Subsequently, during the hearing of election petition, opposite party no.1 filed an application for recounting of votes, alleging therein that though she had secured more votes, the present petitioner has been declared elected by counting rejected votes in his favour.

In the affidavit in evidence filed by opposite party no.1, she has stated that some invalid votes have been added in favour of the present petitioner and many valid votes casted in favour of opposite party no.1 have been rejected.

Learned Civil Judge, considering the grounds taken in the election petition and going through the evidence adduced by opposite party no.1, has come to hold that there are sufficient materials to make out a prima facie case for recounting of votes, which is necessary for efficacious and effective adjudication of the dispute between the parties. Accordingly, learned Civil Judge has directed for production of the ballot papers for recounting of the same.

Learned counsel for the petitioner, with reference to the pleadings made in the election petition and the evidence of opposite party no.1 submits

that as no material particulars have been pleaded and proved to make out a prima facie case with regard to the illegality and/or impropriety in the counting of votes, the impugned order cannot be sustained. In this regard, it is submitted that as the allegations made in the election petition are bald and vague and the evidence adduced by opposite party no.1 did not specify the number of votes which is alleged to have been wrongly counted in favour of the present petitioner and no such objection having been filed before the Presiding Officer or the Election Officer during the counting of votes, such belated plea, merely as an after thought, could not have been accepted by the learned Civil Judge, in order to direct for recounting of votes. It is submitted that recounting of votes cannot be permitted to cause a roving enquiry, which would destroy the secrecy of ballots.

Learned counsel appearing for opposite party no.1 while supporting the impugned order submits that as the materials produced by opposite party no.1 before the learned Civil Judge was found to be sufficient to justify recounting, the impugned order cannot be faulted.

On perusal of the averments made in the election petition, it is seen that the opposite party no.1 had merely stated that there has been some illegality in the counting of votes and that some valid votes casted in her favour have been rejected and some invalid votes have been added in favour of the present petitioner. In the application filed by opposite party no.1 for recounting before the learned Civil Judge, it has been stated that though she had secured more votes than the present petitioner but the Election Officer has declared the present petitioner as the winning candidate by adding rejected votes in his favour.

In the affidavit in evidence filed under Order 18, Rule 4 CPC, opposite party no.1 has merely stated that some invalid votes have been counted in favour of the present petitioner and some valid votes casted in her favour have been rejected. In her cross-examination, she has admitted that she cannot say how many rejected votes have been added in favour of the present petitioner. She further stated in the cross-examination that she has not submitted any written complaint before the Polling Officer with regard to the illegal counting of votes on the date of election and she cannot say how many votes of which Ward have been added in favour of the present petitioner.

In view of the above facts, it cannot be said that opposite party no.1 has furnished any material particulars either in the pleadings or in her evidence so as to justify the impugned order of recounting. It is well settled in law that inspection and recounting of ballot papers cannot be directed as a

matter of course, as the same affects the secrecy of ballots. See- **Kattinokkula Murali Krishna Vs. Veeramalla Koteswara Rao and Ors.**, AIR 2010 S.C., 24).

In view of the above, the impugned order dated 31.08.2012, passed by the learned Civil Judge (Senior Division), Kalahandi at Bhawanipatna, in Election Petition No.16 of 2012, cannot be sustained and the same is accordingly set aside. The writ petition is accordingly allowed.

Writ petition allowed.

**2013 (II) ILR - CUT- 1024**

**B. K. PATEL, J.**

CRLA NO. 497 OF 2006 (Dt.23.09.2013)

**BASUDEV PUJARI & ORS.** ……Appellants

*.Vrs.*

**STATE OF ODISHA** ……Respondent

**A. PENAL CODE, 1860 - S.376 (2) (g)**

**Gang rape – Not only P.Ws.3 & 7, who are relations of the victim, but also P.W.4 the village 'Ganda' supported the prosecution case – Evidence of the victim has been corroborated by medical evidence and injuries on her person fortifies the allegation of forcible inter course – Held, conviction made by the trial Court is confirmed - Fine of Rs.5,000/- is reduced to Rs.2,000/- on each of the appellants which shall be paid to the victim by way of compensation.** (Paras 8,9,10)

**B. CRIMINAL PROCEDURE CODE, 1973 - S.154**

**Rape Case – Delay of six days in lodging F.I.R. – Victim was aged about 40 years, having two children at the time of occurrence – Out of fear and shame she did not disclose the occurrence to anybody in the night of occurrence and the next day and after over coming the shock she disclosed the incident to her parents and the village 'Ganda', in the absence of her husband – Held, considering the tendency of Indian Women to conceal sexual assault, delay in lodging F.I.R. is not fatal in this case.** (Para 8)

For Appellants - M/s. J. R. Dash, K. L. Dash, D.N. Patnaik, M. Rout.
For Respondent - Government Advocate.

---

***B.K. PATEL, J.*** By the impugned judgment and order passed by learned Additional Sessions Judge, Jeypore in Crl. Trial No.42 of 2005 (Crl. Trial No.127 of 2005 of the Sessions Judge, Jeypore) the appellants stand convicted under Section 376(2)(g) of the I.P.C. for having committed gang rape on informant-victim P.W.5. Each of the appellants has been sentenced to undergo R.I. for ten years and to pay a fine of Rs.5,000/- (Rupees five thousands) in default to undergo R.I. for two years. It has also been directed that out of the fine amount, if realized, a sum of Rs.5,000/- (Rupees five thousands) shall be paid to P.W.5 by way of compensation.

2. Prosecution case in brief is as follows:

Occurrence took place on 19.1.2005. Victim P.W.5 is a married woman aged more than 40 years having two children. During the period of occurrence her husband had gone outside for doing labour work. On the date of occurrence at about 8.00 P.M. when P.W.5 was sitting alone on the outer veranda of her house, the three appellants and one Iswar Bhumia, who was being tried as a juvenile delinquent, came to her. When P.W.5 objected to their presence in absence of her husband, the appellants and the juvenile delinquent gagged her mouth and carried her to the backside of her house where they committed rape on her one after another after removing her clothes. Thereafter, they left. Being injured, P.W.5 became senseless. After regaining her sense, P.W.5 narrated about the occurrence to one of her co-villager P.W.1 who came there hearing her crying. After feeling better, the victim went to her parents' village and apprised them about the occurrence. She was taken to village Kusumi for treatment. After getting treatment, the victim went back to her village and reported the incident to P.W.4, the village 'Ganda' and others, and requested them to convene a meeting. However, no meeting was convened. Hence, on 25.1.2005 P.W.5 lodged First Information Report Ext.6, scribed by P.W.6, and submitted to P.W.11, the O.I.C. of Kotpad P.S. P.W.11 registered the case and took up investigation. In course of investigation, P.W.11 visited the spot, effected seizure of articles and examined the witnesses. The appellants and the victim P.W.5 were medically examined by P.Ws.9 and 10 respectively. On completion of investigation, charge-sheet was submitted against the appellants.

3. The appellants took the plea of denial and false implication.

4. In order to establish the charge, prosecution examined eleven witnesses. P.Ws.1, 4, 5, 6, 9, 10 and 11 have already been introduced in

course of narration of the prosecution case. Of them, P.W.1 turned hostile. P.W.2 is a witness to seizure of broken bangles from the spot and other articles. P.W.3 is the cousin brother and P.W.7 is the brother of P.W.5 before whom P.W.5 narrated the occurrence. P.W.8 is a police Havildar who assisted the investigating officer P.W.11 with the investigation. Prosecution also placed reliance on the documents marked Exts.1 to 20.

No defence evidence, oral or documentary, was adduced.

5. On an appraisal of evidence on record, the trial court held the evidence of victim P.W.5 to be cogent, credible and trustworthy and also found the evidence of P.W.5 corroborated by the testimonies of post-occurrence witnesses P.Ws.3, 4 and 7; medical evidence of P.W.10; and circumstance of seizure of broken bangles from the spot. Accordingly, prosecution was held to have established the charge against the appellants and the impugned judgment of conviction was passed.

6. Learned counsel for the appellants submitted that in course of her cross-examination P.W.5 admitted that in the night of occurrence she slept in the house of one Asumati who has not been examined by the prosecution. P.W.5 further admitted that she did not disclose regarding the occurrence to said Asumati. In view of such non-disclosure by P.W.5 to the person whom she met immediately after the occurrence, the trial court should not have relied on the evidence of P.W.5. It was further contended that there has been inordinate delay of seven days in lodging the First Information Report. It was also argued that in absence of any injury on the private part of the victim lady as is evident from the testimony of P.W.10, allegation of gang rape made by P.W.5 should have been disbelieved. Alternatively, it was submitted by the learned counsel for the appellants that the appellants have already served more than eight years of rigorous imprisonment. Though they have been directed to serve minimum sentence of imprisonment for ten years, each of the appellants has been directed to pay a fine of Rs.5,000/-. The appellants being poor persons residing in a tribal region, the amount of fine imposed on them ought to be reduced.

7. Learned counsel for the State supported and defended the impugned judgment. It was strenuously argued that evidence of P.W.5 itself is free from any inconsistency and infirmity. There being adequate corroboration to the evidence of P.W.5, there is no scope to interfere with the impugned judgment of conviction.

8. On reappraisal of evidence on record in the light of the rival contentions, it is found that the victim P.W.5 while deposing in court has given a vivid account of the manner in which she was gang raped by the

appellants. She testified that when she was sitting on her veranda, the appellants and the juvenile delinquent came there. Thereafter, they caught her legs, gagged her mouth and carried her to the backside of her house. They forcibly removed her clothes and also inner loin cloths. She was laid down on the ground in naked condition. The appellants and juvenile delinquent committed sexual intercourse on her one after another without her consent. After committing rape, all of them left. P.W.5 alleged to have sustained injuries on her back. There was vaginal discharge also caused by forcible sexual intercourse. P.W.5 testified to have narrated the occurrence to P.W.1 when he came there when she was crying. P.W.5 further stated that she went to her father's place on the next day and narrated the entire occurrence to her parents. She was taken to village Kusumi for treatment. On the following Monday after recovery from her injuries, P.W.5 went back to her village with her brother P.W.7 and reported the matter to P.W.4. Despite her request, no village meeting was convened. On the following day she informed regarding the occurrence to her cousin brother P.W.3. P.W.5 deposed to have gone to the police station with P.Ws.3 and 7 and lodged First Information Report. She further testified to have medically examined in course of investigation. P.W.5 also stated regarding seizure of broken bangles from the spot and her wearing apparels. Evidence of P.W.5 has not been discredited in any manner in course of cross-examination. Contents of the First Information Report Ext.6 materially corroborate the evidence of P.W.5. That apart, though P.W.1 turned hostile, evidence of all the three post-occurrence witnesses P.Ws.3, 4 and 7 materially corroborates the evidence of P.W.5 who narrated the occurrence to them. P.W.4 testified that P.W.5 showed him the injuries she had sustained. P.W.7 corroborated the evidence of P.W.5 with regard to her statement to have reported the matter to P.W.4. P.W.10, the medical officer of C.H.C. Kotpad testified to have found multiple linear abrasions on the back side of P.W.5. However, he did not find any sign or symptom of recent sexual intercourse on her. Existence of multiple linear abrasions on P.W.5's back side is consistent with the manner in which P.W.5 alleged the appellants to have committed forcible sexual intercourse on her. P.W.5 in course of her cross-examination admitted that in the night of occurrence she slept in the house of Asumati who happens to be the mother of juvenile delinquent. P.W.5 added that due to fear and shame she did not narrate the occurrence to anybody in the village in the night of occurrence and also the next day. Such conduct of non-disclosure by P.W.5 due to fear and shame is perfectly normal for a woman of P.W.5's background. It has to be borne in mind that P.W.5 is a married woman having two children. After such a ghastly incident affecting her dignity, it is natural that P.W.5 would be in trauma and psychological imbalance. However, having overcome the initial shock P.W.5 had

immediately rushed to her parents and disclosed regarding the occurrence. Not only P.Ws.3 and 7 who are her close relations but also P.W.4 supports P.W.5 in this regard. P.W.5 has also given cogent explanation for not having lodged the First Information Report soon after the occurrence. In absence of her husband she went to her parents. Thereafter, she made an attempt to put forth her grievance before the village 'Ganda' P.W.4. Thereafter only she was able to lodge the First Information Report. Under the facts and circumstances of the case particularly considering the tendency of Indian women to conceal sexual assault, delay in lodging the First Information Report on the part of P.W.5 is inconsequential. Absence of sign or symptom of recent sexual intercourse on P.W.5 as deposed by the medical officer P.W.10 also does not affect the veracity of the prosecution case. The occurrence took place on 19.1.2005 and P.W.5 was medically examined on 26.1.2005. Apart from the time gap, the age and marital status of the victim have also to be borne in mind. Despite absence of sign or symptom of recent sexual intercourse, injuries on her person fortifies the allegation of forcible intercourse on P.W.5. Therefore, there is no merit in any of the contentions raised on behalf of the appellants and there is no scope to differ with the finding of the trial court that cogent, credible and trustworthy evidence of P.W.5 has been corroborated by medical evidence and circumstance of seizure of broken bangles. The appellants have rightly been convicted for commission of offence under Section 376 (2)(g) of the I.P.C.

9. While sentencing the appellants to undergo minimum period of R.I. for ten years which may be imposed for commission of offence under which the appellants stand convicted, each of the appellants has been directed to pay fine of Rs.5,000/-. It is not disputed that the appellants belong to economically weaker section of the society and hail from tribal area of Koraput district. In such circumstances, considering the fact that the appellants have served substantial custodial sentence imposed on them, imposition of fine amount of Rs.2,000/- on each of the appellants shall serve the ends of justice.

10. In view of the above discussions, while dismissing the appeal and maintaining the conviction of the appellant for commission of offence under Section 376 (2) (g) of the I.P.C. as well as maintaining the custodial sentence to undergo R.I. for ten years, the sentence to pay fine is modified to the extent that instead of paying a fine of Rs.5,000/- each, each of the appellants shall pay a fine of Rs.2,000/-, in default, each of them shall undergo R.I. for two years. Fine amount, if realized, shall be paid to the victim P.W.5 by way of compensation.

Appeal dismissed.

**2013 (II) ILR - CUT- 1029**

**B. K. NAYAK, J.**

W.P.(C) NO.1008 OF 2008 (Dt.09.07.2013)

**BHUBANESWAR THAKUR** ……..Petitioner

.*Vrs.*

**THE G.M. (OMQ), TATA IRON & STEEL CO. LTD. & ORS.** ……Opp.Parties

**SERVICE LAW – Petitioner made an application for voluntary retirement under Medical separation scheme – Employer accepted the application and retrenched the petitioner – Petitioner raised Industrial dispute but the Tribunal granted no relief – Hence the writ petition.**

**As per Clause-4 of the Medical separation scheme when an employee makes an application for separation under the scheme he must be examined and recommended by the Medical Board that he is unfit to discharge the duties of his office – The procedure appears to be mandatory in nature – However, since the petitioner has not been examined and recommended by the Medical Board about his unfitness, acceptance of petitioner's application is contrary to the scheme – Held, the retrenchment of the petitioner is illegal – Direction issued that in case the petitioner has not reached the age of superannuation he shall be reinstated in service with 25% back wages and his past service from the date of voluntary retirement shall be taken into account for the purpose of retiral benefits – The retirement dues, which the petitioner had already received pursuant to acceptance of his application shall be adjusted towards backwages.**

For Petitioner - M/s. Manoj Ku. Mishra, P.K. Dash, A.K. Nayak & P.K. Nanda.

For Opp.Parties- M/s. Sarada Prasanna Sarangi, B.C. Mohanty & P.P.Mohanty, (for O.P.Nos.1 & 2)

---

***B .K.NAYAK, J.*** The petitioner in this writ petition challenges the legality and propriety of the award dated 31.08.2007 passed by the learned Central Government Industrial Tribunal-cum-Labour Court, Bhubaneswar in I.D. Case No.6 of 2005 under Annexure-4 and further prays for his reinstatement in service with full back wages and all other consequential service benefits.

2. The petitioner asserts that as an Ex-serviceman, he joined under the organization of opposite party nos.1 and 2 (TISCO) on 15.06.1985 as a Driver-cum-Havildar at Joda Division. While on duty on 29/30.07.1998 some miscreants attacked him within the leasehold area of the employer causing injuries on his person. F.I.R. in respect of the occurrence was lodged at Joda Police Station and petitioner was admitted in TISCO Hospital, Joda on 30.07.1998 and was discharged from hospital on 01.08.2998 with medical advice for taking three days rest. While on leave unfortunately on 03.08.1998 the petitioner fell down in bath room and sustained fracture on his left arm and was again admitted in TISCO Hospital where the doctor declared him unfit for six weeks from 04.08.1998 and referred to TISCO Hospital, Jamshedpur where the petitioner was treated from 04.08.1998 to 21.08.1998 for his fracture injury. The petitioner on 15.08.1998 made a complaint before the Managing Director of the Hospital that some outsiders, who were related to some doctors of the said hospital, were forcibly taking away food prepared for the patients. Since the complaint of the petitioner was detrimental to the interest of the doctors, he was referred to the Psychiatrist. The Psychiatrist declared him unfit for mental problem due to mala fide and ulterior motive though the petitioner was in normal state of mind. The petitioner was then referred to TATA Main Hospital (TMH), Jamshedpur where he was admitted on 14.09.1998. On 17.09.1998 the company Medical Board declared the petitioner unfit for a period of six months on Psychiatric grounds. After six months, the petitioner was again examined by the Medical Board at Jamshedpur Hospital and was declared unfit for a further period of six months. Thereafter, the petitioner made a representation before the opposite parties to allow him to resume his duty but he was not allowed. As a result, the petitioner raised an Industrial dispute. An attempt for conciliation of the dispute having failed for non-co-operation of the management, the Conciliation Officer of the appropriate Government made a reference to the learned Tribunal which was registered as I.D. Case No.81 of 2001. The reference in the said I.D. Case was only with respect to the demand of the petitioner for payment of salary/wages for the period of injury on working (IOW) from 04.08.1998 till the date of his so called retirement. The petitioner having found that a wrong reference had been made, filed a representation before the appropriate Government to make necessary correction in the schedule of the reference. While such representation was pending the Tribunal answered the reference in I.D. Case No.81 of 2001 in favour of the petitioner. The petitioner thereafter filed W.P.(C) No.7240 of 2003 before this Court challenging the award passed in I.D. No.81 of 2001. The said writ petition was disposed of at the stage of admission by order dated 09.07.2004 with a direction to the Ministry of Labour, Government of India to look into the grievance of the petitioner and pass appropriate order in

accordance with law. In compliance to such order of this Court, the Central Government made the present reference, which is to the following effect :

> "Whether the action of the Management of Joda Iron Mines of TISCO Ltd., Joda in terminating the services of Shri Bhubaneswar Thakur, Driver-cum-Havildar on Medical Separation Scheme with effect from 02.11.1999 is legal and justified ? If not, what relief the workman is entitled to?"

On the basis of the above reference the Central Government Industrial Tribunal, Bhubaneswar registered I.D. Case No.6 of 2005 and by award dated 31.08.2007 (Annexure-4) the Tribunal came to hold that the petitioner has taken voluntary retirement under the Medical Separation Scheme which does not amount to any retrenchment, dismissal, or discharge and that raising of the dispute after severance of employer and employee relationship makes the reference non-maintainable and accordingly the Tribunal granted no relief. This order of the Tribunal has been impugned in this writ petition.

The petitioner has further stated that he had not applied for voluntary retirement under the medical separation scheme but during his treatment his signatures were obtained on some papers which were subsequently utilized by the Management for giving voluntary retirement to him under the scheme. It is also stated that he himself got examined by the doctors of Ranchi Hospital and SCB Medical College and Hospital, Cuttack, who have reported that he was fit to discharge his normal duty.

3. The opposite party-employer has filed a counter affidavit stating inter alia that during the treatment of the petitioner at Tata Main Hospital, Jamshedpur after taking admission on 14.09.1998, he developed some mental disorder. On 16.09.1998 the petitioner was discharged with an advice to appear before the Special Medical Board. On 17.09.1998 the Special Medical Board on examination declared him unfit for six months. Thereafter again he appeared before the Special Medical Board on 04.03.1999 and was declared unfit for a further period of six months and while the matter stood thus on 15.09.1999, the petitioner submitted application before the Management with a request to accept his voluntary retirement under Medical Separation Scheme. On 02.11.1999, the petitioner's application was accepted and on 17.11.1999, 20.11.1999 & 24.11.1999, the petitioner received all his retirement benefits from the company under the Medical Separation Scheme. At the time of settlement of his dues after acceptance of his application, one conciliation proceeding was pending before the Assistant

Labour Commissioner (Central), Rourkela. The petitioner submitted an application before the Assistant Labour Commissioner (Central), Rourkela with a request to drop the said conciliation proceeding, as he had voluntarily retired from service and copy thereof forwarded to the company has been filed as Annexure-C/1. It is stated that the Assistant Labour Commissioner (Central), Rourkela did not drop the proceeding and sent failure report to the Government of India with mala fide intention and the Government of India made a reference giving rise to registration of I.D. Case No.81 of 2001. After the award was passed in the said I.D.Case, the company paid the dues of injury on work from 30.07.1998 to 06.11.1999 to the petitioner. After receipt of those dues the petitioner filed W.P.(C) No.7240 of 2003, which was disposed of as aforesaid. The claim of the petitioner that he was not medically unfit to resume duty and that for malafide and ulterior motive he was declared medically unfit has been denied. It is also denied that his signatures were obtained on blank papers by the Management and they were subsequently used against him for giving him voluntary retirement in accordance with the Medical Separation Scheme. It is stated that the petitioner does not deny that he has received all his retirement dues pursuant to acceptance of his retirement application and, therefore, the allegation/assertion that he has not filed application for voluntary retirement is not correct.

4. The petitioner has filed a rejoinder affidavit refuting the assertions made in the counter and has further stated that the documents annexed with the counter affidavit of the Management were not submitted by the petitioner with his free consent. Since the petitioner's signatures had been obtained on blank papers, they were subsequently utilized by the Management with mala fide intention.

5. In assailing the impugned order, the learned counsel for the petitioner submits that there is no proof that the petitioner was medically unfit and that no certificate of unfitness of the petitioner at the time of consideration of his so called voluntary retirement application was produced before the Tribunal for its satisfaction. It is also submitted that clause-4 of the Medical Separation Scheme (Annexure-8) provides the procedure for dealing with requests for Separation under the scheme and as per that procedure, after the application in prescribed format for medical separation was received, the medical Board headed by the Chief Medical Officer and two other Specialists is required to examine the case and make recommendation to the GM(OM&Q) and based on such recommendation of the Medical Board the approval for settlement under the scheme would be issued. It is submitted that after the submission of the so called application of the petitioner for voluntary retirement under the Medical Separation Scheme no Medical

Board has examined him and certified unfitness and recommended for his retirement and no such evidence was available before the Tribunal and without adverting to this question, the Tribunal has simply observed that the petitioner applied under the scheme and his application was accepted and he has received all his dues thereunder.

The learned counsel for the opposite party nos.1 and 2, on the other hand, submits that the petitioner having applied for voluntary retirement under the Medical Separation Scheme on his own volition and the same having been accepted and he having received all his retirement dues long back, he cannot now fall back and say that his application was wrongly accepted in contravention of the scheme. It is also his submission that the plea of the petitioner that he signed on so many blank papers and they were utilized by way of fabrication of so many documents do not stand to reason and hence cannot be accepted.

6. The Tribunal framed issue no.2 as follows :

> "2. Whether the workman has taken voluntary retirement under the Medical Separation Scheme and whether the same amounts to termination within the definition of the term?"

While considering the aforesaid issue the Tribunal made a reference to the benefits available under the scheme and taking the different documents bearing petitioner's signature including his application and receipt of the retiral benefit into account it has held that his conduct suggests that he opted for the benefit under the scheme and received the same and, therefore his belated plea cannot be accepted and accordingly decided the issue against him.

7. There are large number of documents including the application of the petitioner for retirement under the Medical Separation Scheme available on record, which bear the signatures of the petitioner. The petitioner has never disputed the genuineness of his signatures on those documents. He is not an illiterate or ignorant person. He is an ex-serviceman. It cannot be believed for a moment that he signed on a large number of blank papers and handed over the same to the management and also received retirement dues. Therefore, his plea that he did not apply for voluntary retirement cannot be accepted.

8. The petitioner has filed the Medical Separation Scheme of the TISCO vide Annexure-8 which has not been disputed by the opposite parties. Clause-4 of the scheme provides for the procedure which may be adopted in dealing with the request for separation under the scheme. The said clause-4 is extracted hereunder :

"4. The following procedure may be adopted in dealing with requests for separation under the scheme.

(i) An employee wishing to avail of medical separation under the scheme should apply in prescribed format to the GM (OM&Q) through his Departmental Head. The application after due scrutiny by the Personnel Department will be sent to Chief Medical Officer within 10 days from the date of receipt of the application.

(ii) A Board headed by Chief Medical Officer and two other Specialists will meet as often as necessary to examine such cases. The Board will send its recommendation to the GM(OM&Q) within 15 days of the receipt of the application from an employee wishing to avail of medical separation under the scheme.

(iii) Based on the recommendation of the Medical Board the approval for settlement under the scheme will be issued by GM (OM&Q) to DM (A/cs) for final settlement."

9. The words "may be adopted" appearing in the aforesaid clause does not mean that the management has a choice to get an applicant examined by the medical board. The procedure appears to be mandatory in nature which has to be gone into or followed in deciding a case whether the applicant concerned is medically unfit to discharge the duties of his office. Even where an employee has been declared unfit for some period by the medical board, in case he makes an application for separation under the scheme, his application is to be processed in the manner stipulated in sub-clauses-(i), (ii) and (iii) of Clause-4 of the scheme. The basis of acceptance or non-acceptance of the application is the recommendation of the medical board. Therefore, without any recommendation by the Medical Board after examination about the medical unfitness of the employee, the application cannot be accepted on the basis of any declaration about medical unfitness for a temporary period made prior to the submission of the application by the employee.

10. In the instant case undisputedly the petitioner was twice declared medically unfit for a period of six months by the medical board, the last declaration being on 02.09.1999. The petitioner only made the application on 15.09.1999. Since there is no declaration of permanent unfitness on 02.09.1999 it was incumbent on the part of the employer to refer the petitioner for his examination by the medical board, in as much as it was possible that the petitioner could have become medically fit. While the petitioner asserts that he was never examined by the medical board after submission of his application dated 15.09.1999 and there was no

recommendation of the medical board about his unfitness or for accepting his application, the opposite parties have remained silent in their counter affidavit on this score. In the premises it must be held that the acceptance of petitioner's application under the medical separation scheme is contrary to the procedure prescribed in the scheme and therefore, illegal and unjustified.

11. The above aspect having not been considered by the Tribunal, the award of the Tribunal is indefensible. Accordingly, it is held that the acceptance of the petitioner's application under the scheme amounts to illegal retrenchment. It is, therefore, directed that in case the petitioner has not reached age of superannuation, he shall be reinstated in service with 25% back wages and his past service from the date of voluntary retirement shall be taken into account for the purpose of retiral benefits. The retirement dues, which the petitioner had already received pursuant to acceptance of his application under the Medical Separation Scheme shall be adjusted towards back wages. The writ petition is accordingly disposed of. No costs.

Writ petition disposed of.

**2013 (II) ILR - CUT-1035**

**B. K. NAYAK, J.**

W.P.(C) NO. 11859 OF 2013 (Dt.12.08.2013)

**UPENDRA DHAL** ……..Petitioner

*.Vrs.*

**GOURANGA PRASAD SAHOO & ANR.** ……..Opp.Parties

**CIVIL PROCEDURE CODE, 1908 –O-6, R-15 (4)**

**Whether for want of affidavit in support of the pleadings, the Election Petition would become incompetent and liable to be dismissed ? – Held, non-filing of affidavit under Order 6, Rule 15 (4) C.P.C. is not fatal and does not affect the maintainability of the Election Petition.**

(Para 12)

**Case laws Referred to:-**

1.AIR 1982 SC 983 : (Jyoti Basu & Ors.-V- Debi Ghosal & Ors.)
2.AIR 2004 SC 38 : (Regu Mahesh @ Regu Maheswar Rao-V- Rajendra Pratap Bhanj Dev & Anr.)
3.AIR 1991 SC 1557 : (F.A. Sapa-V- Singora)
4.AIR 2012 SC 2784 : (P. A. Mohammad Riyas-V- M.K. Raghavan & Ors.)
5.(2013)4 SCC 776 : (G.M. Siddeshwar-V- Prasanna Kumar)

For Petitioner - M/s. Upendra Ku. Samal, C.D. Sahoo, S. P. Patra & S. Naik.

For Opp.Parties- M/s. Soubhagya S. Das, Ramakanta Sahoo, K.C. Mohapatra & J.K. Swain (for O.P.1)
Addl. Standing Counsel (for O.P.2).

---

***B.K.NAYAK, J.*** In this writ petition, in which the petitioner challenges the judgment passed by the Civil Judge (Junior Division), Jajpur in Election Misc. Case No.7 of 2012(Annexure-4) and the judgment passed by the District Judge, Jajpur in Election Appeal No.9 of 2013 (Annexure-5), the only question that arises for consideration is whether for want of affidavit in support of the pleadings in the Election Petition, as required under Order-VI, Rule 15 (4) of the Code of Civil Procedure, the Election Petition would become incompetent and hence liable to be dismissed.

2. The petitioner and opposite party no.1 contested the election to the office of Sarpanch of Bitana Gram Panchayat in the district of Jajpur and the petitioner was declared elected. Opposite party no.1 filed Election Misc. Case No.7 of 2012 before the Civil Judge (Junior Division), Jajpur challenging the election of the petitioner on the ground that the petitioner was disqualified to contest the election since he had three children after the cut off date and that though opposite party no.1 raised such objection at the time of nomination, the Election Officer illegally rejected such objection. The petitioner filed objection to the Election Petition inter alia challenging the maintainability of the proceeding on ground of non-compliance of Section 33 (2) of the Orissa Gram Panchayat Act read with Order-VI, Rule 15 (4) of the Code of Civil Procedure. While deciding the question in Issue No.I, the Civil Judge (Junior Division) in his judgment dated 29.03.2013 has not given any finding on the objection raised, though it declared the election of the petitioner void on the ground that he was disqualified to contest the election to the office of Sarpanch.

3. The petitioner challenged the judgment passed in the Election Case before the District Judge, Jajpur by filing Election Appeal No.9 of 2013. By

judgment dated 14.5.2013 (Annexure-5), the learned District Judge, Jajpur dismissed the appeal and confirmed the judgment passed by the Civil Judge (Junior Division) in the Election Case. It appears from the appellate judgment that no question with regard to maintainability of the Election Petition for non-compliance of the provision of Section 33 of the Orissa Gram Panchayat Act read with Order-VI, Rule 15 (4) of the Code of Civil Procedure was raised by the petitioner before the appellate court and, therefore, no decision on such question has been given.

4. Chapter-V comprising of Sections 27 to 43 of the Orissa Gram Panchayat Act,1964 (in short 'the Act'), provides for conduct of Election and election dispute. Section 30 of the Act provides that no election of any person as a member, Sarpanch or Naib Sarpanch of a Gram Panchayat held under this Act shall be called in question except by an election petition presented in accordance with the provisions of Chapter-V. Under Section 31, the Civil Judge (Junior Division) having jurisdiction over the place at which the office of the Gram Sasan is situated, has been constituted the Election Tribunal before whom the Election Petition is to be filed. The said section also provides for the limitation for presenting the petition with further provision for condonation of delay. Section 32 relates to the parties to the Election Petition.

Section 33 of the Act which provides for the contents of the petition and the manner of its filing, and with which we are concerned, is extracted hereunder :

"**33.Contents of petition:**-(1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies:

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure,1908 (5 of 1908) for the verification of pleadings.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

5. It is seen from Clause (c) of sub Section (1) of Section 33 that the Election Petition shall be verified in the manner laid down in the Code of Civil Procedure,1980 for the verification of pleadings.

Order-VI, Rule 15 stipulates the manner in which pleadings are to be verified. It provides as under :

> "**15. Verification of pleadings.**- (1)Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.
>
> (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what the verifies of his own knowledge and what he verifies upon information received and believed to be true.
>
> (3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed."
>
> (4) *The person verifying the pleading shall also furnish an affidavit in support of his pleadings*.

6. Sub rule (4) of Rule 15 of Order-VI of the C.P.C. was inserted by way of C.P.C. Amendment Act, 46 of 1999 with effect from 30.12.1999. Prior to the amendment, affidavit of the person verifying the pleadings was not required. The Election Petition filed by opposite party no.1 before the Civil Judge (Junior Division), Jajpur has been brought on record as Annexure-1 to the writ petition. Admittedly, it does not contain any affidavit of the verificant (opposite party no.1) as required under Order 6 Rule 15 (4) of the C.P.C. This factual position is not disputed by the leaned counsel for opposite party no.1. While learned counsel for the petitioner contends that non-furnishing of affidavit, as required under Order-VI Rule 15 (4) of the Code of Civil Procedure, which is part of verification, makes the petition incompetent and hence non-maintainable, the learned counsel for opposite party no.1 submits that the provision is not mandatory and non-compliance thereof does not vitiate the proceeding and the judgment passed therein in view of the provision in Section 99 of the C.P.C.

7. Section 33 of the Act is parimateria to Section 83 of the Representation of the People Act,1951 except that a proviso has been added to Section 83(1) to the following effect:

> "provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed

form in support of the allegation of such corrupt practice and the particulars thereof."

8. The Supreme Court in the case of ***Jyoti Basu and others v. Debi Ghosal and others : AIR 1982 SC 983*** held as follows :

"**8.** A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and, therefore subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. … ..."

9. In the case of ***Regu Mahesh alias Regu Maheswar Rao v. Rajendra Pratap Bhanj Dev and another: AIR 2004 SC 38***, while examining the contention, among others, that the affidavit with regard to corrupt practice in election accompanying the election petition was not in the prescribed form and that verification done did not conform to the requirements as laid down in the statute, the apex Court relying upon its earlier decision in the case of ***F.A. Sapa v. Singora : AIR 1991 SC 1557*** held as follows :

"**12.** It is, therefore, a settled position in law that defect in verification or an affidavit is curable. But further question is what happens when the defect is not cured. There is gulf of difference between a curable defect and a defect continuing in the verification affidavit without any effort being made to cure the defect.

**13.** In F.A. Sapa's case (supra) it was held that even though ordinarily a defective verification can be cured and the failure to disclose the grounds or sources of information may not be fatal, failure to place them on record with promptitude may lead the Court

in a given case to doubt the veracity of the evidence ultimately tendered.

**14**. xxx xxx … … In the present case the defect in verification was pointed out by raising a plea in that regard in the written statement. The objection was pressed and pursued by arguing the same before the Court. However, the petitioner persisted in pursuing the position without proper verification which the petitioner should not have been permitted to do. In our opinion, unless the defect in verification was rectified, the petition could not have been tried."

10. A two-Judge Bench of the apex Court in the case of ***P.A. Mohammad Riyas v. M.K. Raghavan & Ors.: AIR 2012 SC 2784*** was directly confronted with the question of want of affidavit as per Order-VI, Rule-15 (4) of the C.P.C. in the election petition and held as follows :

"**25.** xxx xxx … …In this context, we are unable to accept Mr. Venugopal's submission that despite the fact that the proviso to Section 83(1) of the 1951 Act provides that where corrupt practices are alleged, the Election Petition shall also be accompanied by an affidavit in the prescribed form, it could not have been the intention of the legislature that two affidavits would be required, one under Order VI Rule 15(4) CPC and the other in Form 25. We are also unable to accept Mr. Venugopal's submission that even in a case where the proviso to Section 83(1) was attracted, a single affidavit would be sufficient to satisfy the requirements of both the provisions. Mr. Venugopal's submission that, in any event, since the Election Petition was based entirely on allegations of corrupt practices, filing of two affidavits in respect of the selfsame matter, would render one of them redundant, is also not acceptable. As far as the decision in F.A. Sapa's case (supra) is concerned, it has been clearly indicated that the petition, which did not strictly comply with the requirements of Section 86(1) of the 1951 Act, could not be said to be an Election Petition as contemplated in Section 81 and would attract dismissal under Section 86(1) of the 1951 Act. xxx xxx … …"

11. The correctness of ***P.A. Mohammad Riyas*** (supra) having been doubted, the matter was referred to a larger Bench. A three-Judge Bench of the Court in the case of ***G.M. Siddeshwar v. Prasanna Kumar: (2013) 4 SCC 776*** held as follows :

"**22.** A Plain reading of Rule 15 suggests that a verification of the plaint is necessary. In addition to the verification, the person verifying the plaint is "also" required to file an affidavit in support of the pleadings. Does this mean, as suggested by the learned counsel for Siddeshwar that Prasanna Kumar was obliged to file two affidavits- one in support of the allegations of corrupt practices and the other in support of the pleadings ?

**23.** A reading of Section 83(1) (c) of the Act makes it clear that what is required of an election petitioner is only that the verification should be carried out in the manner prescribed in CPC. That Order 6 Rule 15 requires an affidavit "also" to be filed does not mean that the verification of a plaint is incomplete if an affidavit is not filed. The affidavit, in this context, is a standalone document.

**24**. xxx xxx xxx

**25.** It seems to us that a plain and simple reading of Section 83(1) (c) of the Act clearly indicates that the requirement of an additional affidavit is not to be found therein. While the requirement of "also" filing an affidavit in support of the pleadings filed under CPC may be mandatory in terms of Order 6 Rule 15(4) CPC, the affidavit is not a part of the verification of the pleadings_both are quite different. While the Act does require a verification of the pleadings, the plain language of Section 83(1) (c) of the Act does not require an affidavit in support of the pleadings in an election petition. We are being asked to read a requirement that does not exist in Section 83(1) (c) of the Act.

**26.** xxx xxx xxx

**27**. xxx xxx xxx

**28**. xxx xxx xxx

**29.** While the necessity of filing an affidavit in support of the facts stated in a plaint may be beneficial and may have salutary results, but we have to go by the law as it is enacted and not go by the law as it ought to be. CPC no doubt requires that pleadings be verified and an affidavit "also" be filed in support thereof. However, Section 83 (1)(c) of the Act merely requires an election petitioner to sign and verify the contents of the election petition in the manner prescribed by CPC. There is no requirement of the election petitioner "also" filing an affidavit in support of the averments made in the election

petition except when allegations of corrupt practices have been made." -(***emphasis supplied***)

12. It is apparent from the law laid down by the apex Court in the case of ***G.M. Siddeshwar*** (supra) that the requirement of filing an affidavit in terms of sub rule (4) of Rule 15 of Order-VI of the C.P.C. is not part of the verification of the election petition as required under Section 83 (1) of the Representation of the People Act. The same principle would also apply to an election petition under Section 33 of the Orissa Gram Panchayat Act. Therefore, non-filing of affidavit by opposite party no.1 under Order-VI Rule 15(4) of the Code of Civil Procedure is not fatal and does not affect the maintainability of the election petition. Besides, in the election appeal the petitioner has not raised the contention with regard to non-filing of affidavit as per Order-VI Rule 15(4) of the Code of Civil Procedure by opposite party no.1.

In the aforesaid view of the matter, I find no merit in the writ petition, which is accordingly dismissed.

Writ petition dismissed.

**2013 (II) ILR - CUT-1042**

**S. K. MISHRA, J.**

W.P.(C) NO. 1416 OF 2013 (Dt.01.10.2013)

**DROUPADI JAIN & ORS.** ……..Petitioners

*.Vrs.*

**ANANDA KU. AGRAWAL & ORS.** ……...Opp.Parties

**CIVIL PROCEDURE CODE, 1908 – O-12, R-6**

**The Court can at any stage of the suit pass a judgment basing on the admission made by the defendant, if such admission is clear, unequivocal and positive but the Court may still require the plaintiff to prove the fact, which has been admitted by the defendant – Held, findings recorded by the trial Court being correct, needs no interference.** (paras 4.5)

**Case laws Referred to:-**

1.(2003)6 SCC 675 : (Surya Dev Rai-V- Ram Chander Rai)
2.AIR 1999 SC 3381 : (Balraj Taneja & Anr.-V- Sunil Madan & Anr.)
3. AIR 1958 SC 886 : (Razia Begum-V- Sahebzadi Anwar Begum).

For Petitioners - M/s. Ramakant Mohanty, D. Mohanty, S. Mohanty, D.Varadwaj, A. Mohanty & S.N. Biswal.
For Opp.Parties - M/s. Gautam Mishra & D.K. Patra.

---

***S.K.MISHRA,J.*** The order dated 04.01.2013 passed in Civil Suit No.198 of 2008 of the court of Civil Judge (S.D.), Rourkela is in question in this case.

2. An application was filed under Order 12 Rule 6 of the Code of Civil Procedure, 1908 (for short 'the Code') to pronounce the judgment on the admissions made by the defendant in the written statement. The learned Civil Judge (S.D.) came to the conclusion that a judgment and decree in respect of the admitted claim pending adjudication of dispute in the suit can be passed but the admission must be unequivocal, clear and positive. However, the factual finding of the learned Civil Judge (S.D.) is that the defendants are denying the assertions of the plaintiffs. Therefore, he rejected the application for amendment.

3. The learned counsel for the petitioners argued extensively referring to the pleadings of the parties and stated that the order passed by the learned Civil Judge (S.D.) is factually incorrect. Such being the case, this Court exercising its jurisdiction under Article 227 of the Constitution should not go into the questions of fact to re-appreciate the matter and the learned counsel for the petitioners submitted only on the question of fact. According to him there has been admission of the case of the plaintiffs-petitioners by the defendants-opposite parties. Relying on the reported case of ***Surya Dev Rai Vs. Ram Chander Rai,*** (2003) 6 SCC 675 this Court is not inclined to entertain any submissions made on behalf of the petitioners on the factual aspects of the case.

4. Moreover, it is seen that even when there has been admission on the part of the defendants, the court is not under compulsion to pass a decree in favour of the plaintiffs. This is evident from the reported case of ***Balraj Taneja and another Vs. Sunil Madan and another,*** AIR 1999 SC 3381. In the reported case, the Hon'ble Supreme Court took into consideration the provision of Order 12, Rule 6 of the Code as it stands now after the amendment, 1976 and held that the court can, at interlocutory

stage of proceeding, pass a judgment on the basis of admissions made by the defendant. The Apex Court further held that before the court can act upon the admission, it has to be shown that admission is unequivocal, clear and positive. It further held that this rule empowers the court to pass judgment and decree in respect of the admitted claim pending adjudication of the disputed claim in the suit. In that reported case, the Hon'ble Supreme Court further took note the case of ***Razia Begum Vs. Sahebzadi Anwar Begum,*** AIR 1958 SC 886 wherein it was held that Order 12 Rule 6 has to be read along with Rule 5 of Order 8 of the Code. The Supreme Court, therefore, held that not withstanding the admission made by the defendant in his pleadings, the court may still require the plaintiff to prove the facts pleaded by him in the plaint. Thus, holding the Supreme Court ruled in spite of admission of fact having been made by a party to the suit, the court may still require the plaintiff to prove the fact, which has been admitted by the defendant. The Supreme Court further held that this is also in consonance with the provisions of Section 58 of the Evidence Act, 1872.

5. In view of such clear cut legal position, this Court comes to the conclusion that there is no need to interfere with the findings recorded by the learned Civil Judge (S.D.), Rourkela in the aforesaid suit and it need not be set aside.

Hence, the writ petition is devoid of merit and the same is dismissed. Pending Misc. Cases are disposed of as infructuous.

Writ petition dismissed

**2013 (II) ILR - CUT-1044**

**S. K.MISHRA, J.**

W. P.(C) NO.15082 OF 2013 (Dt. 01.10.2013)

**DEBAKANTA RAY** .....Petitioner

*.Vrs.*

**SECRETARY, ROTARY CLUB, PURI** .....Opp.Party

**CIVIL PROCEDURE CODE, 1908 - S.80**

**Notice U/s. 80 C.P.C. is to be done prior to institution of the suit – However in cases where the cause of action arose against the State after institution of the suit, then in that case such notice can be send after institution of the suit and thereafter the state can be impleaded as a party – The object of such notice is to give the concerned Government and public officer an opportunity to reconsider the legal position and settle the claim if so advised without waisting public money and time in unnecessary litigation.**

**In this case the suit was instituted on 15.04.2008 and notice in compliance of Section 80 C.P.C. was sent on 17.06.2008 and thereafter applications made to implead the state as a party in the suit which was dismissed by the learned trial Court – Held, the impugned order passed by the trial Court is just and proper and requires no interference by this Court.** (Paras 7, 8)

**Case laws Referred to:-**

1.1997(I) OLR 98 : (Sk. Dofian Hossain-V- Narayan Keshi & Ors.)
2.AIR 1953 H.P. 123 : (Sabhu & Ors.-V- Ramsa & Anr.).

For Petitioner - M/s. Bhaktahari Mohanty, D. P. Mohanty, R.K. Nayak & T. K. Mohanty.
For Opp.Party - M/s. Goutam Mukherji, P. Mukherji, S. D. Ray, S. Barik, S. Priyadarsini, Amit Biswal.

---

***S.K.MISHRA, J.*** The order dated 21.06.2013 passed in Civil Suit No.71 of 2008 of the court of Civil Judge (J.D.), Puri is in question in this writ petition.

2. Facts are not disputed. The petitioner, being the plaintiff filed a suit for declaration and other relief against the opposite party, who happens to be the Secretary, Rotary Club, Puri. On 26.08.2008 and on 10.02.2009, two applications were filed under Order 6 Rule 17 of the Code of Civil Procedure, 1908 (for short 'the Code'. In both the applications, the petitioner prayed for similar amendment and, therefore, the same were disposed of as per the common order passed by the learned Civil Judge (J.D.), Puri on 21.06.2013 rejecting the application to implead State of Orissa as a party to the suit along with amendment petition. The plaintiff submitted a copy of the notice under Section 80 of the Code and memo in support of the receipt

received by the Collector, Puri. It is not disputed that the suit was instituted on 15.04.2008, whereas notice was sent in compliance of Section 80 of the Code on 17.06.2008. Thus, the notice has been sent after institution of the suit.

3. The question that arises for determination in the case is whether in a pending case after complying requirement of Section 80 of the Code, State of Orissa can be added as party or not. The learned Civil Judge (J.D.), Puri came to the conclusion that in such an application the State of Orissa cannot be added as a party after institution of the suit as the requirement of Section 80 of the Code is mandatory and it is not an empty formality. Assailing such findings, the learned counsel for the petitioner relies upon the reported cases of ***Sk. Dofian Hossain vs. Narayan Keshi and others,*** 1997 (I) OLR 98 and ***Sabhu and others vs. Ramsa and another,*** AIR 1953 H.P. 123.

4. In the case of ***Sk. Dofian Hossain vs. Narayan Keshi and others,*** (supra), the facts are different. In that case, the amendment was made prior to giving notice to the State of Orissa and later on after impletion of the party a notice was issued that too after remand of the case to the learned District Judge. Undisputedly, in that case this Court held that no notice was at all served when the petition for amendment was filed. While allowing the plaintiff's prayer at the first instance, this Court further held that the learned District Judge did not apply his mind to this legal aspect of the case. This Court further observed that when the case was remanded, plaintiff served notice through advocate attaching a copy of the plaint by registered post on 13.05.1995. So, the ratio decided in that case is not applicable to the case at hand. Further, it appears that the Court was perhaps of the view that if the requirements of Section 80 of the Code were complied prior to filing of amendment petition, the State could have been made party by filing appropriate application. Such is the case in the present suit, where from the writ petition arose.

5. In ***Sabhu and others vs. Ramsa and another,*** (supra), the High Court of H.P. has held that at a later stage a notice cannot be served because Section 80 of the Code provides that such a notice should be given before institution of the suit.

6. In the writ petition, the petitioner has averred that he has taken a plea in the plaint that due to urgency of the situation the defendant has started minimum construction over the suit property. The plaintiff filed the suit for injunction only reserving right to implead State of Orissa by way of

amendment after compliance of all requirements, the learned court below should have allowed the application in stead of its rejection. However, a careful examination to the petition filed under Order 6 Rule 17 of the Code, it is seen that the petitioner has no where averred such factual assertion. Thus, it appears that such assertion is after thought.

7. Service of notice under Section 80 of the Code is not an empty formality. The object of such notice is to give concerned Government and public officer, an opportunity to reconsider the legal position and settle the claim, if so advised, without landing in any legal battle. The legislative intention behind such provision is that public money and time should not be wasted on unnecessary litigation and the Government or the public officer should be given reasonable opportunity to examine the claim made against them. The provision being imperative, failure to serve notice complying with the requirement will entail dismissal of the suit. It is observed that Section 80 of the Code provides that no suit shall be instituted against the Government or public officer in respect of an act purporting to be done by such public officer in his official capacity, until expiration of two months next after notice in writing has been delivered to or left at the office of the State Government, etc. Thus, notice given under Section 80 of the Code is to be done prior to the institution of the suit. Since in this case notice has been issued after institution of the suit and it is not case of the plaintiff-petitioner that the cause of action against the State of Orissa arose after institution of the suit during pendency of the same, it cannot be said that the compliance of Section 80 of the Code during pendency of the suit shall be appropriate and sufficient. However, in the cases where the cause of action arose later on against the State, suppose for example, in a case where the subject matter of the suit was acquired by the State after the institution of the suit, then in that case a notice under Section 80 of the Code can be sent after the institution of the suit and thereafter the State of Orissa can be impleaded as a party. Such is not a case here. It is not stated by the learned counsel for petitioner that the cause of action to implead the State of Orissa as a party to the proceeding arose after the institution of the suit.

8. In that view of the matter, this Court is of the opinion that the order passed by the learned Civil Judge (J.D.), Puri is just and proper and requires no interference.

Hence, the writ petition is devoid of merit and the same is dismissed. Pending misc. case is disposed of as infructuous.

Writ petition dismissed.

**2013 ( II ) ILR - CUT-1048**

**C. R. DASH, J.**

W.P.(C) NO. 58 OF 2003 (Dt.25.09.2013)

**HINDUSTHAN LEVER LTD. & ANR.** .....Petitioners

*.Vrs.*

**THE COLLECTOR & DISTRICT MAGISTRATE,SUNDARGARH** .....Opp.Party

**ESSENTIAL COMMODITIES ACT, 1956 - S.6 (A)**

**Seizure of Vanaspati Dalada along with the truck – Seizure made on 17.08.2001 – At the relevant time dealing in Vanspati by an unlicensed dealer was in contravention of Odisha Pulses and Edible Oil Dealers' Licensing Order, 1977 – Confiscation order passed by the Collector - Order challenged – During pendency of the Confiscation Proceeding Removal of (Licensing requirements, stock limits and Movement Restrictions) on specified Food Stuffs Order, 2002 came into operation – The provisions of 2002 order has to be given, retrospective operation for the benefit of the petitioner who is alleged to have sold Vanspati Dalada to an unlicenced dealer – So on this score the impugned order is liable to be set aside.**

**In the other hand the truck with Vanaspati was seized during transit and none had acknowledged receipt of the consignment on behalf of the consignee and since the transit continued the petitioner No.1 company was the owner of the goods at the time of seizure and carrying of goods in a vehicle does not amount to storage and petitioner No.1 company who had valid licence to deal with Vanaspati Dalada, continued to be the owner of Vanaspati Dalada and no contravention can be held to have occasioned by the time of seizure – Held, impugned order of confiscation is not sustainable in the eye of law, hence set aside.**

**Case laws Referred to:-**

1.AIR 1965 SC 444 : (Rattan Lal-V- State of Punjab)
2.1998 CRL. LJ.2876 : (Maya Prakash-V- State of U.P. & Anr.)
3.67(1989)CLT 80 : (Akola Oil Industries Ltd.-V- Budhuram Marandi, Food Inspector & Ors.)
4.1974 FAC 19 : (Municipal Corporation of Delhi-V- Mal Ram @ Bhaya Ram)

5.AIR 1996 SC 2531 : (Bijaya Kumar Agarwala-V- State of Orissa)

For Petitioners - M/s. S.C. Lal, S.Lal & S. Panda.

For Opp.Party - Addl. Govt. Advocate.

---

***C.R. DASH, J.*** This writ petition is directed against the order of confiscation dated 07.12.2002 passed by the Collector & District Magistrate, Sundargarh under Section 6(A) of the Essential Commodities Act, 1956 (for short 'the Act') vide Annexure-9, in Misc. Case No.40 of 2001, directing confiscation of the value of the seized commodities, i.e. by encashings Bank Guarantee furnished by petitioner no.1 to the tune of Rs.3,00,000/- (three lakhs) while taking interim release of the seized stock of 'Dalda' and calling upon petitioner no.1 to deposit the differential amount of Rs.88,876/- (eighty-eight thousand eight hundred and seventy-six) and the truck bearing Registration No. OSU- 3915.

2. The brief fact of the case relevant for disposal of this writ petition is as follows :-

Petitioner no.1 is a company having one of its depots at Mahanadi Clearing House, Gopalpur, NH-5, Cuttack. It is engaged in manufacturing and distribution of consumer goods and food articles like Vanaspati, Jam, Jelly and other products. Petitioner no.1 – company never does any retail business and it used to supply goods from its Cuttack depot to the dealers / distributors all-over Odisha. By two invoices dated 16.08.2001 (Annexure-1) the petitioner dispatched 485 cases or 87 quintals 900 grams of Vanaspati Dalda, Mixed Fruit Jam in 24 cases and Tomato Sauce in 25 cases to M/s. Santosh Traders, Vedavyas. The consignee M/s. Santosh Traders at Vedavyas had paid for the aforesaid consignment through Cheque No.548627, dated 16.08.2001. The aforesaid goods were entrusted to the Transporters and the transportation was effected in Truck No. OSU-3915 on 16.08.2001.

At about 5.30 P.M. on 17.08.2001 the Marketing Inspector, Enforcement Squad, Panposh intercepted the aforesaid truck in Vedavyas Chowk in front of Bhagabati Weigh Bridge and seized the aforementioned articles and the truck vide Seizure List dated 17.08.2001 on the ground that the said Marketing Inspector had reason to believe that there has been contravention of Orissa Pulses and Edible Oil Dealers' Licensing Order, 1977 ('Licensing Order' for short). The Marketing Inspector also seized the Way Bill, Chalan-cum-Consignment Note, two invoices (copies of which have been filed as Annexure-1) and other documents vide Seizure List (Annexure-2). On 18.08.2001 the Marketing Inspector submitted report before the Collector, Sundargarh (opp. party) and made a prayer for

confiscation and interim disposal of the seized commodities. Learned Collector (opp. party) passed order for issuance of notice to the driver of the vehicle to show cause. He also directed the Marketing Inspector to release the Jam and Sauce in favour of the persons from whom seized, as those articles were not essential commodities. Petitioner no.1 however appeared suo motu before the Collector (opp. party) for release of the seized goods in favour of petitioner no.1 pending enquiry in the proceeding under Section 6(A) of the Act. In lieu of the release of the seized commodities and the truck in favour of petitioner no.1, the Bank Guarantee of Rs.3,00,000/- (three lakhs) was given after intervention of this Court in O.J.C. No.15613 of 2001 filed by the petitioner challenging the order of interim release passed by the Collector (opp. party) directing furnishing of security of Rs.3,00,000/- (three lakhs) in the shape of TDR in a nationalized Bank pledged in favour of the Collector, Sundargarh. Subsequently on 08.02.2002 petitioner no.1 filed a petition praying therein to drop the confiscation proceeding under Section 6(A) of the Act on various grounds.

Learned Collector, Sundargarh (opp. party) on 07.12.2002 passed the impugned order vide Annexure-9 directing confiscation of the value of the seized commodities, i.e. by encashing the bank guarantee furnished by petitioner no.1 to the tune of Rs.3,00,000/- (three lakhs) and calling upon petitioner no.1 to deposit the differential amount of Rs.88,876/- and the truck bearing No. OSU-3915. The petitioner has, therefore, been obliged to move this Court in the present writ petition challenging the aforesaid order of confiscation passed vide Annexure-9.

3. Mr. S.C. Lal, learned senior counsel appearing for the petitioner impugns the order of confiscation passed vide Annexure-9 on the following grounds :-

(i) There being no reason to believe about any contravention of any specific provision of the Control Order, the seizure is illegal and initiation of the proceeding under Section 6(A) of the Essential Commodities Act is without authority of law and without jurisdiction;

(ii) The goods having been seized in transit, which does not amount to storage, no contravention of the licensing order can be held to have been occasioned, and initiation of the proceeding is, therefore, without any jurisdiction;

(iii) The articles having not been delivered to M/s. Santosh Traders though an unlicensed dealer and the articles having been seized during transit, there cannot be said to be any contravention of the

Control Order, as the transit continues till delivery according to Section 51 of the Sale of Goods Act, 1930;

(iv) Learned Collector, Sundargarh (opp. party) has violated the mandatory provision of Section 6(B) of the Essential Commodities Act by not issuing any notice to the petitioner, who is the owner of the goods, and the petitioner having not been provided with opportunity of submitting its version on the ground of seizure and confiscation, there is violation of the principle of natural justice;

(v) The incident of sale having not been completed for non-passing of consideration, the petitioner continues to be the owner of the goods as per Section 45(1)(b) of the Sale of Goods Act, 1930 and there cannot be said to be any contravention of the Control Order; and

(vi) Learned Collector, Sundargarh (opp. party) committed error of law in holding that "Removal of (Licensing requirements, Stock limits and Movement Restriction) on Specified Foodstuffs Order, 2002 has no retrospective effect since seizure was made on 17.08.2001. Learned Collector thereby has failed to appreciate the ratio of different decisions cited before him."

4. Learned Addl. Standing Counsel on the other hand supports the impugned order and submits that all the contentions raised now by the learned counsels for the petitioners were raised before the learned Collector, Sundargarh, who, by a well discussed order, has taken care of all the submissions made before passing the impugned order.

5. The 485 cases or 87 quintals 900 grams of Vanaspati Dalda were seized on 17.08.2001 by the Marketing Inspector Enforcement Squad, Panposh while the same were being ferried to M/s. Santosh Traders, Vedavyas in truck bearing No.OSU-3915 on being dispatched by petitioner no.1 company from the depot of its C & F agent at Mahanadi Clearing House, Gopalpur, N.H.5, Cuttack. At the relevant time Orissa Pulses and Edible Oil Dealers' Licensing Order, 1977 was in force, which prohibited dealing with Vanaspati Dalda by an unlicensed dealer, and it is alleged that M/s. Santosh Traders, Vedavyas was an unlicensed dealer so far as dealing in Vanaspati Dalda is concerned. On the basis of the report of the Marketing Inspector, Panposh, proceeding under Section 6(A) of the Essential Commodities Act, 1956 was initiated before the Collector, Sundargarh (opposite party) vide Misc. Case No.40 of 2001. While the matter stood thus, the "Removal of (Licensing requirements, Stock limits and Movement Restrictions) on Specified Foodstuffs Order, 2002 ('2002 Order' for short) came into operation. It was published in the official gazette on 15.02.2002 and it was to come into force after 30 days from the date of publication in the

official gazette. The aforesaid 2002 Order allowed the dealers to freely buy, stock, sell, transport, distribute, etc. specified foodstuffs, namely, wheat, paddy / rice, coarse grains, sugar, edible oils and edible oilseeds. Pursuant to the aforesaid 2002 order, Government of Odisha in the Food Supplies and Consumer Welfare Department letter No.7908 dated 19.03.2002 issued the following instructions to all the Collectors :-

"To

All Collectors

Sub : The "Removal of (Licensing requirements, Stock limits and Movement Restriction) on Specified Foodstuffs Order, 2002.

Sir,

The Central Govt. has notified the "Removal of (Licensing requirements, Stock limits and Movement Restriction) on Specified Foodstuffs Order, 2002 (Copy enclosed) in the Gazette of India on 15.02.2002 allowing the dealers to freely buy, stock, sell, transport, distribute, etc specified foodstuffs, namely, wheat, paddy/rice, coarse grains, sugar, edible oils and edible oilseeds, consequently relevant clauses relating to licensing, movement under different state Control Orders issued under the Essential Commodities Act, 1956 will become infructuous from the date of coming into force of the above order, These are ;

(i) the Orissa Rice and Paddy Control Order, 1965.

(ii) the Orissa Wheat and Wheat Products Control Order, 1988.

(iii) the Orissa Sugar Dealer's Licensing Order, 1963 and

(iv) the Orissa Pulses and Edible Oils Dealers (Licensing) Order, 1977 so far as it relates to edible oils.

Permit on sale and movement of paddy under clause-10 of the Orissa Rice and Paddy Procurement (Levy) and Restriction on Sale and Movement Order, 1982 within and outside the State is, therefore, no longer required."

xx xx xx xx"

6. Mr. S.C. Lal, learned Senior Counsel appearing for the petitioner submits that, as during pendency of the confiscation proceeding 2002 order came into force, the beneficial provision there in the 2002 Order shall apply to the petitioner though the Vanaspati Dalda in question was seized on 17.08.2001, the date before coming into force of the 2002 Order. To substantiate his contention, Mr. S.C. Lal, learned Senior Counsel relies on the case of **Rattan Lal *vrs.* State of Punjab,** AIR 1965 SC 444, **Maya Prakash *vrs.* State of U.P. and another**, 1998 CRL. LJ 2876 and a Bench decision of this Court in the case of **Akola Oil Industries Ltd. *vrs.* Budhuram Marandi, Food Inspector and others,** 67 (1989) CLT 80.

7. Learned Addl. Standing Counsel on the other hand submits that, on the date of seizure, i.e. 17.08.2001, the 2002 Order having not come into force, the 2002 Order cannot be applied retrospectively, as held by the Collector in the impugned order for the benefit of the petitioner.

8. Hon'ble Supreme Court in the case of **Rattan Lal** (supra) had applied provisions of the Probation of Offenders Act, 1958 retrospectively in respect of an accused who was convicted by the trial court before the Act came into force.

9. Hon'ble Delhi High Court in the case of **Municipal Corporation of Delhi *vrs.* Mal Ram alias Bhaya Ram,** 1974 FAC 19 was in seisin over the matter on the issue of adulteration of Haldi powder. The already existing requisite standard of Haldi was substituted by a new one through a subsequent notification. The Delhi High Court relied upon decision of Hon'ble Supreme Court in the **Rattan Lal**'s case (supra) and it was held that the notification which substituted new standard in place of old must be given retrospective operation. Similarly in the case of **Maya Prakash** (supra), Hon'ble Allhabad High Court was in seisin over the matter on the issue of adulteration of ghee, i.e., presence of Synthetic Vitamin 'A' to a particular extent in Vanaspati Ghee. The Allhabad High Court relying on the aforesaid decision of Hon'ble Supreme Court in Rattan Lal's case and the Delhi High Court in **Municipal Corporation of Delhi *vrs.* Mal Ram alias Bhaya Ram,** (1974 FAC – 19), took the same view and held that the notification which substituted new standard in place of old modifying extent of presence of Synthetic Vitamin 'A' in Vanaspati Ghee must be given retrospective operation.

10. This Court in the case of **Akola Oil Industries Ltd**. (supra) was in seisin over the matter on the issue of melting point of Vanaspati by capillary slip method. Till 27.10.1984 one standard was there, but subsequently by amendment the standard was substituted. This Court, relying on a Division Bench decision of Allhabad High Court in **Shyam Lal *vrs.* State**, AIR 1968

Allhabad 392, quoting crewford's "construction of statute" held that the substituted standard must have to be given retrospective operation for the benefit of the accused.

11. In the present case, the seizure was made on 17.08.2001. At the relevant time dealing in Vanaspati by an unlicensed dealer was a contravention of Orissa Pulses and Edible Oil Dealers' Licensing Order, 1977. But during pendency of the confiscation proceeding the 2002 Order having come into operation, the provisions of 2002 Order has to be given retrospective operation for the benefit of the petitioner, who is alleged to have sold Vanaspati Dalda to an unlicensed dealer. On this score, the impugned order becomes vulnerable and the same is liable to be set aside.

12. Coming to the next contention, it is submitted by Mr. S.C. Lal, learned Senior Counsel for the petitioner that the petitioner had dispatched the Vanaspati Dalda in question from the depot of its C & F agent on 16.08.2001 on acceptance of payment through Cheque. The goods were entrusted to the transporter and the transportation was affected in truck No.OSU-3915 on 16.08.2001. Before it reached the consignee M/s. Santosh Traders of Vedavyas, the Vanaspati Ghee was seized by the Marketing Inspector in Vedavyas Chowk at about 5.30 P.M. on 17.08.2001. As the consignment was not received by the consignee, the consignee as it seems issued instruction of "stop payment" and the Cheque given by him towards sale price on 16.08.2001 was dishonoured. Petitioner no.1 company having not yet received the consideration, it continued to be the owner of the goods as per Section 45(1)(b) of the Sale of Goods Act, 1930, and as the consignment had not reached its destination, the transit continued and petitioner no.1 remained the owner of the goods according to Section 51 of the Sale of Goods Act, 1930. It is further submitted by Mr. S.C. Lal that the sale having not yet been completed and the goods being in transit in a truck, the said did not amount to storage and it could not have been held that petitioner no.1 - company had sold the goods (Vanaspati Ghee) to an unlicensed dealer.

13. Learned Addl. Standing Counsel on the other hand submits that petitioner no.1 having admitted sale of the Vanaspati to M/s. Santosh Traders of Vedavyas, which is an unlicensed dealer, it cannot now take the stand that it is not liable as the goods had not yet been delivered.

14. The relevant provision of Section 45(1) of the Sale of Goods Act, 1930 reads as follows :-

> **"Unpaid seller"** defined – (1) The seller of goods is deemed to be an "unpaid" seller within the meaning of this Act,-
>
> (a) when the whole of the price has not been paid or tendered;
>
> (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise."

15. The aforesaid provision unerringly makes it clear that the seller, i.e., petitioner no.1-company here was an unpaid seller at the relevant time of seizure as the Cheque given by the consignee M/s. Santosh Traders, Vedavyas was dishonoured before the Vanaspati Dalda and other consignments were delivered.

16. Section 51 of the Sale of Goods Act, 1930 reads as follows :-

> "**Duration of transit**- (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.
>
> (2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.
>
> (3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.
>
> (4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.
>
> (5) Where goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, that transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give un possession of the whole of the goods."

17. If the above provision is considered in the light of the fact obtained on record, it is to be seen that the truck was seized by the Marketing Officer at Vedavyas Chowk in front of Bhagabati Weigh Bridge and it had not yet reached the destination or none had acknowledged receipt of the consignment on behalf of the consignee. The transit therefore continued and the petitioner no.1 company for all purposes was the owner of the goods at the time of its seizure by the Marketing Inspector. It is not required to refer to different judicial pronouncements to burden the judgment so far as proposition that carrying of goods in a vehicle does not amount to storage is concerned. In this regard reference may be made to **Bijaya Kumar Agarwala *vrs*. State of Orissa**, AIR 1996 SC 2531.

18. Viewed from this perspective, as the petitioner no.1 company, who had valid licence to deal with Vanaspati Dalda, continued to be the owner of the Vanaspati Dalda, no contravention can be held to have occasioned by the time of seizure and the consequent order of confiscation is not sustainable in the eye of law.

19. Mr. S.C. Lal, learned Senior counsel for the petitioner has raised some more contentions, discussion of which may become academic only in view of the findings (supra).

20. In the result, the impugned order vide Annexure-9 is set aside. The bank guarantee furnished by petitioner no.1 - company to the tune of Rs.3,00,000/- (rupees three lakhs) while taking interim release of the seized truck and Vanaspati Dalda be cancelled and the interim Zima of the truck bearing Registration No.OSU-3915 is made absolute. The writ petition is accordingly allowed.

Writ petition allowed.

**2013 (II) ILR - CUT- 1057**

**R. DASH, J.**

R.S.A. NO.224 OF 2012 (Dt.14.08.2013)

**ANANTA CHARAN POTHAL** …….Appellant

*.Vrs.*

**GURAMANI POTHAL & ORS.** ……..Respondents

**CIVIL PROCEDURE CODE, 1908 – O-41, R-5**

**Stay execution of decree by appellate Court – The party applying for stay must show that if evicted he or she would suffer substantial loss – However in case of a decree for eviction from immovable property, stay of execution should not be granted in a routine manner.**

**In this case admittedly the plaintiff appellant has been in continuous possession of the properties in question much prior to the institution of the suit and it is not shown that the application for stay has been made with unreasonable delay – From the judgment of the learned trial Court it is seen that the respondents in their counter claim had claimed compensation of Rs.500/- P.M. from the appellant till his eviction from the above property – Held, further proceeding in the Execution Case is stayed till disposal of the Second Appeal subject to condition that the appellant shall deposit Rs.2,500/- P.M. from the month commencing Sept.2013 till disposal of the Second Appeal and in case the appeal is dismissed, the money so deposited with accrued interest shall be held to be to the credit of the decree holder and the appellant shall not be permitted to withdraw the same, otherwise the appellant shall be entitled to withdraw the amount in deposit and in the event of default in making such deposit for two consecutive months shall automatically result in vacation of the order of stay.**

(Paras 9,10,11)

**Case law Referred to:-**

2004(10) SCALE 345 : (M/s. Atma Ram Properties (P) Ltd.-V- M/s. Federal Motors Pvt. Ltd.).

For Appellant - M/s. S.P.Mishra
For Respondents - M/s. A.K.Nath

---

This is an application under Order 41 Rule 5 read with Section 151 of the C.P.C. arising out of R.S.A. No.224 of 2012.

2. The appellant-petitioner is the judgment-debtor in Execution Case No.4 of 2012 pending in the court of the learned Civil Judge (Senior Division), Balasore. Appellant-petitioner has preferred the appeal challenging the judgment and decree passed by the learned lower appellate court confirming the judgment and decree of the trial court in a suit for partition bearing T.S. No.403 of 1990-1 in the court of the learned Additional Civil Judge (Senior Division), Balasore which was brought by the appellant-petitioner and was dismissed by the learned trial court. In their written statement, the respondent-O.P. Nos.1 to 3 (defendant Nos.1 to 3 in the suit) had made a counter-claim seeking declaration of their title over Schedule P and Q properties as mentioned in the written statement. The plaintiff-appellant denied the counter-claim challenging the title and possession of defendant Nos.1 to 3 over Schedule P and Q properties. Learned trial court rejected the counter-claim but the learned lower appellate court allowed it declaring the title of defendant Nos.1 to 3 over the counter-claim properties and directed eviction and recovery of possession. Thus, the Execution Proceeding is regarding delivery of possession of the counter claim properties which is, admittedly, in the occupation of the appellant-petitioner.

3. In the present petition, the petitioner in support of the petition for stay of the Execution Proceeding, has contended that he has got a very good prima facie case and fair chance of success in the Second Appeal and that unless the Execution Proceeding is stayed, the petitioner who is, admittedly, in possession of the properties will be highly prejudiced and will suffer substantial loss.

4. In their objection, the opposite party-respondent Nos.2 and 3 (Respondent No.1 has died during pendency of the Second Appeal leaving behind respondent Nos.2 and 3 as his legal heirs) have contended that the appellant has absolutely no chance of success in the Second Appeal and that it is not the appellant but the Respondent Nos.2 and 3 who will suffer substantial loss in the event the Execution Proceeding is stayed.

5. The parties to the suit hail from common ancestor late Sadasiv whose four sons are the four branches of the family tree. Plaintiff is one of the sons of Sadasiv's second son and D.1 to 3 are members of the branch of Mahendra, the 4$^{th}$ son of Sadasiv. There is no dispute between the parties that the joint family property was partitioned long back. According to the plaintiff the sons of Sadasiv partitioned the properties on 28.5.1932 whereas according to D.1 to 3 the partition took place in the year 1929. Defendants 1 to 3 are the widow, son and daughter, respectively, of Mahendra. The plaintiff claims to be the adopted son of Mahendra which is denied by D.1 to 3. So far as Schedule P & Q properties of the counter claim are concerned,

plaintiff's stand is that being the adopted son of Mahendra he has been in possession of the same since 1971. D.1 to 3 admit plaintiff's possession but their contention is that since Mahendra's son (D.2) was staying away from her widow mother (D.1), the latter reposing confidence on the plaintiff had entrusted some of her responsibilities to the plaintiff who later on played treachery and creating some documents clandestinely, showing himself to be the adopted son of Mahendra, got possession over the counter claim properties.

6. Admittedly, the plaintiff-appellant has been in continuous possession of the counter claim properties much prior to the institution of the suit. It is to be examined if at this stage of the litigation the executing court should be permitted to go ahead with the execution proceeding to evict the appellant from the properties in question. The foremost factor to be considered before going to pass an order of stay execution of a decree is to find out whether substantial loss will result to the appellant if the execution proceeding is not stayed. In case of a decree for eviction from immovable property, stay of execution should not be granted in a routine manner. The party applying for stay must show that if evicted he or she would suffer substantial loss. However, while considering as to whether in a given case substantial loss will result or not, the court should consider the nature of the property and the character of the possession including past enjoyment of the property.

7. Defendant-respondent Nos.2 and 3 in their objection have stated that the appellant is in unauthorized occupation of the property which consists of a two storied building situate at Remuna and being used for commercial purpose. According to them the building is within market area of Remuna and if let out it would fetch monthly rent of not less than Rs.15,000/-. It is admitted that the appellant is conducting his business from the ground floor of the building in question. It is not on record as to whether the appellant has got any source of income other than the business he has been running in the suit building. It is quite possible that he has been running the business in that suit premises ever since he came in possession of the building. Under such circumstances, if he is evicted from the building it would cause substantial loss to him.

8. It is not shown that the application for stay has been made with unreasonable delay. So far, security is concerned the appellant-petitioner can be asked to furnish security for the due performance of such decree or order as may ultimately be binding upon him. Under such circumstances, this Court is in favour of stay of further proceeding in the execution case.

9. The main grievance of D.1 to 3 is that for a very long period, the appellant-petitioner has been enjoying the suit building commercially

depriving them from any financial benefit. It is submitted that the litigation has already lasted for more than 22 years and it is uncertain as to when the lis will come to an end. Under such circumstances, it is submitted, the respondent-O.P.Nos.2 and 3 who have already suffered a great deal of loss will further suffer substantial loss in the event the execution proceeding is stayed. Much emphasis is also given to their contention that the appellant does not have a fair chance to succeed in the Second Appeal. Without going into the strength and/or weakness of the Second Appeal, it is considered very much essential to safeguard the interest of the respondent-O.P.Nos.2 and 3 who have obtained a decree for eviction of the appellant from the suit building. From the judgment of the learned trial court it is found that these respondents in their counter claim had claimed, inter alia, compensation from the appellant @ Rs.500/- per month till the later's eviction from the property in question. Even though the learned lower appellate court allowed the counter claim for eviction, it did not pass any order on the aforestated prayer for compensation. Therefore, the concern of the respondent-O.Ps. that in case the lis ultimately goes in their favour they will get delivery of possession of the suit premises but they will be deprived of the financial benefit therefrom till they get delivery of possession of the property which is likely to take a very long time, is well founded. Under such circumstances, the stay of execution should be granted on conditions that the appellant deposits certain amount every month as security till disposal of the Second Appeal so that if the appeal is dismissed the money so deposited should be held to have been credited to the decree holders.

10. In ***M/s. Atma Ram Properties (P) Ltd. v. M/s. Federal Motors Pvt. Ltd***., reported in ***2004 (10) SCALE 345***, the Hon'ble Supreme Court have held that while passing an order of stay under Rule 5 of Order 41 of the CPC the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed. It is further observed that such terms must be reasonable.

11. In the result, the Misc. Case is allowed. Further proceeding in Execution Case No.04 of 2012 pending in the Court of the learned Civil Judge (Senior Division), Balasore shall remain stayed till disposal of the Second Appeal subject to the petitioner-appellant depositing every month a sum of Rs.2,500/- (Rupees two thousand five hundred) from the month commencing September, 2013 till disposal of the Second Appeal and in case the Second Appeal is dismissed, the money so deposited with accrued interest shall be held to be to the credit of the decree holder and the appellant shall not be permitted to withdraw the same, otherwise, the

appellant shall be entitled to withdraw the amount in deposit. For the purpose of such deposit, a recurring deposit account be opened in the name of the Civil Judge (Senior Division), Balasore in a nationalized Bank situate at Remuna and the appellant shall directly deposit the monthly amount in the Bank concerned and keep with him the counterfoil showing such deposit in proof of such deposit. The event of default in making such deposit for two consecutive months shall automatically result in vacation of the order of stay. In case of default in making deposit of the sum in any particular month, the amount due for that month must be deposited in the following month. The Misc. Case is, accordingly, disposed of. There shall be no order as to cost.

Application disposed of.

**2013 (II) ILR - CUT-1061**

**DR. A. K. RATH, J.**

W.P.(C) NO. 5028 OF 2009 (Dt.20.09.2013)

**KUNIMANI MALLIK** ……...Petitioner

.*Vrs.*

**COLLECTOR, PURI & ORS.** ……Opp.Parties

**SERVICE LAW – Appointment of Anganwadi Worker – Guide line framed by Government – Advertisement made basing on such guide line fixing definite time for scrutiny of certificates in presence of candidates – Neither the committee nor the CDPO has any discretion to defer the date of scrutiny/verification of documents.**

**In this case on the date of scrutiny of certificates out of four candidates, applied for the post, O.P.5 did not appear on the ground of illness and the petitioner and another appeared and the petitioner was selected and notice issued for public objection and at that stage CDPO and the selection committee extended the date of scrutiny for absentee candidates and in that process O.P.5 was selected and given appointment – Action challenged by the petitioner – Held, the**

**impugned orders passed by the Collector, Puri as well as the engagement of O.P.5 as Anganwadi Worker in Anganwadi Centre Binayakpur are quashed – Direction issued to C.D.P.O. to issue engagement order in favour of the petitioner.** (Paras 9,10)

**Case laws Referred to:-**

1.103 (2007) CLT 254 : (Hari Das-V- Director of Fisheries)
2.AIR 1979 SC 1628 : (Ramana Dayaram Shetty-V- The International Airport Authority of India & Ors.)

For Petitioner - M/s. Prashanta Ku. Mohanty & M.K. Panda.
For Opp.Parties - Addl. Govt. Advocate (for O.P.1 to 4)
M/s. Nirmal Kishore Rath & P.K.Mohanty, (for O.P.5).

---

***DR. A.K.RATH, J.*** The sole question that hinges for my consideration is as to whether the Child Development Project Officer, Pipili can extend the date of verification of documents of the candidates applying for the post of Anganwadi Worker in respect of Anganwadi Centre, Binayakpur, when a cut-off date is provided in the guideline issued by the Commissioner-cum-Secretary to Government, Women and Child Development Department, Government of Orissa vide Annexure-1.

2. Adumbrated in brief, the case of the petitioner is that Commissioner-cum-Secretary to Government, Women and Child Development Department has formulated a revised guideline dated 2.5.2007 vide Annexure-1 for engagement of Anganwadi Workers. The said guideline is a set of codified executive instruction, which provides the qualification required for selection of Anganwadi Workers and the procedure to be followed in making the selection. The Child Development Project Officer, Pipili (hereinafter referred to as "CDPO") had issued an advertisement on 15.2.2008 vide Annexure-2 for selection of Anganwadi Worker in respect of Anganawadi Centre, Binayakpur. The advertisement clearly spells out that the applications shall be received between the period from 15.2.2008 to 29.2.2008 from the eligible candidates. Clause-13 of the advertisement provides that the application forms so received shall be scrutinized on 1.3.2008 in presence of the candidates. It is further provided that at the time of such scrutiny/verification, the candidates shall remain personally present with original certificates and testimonials. It further provides that the application of absentees shall not be taken into consideration. The petitioner as well as other persons submitted applications along with required documents for

engagement as Anganwadi Worker. On the date of scrutiny i.e. 1.3.2008, out of four candidates, the petitioner and one Sabita Satapathy attended the scrutiny/verification process. After due consideration, the petitioner was declared to have secured the first position in the merit list. As per the provision of the scheme, a notice was published by the CDPO inviting objection to the selection of any of the two candidates, wherein it was indicated that the objection, if any, should be preferred by 10.3.2008 and, thereafter no objection shall be entertained. The further case of the petitioner is that opposite party no.5 was not present at the time of verification/scrutiny i.e. on 1.3.2008. After issuance of general notice on 3.3.2008 inviting public objections, the selection committee held its meeting on 12.3.2008 and allowed the absentee candidates to produce their original certificates on 19.3.2008 for verification/scrutiny. Being aggrieved by the action of the selection committee, the petitioner preferred an A.W.W. Misc. Appeal No.39 of 2008 before the Sub-Collector, Puri. The Sub-Collector by order dated 23.10.2008 set aside the engagement of opposite party no.5 and directed the CDPO to issue engagement order in favour of the petitioner holding, inter alia, that the selection committee had not followed the revised guideline issued by the Government. In consonance with the order of the Sub-Collector, the CDPO issued engagement order in favour of the petitioner on 27.10.2008. Thereafter, the petitioner joined as an Anganwadi Worker.

3. While the matter stood thus, opposite party no.5 preferred an appeal before the Collector, Puri, which was registered as A.W.W. Appeal Case No.60 of 2008, pursuant to the observations of this Court in W.P.(C) No.15820 of 2008. In the said writ application, no notice was issued to her. The Collector, who has no jurisdiction to entertain the appeal filed at the behest of opposite party no.5, examined the merit of the selection process and tenability of the findings recorded by the Sub-Collector in A.W.W. Misc. Appeal No.39 of 2008, by order dated 2.3.2009 came to hold that the Committee had not committed any illegality by extending the time for verification/scrutiny and thereby granting time in favour of opposite party no.5.

4. Pursuant to issuance of notice, the CDPO, opposite party no.4 has entered appearance and filed counter affidavit. The sum and substance of the case of opposite party no.4 is that in response to the advertisement dated 15.2.2008, four candidates submitted their applications for engagement of Anganwadi Worker including the petitioner and opposite party no.5. After verification/scrutiny of their original documents, the selection committee informed them to remain present on 1.3.2008, which was duly communicated to all the candidates. Opposite party no.5 filed a

time petition supported by a medical certificate showing that she was ill and unable to attend in the verification process. The selection committee in its meeting on 12.3.2008 considered the aforesaid application of opposite party no.5 along with another candidate Smt. Diptimayee Satpathy and allowed them for verification/scrutiny of their original certificates. The resolution was signed by the President of the selection committee, who is the Vice-President of Pipili Panchayat Samiti. It is further stated that on 24.3.2008, the selection committee taking into account the candidature of four candidates took a decision that since opposite party no.5 has secured the highest mark as per the guideline of the State Government, selected her as Anganwadi Worker. It is further stated that granting extension of time for scrutiny of the documents by the selection committee cannot be termed as illegal, since for unavoidable and bona- fide reasons, opposite party no.5 was prevented from appearing on the date of scrutiny as has been found by the selection committee in its meeting dated 12.3.2008. The further case of the opposite party no.4 is that the guideline for selection is an executive instruction, which should be followed in spirit, even though in the present case, the time scheduled was breached by mechanical reasons, but has not affected in selecting the most meritorious candidate.

5. Opposite party no.5 has also filed a counter affidavit**.** Case of opposite party no.5 is that four candidates had applied to the post of Anganwadi Worker at Binayakpur, out of them, one Sabita Satpathy and petitioner were present on the date of scrutiny. She was ill on the date of scrutiny/verification of documents. Thereafter she filed an application before the CDPO requesting her to verify documents. The selection committee on 12.3.2008 decided to allow the candidates for verification of their documents on 19.3.2008 and after a thorough verification, it was found that amongst the four candidates, she has secured the highest mark and, accordingly, selected her. It is further stated that the petitioner had not raised any objection against the decision of the authority on 12.3.2008. The further stand of opposite party no.5 is that nowhere in the guideline, there is any restriction/prohibition upon CDPO from giving a notice to the candidate asking his/her to remove the defects, if any.

6. In course of hearing, Mr. P.K.Mohanty, learned counsel appearing for the petitioner submitted that under the guideline formulated by the Government vide Annexure-1, there is no provision for second appellate forum against the decision of the Sub-Collector in the matter of selection of Anganwadi Workers. The restricted appellate power conferred upon the Collector under the guideline is circumscribed by the provisions of Clause-7(i) and 7(iv) of the guideline, which can be invoked in the event of

disengagement of an Anganwadi worker on happening of any of the situations/contingencies enjoined in clause-7(iv). Such situations do not arise in the fact and circumstances of the present case. Furthermore, the Collector has delved into the tenability or correctness of the findings/conclusions arrived at by the Sub-Collector in purported exercise of a second appellate forum and hence the impugned order is without jurisdiction and is liable to be quashed. The second limb of submission of Mr. Mohanty is that the administrative guideline is clear and has woven stringent procedural requirements with definite time limits. The authorities derive powers from the guideline. They have duty to exercise such powers strictly as per the provisions enjoined in the guideline governing the field. The committee and authority have not been vested with sweeping unbridled power at their subjective discretion. The authority having acted beyond the scope of the provisions contained in the guideline and exercised powers in granting relaxation in favour of opposite party no.5, which is dehors the provision of the guideline, the action is indefensible and is liable to be struck down. Mr. Mohanty further submitted that in absence of any statutory provision, the guideline issued by the Commissioner-cum-Secretary has the force of law and has to be strictly followed. The selection committee or the authority lacks power and jurisdiction to act in violation of the guideline and conferring opportunity to the absentee candidates for scrutiny of their documents beyond the date fixed as per the notification and thereby making the entire selection process, which had been completed as per the guideline, to a meaningless formality.

7. Per contra, learned Addl. Government Advocate appearing for the opposite party no.4 submitted that the selection committee by its meeting dated 12.3.2008 considered the application of opposite party no.5, who was ill on the date of verification/scrutiny and allowed her time for verification of the document on 19.3.2008. On 24.3.2008, the selection committee considered the applications of four candidates and found opposite party no.5 to be suitable and, accordingly, issued engagement order in her favour, since she has secured highest mark. Learned Addl. Government Advocate further submitted that granting extension of time for scrutiny of the documents by the selection committee cannot be termed as illegal, since for unavoidable and bona fide reasons, opposite party no.5 was prevented from appearing on the date of scrutiny of the documents as found by the selection committee on 12.3.2008. Learned Addl. Government Advocate further submitted that the guideline for selection is an executive instruction, which should be followed in spirit, even though in the present case, the time scheduled was breached by mechanical reasons, but the same has not affected in selecting the most meritorious candidate.

8. Mr. Rath, learned counsel appearing for opposite party no.5 submitted that on the date of verification, since opposite party no.5 was ill, she filed an application before the selection committee, which was accepted and, thereafter, a date was fixed for verification of the documents. No prejudice was caused to the petitioner when the date of verification of the documents was deferred by the CDPO. Furthermore, opposite party no.5 was more meritorious than others for which she was selected. So far as the appeal filed before the Collector, Puri is concerned, Mr. Rath submitted that in pursuance of the direction of this Court passed in W.P.(C) No.15820 of 2008, opposite party no.5 filed appeal. Mr. Rath fully supported the order passed by the Collector, Puri. Placing reliance on the order dated 26.2.2008 passed by this Court in the case of ***Smt. Jyotirekha Nayak Vrs. Collector, Kendrapara and others,*** in Writ Appeal No.81 of 2007, Mr. Rath submitted that there is no prohibition for the CDPO in fixing another date for scrutiny/verification of documents.

9. This Court, in the case of ***Hari Das Vrs. Director of Fisheries***, 103 (2007) CLT 254, while dealing with the guideline held that when executive authorities themselves frame a procedure, they are bound by such procedure. While coming to such a conclusion, heavy reliance was placed on ***Ramana Dayaram Shetty Vrs. The International Airport Authority of India and others,*** AIR 1979 S.C.1628. In Jyotirekha Nayak case, opposite party no.3 filed a complaint before the Collector, Kendrapara to the effect that she made an application for the post of Anganwadi Worker of Hanumantpal (Paikrapur) Anganwadi Centre and that her application was rejected by CDPO, Kendrapara on the ground that her HSC mark sheet was not available in the application. In her complaint she had categorically stated that she had applied for the post along with the mark sheet and educational certificate within the stipulated time, but her application was rejected by detaching the HSC mark sheet from the application with some ulterior motive. The said compliant was inquired into by the Collector, who held that if the mark sheet was not available, the CDPO should have informed the candidate by allowing three days notice. This Court held that there is no prohibition for the CDPO from giving any notice to the candidate asking her to remove the defect, if any. The said observation is no authority for the proposition that when the Government have framed a guideline stipulating certain terms and conditions embodied therein for appointment of Anganwadi Worker, the Committee/CDPO on their sweet-will appoint Anganwadi Worker in contravention of the said guideline. The administrative guideline issued by the Government is clear and unambiguous. The CDPO derives power from the said guideline. It is her bounden duty to see that time stipulation is strictly followed. Neither the Committee nor the CDPO have

been vested with any discretionary power to relax the norms. The procedure provided for selection of Anganwadi Worker vide Annexure-1 would show that there is a definite time limit for inviting applications, verification of documents and filing of objections, but no relaxation clause is there. Thus, the findings of the Collector, Puri is that if a candidate files application within the stipulated time, but nominal verification could not be made on any bona fide and unavoidable grounds by the stipulated date and verification of documents on a subsequent date decided by a statutory committee is not a wrong step or decision, is perverse and not in consonance with law. Neither the Committee nor the CDPO has any discretion to defer the date of scrutiny/verification of documents, when a definite time limit is provided under the guideline. There is also no provision for entertaining an application at the behest of a candidate to defer the date of verification of documents on the ground of illness.

10. On taking a holistic view of the matter, I am of the considered opinion that the order dated 2.3.2009 passed by the Collector, Puri in A.W.W.Appeal Case No.60 of 2008 is not sustainable and liable to be quashed. Accordingly, the order dated 2.3.2009 passed by the Collector, Puri is quashed. Consequently, the engagement of opposite party no.5 as Anganwadi Worker in Anganwadi Centre, Binayakpur is quashed. The CDPO, opposite party no.4 is directed to issue engagement order in favour of the petitioner within a period of thirty days from the date of receipt of certified copy of the judgment.

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

Writ petition allowed.

**2013 (II) ILR - CUT- 1067**

**DR. A. K. RATH, J.**

W.P.(C) NO. 325 OF 2009 (Dt.30.09.2013)

**SOBHAGINI TRIPATHY** ……Petitioner

.*Vrs.*

**SUBHASHINI TRIPATHY & ORS.** ……Opp.Parties

**CIVIL PROCEDURE CODE, 1908 – O-3, R-1 & 2**

**Power of attorney holder – Whether power of attorney holder of a party is entitled to appear as a witness on behalf of the said party ? – Held, No.**

**In this case plaintiff filed a suit and the husband of the plaintiff filed evidence on affidavit on behalf of the plaintiff – Defendant No.1 filed application to reject such affidavit and to direct the plaintiff to give her evidence – Trial Court rejected the application – Hence the writ petition – If the power of attorney holder has done some acts pursuant to the power of attorney, he may depose for the Principal in respect of such acts, but he cannot depose for the principal for the acts done by the Principal – He also cannot depose for the Principal in respect of the matter which only the Principal can have personal knowledge and in respect of which the Principal is entitled to be Cross-examined.**

**Held, power of attorney holder of a Party is not entitled to appear as a witness for the said Party – Impugned order is quashed.**

(Para 7)

**Case law Referred to:-**

AIR 2005 SC 439 : (Janki Vashdeo Bhojwani & Anr.-V- Indusind Bank Ltd. & Ors.)

For Petitioner - Mr. Digambar Mishra.

For Opp.Parties- M/s. T. Nanda & K. Dash, M/s. Gurudatta Kar, A. Mohanty, J. Behera, M/s. Arun Kr. Mishra, T. Mishra &K.K. Mohapatra,

---

***DR. A.K.RATH,J.*** The seminal question that hinges for my consideration is as to whether power of attorney holder of a party is entitled to appear as a witness on behalf of the said party?

2. Opposite party no. 1 as plaintiff laid a suit in the court of the learned Civil Judge (Senior Division), Bolangir for a declaration that she is entitled to 1/4$^{th}$ share over the Schedule- A and B property, for recovery of the amount already taken by the defendant no. 1 from the defendant no. 5 and for permanent injunction, which was registered as Civil Suit No. 147 of 2005. Pursuant to issuance of summons, defendant no. 1 entered appearance and filed a comprehensive written statement denying the assertions made in the plaint. Be it noted that dispute pertains to the insurance claim and other service benefits of deceased Sudhir Ranjan Tripathy between mother and widow of the deceased.

3. While the matter stood thus, Dayanidhi Hota, husband of the plaintiff filed evidence on affidavit on behalf of the plaintiff. The defendant no. 1 filed an application on 11.11.2008 with a prayer to direct the plaintiff to give her evidence and to reject the evidence of affidavit filed by said Dayanidhi Hota. By order dated 4.12.2008 the learned trial court rejected the petition filed by the petitioner-defendant no.1. The said order is impugned in the present writ application.

4. Assailing the said order dated 4.12.2008, Mr. Digambar Mishra, learned counsel for the petitioner submitted that a power of attorney holder can appear, plead and act on behalf of the party, but he cannot become a witness on behalf of the party. He can only appear in his own capacity. Per contra, Mr. Trilochan Nanda, learned counsel appearing for contestant defendant supported the order passed by the learned trial court.

5. To appreciate the rival contentions made at the bar, it is necessary to quote Rules 1 and 2 of Order III of the Code of Civil Procedure (for the sake of brevity "CPC")

**Order-III**

"1. **Appearance, etc., may be in person, by recognized agent or by pleader**.- Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader(appearing, applying or acting, as the case may be,) on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

2. **Recognized agents**.- The recognized agents of parties by whom such appearances, applications and acts may be made of done are-

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, whereon other agents is expressly authorized to make and do such appearances, applications and acts."

6. An identical question came up for consideration before the Hon'ble Supreme in the case of **Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others**, AIR 2005 SC 439. Interpreting Rules 1 and 2 of Order III, CPC, their Lordships in paragraph 13 of the report held as follows:-

> 13. "Order III, Rules 1 and 2, CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2, CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

7. On a conspectus of the said judgment, it is evident that if the power of attorney holder has done some acts pursuant to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. He also cannot depose for the principal in respect of the matter which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross examined.

8. I have given my anxious consideration to the rival contentions of the parties and carefully perused the impugned order. In view of the authoritative pronouncement of the Hon'ble apex Court in the case of **Janki Vashdeo Bhojwani** (supra), the order dated 4.12.2008 passed by the learned Civil Judge (Sr. Division), Bolangir is not sustainable in the eye of law and the same is liable to be quashed.

8. Accordingly, the order dated 4.12.2008 passed by the learned Civil Judge (Sr. Division), Bolangir is quashed. The writ petition is allowed. There shall be no order as to costs.

Writ petition allowed.

**2013 (II) ILR - CUT- 1071**

**DR. B. R. SARANGI, J**

CRLMC NO. 532 OF 2002 (Dt.23.08.2013)

**SARAT CHANDRA BEHERA & ORS.** .....Petitioners

*.Vrs.*

**STATE OF ORISSA** .....Opp.Party

**CRIMINAL PROCEDURE CODE, 1973 – S.482**

**Petitioners challenge the Order taking cognizance – Their name neither appeared in the F.I.R. nor in the charge sheet – Learned Magistrate directed to add their names basing on subsequent materials available on record – Hence this application for quashing.**

**The Magistrate is not bound by the police documents and records – Magistrate has jurisdiction to take cognizance if materials available subsequent to the filing of F.I.R. and charge sheet – In this case subsequent disclosure indicates that the petitioners were the participants in the incident occurred – Held, taking cognizance against the petitioners is justified which needs no interference at this stage.**

(Para 10)

For Petitioners - M/s. B. Routray, D.K. Mohapatra, B.N. Satpathy, B.B. Routray, D. Mund.

For Opp.Party - M/s. Sk. Zaffrulah, Addl. Standing Counsel.

---

***DR. B.R.SARANGI, J.*** The petitioners have filed this application under Section 482, Cr.P.C. seeking to quash the order dated 19.04.1996 passed by the learned J.M.F.C.(P), Kujang in G.R. Case No. 438 of 1995 taking cognizance of the offences under Sections 147/148/307/341/427/ 323/336/337/332/188/149, IPC and under Section 7 of Criminal Law Amendment Act read with Section 3 of PDP Act.

2. The prosecution case, as revealed from the F.I.R., is that one Surajit Das, O.A.S. Addl. Tahasildar and Executive Magistrate lodged the information that while he was under law and order duty in connection with gherao organized by a section of local fishermen protesting against the lease of Saharpentha Machhadia Sairat to Kalinga Karnadhar Fishermen Primary Cooperative Society. The D.S.P., Paradeep, C.I. Tirtol and O.I.C., Kujang Police Station with staff and women constable were detailed inside

the Tahasil office premises. At about 11.30 A.M. a procession of the fishermen around 1500 including 20-30 ladies lead by Govind Tarai and Rabi Dalai came in front of Tahasil office shouting slogan against the Tahasildar, Kujang for leasing out the said sairat. Four sections of O.S.A.P. were on cordon duty in front of Tahasil office building and rest of the 4 APR staffs were on two gates to prevent the mob from entering inside the Tahasil office. The mob, which was very much agitated, shouted at the top of their voice and all off a sudden pushed back the staff and both the gates and started to break the cordon to enter into the Tahasil office building. Sincere steps were taken to pacify the mob restraining them from such unlawful activities. As female folk with their kids in arms were in front of the mob apprehending stampede to lady members no police action could be initiated. Breaking the cordon, the mob forcibly went inside verandah of Tahasil office and committed serious mischief by breaking the door and window panes and chairs. As a preventive measure, order under Section 144 Cr.P.C. was promulgated announcing that the mob was unlawful and warned them to disperse. Then the mob started brick batting over the police personnel and staff. One of the miscreants from close vicinity directly dealt a heavy stone aiming at the head of S.D.P.O., Paradeep which hit the roof of right ears as a result he fell down. They were shouting to kill police and due to such heavy brickbat and pelting of stones, the informant, C.I., Tirtol and other police personnel sustained severe injuries. As there was no chance of escape from death and grievous hurt, the zamadar in charge of OSAP was ordered for tear gassing. Though three grandees and six LR shells were fired but it was not effective due to against wind. The mob continued through brickbats, and finding no other alternative, to escape from the attack by the mob, order for mild lathi charge below the waist was given after due warning and as a result of which mob dispersed and nine accused persons, namely, Govinda Tarai, Jasindranath Parida, Narayan Samal, Akshya Samal, Rama Chandra Parida, Tapan Majhi, Biday Rout, Hari Behera and Arjuni Behera were apprehended from whom most of them were injured by brick batting.

3. On the basis of the F.I.R. lodged on 08.09.1995, police took up the investigation and G.R. Case No. 438 of 1995 was registered in the court of the learned J.M.F.C., Paradeep, Kujang. On the basis of the investigation, 11 accused persons were arrested and cognizance of offence under Sections 147/148/ 307/341 /427/323 /336 /337 /332/188/149, IPC and under Section 7 of Criminal Law Amendment Act read with Section 3 of PDP Act was taken. The persons those who have apprehended, they have moved before the court of Sessions Judge, Cuttack in Criminal Misc. Case No. 967 of 1995 seeking for grant of bail, which was considered and the learned District Judge passed the order stating that the offence in which the

petitioners are allegedly involved does not end in capital punishment and the materials collected against the petitioners to implicate against them is not sufficient as disclosed from the case diary so far collected by the I.O., thereby ordered to release all the petitioners on bail of Rs.5000/- cash with one surety each for the like amount to the satisfaction of the learned J.M.F.C., Kujang and passed a conditional order directing the petitioners that after releasing on bail they shall not leave the court jurisdiction of Kujang and to enter appearance twice in a month on 15th and 30th before the O.I.C., Kujang till completion of the investigation.

4. After the investigation was over, police submitted charge-sheet against the Gobinda Tarai and 18 others for the offence under Sections 147/148/ 307/341 /427/323 /336 /337 /332/188/149, IPC and under Section 7 of Criminal Law Amendment Act read with Section 3 of PDP Act, on the basis of which, the learned J.M.F.C., Paradeep, Kujang took cognizance on 19.04.1996 and issued summons to the accused persons already bailed out and issued N.B.Ws. against the absconding accused persons for their appearance on 22.05.1996.

5. Three out of the 19 persons against whom cognizance was taken, approached this Court by filing Criminal Mics. Case No. 2341 of 1996 with a prayer to quash the order of taking cognizance dated 19.04.1996 in G.R. Case No.438 of 1995. When the matter was pending for adjudication, the petitioners made a mention that since their names do not find place in the charge-sheet, the criminal misc. case may kindly be disposed of. Accordingly, this Court by order dated 14.7.2000 dismissed the said criminal misc. case as infructuous on the statement made by the counsel appearing for the petitioners. Subsequently, the petitioners have filed Misc. Case No. 2180 of 2002 arising out of Criminal Misc. Case No. 2341 of 1996 to recall and to modify the order dated 14.7.2000, which was considered and disposed of by this Court vide order dated 8.5.2003 observing that there is no provision in the Cr.P.C. for modification of an order dismissing an application under section 482 Cr.P.C. for which this Court did not inclined to entertain the said application and accordingly rejected Misc. Case No. 2180 of 2002 arising out of Criminal Misc. Case No. 2341 of 1996 filed to recall or to modify the order dated 14.7.2000.

6. It is stated that the petitioners moved an application for anticipatory bail under Section 438 Cr.P.C. before the learned Sessions Judge. The learned Sessions Judge, in his order dated 18.9.1995 found that no material is available against the petitioners to connect them in the alleged offence. Learned Sessions Judge while considering the anticipatory bail application

in Misc. Case No. 1045 of 1995 found that there is absolutely no material on record to implicate them and accordingly passed the order on 18.10.1995. But the petitioners came to know that they have shown as absconder in G.R. Case No. 438 of 2005 they immediately applied for certified copy of the order dated 19.04.1996 on 7.6.2002, in which they have been implicated as accused No.17, 18 and 19 and N.B.Ws. have been issued showing them absconder**.**

7. It is brought to the notice of this Court by the learned counsel appearing for the petitioners that separate application has been filed under section 482 Cr.P.C. for separate cause of action while considering the Misc. Case No. 2180 of 2002, which is the culmination of the present Criminal Misc. Case. The order dated 19.4.1996 taking cognizance passed by the learned J.M.F.C., Kujang in G.R. Case No. 438 of 1995 has been challenged on the ground that the offence alleged is trible by court of Sessions and the Magistrate has jurisdiction to add or subtract the persons as accused persons and the only duty of the Magistrate is to commit the case to the Court of Sessions after receiving the record from the police for framing of charge and to commence the trial on that score. It is stated that the Magistrate has exceeded his jurisdiction, therefore the order dated 19.4.1996 passed by the learned J.M.F.C.(P) Kujang in G.R. Case No. 438 of 1995 should be quashed.

8. Learned counsel appearing for the petitioners vehemently urged that when the names of the petitioners did not find place neither in the F.I.R. or in the charge sheet, the subsequent addition of their names for taking cognizance by the court is absolutely misconceived one and therefore the proceeding initiated as against them should be quashed.

9. Mr. Zafarulla, learned Addl. Standing Counsel states that even after charge sheet was submitted, subsequent facts can also be taken into consideration and on the basis of materials available on record, the Magistrate can implicate the persons and take cognizance by issuing summons.

10. It is the case of the petitioners that their name having not been found place in the charge sheet, the earlier Criminal Misc. Case No. 2341 of 1996 was dismissed as infructuous. Subsequently it is found that the Magistrate while taking cognizance implicated their names on considering the materials available on record. It may be noted that, law is well settled that Magistrate is not bound by the police document and records and if subsequent materials would be made available, on that basis the Magistrate has got the

jurisdiction to take cognizance. In view of such position, if subsequent disclosure indicates that the petitioners were the participants in the incident occurred and they have been implicated as parties and being absconders, N.B.Ws has been issued for their appearance by taking cognizanceno fault can be found with such order. In the present case, the Magistrate has not committed any error or any illegality so as to invoke the jurisdiction of this Court in exercise of power under Section 482, Cr.P.C. to quash the order of taking cognizance. The action taken by the Magistrate is within the framework of law and as such, the impugned order taking cognizance against the petitioners is wholly and fully justified and needs no interference at this stage. Accordingly, the CRLMC is dismissed.

11. In view of the aforesaid facts and circumstances, I am not inclined to interfere with the order dated 19.4. 1996 passed by the learned J.M.F.C., Kujang in G.R. Case No. 438 of 1995. taking congnizance of the offence against the petitioners . Accordingly, the CRLMC is dismissed.

12. Since the G.R.Case is of the year 1995, the learned J.M.F.C. (P), Kujang is directed to commit the case to the Court of Sessions forthwith, as the offences alleged are triable by court of Sessions. On receipt of the same, the learned Sessions Court shall do well to dispose of the same expeditiously.

Application dismissed.

**2013 (II) ILR - CUT-1075**

**DR. B. R. SARANGI, J.**

CRLMC. NO. 2609 OF 2013 (Dt.20.09.2013)

**SANTOSH KU. MOHARANA**
**@ DILLIP MOHARANA** ……..Petitioner

.*Vrs.*

**STATE OF ODISHA** ……...Opp.Party

**CRIMINAL PROCEDURE CODE, 1973 - S.482**

**Charge sheet filed showing the petitioner "absconder' and while taking cognizance the Magistrate issued N.B.W., although the petitioner was released on anticipatory bail – Action challenged - Held, the description of the petitioner as 'absconder' in the charge sheet is expunged and the impugned order issuing N.B.W. against him is recalled – Direction issued that whenever an anticipatory bail is granted by this Court, the concerned Law Officer should communicate the said order to the concerned police station in order to avoid such difficulties in future.** (Paras 12,13,14)

**Case law Referred to:**

(2009)7 SCC 1-4=(2010)2 SCC (Cri)500=(2008)108 CLT 761 : (Jayendra Vishnu Thakur-V- State of Maharashtra & Anr.)

For Petitioner - M/s. Biswajit Moharana, S. Mohanty, B.Mohanty & D.Chhotray.

For Opp.Party - Sk. Zafarulla, Addl. Standing Counsel.

---

***DR. B.R.SARANGI, J.*** The petitioner has filed this application under Section 482 Cr.P.C. invoking inherent jurisdiction of this Court seeking to expunge the word 'absconder' in the charge-sheet no. 143 dated 24.8.2011 and to quash the consequential order dated 13.5.2011 passed by the learned S.D.J.M. (S), Cuttack in G.R. Case No. 102 of 2011 arising out of Madhupatna P.S. Case No. 6 of 2011 issuing N.B.W.(A) against him under Annexure-2.

2. The fact of the case as revealed from the F.I.R. lodged by the informant, Ashok Kumar Swain, the proprietor M/s. Laxminarayan Enterprises which was registered as Madhupatna P.S. Case No. 6 of 2011 dated 28.1.2011, against the petitioner along with two others under Sections 381/411/34, IPC, is that the petitioner along with some other persons have stolen away some valuable articles from his godown. It is alleged that on 25.1.2011 the petitioner and his associates transported those materials by an Auto Rickshaw from Khannagar Fish Market to Pithapur worth of which IS around Rs.4,70,000/- vide Annexure-1.

3. After filing of the F.I.R. under Annexure-1 apprehending arrest, the petitioner approached this Court by filing an application under Section 438

Cr.P.C. which was registered as BLAPL No. 2624 of 2011 and this Court disposed of the same on 09.02.2011 with the following order:

" xxx xxx xxx xxx

Considering the materials available on record and keeping in view the nature of allegations made against the petitioner it is directed that in the event of arrest of the petitioner in Madhupatna P.S. Case No. 06 of 2011, corresponding to G.R. Case No. 102 of 2011 pending in the court of the learned S.D.J.M. (S), Cuttack, he shall be released on bail by the arresting officer on such terms and conditions as the arresting officer may deem just and proper.

UCC be granted on proper application."

The F.I.R. was lodged on 28.1.2011 and the petitioner filed the application for anticipatory bail on 4.2.2011 and this Court passed the bail order on 9.2.2011 when the investigation was in progress. It appears that the police has never tried to apprehend the petitioner. Since no action was taken to apprehend the petitioner, question of releasing the petitioner on bail pursuant to the order dated 9.2.2011 did not arise. Further the order of granting anticipatory bail dated 9.2.2011 was passed in presence of the learned counsel for the State.

4. After completion of investigation, the police submitted charge-sheet showing the petitioner as 'absconder' and thereafter the learned S.D.J.M. (S), Cuttack took cognizance of offence under Sections 381/411/34, IPC vide order dated 11.5.2011 in G.R. Case No. 102 of 2011 and issued non-bailable warrant of arrest against him.

5. Mr. Moharana, learned counsel for the petitioner strenuously urged the following questions:

a) Whether a person can be declared absconder when he was under the protective shield of the court?

b) Whether N.B.W.-A can be issued when a person is deemed to be in the constructive custody of the Court?

He further submitted that the alleged charge-sheet submitted by the police indicating the petitioner as 'absconder' may give rise to a presumption under Section 8 of the Indian Evidence Act and further the order dated 13.5.2011 may curtail the liberty of the petitioner guaranteed under Article 21 of the Constitution of India when he is under the protective umbrella of the order

passed by this Court on 9.2.2011 in an application under Section 438 Cr.P.C. Hence, the action taken is illegal and arbitrary. Therefore, this Court in exercise of power under Section 482 Cr.P.C. should quash the same. He further submitted that the petitioner, who is working as a labourer in his locality, was all along available at his residence. Due to his illness, the doctor advised him to take rest for three weeks and as such he has not attempted to avoid any arrest because he is being protected by order of this Court. Therefore, showing the petitioner as 'absconder' in the charge-sheet no. 143 dated 24.8.2011 by the police is thoroughly misconceived one.

6. Mr. Zafarulla, learned Addl. Standing Counsel for the State vehemently objected to such contention raised by the learned counsel for the petitioner and submitted that since the petitioner is avoiding the arrest, the learned Magistrate has passed just and appropriate order while taking cognizance by issuing N.B.W.-A against him which is well within his jurisdiction and therefore, this Court should not interfere with the same by exercising of power under Section 482 Cr.P.C.

7. It appears that as the charge-sheet was submitted by the police showing the petitioner as 'absconder', the learned Magistrate issued non-bailable warrant of arrest while taking cognizance though the petitioner is under protective umbrella pursuant to the order dated 9.2.2011 passed by this Court under Section 438 Cr.P.C. Therefore, when the petitioner is under the protective umbrella under Section 438 Cr.P.C., question may come for consideration whether he can be considered as an 'absconder'.

8. In view of such position, it is necessary to consider at this stage what is the meaning of 'absconder'.

a) In Chamber's twentieth century Dictionary the word "abscond" has been defined as "to hide or quite the country in order to escape a legal process or anticipating the issuance of said process quits the country he can said to have been absconded".

b) Absconder. To be an "absconder" in the eye of law, it is necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home. [ Kartarey v. State of U.P., 1976 Cri.L.J. 13 (SC)= (1976) 1 SCC 172, (1975) SCC (Cri.) 803, (1975) Cri.L.R. (SC) 690.

9. Now let us come to the meaning of 'absconding'. The Apex Court had occasion to consider the meaning of "Absconding" in ***JAYENDRA VISHNU THAKUR v. STATE OF MAHARASHTRA AND ANOTHER***,

(2009) 7 SCC 104=(2010) 2 SCC (Cri) 500= (2008) 108 CLT 761. Paragraphs 40 and 41 of the said judgment read as follows:-

> "40. The term "absconding" has been defined in several dictionaries. We may refer to some of them:
>
> Black's Law Dictionary – To depart secretly or suddenly, especially to avoid arrest, prosecution or service of process.
>
> P. Ramanatha Aiyar – primary meaning of word is "to hide".
>
> Oxford English Dictionary – "To bide or sow away".
>
> Words and Phrases – "clandestine manner/intent to avoid legal process".
>
> 41. In Kartarey v. State of U.P. this Court held: (SCCp.181, para 43):-
>
> "43. Further it is wrong to say that Baljeet never absconded. Contrary to what Baljeet has said in his examination under Section 342 Cr.P.C., the investigating office, P.W.7, testified that Baljeet was found hiding in a chhappar in the village from where he was arrested. This account of Baljeet's arrest was not challenged in cross-examination. To be an 'absconder' in the eye of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home. We therefore, do not find any ground to distinguish the case of Baljeet from that of Sitaram and to treat him differently."

10. From the above meaning of the word 'abscond', 'absconder' and 'absconding', the reasonable conclusion is that there must be intention to avoid legal process for that it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home. Applying the meaning attached to the above words in the present context, the petitioner can not be construed to be an "absconder" so as to take cognizance against him on the basis of charge-sheet submitted and issuing non-bailable warrant of arrest.

11. Admittedly, the petitioner is under the protective umbrella of Section 438 Cr.P.C. by getting an anticipatory bail and in the event of arrest he would be released on bail by the Arresting Officer as per the terms and conditions to be fixed by him. As it appears that the petitioner has not been

apprehended by the police in course of investigation rather the police has submitted charge sheet showing him as 'absconder' without making proper investigation or taking steps to arrest him. This clearly indicates that the police has not taken steps during the investigation to apprehend the petitioner rather the police has acted just in a casual manner and submitted charge-sheet showing the petitioner as 'absconder' though he was all along available in his own house under the protective umbrella pursuant to the order passed by this Court under Section 438 Cr.P.C. By using the word 'absconder', the Investigating Officer has deliberately made an attempt to lend weight for such presumption under Section 8 of the Indian Evidence Act in consequence whereof the learned court below was constrained to pass order for issuance of N.B.W.-A against him when he is in fact under protection of anticipatory bail order of this Court.

12. The order of anticipatory bail dated 9.2.2011 was passed in presence of the counsel for the State. Even if for any reason the petitioner has not been arrested by the I.O., the Government counsel in whose presence the order was passed should communicated to the concerned police station the order passed by this Court granting anticipatory bail. As it appears, no communication has been issued from the office of the Advocate General to the concerned Police Station with regard to the order granting anticipatory bail in favour of the petitioner on 9.2.2011 though the said order was passed in presence of the counsel for the State. Due to such non-communication by the learned counsel for the State, the police had shown the petitioner as an 'absconder' in the charge-sheet no. 143 dated 24.8.2011, thereby the learned court below has taken cognizance and issued non-bailable warrant of arrest against the petitioner showing him as absconder vide impugned order dated 13.5.2011.

13. In view of the aforesaid facts and circumstances, the description of the petitioner as absconder in the charge-sheet no. 143 dated 24.8.2011 is hereby quashed. Consequently, the N.B.W.-A issued vide impugned order dated 13.5.2011 is recalled. The learned S.D.J.M. (S), Cuttack is directed to proceed with the matter on the basis of the charge-sheet no. 143 dated 24.8.2011 in accordance with law without treating the petitioner as an absconder. Further, if the petitioner files an application for bail in the said G.R. Case, he shall be released on bail on such terms and conditions as the learned Magistrate may deem just and proper.

14. Before parting, this Court is of the view that whenever an anticipatory bail is granted by this Court, the concerned Law Officer of the Office of the Advocate General, Odisha should communicate the order passed by this

Court to the concerned Police Station so that in future such type of difficulties may not arise.

15. With the above observation and direction, the CRLMC is disposed of.

A free copy of this judgment be handed over to the learned Addl. Standing Counsel for the State for necessary action at the end of the Office of the Advocate General, Odisha.

Application disposed of.